Nilesh Ojha's

HUMAN RIGHTS MANUAL

HUMAN RIGHTS BEST PRACTICES FOR CRIMINAL COURTS & POLICE

(VOLUME - I)

HOW TO PROSECUTE JUDGES, POLICE AND GOVT. PLEADERS

WITH

HOW TO GET BAIL

(A COMPLETE GUIDE FOR GETTING BAIL)

(Revised 2nd Edition 2014)

By

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WITH THE BLESSINGS OF '**ALL MIGHTY ALLAH'**

ABOUT THE BOOK.

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-: THIS BOOK IS DEDICATED TO :-

1) **Prophet Muhammad**
2) **Swami Vivekananda**
3) **Rashtrapita Mahatma Gandhi**
4) **Bharatratna Dr. Babasaheb Ambedkar**
5) **Martin Luther King**
6) **Spiritual Guru Shri. Pyarebhai,Pusad**
7) **Parents Sau. Suman & Chandrabhushan Ojha**
8) **Master Navmesh, Kaushal, Raj, Ku. Kunjika & Ku. Manya**

AND - All Human Rights Activists and all those who directly and indirectly help us in publishing this book

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OUR INSPIRATION

Hon'ble Mr. Justice N.D. Ojha
Former Judge Supreme Court

PROFILE

- Mr. Justice Narayan Dutta Ojha, Born on 19th January, 1926 in **District Pratapgarh (U.P.)**. Passed High School Examination from Daraganj High School, Allahabad in 1939 and Intermediate Examination from the K.P. Intermediate College, Allahabad in 1941. Did his B.A. In1943 and L.L.B. In 1945 from University of Allahabad. Married to Savitri Devi on 15th June, 1948. Practised for a few years as a Pleader in the District Courts of Allahabad. Enrolled Advocate of the Allahabad High Court on 20th December, 1951. Conducted civil and constitutional cases in the Allahabad High Court. Appointed Additonal Judge of the Allahabad High Court with effect from 3rd September,1971 and permanent Judge of that High Court on 12th December, 1972. Was Acting Chief Justice of the Allahabad High Court from 18th August, 1986 to 30th September, 1986. Appointed Chief Justice of Madhya Pradesh High Court on 8th January, 1987. Discharged the functions of governor Madhya Pradesh from 1st December, 1987 to 29th December, 1987 and thereafter continued as Chief Justice of Madhya Pradesh High Court.
- Appointed Judge of the Supreme Court on 18th January, 1988.
- Retired on 18.1.1991.

Judges are bound by precedents and procedure:-

Justice Gopal Oza,

Former Judge, Supreme Court of India.

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AIR 1990 SUPREME COURT 261

Constitution of India, Art.141- PRECEDENTS - Judges are bound by precedents and procedure *- They could use their discretion only when there is no declared principle to be found, no rule and no authority - where a single judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure - it is the duty of judges of superior courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Sub-ordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute- One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench.*

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OUR INSPIRATION

Hon'ble Mr. Justice G.L. Oza
Former Judge, Supreme Court

Term of Supreme Court: 29/10/1985 to 11/12/1989

PROFILE

- Shri Justice Goverdhan Lal Oza was born on 12th December, 1924 at Ujjain. His father Shri Jamnalalji Oza has been a well known Social worker of Ujjain. He had his early education at Madhav College, Ujjain.
- In the student days he took active part in student politics and the freedom movement called 'Quit India' under the leadership of Mahatma Gandhi. As a student, he also led the agitation against the rulers of the Holkar State who wanted not to merge with the Indian Union and ultimately the ruler accepted the merger of the State in the Indian Union. In 1948, he joined the Bar at Indore. In the early days at the Bar he was actively associated with the politics in the country and attended the Asian Socialist Conference at Rangoon (Burma) in December, 1952 as a delegate from India.
- He has been a lawyer of outstanding merit. He has worked in Constitutional, Civil, Criminal, Labour and other cases. He has been associated with practically all the important and sensational cases at Indore for about a decade before elevation to the Bench.
- On 29th July, 1968, he was sworn in as Additional Judge of the M.P. High Court at Jabalpur. He joined the Indore Bench of the High Court. Indore Bar welcomed the appointment of their colleagues with acclamation.
- As a Judge he was the pioneer in starting the work of legal aid and founded a voluntary legal aid and education society. It continued to function till the State Government took over the legal aid programme.
- On 3rd January, 1984 he took over as the Chief Justice of the State and was Acting Chief Justice till 1st of December, 1984 when he was appointed as the permanent Chief Justice of the High Court of Madhya Pradesh.
- On 29th of October, 1985 he took the oath of office as a Judge of the Supreme Court of India.
- Retired on 11th Dec 1989

OUR NGO WILL ALWAYS REMAIN GREATFUL TO FOLLOWING HON'BLE JUDGES FOR THEIR LANDMARK JUDGEMENTS

1) Justice A.M.Ahmadi, Former Chief Justice of India
2) Justice V.R Krishna Aiyyar Judge, Supreme Court
3) Justice Dr. Dalveer Bhandari, Judge, Supreme Court
4) Justice K.S.P. Radhakrishnan, Judge, Supreme Court
5) Justice N. Santosh Hegde, Former Judge, Supreme Court
6) Justice B.S. Chauhan Judge, Supreme Court
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8) Justice Kuldip Singh Former Judge, Supreme Court
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14) Justice G.B. Patnaik , Former Judge, Supreme Court
15) Justice S.C. Sen, Former Judge, Supreme Court
16) Justice G.S. Singhavi Judge, Supreme Court
17) Justice H.L Dattu Judge, Supreme Court
18) Justice Gopal Oza, Former Judge, Supreme Court
19) Justice Sharad Bobade Judge, Supreme
20) Justice A.M.Khanwilkar, Chief Justice,Himachal Pradesh HighCourt
21) Justice B.R. Gavai Judge, Bombay High Court
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25) Justice R. Basant, Former Judge , Keria High court
26) Justice S.S Parkar, Former Judge, Bombay High Court
27) Justice S.P. Kukdey, Former Judge, Bombay High Court.

& all other Hon'ble Judges delivering judgments which protect and uphold Human Rights

-: WE ARE THANKFUL TO :-

1) Adv. Onkareshwar Kakade, High Court, Nagpur.
2) Adv. Shailesh Narnawre, High Court, Nagpur.
3) Adv. Rajendrasingh Kakan, Pusad.
4) Dr. Uma Mangesh Hindlekar, Devgad, Sindhudurga.
5) Adv. Ashish Deshmukh, Chairman , Bar Council of Maharashtra & Goa
6) Adv. Anil Goverdipe, Vice -Chairman , Bar Council of Maharashtra & Goa
7) Adv. Ashok Mundargi , Senior Counsel, High Court, Mumbai.
8) Adv. Shirish Gupte , Senior Counsel, High Court, Mumbai.
9) Adv. Satyajeet Desai, Supreme Court, New Delhi.
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64) Miss. Chhaya Pawar , Bhayander , Thane.
65) Adv. Amol Kotamkar, Wardha.
66) Adv. Vinod Gangwal, High Court , Mumbai.

Preserve Everyone's Human Rights

Shri. Raj Khilnani
Addl. Director General
Of Police Maharashtra.

Amravati :-

POLICEMEN should not feel that the Human Rights Act puts restrictions on their work. The Act is actually meant to help them to work within the frame of constitution.

Human Rights commission and the Act have been made because of the demand and pressure from common people. We always talk about human rights of the accused and the criminals. We should not forget that it is also the rights of witnesses in court, complainants, common people and police. We should strive for maintaining rights of everyone. Besides accused, common people should also be considered within the sphere of Human Rights.

People who are victims of bomb blasts at various places also come under Human Rights.

Clash between police and accused regarding Human Rights occurs mostly because of ego problems. Police should try to keep there emotions in control and use techniques like meditation to keep their cool.

Date 17 January 2007

Courtesy : The Hitwada 18/01/2007

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CAN THE POLICE DO THEIR JOBS OF ARRESTING THE GUILTY WITH SO MANY RESTRICTIONS ?

First of all it is not the job of the police to decide who is guilty or who is not. The police are only to apprehend or catch suspects and accused people. But they cannot behave as if the person is already guilty and they have the right to punish them. That is a job for the courts. Meanwhile, people in custody must be given every protection from flase accusations and mistreatment. That is why the "restrictions" are there. Actually they are not restrictions at all, but just procedures designed to make sure that everyone has a fair chance before the courts.

Courtesy – Commonwealth Human Rights Initiative

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Don't see "Who" is Right,

But see "What" is Right

Then only there will be impartial justice.

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……. Adv. Nilesh C. Ojha

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Any Judge Who Seeks

Immunity from truth under

The cover of the robe

Robs the rights of we

The people of India."

…….. Justice V R Krishna Iyer

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-: CHAPTER =1 :-

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TOPICAL INDEX

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22	Bail – Parity – Co-accused similarly placed granted bail – Appellant should be released on Bail – I.P.C. Section 120-B, 417, 420, 468, 471.	April 18, 2011	255
23	Criminal Procedure Code, 1973- Section 439 - Appellants Involved in case for which there was counter case— Appellants could be released on ball on bond of Rs. 25000/- with surety.	2001(3) Crimes 188 (SC)	256
24	Criminal P.C. (2 of 1974), S.437 - Interim bail during pendency of regular bail application - Court has inherent power to grant interim bail to a person pending final disposal of the bail application – It should be decided on same day when petitioner files before the court -When a person applies for regular bail then the court concerned ordinarily lists that application after a few days so that it can look into the case diary which has to be obtained from the police authorities and in the meantime the applicant has to go to jail. Even if the applicant is released on bail thereafter, his reputation may be tarnished irreparably in society. The reputation	2010 CRI. L. J. 1435	257

	of a person is his valuable asset, and is a facet of his right under Article 21 of the Constitution.		
25	Interim bail should be granted pending disposal of final bail application since arrest and detention of a person cause irrepairable loss to a person's reputation.	2010 ALL MR (Cri) 2030, 2009-Crimes (SC)-2-4 , 2009-SCC-4-437 Cr. P.C. 437	258
26	I.P.C. section 186, 353, 356, 379 – Constitution of India, - Arts 226, 21 – Cri. P.C., (1973), S. 46 – Arrest – Power of Police to arrest the accused – Held, the investigation has to be made without touching the offender – The question of touching the offender would arise only while submitting a charge-sheet – Compensation of Rs. 25,000/- granted to accused – State directed to take action against police officer responsible for violation of fundamental rights of accused.	2008-All MR(Cri)-0-2432,	260
27	Wrongful arrest & detention in police custody – IPC Ss. 420 & 471 Cr.P.C. S.41-Police Officer is not expected to act in a mechanical manner and in all cases to arrest accused as soon as report of cognizable offence is lodged – Existence of power to arrest is another thing & justification for exercise of it is another thing there must be some reasonable justification in opinion of officer effecting arrest that it was necessary and justified – Except in heinous offences arrest should be avoided – If Police Officer issue notice to a person to attend the Police Station and not leave the station without permission would do – offence u.s. 420, 471, 468 of IPC are not herious offences – Arrest illegal. B] Compensation- Petitioner was arrested by respondent Police Officer in case registered U/s 420, 468, 471. If IPC – Offences are not heinous offences - Arrest found malafide and mischievous & not protected by element of good faith – Infringement of fundamental right of a citizen cannot stop by giving a mere declaration – Compensatory relief is to be provided under – Cost of Rs. 25,000/- imposed on Police Officer who arrested the petitioner.	2003-ALL MR(CRI)-0-1096,2003-BCR(Cri)-0-1655, 2004(I) Crimes1 (Bom) (DB)	265
28	Criminal P. C. (2 of 1974) - S. 438 Anticipatory bail - Serious allegations by petitioner against ACP for threatening him to falsely implicate him in case of cheating - Story set up by police and complainant does not inspiring confidence – Held, Bail granted to Petitioner and investigation transeferred to crime Branch.	2011 CRI. L. J. (NOC) 398 (P. & H.)	273

29	Cr - P.C. S. 438 – IPC SS 452, 323, 294 and 506 – Applicant earlier lodged a complaint against police officials and to take revenge police wanted to arrest applicant – Fit case for protection of anticipatory bail under S. 438 of Cr. P.C. – Anticipatory bail granted.	2005 (2) Crimes 299 (HC)	277
30	Criminal P.C. S. 437 – Bail – Grant of - If the case is not covered by cls (i) and (ii) of S. 437(1) of Cr. P.C. i.e. the offences are not punishable with death or imprisonment of life and the accused is not previously convicted for seven years imprisonment or two times for 3 years or more - Held- the accused is entitled to get bail – Therefore ordinarily a person suspected to having committed an offence u.s. 420, 120(B) of I.P.C. would be entitled to bail.	1997 CRI. L. J. 3124, AIR 1997 SC 2575,	278
31	Bail – Power of Magistrate to grant bail in session triable cases – offence under S.C. & S. T. Act – Held, Magistrate has power to grant bail to accused even if the offence is triable by Court of session.	2005-MhLR-4-111 , 2005-Cri.L.J.-0-2984	283
32	P.C.R. – Request for Police custody – Order of rejecting Police custody – Once application for P.C.R. is rejected – Police cannot repeat and make a application again for Police custody. (A) Cr. P.C. S. 437(1) – Penal code S.S. 467, 409 – The offences are punishable with life or for 10 years imprisonment – Magistrate has powers to grant bail to the accused – Restriction under S. 437 (1) is in respect of offences which are punishable with alternative sentence of death or life imprisonment. In case under Sec. 326 of I.P.C. also the Magistrate has power to grant bail.	2010-AD(CR)-4-466 , 2010-ALLMR(CRI)-0-2775	288
33	Criminal P.C. (2 of 1974), S.439 - BAIL - COURT OF SESSIONS - CUSTODIAL REMAND - Bail - Application for - Is maintainable even if filed during period of police remand granted by Magistrate - Sessions Court cannot reject application for bail on that ground - Bail application should be entertained and considered on merits even if there is order of police remand.	2011 CRI. L. J. 2065	300
34	Cr. P.C. – S. 438 – Anticipatory Bail – Case of Complainant doughtful -Different versions given in different complaints – I.P.C. - Section 395, 397, 467, 468 and 471 – Grant of anticipatory bail to accused justified.	2010 (3) SCC (Cri) 469, 2010-TLPRE-0-452 , 2010-JT-6-656	303

35	] Cr. P.C. – Section 438 – Anticipatory Bail – I.P.C. – 304 – B, 406, 498 – A, 34 – Accused and Complainant relying on documentary evidenc – Bail should be granted - Wife Committing Suicide – Allegation of demand of dowry made by her parents – Accused taking defence that she was suffering mental illness- Both sides relying on documentary evidence – Held - accused relying on documentary evidence genuineness of that document can be decided by the trial court- however in such case the accused are entitled to be released on anticipatory bail. B] Media Trial – Supreme Court condemned the act of publishing and holding of media trials of the matters which is subjudice before Court. Note :- See also – 2007 ALL MR (Cri.) 674 (Bom) – Bail granted in Rape case sec. 376 I.P.C.- as accused relied on love letters.	2005 Cri. L. J. 1416, 2005-Crimes(SC)-1-283 , 2005-AIR(SC)-0-790	307
36	Cr. P.C. – Section 438 – Anticipatory Bail – Murder Case – I.P.C. 302, 34 – There is no allegations against petitioner that he hit the deceased with dangerous weapons – Anticipatory bail granted.	2009-ALL MR(CRI)-0-3289	310
37	Cri.P.C.(1973),S.439-Bail-Offenceofmurder-- Investigation was complete and charge- had already been filed - Trial was not likely to take off – Applicant entitle to bail - Application allowed with conditions.	2013 ALL MR (Cri) 1317	311
38	Cr. P.C. – 437 – I.P.C. 302 Murder Trial – Two set of evidences inconsistent with each other – one incriminating the accused, while the other indicating his absence at relevant time on the spot – Accused deserves to be granted bail.	2002-ALLMR(CRI)-0-573	313
39	Criminal Procedure Code, 1973, Section 439 (2)-Constitution of India, Article 21-Cancellation of bail— When two views are possible in respect of commission of crime, , justifying or not justifying the grant of bail, then the view which leans in favour of accused must be favoured.	[2008(4) B Cr C 716 (SC)]	314
40	(A) Bail – Murder Case – I.P.C. 302 – Mere gravity of offence and severity of punishment is no ground for rejection of bail - The nature of evidence, part played by the accused and the likely hood of the accused absconding has to be taken in to account – the allegations against accused are that they hold the deceased and other accused pelted stones – nIt does not mean that accused have common	2003-ALLMR(CRI)(JOUR)-0-59 , 2003-Cri.L.J.-0-736	321

	intention of murder. (B) There is no allegation that if released on bail the accused are likely to abscond with a view to evade the trial – Accused entitled to get bail. Plea that accused if released may be assaulted by complainant party not tenable – Bail granted in Kuldip Singh v. State of Punjab, 1994 (3) Rec Cri R 137 : (1994 Cri L.J. 2201) (SC).		
41	Criminal P.C. (2 of 1974), S.436 – Transit BAIL - Rejection by Magistrate by simply stating that alleged offence had been committed beyond his jurisdiction – Illegal - The Magistrate has ample jurisdiction to consider the question of bail - Such bail, if granted, must be for a temporary period to enable the accused person to appear before the proper Court within a fixed period and it would not be open to Magistrate to reject bail application straightaway. [See also 2001 ALL MR (Cri.) 1696]	1999 CRI. L. J. 1084	325
42	A) Criminal P.C. (2 of 1974), S.438, S.71, S.482 - INHERENT POWERS - ANTICIPATORY BAIL - Dishonour Of Cheque - Anticipatory bail - Grant of - Issuance of non-bailable warrant directly by Magistrate without first issuing bailable warrant is illegal - Court in exercise of power under S. 482 granted anticipatory bail.	2006 CRI. L. J. 4332	327
43	Cri. P.C. Section 436 or 437- Bail to accused against WHOM warrant of arrest is issued by the Court - WHEN an accused, against whom a warrant of arrest has been issued, appears before the court where the offences are neither punishable with death nor imprisonment for life nor otherwise of a grave nature, the magistrate should examine granting interim bail till such time as objections, if any, are filed by the prosecution and thereafter decide on the merits of the bail application	LAWS(KAR)-2000-4-39=ILR(Kar)-2000-0-4000	329
44	Summons Case – N. I. Act – Sec. 138 – When accused appears pursuant to the Summons issued by court there is no need for him to move bail application and furnish personal bond – Impugned order asking accused to furnish security for his enlargement is illegal – Order quashed.	1998 DCR 249, ILR 1997 KAR 2560	332
45	Cases triable by the Magistrate- Factor to be taken in to consideration while dealing with the bail application -	2000 (I) RCR (Cri)	334

	Cases in which 7 years or more punishment is provided are triable by Magistrate First Class who has the jurisdiction to award the maximum sentence of 3 years- This factor has to be taken in to consideration while dealing with the bail application - The Magistrate or the Sessions Judge, while considering the application for grant of bail are also required to see whether the offence is triable by First Class Magistrate or by the Court of Session- They should not forget that many of the cases in which 7 years or more punishment is provided are triable by Magistrate First Class who has the jurisdiction to award the maximum sentence of 3 years. At this stage the court considering the bail application must not forget that if the accused is ultimately convicted he cannot be awarded a sentence of more than 3 years. B] Cr. P.C. SS. 437, 439 – Change in circumstance- Delay is change in circumstances - Second bail application not to be dismissed on the ground that previous application was rejected on merits – Each days delay and detention of accused should be taken as relevant consideration while considering the second application –The court considering the application must again look into the facts, the nature of the allegation, character of the evidence collected and should also see whether the allegations made are making out a prima facie case against the accused or the allegations even on their face entitle the accused to bail. There may be cases where on the first occasion considering the totality of the circumstances the Judge may reject the bail but after filing of the Challan or after discharge of the complainant from the hospital or after recovery of certain articles or after collection of certain other evidence the accused may be in a position to persuade the Judge to admit him to bail. It is not possible for this Court to give a myriad example but the court while applying its wisdom to the facts of the case must not forget that it has a discretion to grant bail and unless very strong evidence is produced before the Court, the personal liberty of the accused should not be interfered by unnecessarily keeping him in jail. ' A Judge while deciding the application should not derive a sadistic pleasure in keeping the person in jail and he should not reject the application just for nothing. In a case like present the rejection of the application, on the ground that the earlier application was rejected after considering the merits, was not only contrary to the provisions of law but shows non-application of mind.	399,1999-TLMPH-0-106 ,1999-MPL.J.-2-663	
46	Cr. P.C. Sec. 438 – I.P.C. 420, 467, 468, 471, 120 (B) – Bail should not be withheld as a punishment – The	2005-ALLMR(CRI)(J	338

	requirement of bail is to secure the attendance of the prisoner at trial - Anticipatory Bail –Accused entitled to be granted with anticipatory bail.	OUR)-0-12 , 2004-Cri.L.J.4576	
47	Bail – Remand of accused to custody when he appears before court – Held -when a Court issues summons and not a warrant in a non – baillable case – then the accused should be released on bail when he appears before the Court - he should not be committed to custody.	2008-CRIMES-4-327 , 2008-ILR(Ker)-3-604	342
48	Bail – Parity – Co-accused with similar allegations have been granted anticipatory bail – Held- the appellant entititled to be granted anticipatory bail	2005-SCC-7-226 , 2006-AIR(SCW)-0-4723	344
49	Cr. P.C. & 438 – Anticipatory Bail – Interim Bail – Presence of accused – Held, the order directing accused to remain present can not be passed without granting interim bail to the accused.	2010-ALL MR(CRI) -0-2524	344
50	Bail – Condition – Imposition of – Held- Condition can only be imposed in non-bailable offences having punishment more than 7 years – But for other non-bailable offences conditions could not be imposed.	2007-ALLMR(CRI)(JOUR)-0-24 , 2006-GLR-3-2529	355
51	Cr. P.C. 209 – Commitment of case under Attrocities Act to sessions Court– Court insisting accused to obtain bail is improprer. It is not a requirement u/s 209 of Cr. P.C. – Magistrate can commit the case by taking personal bond from him to appear before special court ensuring his attendance before said court till conclusion of trial.	2011 CRI. L. J. (NOC) 364 (A.P.)	359
52	Cri. P.c. S. 167 and 109 – Procedure for remand of accused – Duty of Magistrate – It is duty of Magistrate to safeguard liberty of a citizen – Court should not behave as an agent of the Executive to help the police in detaining persons in custody at the wish of the police – When the person detained informs the Magistrate that he was not told of the reasons for his arrest then it should be seen that such a person is informed of the grounds of his arrest – There is no provision u.s. 109 of Cri. P.c. to detain a person in jail.	1963 (1) Cri. L. J. 451 (1), AIR 1963 MANIPUR 12	361
53	Criminal P.C. – Section 439 – Murder – No direct evidence of offence – Admission on the part of applicant before police regarding commission of offence could hardly a ground to deny a bail, even in murder case –	2004-ALLMR(CRI)-0-646 , 2004 (1) Crimes	366

	Accused granted bail – If the accused belong to other state proper condition be imposed to secure his presence at the trial.	202	
54	Bail – charges against accused having assets disproportionate to their known source of Income – Prevention of corruption Act section 5 (2) (e). The accused have statutory right to render explaination before the trial court – The apprehension that the accused will flee away if enlarged on bail cannot viewed with seriousness as they have deep root in the society and social status – The petitioner required to be admitted to bail.	1998-Cri.L.J.-0-2656	368
55	Cr. P.C. Sec. 438 - Anticipatory Bail – Murder case – IPC 302, 149 –Accused name not in F.I.R. – The appellant was included amongs others as a result of further investigation – He is not named in F.I.R. – The appeallant be directed to be released on bail if he surrender before Police.	2000 Cri. L. J. 4660, 2000-AIR(SCW)-0-3349	371
56	Bail by invoking provisions of sec. 482 of Cri. P.C. and Art. 226 of the Constitution of India -Penal code (1860), Ss. 498-A, 406 – F.I.R. against petitioner who is not relative of husband – S. 498-A does not get attracted – Allegations against petitioner – about not returning jwellery which belonged to the complainant Held, The allegations are extremely wild and disgusting – In such cases interests of accused required to be protected – The petitioner accused would not be required to attend the proceedings unless specifically directed by the court to do so and that too in the case of extreme necessity – Similarly no step shall be taken against her – She shall be granted bail by the court trying the case – The Trial Court shall be careful while considering the framing of charge – The appellant shall not be tried for offence u.s. 498 – A of I.P.C.	2010-JT-6-498 , 2010-TLPRE-0-407	372
57	Article 226 of constitution of India – Even if the offence is committed outside the jurisdiction of the High Court – The High Court can grant anticipatory bail even by using provisions of Article 226 of the constitution of India.	1991 Cr. L.J. 950, 1990-ILR(Del)-2-203 , 1992-CCR-1-708	376
58	Anticipatory Bail – I.P.C. 406, 409, 420. 467, 468, 471, 120 B – Petitioner Director of the company – Complainant company signed MOU – Contract with petitioner – Failure to fulfil promise – Security deposit of complainant not returned – Held, Dispute is purely of civil nature – The tendency in the business circles to convert purely civil disputes in to criminal cases highly deprecated by Supureme Court – Co-accused already granted bail – Petitioners also entitled to be released on	2006-DLT-134-390, 2006-AD(Del)-7-589	385

	Anticipatory Bail.		
59	Cr. P. C. 438 – Anticipatory Bail – Delay in lodging in F.I.R. Sections 295, 354, 500, 506, 509, 34 of IPC – Documents shows that the victim tried to falsely implicate the accused – FIR lodged after a delay of 1 year – Charges made are not free from doubt Accused entitles to be granted anticipatory bail.	2001-Cr L. J. -0-3739, 2001-Crimes-3-409	389
60	Cr. P.C. 438, 437, 439 – Anticipatory bail – Refusal of anticipatory bail is no ground to refuse regular bail to accused under Sec. 437 or 439. – Considerations for grantirng anticipatory regular bail are different than that of regular bail. Cr. P.C. 438, 437, 439 – Anticipatory bail – Refusal of anticipatory bail is no ground to refuse regular bail to accused under Sec. 437 or 439. – Considerations for grantirng anticipatory regular bail are different than that of regular bail.	2009-CRI.L.J.-1031	396
61	Criminal P.C. (2 of 1974), S.439 - BAIL - Ball - Cancellation of - Conduct of accused subsequent to his release on bail and supervening circumstances alone are relevant. (A) Criminal P.C. (2 of 1974), S.438 - ANTICIPATORY BAIL - Cancellation of - Dispute Inter se petitioner and accused persons relates to immovable property which is more of civil in nature - No allegations of any attempt by any of accused persons to avoid their presence before Investigating Officer for Investigation purposes - Anticipatory bail granted to accused persons - Cannot be cancelled.	2009 CRI. L. J. 1067	400
62	Criminal P.C. (2 of 1974), S.438 - ANTICIPATORY BAIL – SC & ST ACT (POA) - Anticipatory bail - Grant of - Offence alleged under Atrocities Act - F.I.R., recommendations of Superintendent of Police not prima facie disclosing commission of offence - Anticipatory bail to be granted.	2006 Cri. L. J. 4346	405

63	Criminal P.C. (2 of 1974), S.438 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), S.18, S.3(1)(x) - ANTICIPATORY BAIL - - If complaint is found to be false, anticipatory bail cannot be denied - Complaint lodged after delay of 14 days - It raises doubt about genuineness of complaint - Further there was dispute going on between accused official and complainant - In such circumstances, accused entitled to anticipatory bail. [See also : 2010 ALL MR (Cri.) 1223 :- One day delay is ground for anticipatory bail.	2004 CRI. L. J. 680	408
64	Cr. P.C. Sec. 438 – Anticipatory bail – I. P.C. sec. 366 – Applicant's name does not appear in F.I.R. – Accused already grnted bail – Applicant belongs to respectable family -Deserves to be granted with anticipatory bail.	1986-Crimes(2) 61	414
65	Criminal P.C. (2 of 1974), S.438, S.204 - ANTICIPATORY BAIL - Can be granted even after summons or warrant is issued by Magistrate - It is not possible to hold as a proposition of law that Sessions Court or the High Court will have no power to entertain the application for anticipatory bail where either summons or warrants have been issued against the accused. The Court has the jurisdiction to grant anticipatory bail on being satisfied that the accused apprehends arrest in a non-bailable offence B)Criminal P.C. (2 of 1974), S.438 - ANTICIPATORY BAIL - Grant of - Petitioner in Government service - No apprehension of his absconding – He entitled for anticipatory bail.	1998 CRI. L. J. 3969	421
66	Cr. P.C. SS. 205, 251, 71 – Issurance of Non – bailable warrants – It should be issued as alast resort – Magistrate may issue a summons and then a bailable warrant and only if presence of accused is not secured then only N.B.W. may be issued – Magistrate should not insist on the presence of the accused at all times unless it is necessary – There is no need for accused or his advocate to apply for exemption on every date of hearing – If the accused makes even the first appearance through a counsel, he may be allowed to do so.	2010 ALL MR (Cri) 2368 , 2010-Crimes-3-604 ,	427
67	Application for cancellation of Non – bailable warrant – There is no necessity for accused to remain present – Warrant can be cancelled in absence of accused – Court can not require presence of accused before dealing with application.	4429 OF 2013	431

68	Application for cancellation of Non – bailable warrant – There is no necessity for accused to remain present – Warrant can be cancelled in absence of accused – Court can not require presence of accused before dealing with application.	2001-DCR-1-500 , 2001-ALLMR(CRI)(JOUR)-0-33	432
69	Trail in absence of accused – Non – bailable warrant issued against accused- Held- Nothing to show thant any order was passed on previous dates asking accused to remain present – Held, issurance of warrant unjustified – Hence quashed.	2009-Cri.L.J.-0-523,2009-AIR JharR-2-203 Cr. P.C. S. 317	436
70	Cr. P.C. 438 – Anticipatory Bail – I.P.c. 376, 343, r/w 34 and u.s 5 of prevention of Immoral Traffic act – All the applicants are Social Workers, Politicians and Police officers – As such having deep roots in the society – No possibility of fleeing away from the ends of justice – Court inclined to allow bail application.	2007-AllMR(Cri)-0-2283 , 2008-CRIMES-4-151	441
71	Cr. P.C. 439, 389 – Accused convicted U.S. 307 of I.P.C. – conflicting version of accused and prosecution witnesses – Prima facie case made out for granting bail – Bail granted.	2009-All MR (Cri)-0-433	445
72	Cri. P.C. S. 439 – I.P.c. – 363, 366, 376 – Bail – Accused was alleged to have induced girl – Prosecutrix, aged 17 years to go with him promising her to marry with her – Held, the prosecutrix moved with applicant from place to place – Fit case to grant bail.	2003-CRIMES-1-558	446
73	(A) Criminal P.C. (2 of 1974), S.436, S.437 - BAIL – Bailable OFFENCE - In case of bailable offence, there is no question of discretion in granting bail. (Para 6) (B) Criminal P.C. (2 of 1974), S.436 - Penal Code (45 of 1860), S.500 - BAIL - DEFAMATION - Bail - Release of person accused of bailable offence - Court is not bound to issue notice to complainant and hear him - Cancellation of bail on ground that complainant was not heard and thus principles of natural justice were violated – is illegal.	2009 CRI. L. J. 1887	447
74	Criminal P.C. (2 of 1974), S.70, S.482 - BAIL - Non-bailable warrant - Execution - Stay of - Accused is willing to surrender himself and seeking permission to appear before Court - Execution of non-bailable warrant issued against him stayed in interest of justice.	2001 CRI. L. J. 2835	452
75	Cr. P.C. Sec. 439, 389 - Murder case –Conviction – Bail-Disclosure Statement of accused was not properly recorded – Also, there is no evidence on motive –	2010-ALLMR(CRI)-0-1798 ,	454

	Accused entitled to bail.		
76	Criminal Procedure Code (2 of 1974), S. 438 — Anticipatory bail — Court Cannot impose conditions which are harsh, onerous of excessive so as to frustrate the very object of grant of anticipatory bail - Court should be extremely chary in imposing conditions while enlarging an acc used on bail —— Accused cannot be subjected to any irrelevant condition at all — To subject an accused to any other condition than mentioned in sections 437 and 438 would be beyond jurisdiction of the power conferred on Court — Condition imposed by the High Court directing appellant to pay a sum of Rs. 12,500/- per month as maintenance to his wife and child is onerous, unwarranted and is liable to be set aside, (Para 8)	[2009(3) Mh.L.J.(Cri.)19]	456
77	Cr. P.C.S. 437 – Bail – Conditions – I.P.C. 363, 392 – Accused directed to pay cash deposit of Rs. 10,000/- - Held- insistence on cash deposit is illegal and liable to be quashed.	2003-ALLMR(CRI)(JOUR)-0-45, 2003-Cr. L.J-0-353	459
78	Section 120B—Prevention of Corruption Act, 1988—Sections 7, 8, 12, 13(2) rw/s 13(l)(d) —Bail—Grant of—Petitioner - Prosecution case that petitioner demanded and agreed to accept an illegal gratification of Rs. 7,00,000 from one 'MKB'— Allegations that 'MKB' demanded Rs. 10,00,000 from an Advocate representing a faction of a company who was to get in touch with the petitioner for getting an favourable judgment in the matter of appointing President of the company—Recovery of an amount of Rs. 55,00,000 in cash from residence of petitioner—Recovery of Rs. 1,21,23,800 from a number of lockers of petitioner—Petitioner was arrested on 23.11.2009—Petitioner entitled to be released on bail-	2010(3) Crimes 151 (Del)	461
79	Criminal P.C. (1973), S.439 –Capacity of accused - Court should examine capacity of prisoner before fixing amount of bail bond - Amount of bail bond reduced from Rs. 2,00,000/- to Rs. 50,000/-	2000 ALL MR (Cri) 1898	468
80	Criminal P.C. (1973), S.436 – Absconding is not a ground to be given weight age in grant of bail - Court would not be impressed by the surmises and conjectures- While considering the prayer for bail, the Court has to consider the strength of material which the investigating agency has collected for going to the trial against the accused. Fact of absconding would not by itself disentitle the accused to get the bail. It is a matter of experience that on some occasions even innocent persons hide	2002 ALL MR (Cri) 565	469

	themselves from police on account of fear.		
81	Code of Criminal Procedure, 1973, Sec. 167(2)(a)(ii) -Bail application- On ground that charge-sheet when filed was incomplete because chemical analyst's report was not filed - That Chemical Analyzers report was filed much after 90 days period, hence he was entitled to a bail - Held, in this case seizure was affected on an information and contents had been tested positive for contraband with help of a field kit On merits contraband herein is Acetic Anhydride being a "controlled substance" which is a versatile substance, can be used in manufacture of innocuous medicines. Quantity seized is also less.	2009 (1) Bom.C.R.(Cri.) 411	471
82	Criminal P. C. (2 of 1974), S. 446 — Issuance of warrant for recovery of security bond — Accused was absconding — Forfeiture of bail bonds - Sureties producing accused before Court — Matter of recovery of amount of bail bond from sureties would require reconsideration — Order passed by trial Court for issuing the recovery warrant against surety is set aside.	2009 CRI. L. J. 160	480
83	Cri.P.C.Sec. 438 – Anitcipatory Bail can be granted even if charge-sheet is filed and cognizance is taken by the court. The gravity of the offence, need for custodial interrogation, fact of filing of charge sheet etc. cannot by themselves be construed as a prohibition against the grant of anticipatory bail. The object of S.438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a Court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, prevent the concerned Courts from granting anticipatory bail in appropriate cases. The Courts i.e. the Court of Sessions, High Court or Apex Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under S.438 of the Crl. P. C. even when cognizance is taken or charge-sheet is filed provided the facts of the case require the Court to do so.	2003 ALL MR (Cri) 2379 (S.C.)	482
84	Criminal P.C. (1973), S.437 – Bail – Murder - Long-lasting litigation between two groups - Complainant and family members wanted to take forcible possession - Cross-firing and attack followed - Several persons from both sides receiving injuries - It was not possible to say that respondent applicant had caused injuries to deceased and was the only person responsible for	2008 ALL SCR 1480	485

	injuries resulting in death -Grant of bail to him justified.		
85	Bail – Murder case – oppose by state- Held- whenever the state opposes an application for grant of bil to an under trial prisoner it has to ensure a speedy trial – failure to take appropriate steps by state accused is entitled to get bail.	1987-Cri.L.J.-0-1100 , 1987-MPL.J.-0-380	487
86	Indian Penal Code, 1860— Section 120-B/406/409/420/468/ 471—Anticipatory Bail—Facts of purely civil nature-—Business transaction— Co-accused already on bail;— Held—Where petitioner have done no criminal wrong who had roots in the society - There is no apprehension of absconding—Petitioner cannot be denied of bail – Anticipatory bail granted.	2007 (1) CRJ 635	489
87	Indian Penal Code, i860—Section 363/366/342/506 and 376—Bail—Petitioner is in custody—Victim already examined—Victim has married to some one else and has a child therefrom—Witnesses also examined—Held—No question arises to tempering the evidence—Accused entitled to bail.	2005 (6) CRJ 443	493
88	Cr. P.C. – Section 439 – Accused was a of High Court – Arrested under section 120 – B, IPC r/w sec. 7,8,11,12,13 (1) of prevention of corruption Act.- Charges of misuse of power for passing favourable order – Petitioner/accused is having relationship with another accused – Petitioner used to enjoy his hospitality in terms of wine and women – 12 days police remand granted but nothing incriminating was found – Petitioner's wife is ill – Held petitioner entitled to be released on bail.	2003-DRJ-70-327 ,	494
89	Criminal P. C. (2 of 1974) - S. 439 Bail -Allegation of causing bomb explosion against petitioner – On consideration of over all facts and circumstances of case as well as evidence on record, - It will be proper to release petitioner on bail without going in to merits of controversy (Para 10)	2011 CRI. L. J. (NOC) 415 (RAJ.)	496
90	Criminal P. C. (2 of 1974) - S. 439 - Bail- Case of abetment of suicide - Allegation in complaint that petitioners teachers searched victim by stripping her clothes for theft of cash and as a result, she had committed suicide by hanging herself at her residence - Allegation of searching victim by stripping her clothes not mentioned in suicidal note - Petitioners are ladies and they are very much available in the college premises and there is no allegation that they are attempting to evade	2011 CRI. L. J. (NOC) 430 (MAD.)	499

	the due process of law by absconding or fleeing from justice – They entitled to bail. (Paras 19,22)		
91	Cri. P.c. Section 439 – Bail – Grant of – Accused in jail – Trial is going very slow – Unnecessary harassment to accused – Held – It appeared that the Judge forgotten his duties towards poor accused who is in jail – An expeditious criminal trial is an fundamental right of the accused – High Court granted bail to the accused even though it was rejected	1992 CRI. L. J. 2873	506
92	[A]Police – Arrest – Guidelines by Supreme Court – It shall be the duty of the Magistrate before whom the arrested person is produced to satisfy himself that the guidelines regarding arrest are complied by the Police. [B]Right of arrestee to consult privately with lawyer are fundamental rights. [C] No arrest can be made in routing manner immediately after the registration of crime – Except in heinous offences arrest must be avoided – If a Police Officer issues notice to attend the station house and not to leave the area without permission can be made, because it is lawful for the police officer to do so – The existence of the power to arrest is one thing but the justification for arrest is another thing. – The Police officer must be able to justify the arrest - Arrest and detention in police lock up of a person can cause incalculable harm to the reputation and self esteem of a person-D.G.P. of all states shall issue necessary instructions requiring due observance of guidelines issued by Supreme Court.	1994-IJR-0-267 , 1994-AIR(SC)-0-1349	509
93	A] Criminal procedure code, 1973 – Sec 160 (1), 161 (2), - Constitution of India Article 20 (3) and 22(1) – Rights to keep silence – Held – Accused has *constitutional right to keep silence till end of the trial – the Police Officer* cannot pressurize the accused to give answer to their questions– Secondly the Police cannot summon a woman at Police Station – Compelled Testimony includes both physical and psychological compulsion – Threats of prosecution for failure to answer and manner of delivery of answers amounts to compulsion – Proceeding against accused quashed – Appellant – accused given protection under Article 20 (3) that he should not be compelled to answer the questions asked by the police which are self incriminating. B] Use of torture/third degree is not permissible – However worthy the end is, it will not be permissible to	1978-AIR(SC)-0-1025 , 1978-SCC-2-424	515

	achieve it by sacrificing the dignity of the individual and freedom of the human person by improper means – We have to draw up clear lines between whirl – Pool and the rock where the safety of society and the worth of the human person may co-exist in peace. C] Police cannot be the law unto themselves expecting others to obey the law. If the alibi is that the Sessions Court had directed the accused to appear at the police station, that is no absolution for a police officer from disobedience of the law. D] Before discussing the core issues, we wish to note our regret, in this case, at a higher level police officer, ignorantly insisting on a woman appearing at the police station, in flagrant contravention of the whole-some proviso to Section 160 (1) of the Cr. P. C. Such deviance must be visited with prompt punishment since policemen may not be a law unto themselves expecting others to obey the law. The wages of indifference is reprimand, of intransigence disciplinary action. If the alibi is that the Sessions Court had directed the accused to appear at the police station, that is no absolution for a police officer from disobedience of the law. There is public policy, not complimentary to the police personnel, behind this legislative proscription which keeps juveniles and females from Police Company except at the former's safe residence. May be, in later years, community confidence and consciousness will regard the police force as entitled to better trust and soften the stigmatizing or suspicious provisions now writ across the Code.		
94	BAIL- I.P.C. Sections 302,307, 325/34 - Murder - In an attack by Respondent, when appellant alongwith his supporters was going to attend *a* meeting, one died and others injured - FIR filed - Charge-sheet served - Application for bail, objected to by appellant on the ground that threats to life were being received from respondent for pursuing the case - High Court granted conditional bail - Justification - Respondent in jail since long time - Two important witnesses already examined - Adequate protection given to appellant - Assurance by State that trial will not be prolonged. Held, on facts no interference is needed specially when High Court has granted conditional bail and liberty to trial court to jail respondent in case of breach of conditions. Proper steps to be taken if fresh threats are given.	JT 2012 (1) SC 159, LAWS(SC)-2012-1-28, ACC-2012-76-792	543
95	Criminal P.C. (2 of 1974), S.437 BAIL - Bail - Grant of - Murder case – Different versions of dying declaration and investigation – Grant of bail and transfer of investigation - FIR and dying declaration of deceased showing names	2002 CRI. L. J. 165	547

	of actual culprits who participated in incident - However, later part of investigation showing different thing and turned narration of facts recorded in F.I.R. and dying declaration, resulting in making brother of deceased as an accused - Further though FIR and dying declaration are on record brother of deceased is arrested, challan is filled, charge is framed against him and he is detained in custody - Facts of case such as requiring investigation by C.B.I. - C.B.I. enquiry accordingly ordered - But since enquiry will take long time applicant (brother of deceased) ordered to be released on furnishing personal bond in sum of Rs. 50, 000/- and two solvent sureties in like amount.		
96	Criminal P.C. (1989), S. 499 – Imposing Condition in bail which keeps the accused away from his family and also keeping away from the means of livelihood is impossible to comply for any one and should never be imposed. Held, such condition should never be imposed – How can a man in ordinary circumstances afford to live at place 'X' when his family lived at 'Y' and in all probability his sole means of livelihood was at 'Y' – The contention of sessions Judge that the petitioner will tamper with the witnesses at place 'Y' if he allowed to enter that place is not proper because it is common knowledge that in every bail case the police allege that there is danger of tampering with witnesses, if witnesses can be tampered in this way it shows inefficiency of police – The condition imposed is such that it is not possible for any person to comply with – it tantamount to refusing bail – The order of Sessions Judge illegal and therefore set aside – Accused directed to be released on bail unconditionally.	AIR (36) 1949 Calcutta 582 [C.N.159]	550
97	WHEN POLICE ARE ACCUSED :- A. Criminal Procedure Code, 1973 — Ss. 439(2) and 437(5) Bail — Cancellation of —Police acting as contract killers — Accused policemen allegedly killed deceased in a false police encounter at behest of third person — Held, position and standing of accused, etc. are factors other than misuse of bail to be considered for bail cancellation — Witnesses can have no security to their life if policemen who are supposed to uphold and protect law become predators — In the circumstances of case, held, High Court rightly cancelled bail as there exists prima facie case against accused policemen which disentitles them to bail — Human and Civil Rights. B. Constitution of India — Art. 21 — Fake encounter killing(s) by police — Death sentence warranted — Held, where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare.	2011 (2) SUPREME COURT CASES (CrI) 848, 2011 (6) SUPREME COURT CASES 189	552

	c.Rule of Law – Anarchy – Matsyanayaya – larger fish devouring the smaller ones or the strong despoiling the weak – Observed, the country is heading towards such a state of lawlessness.		
98	Criminal P.C. (1973), S.439 - Cancellation of bail - Police Officers and staff engaged by some private persons to kill their opponent - Police Officers and staff acting as contract killers - Strong apprehension in mind of witnesses about their own safety - Held, very strong reasons and circumstances exist in the present case for cancellation of bail.	2011 ALL MR (Cri) 1122	560
99	Criminal P.C. (2 of 1974), S.438, S.439 - BAIL - ANTICIPATORY BAIL - Bail - Regular or anticipatory - Considerations for granting are substantionally same - Not substantially different- only difference is that the anticipatory bail is before arrest and regular bail is after arrest.	2012 CRI. L. J. 2101	567
100	Criminal P.C. (2 of 1974), S.438 - Penal Code (45 of 1860), S.498A - ANTICIPATORY BAIL - CRUELTY BY HUSBAND OR HIS RELATIVE - Anticipatory bail - Accused persons married sister-in-laws of complainant and their husbands alleged to have instigated other accused persons i.e., husband, father-in-law etc. to harass complainant - One sister-in-law and her husband were residing in U. S. A. - Held, it is very difficult to believe that accused used to harass complainant, all the way - Accused persons entitled to anticipatory bail.	2008 CRI. L. J. 1083	573
101	(A) Bail - Prevention of Terrorists Act (2002), S.50 - Sanction to take cognizance of offences - Failure to obtain sanction by prosecuting agency - Accused entitled to bail - Similarly, we cannot ignore the fact that Section 50 opens with the non-obstante clause and prohibits the Special Court from taking cognizance without valid sanction from the appropriate Govt. Prima facie taking into consideratio n the above referred factors, the appellant has made out a case for grant of bail. AIR 1996 SC 204 and AIR 1963 SC 765 - Followed. (Paras [91 , 92 and 93]) (B) Prevention of Terrorists Act (2002), Ss.30(1), 32(1) – Confession before specific Police Officer - Admissibility of in evidence - Confession shall be admissible in trial of such person only for an offence under this Act and Rules made thereunder - Confession made by accused, cannot be a substantive piece of evidence against co-accused, abettor or conspirator who is being tried jointly for the same offences - Such a confessional statement not a ground to refuse bail to accused. (C) Prevention of Terrorists Act (2002), S.50 - Sanction	2010 ALL MR (Cri) 1466	576

	to take cognizance of offences - Sanction by competent authority is condition precedent for taking cognizance of the offence - Court is forbidden from taking cognizance of the offence without such sanction - If Special Court takes cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will be without jurisdiction. (Paras 54 & 55) As far as provisions of Sections 21(2) and 22(3) are concerned, the word 'knowledge' used in these provisions needs to be construed on the backdrop of the concept of mens rea. In case of other criminal offences, mens rea and intention are required. So far as the offences contemplated under sub-section (2) of Section 21 and sub-section (3) of Section 22 of POTA are concerned, the offender needs to have knowledge without which it will be difficult to fasten criminal liability on a person under these provisions of POTA. Absolute liability is not to be lightly presumed but has to be clearly established. (D) Evidence Act (1872), S.34 - Prevention of Terrorists Act (2002), S.21(3) - Entry made in loose chit - Admissibility of, in evidence - Amount of Rs.36,60,000/- allegedly paid by accused to Naxalite group - Mere loose paper/chit and entries made thereunder – is not sufficient to connect accused with the crime in question. (E) Prevention of Terrorists Act (2002), Ss.49(7), 50, 32(1) - Grant of bail – If any evidence is inadmissible then it is a ground to be considered while deciding the bail application - Charge under POTA - At the stage of grant or refusal of bail, evidence cannot be appreciated - However admissibility/inadmissibility of evidence will have a positive bearing in considering the aspect of grant or refusal of bail and therefore, this aspect cannot be ignored by the court - However, it cannot be ignored that what is inadmissible in law at this stage cannot become admissible at the later point of time unless it depends upon further evidence to be adduced by prosecution and, therefore, such issues and such legal aspects are prima facie required to be considered by the Judge of the Special Court, particularly keeping in view the mandate of Section 49(7) of the POTA. However, admissibility/inadmissibility of evidence will have a positive bearing in considering the aspect of grant or refusal of bail and, therefore, this aspect cannot be ignored by the court. While passing the impugned order, dated 16-11-2002, the Judge of the Special Court has not considered all these issues in the light of the law laid down by the Apex Court in this regard and, therefore, the order is unsustainable in law. (Para [93])		

102	Criminal P.C. (2 of 1974), S.309(2), S.167(2) - REMAND - Powers of remand - Exercise of - Remand of accused to custody on filing of chargesheet - Can only be under S. 309(2) and that too after cognizance is taken - Time lag between date of filing of charge sheet and date of cognizance of custody for intervening period - Is unauthorised - Same entitles him to bail, as the custody was neither under section 167, Cr.P.C. nor under Sec. 309 Cr.P.C	2004 CRI. L. J. 1506	590
103	Criminal P.C. (2 of 1974), S.437 - BAIL - Bail - Delayed trial - Prosecution failing to produce some witnesses for two years, seeking eight adjournments - Accused not responsible for delay - Bail to be granted. (Para 4 ,5)	1993 CRI. L. J. 2621	652
104	Criminal P.C. (2 of 1974), S.437, S.439, S.441 - BAIL - MURDER - Bail-Grant of-Accused charged for murder-Proceedings being conducted carelessly and slowly-Accused can be granted bail on personal bond and sureties - The right to life and liberty is guaranteed by Art.21 of the Constitution and the liberty of the person who even may be an accused person, cannot be curtailed unless the circumstances so require. When a person is an accused of a criminal offence and is behind bar, the least that is expected from a judicial Court is to see that the trial Court proceeds at a reasonable pace so that the liberty of the accused person is not curtailed unnecessarily for a long time. Where the accused charged for murder was behind the bars since 25 months and the prosecution had examined only 11 witnesses out of 22 and approach of the trial court was very careless and casual and prosecution was wasting time and prolonging the trial, the accused should be granted bail on furnishing personal bond and sureties to the satisfaction of the trial Court. (Paras 4, 5, 6)	1991 CRI. L. J. 1176	655
105	(A) Constitution of India, Art.22(2) - Criminal P.C. (2 of 1974), S.57 - - Meaning of - Commencement of arrest.	1990 CRI. L. J. 2201	657
106	I.P.C. 302, 201 r/w 34 - Criminal P.C. (2 of 1974), S.167(2), S.173 and S.2(c) - CHARGE SHEET - INVESTIGATION - BAIL - Charge sheet under S.173 can be filed only after completion of investigation of case - Case involving several cognizable offences- I.P.C. 302, 201 r/w 34 - Investigator filing first charge-sheet relating to some of offences before expiry of 90 days with reference that opinion of expert is awaiting -	1984 CRI. L. J. 1277	669

	Second charge-sheet relating to remaining offences filed after expiry of 90 days - Investigation of case must be taken as completed when second-charge-sheet was filed - Since it was completed after 90 days, accused were entitled to bail under S.167 (2) Proviso(a) (i). (Bail - Delay in investigation and filing charge-sheet). The provisions in Chap. XII. relating to power of police to investigate indicate that the investigation is to be of a case which would mean all the offences involved therein. Therefore, when S.173, speaks of completion of investigation, it must ordinarily be taken to refer to completion of investigation of all the facts and circumstances relating to the case whether it involves one offence or plurality of offences. Therefore, a final report or charge-sheet under S.173, can be filed only after completion of investigation in the case relating to all the offences arising in the case. The investigation of the case does not end with the collection of evidence but includes the formation of opinion by the investigator as to whether on the evidence collected there is a case to place the accused before a Court for trial and if so taking the necessary steps for the same by filing a charge-sheet. Therefore, where in a case involving several cognizable offences the first charge-sheet against the accused persons in respect of some of the offences was filed by the investigator within the period of 90 days, referred to in S.167 (2) Proviso (a) (i) and the second charge-sheet relating to the remaining offences was filed after the expiry of 90 days on the ground that the investigator had been awaiting expert legal opinion as to whether a charge would lie in respect of those offences, it must be taken that the investigation was not complete on the date of filing of the first charge-sheet and in was complete only when the second charge-sheet was filed. Thus, since the investigation was completed only after the expiry of 90 days, the accused were entitled to be released on bail under S.167 (2) Proviso (a) (i). The defective investigation and filing of the charge-sheet would not, however, vitiate the proceedings before the Magistrate. The proceedings would only be irregular and the irregularity was cured when the Magistrate acting on the second charge-sheet clubbed it with the first for the purpose of committal of the case to the Sessions Court.		
107	Criminal P.C. (2 of 1974), S.167, S.173, S.190, S.309(2), S.437 - BAIL - INVESTIGATION - REMAND - Murder case - Detention of accused. illegal - if the detention is illegal, it cannot be validated by order of remand subsequently made by the Judicial Magistrate or by Additional Sessions Judge under S.309(2) of the Cri. P.C.	1982 CRI. L. J. 2319	677

	- In this view of the matter, the Additional Sessions Judge should have accepted the application for bail filed by the petitioners in both the cases and should have released them on bail.- Accused must be released on bail. (Paras 6, 7)		
108	Criminal P.C. (2 of 1974), S.167(2), Proviso (a) and S.309 - ADJOURNMENTS - INVESTIGATION - BAIL - Accused in custody for sixty days – Police filed preliminary charge-sheet – Such a incomplete charge-sheet is not a police report within the meaning of Section 173(2) – Court cannot take the cognizance of offence on the basis of such charge-sheet - Investigation not complete - Accused has to be released on bail - Prosecution cannot invoke, S.309. 309 on the basis of a preliminary charge-sheet. Such a preliminary charge-sheet is not a police report within the meaning of Section 173(2) and hence the question of the Magistrate's taking cognizance of the offence and remanding the accused under Section 309 does not arise. 1975 Cri LJ 647 (Gauhati) and 1966 Cri LJ 1377 (Andh Pra), Relied on. (Paras 9, 14, 15)	1976 CRI. L. J. 1247	680
109	(A) Criminal P.C. (2 of 1974), S.57, S.151, S.154 - Accused - Person when becomes 'accused person' - Person does not become an accused simply on lodging of FIR or on being arrested or detained - Such person becomes an accused only after there are grounds of believing that information against him is well founded. (Para 13) (B) Criminal P.C. (2 of 1974), S.319 - Addition of accused - Expression 'person not being accused' - Does not cover person figuring as accused in case at any stage - Three persons named as accused in complaint - Cognizance taken only against two of them and not the third accused i.e. the petitioner - Petitioner could not be described as 'any person not being an accused' - Cannot thus be added as an accused. (Paras 27, 28)	1998 CRI. L. J. 2807	686
110	(A) Criminal P.C. (2 of 1974), S.167(2) - CUSTODIAL REMAND - During 15 days mentioned in S.167(2) Magistrate can alter judicial custody to police custody and vice versa.	1982 CRI. L. J. 1103	695
111	Criminal P.C. (5 of 1898), S.167 – ILLEGAL DETENTION Detention by police in contravention of S.167 is illegal - it must be noted that although police had power under the Criminal Procedure Code to arrest any person suspected of having committed an offence without a warrant, he could not detain that person in police custody for more	AIR 1961 BOMBAY 42 (V 48 C 8)	704

	than 24 hours. The provisions of the Criminal Procedure Code, expressly require a police officer to produce the person arrested for commission of a cognizable offence before the Magistrate within 24 hours. If he fails to do it, he will be certainly guilty of wrongful detention. (Para 5)		
112	(A) Criminal P.C. (5 of 1898), S.60, S.61 and S.167(1) - ARREST - INVESTIGATION - Duty of Police to produce arrested person before Magistrate forthwith - Unless a Police Officer considers that he can complete the investigation within a period of 24 hours, it is his duty to produce the accused forthwith before the Magistrate. (B) Criminal P.C. (5 of 1898), S.497 - BAIL - Application for bail can be made orally - Section 497 does not contemplate any written application for bail at all. When a person accused of any non-bailable offence appears or is brought before a Court, he can either himself or through a lawyer apply even orally for bail. There is nothing wrong or illegal in making successive applications for bail, when the accused person remains in custody. Such applications should be disposed of by the Court without any delay and it is the duty of the Police to co-operate with the Court in doing so. (Para 22) (C) Criminal P.C. (5 of 1898), S.167 - INVESTIGATION - Provisions to be strictly complied - Magistrate can release accused by rejecting prayer for remand (P.C.R.) ` If the police do not transmit to the Court a copy of the entries in the diary relating to the case, the Magistrate has no jurisdiction to direct the detention of the arrested person. It is toe duty of the police to comply with the provisions of Section 167(1) and the Magistrate should insist on such strict compliance and if the police do not satisfy the Magistrate with the documents that a remand was necessary, for the purpose of investigation, the Magistrate may release the accused. (Paras 25, 26) (D) Previous involvement of accused in Criminal case and his desperate character are no grounds for refusing bail.	AIR 1964 MANIPUR 39	706
113	Criminal P.C. (2 of 1974), S.439 - BAIL - Constitution of India, Art.21- Bail – Bail can be granted when Sessions Judge completely forgotten their duties towards the accused who are in jail- Dowry death alleged - Non-recording of statements of witnesses though available, on lame excuse, by Sessions Court - Delay in trial by adjourning case for long periods - Violation of fundamental right of accused of speedy trial, especially when he is in jail - Delay in trial deprecated and bail granted though it was earlier refused - It is really	1992 CRI. L. J. 2873	716

	disturbing that the trial courts are so unaware of liberties of the citizens - An expeditious criminal trial is a fundamental right of the accused, especially when he is in jail. No accused can be kept in jail for uncertain period, as a under-trial prisoner, especially when there is no fault on his part. In Criminal cases in which the accused is in jail, it is the duty of the presiding Officer to complete the trial as expeditiously as possible and to record the statements of the prosecution witnesses without any delay, rather day to day; and all efforts are to be made through the police agency to secure the attendance of the witnesses on the date fixed for recording their statements. It is also his duty not to grant adjournment unless it is found extremely necessary. Even if the case has to be adjourned, then the next date should not be after a long period		
114	Penal Code (45 of 1860), S.220 - WRONGFUL CONFINEMENT - Malicious confinement- Malkiat Singh respondent is in police service and at the particular time he was posted as an A.S.I, at police-station Sangrur - he arrested complainant with a view to put pressure on the person confined to come to terms with a certain person in whom the accused is interested - the offence for which Sita Ram was arrested was a bailable one - The bail, though offered, was not accepted - respondent in going to the mandi, arresting Sita Bam there and taking him hand-cuffed through the bazar was simply to put pressure upon him to come to terms with one Bhagwati Prasad. It has also been found that the offence for which Sita Ram was arrested was a bailable one - The bail, though offered, was not accepted. The learned Sessions Judge concurred with these findings. Bhagwati Prashad was complainant in the case in which Sita Ram was arrested and Malkiat Singh was a tenant of Bhagwati Parshad. The unlawful commitment to confinement was wilful, without any excuse and with a view to put pressure on Sita Ram to come to terms with Bhagwati Parshad, in whom Malkiat Singh was interested. -where the unlawful commitment to confinement is wilful, without any excuse and with a view to put pressure on the person confined to come to terms with a certain person in whom the accused is interested, the accused can safely be said to have acted "maliciously." (Para 6)	AIR 1956 PEPSU 30 (Vol. 43, C. 10 Mar.)	720
115	Criminal P.C. (1973), Ss.239, 301, 302 - Application for assist to PP - First informant Opportunity of hearing cannot be refused to him ,his role will be limited and he cannot take place of	2012 ALL MR (Cri) 1624	724

	Public Prosecutor - He, cannot be allowed to take over the control of prosecution by allowing to address the court directly.		
116	**INTERIM BAIL AND GENERAL**		735
	-: CHAPTER = 2:- **APPLICABILITY & BINDING NATURE OF CASE LAW/CITATION**		
117	Contempt by Judge - Arrest of accused - Bail - Non compliance of direction given by High Court and Apex Court - Non granting bail to accused - The Session Judge was shown with the case Law/Order passed by the Supreme Court and Bombay High Court but the Sessions Judge refused to grant bail to accused- He did not follow the guidelines without justifiable reasons or recording any reason in writing - Held, if any Sessions Judge is found not following the directions of Higher Courts then besides taking administrative action against such Sessions Judge, he shall be liable for action of contempt of this Court.	2012 ALL MR (Cri) 271	838
118	Constitution of India, Art.141- PRECEDENTS - Judges are bound by precedents and procedure - They could use their discretion only when there is no declared principle to be found, no rule and no authority - where a single judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure - it is the duty of judges of superior courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Sub-ordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute- One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. (Paras 17, 20)	AIR 1990 SUPREME COURT 261 = 1991 AIR SCW 2124	845

	AIR 1960 SC 936, AIR 1965 SC 1767 and AIR 1989 SC 1933 Rel. on. Civil Writ Petn. No. 3420 of 1983, D/-14-8-1985 (Bom) Reversed. AIR 1980 SC 882 Foll. (Para 24)		
119	Case Law – Duty of the Judge – The Judge dismissed the complaint by a cryptic order without discussing case Laws – The Courts are not expected to pass such Cryptic orders – The Judge should record reasons in his order demonstrating how case law Cited by Party is applicable to the case in hand – The Judge should exhibit from the conduct and from their orders concern for the justice and not casualness.	2006-ALL MR(CRI)-0-2269 , 2006-MH LJ-5-264	854
120	Law of precedent- Judicial propriety- Applicability of the case law – Duty of the Court / Tribunal - The decision relied upon by the party has not considered and/or dealt with – Held, it appears that the learned tribunal has not considered and/or dealt with the aforesaid decision relied upon by the assessee at all -Whenever any decision has been relied upon and/or cited by the assessee and/or any party, the authority/tribunal is bound to consider and/or deal with the same and opine whether in the facts and circumstances of the particular case, the same will be applicable or not. In the instant case, the tribunal has failed to consider and/or deal with the aforesaid decision cited and relied upon by the assessee- Under the circumstances, all these appeals are required to be remanded to the tribunal to consider the addition made and to take appropriate decision in accordance with law and on merits. (Para 4)	21/10/2013	855
121	Precedents – How to deal with case law relied by the party - Sessions Judge merely reproduced the head notes/placitums - The Magistrate also did not discuss the case law with reference to the ratio of the decisions - Held, many Judicial Officers follow practice of reproducing the head notes/placitum from the reported precedents. The Judicial Officers need to understand that the head notes are drawn by editors/staff members of the Law Journals. It is necessary to read the precedent in entirety. The judicial Officer is required thereafter to cull out the ratio of the authority. The matching of facts and circumstances would then enable the Court to examine whether such ratio is applicable to the case with which the Court is required to deal with- the Judicial Officers shall avoid such practice. They shall not merely quote the head notes/placitum appearing from the indexes or the prelude to the judgments reported in the law Journal.(Para 6)	2008-0-751 = LAWS(BOM)-2008-2-146	860

122	JUDICIAL ADVENTURISM – Order by ignoring case laws of Supreme Court - The appellant would be entitled to costs quantified at Rs. 20,000.00 - Sub ordinate Courts should not pass orders by ignoring law settled by Higher Courts – When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate Courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops - It is unfortunate, that notwithstanding the authoritative pronouncements of this Court, the High Courts and the Courts subordinate thereto, still seem intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled - The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it in avoiding to follow and apply the law as laid down by this Court- (Para 32 ,33,29)	1997-AIR(SC)-0-2477 , 1997-SCC-6-450	868
	-: CHAPTER = 3:- **LAW RELATING TO CRIMINAL PROSECUTION AGAINST JUDGES**		
123	A) Contempt of Court - Constitution of India— Arts. 141, 142 and 144 — Flouting of the order of Supreme Court by High Court - Power of Supreme Court to initiate contempt proceedings against the erring Judges of High Court - Supreme Court's order to High Court— Even if it is only in the form of a request instead of explicit command or direction, it is a judicial order and is binding and enforceable throughout the territory of India— In case of flouting of the order by High Court, it is open to Supreme Court to initiate contempt proceedings against the erring Judges of High Court— Supreme Court while adjourning the case asking the parties to approach High Court for early disposal of a matter pending before it and	(1995) 1 Supreme Court Cases 259	877

	to apprise it on the next date of hearing the result of it and adding. We have no doubt that the High Court... would give the matter due attention as is expected by us. — Division Bench of the High Court finding nothing important in the matter, directing that the appellant before it to a take his chance strictly in order in which he approached this Court by filing these appeals. — Held, High Court flouted the order of Supreme Court by causing deliberate and conscious obstruction to compliance with that order— Having regard to advice obtained from Solicitor General of India and counsel appearing for the parties as regards the action to be taken against the Judges of the High Court, request reiterated by Supreme Court to the High Court to dispose of the matter expeditiously; at any rate within one month. B) Practice and procedure— Supreme Court's order to High Court— It should normally be in the form of a request, not command or direction- The language of request often employed by the Supreme Court in such situations is to be read by the High Court as an obligation, in carrying out'the constitutional mandate, maintaining the writ of the Supreme Court running large throughout the country.		
124	Cri. P.C. Sec. 197 – I.P.C. Sec. 167, 465, 466 and 471 – Prosecution of Judge who made interpolation in the order sheet – The appellant was posted as first class Magistrate – Accused whose case was pending in his Court filed transfer petition before District Judge to transfer case to another Court – The appellant Judge made some interpolation in the order sheet to show that some orders had passed earlier – After enquiry ADJ sent report to District Magistrate for initiation of proceeding against appellant – Magistrate – The report of District Magistrate forwarded to state Govt., Who accorded sanction for prosecution – The senior District prosecutor filed a complaint in the court against appellant u.s. 167, 465, 466 471 of I.P.C. – Charges framed against appellant – The appellant raised objection that there is bar under sec. 195 of cri. P.C. in taking cognizance – Held – The proceeding against appellant the then Judge is valid and legal-proceeding not liable to be dropped.	1971-AIR(SC)-0-1708 , 1971-SCC-3-329	884
125	Criminal P.C. (2 of 1974), S.197 - SANCTION FOR PROSECUTION - Prosecution of judges and public servants - Complaint under Section 504 I.P.C. - Use of words "non-sense" and 'bloody fool' by Presiding Officer against complainant - Sanction to prosecute, not necessary – This is not the part of his official duty.	1993 CRI. L. J. 499	890

	A Presiding Judge is expected to maintain decorum in the proceedings before him. He is expected also to act with restraint- One would expect him to be sober, unruffled and temperate in language even when faced with a situation where those appearing before him may tend to lose their composure. In this scheme of things any vituperative outburst on the part of the Presiding Officer, howsoever grave the provocation to him, cannot be countenanced as an action sustainable as one performed by him "while acting or purporting to act in the discharge of his official duty."		
126	I.P.C. Sec. 193, 196, 466, 471, 474, r/w 09 – Criminal Procedure code, 1978, Sec. 344 – Summary trail for fabricating false evidence against Judicial Magistrate ,P.P., Police Officer,and others– Trial court acquitting accused on basis of forged dying declaration not produced by the prosecution – Trial Judge without clarifying anywhere as to who produced the dying declaration directly taking it on record – Held Acquittal set aside – High Court issued show cause notice to Advocate for accused, Additional public Prosecutor for State, PSI, Special, Judicial Magistrate calling explanation as to why they should not be tried summarily for giving false evidence or fabricating false evidence	ALLMR(CRI)-0-2640 , 2003-MhLR-2-117	895
127	A) Constitution of India – Handcuffing – Contempt of court by S.P. and Magistrate – The accused were handicuffed by the police – When produced before Magistrate he did not perform his duty by directing removal of handcuff – This is clear violation of supreme court's direction in Prem Shankar Shukla case (AIR1980 SC 1535 – Contempt notice issued by Supreme court to S.P. , concerned police and Magistrate – While filing reply S.P. did not taken stern action against erring police officials – it means that S.P. has approved the illegality committed by the police and therefore he is guilty of contempt of Supreme Court – Strong disapproval of Supreme Court is directed to be placed in personal file of S.P. and all erring police officers. B) Contempt by Magistrate – Contemnor B.K. Nigam was J.M.F.C. – When prisoners were produced before him he did not take any action against handcuffing by police – The magistrate simply passed order calling explanation by police – Held, the Magistrate was bound to take immediate actions for removal of handcuffs – Magistrate was completely insensitive about the serious violation of the human rights – This is a serious lapse on the part of judicial officer – The Magistrate was expected	1996-AIR(SC)-0-2299 , 1996-SCC-4-152	914

	to ensure that the basic human rights of the citizens are not violated – The Magistrate should also expected to take action against police officer for bringing the accused to the court in handcuffs and taking them away in the handcuffs without his authorization – Keeping in view that contemnor Magistrate is a young judicial officer Supreme court did not imposed punishment on him – However recorded strong disapproval of his conduct and directed that a note of this disapproval shall be kept in his personal file. C) Handcuffing – Authorisation – The Police and jail authorities on their own have no authority to direct the handcuffing of any inmate from jail to court and elsewhere. D) Handcuffing – Permission by Magistrate – The Magistrate should have concrete proof regarding proneness of the prisoner to violence, his tendency to escape- he being so dangerous/ desperate and finding that no other practical way of forbidding escape is available then only Magistrate can grant permission for handcuffing – It could not be done in a routine way but in rarest of rare case.		
128	A]Cri. P.C. Sec. 197 – Sanction for prosecution – Accused are Additional High Court Judge, Suprintendant of Police Sanjeev Bhatt and others – The accused hatched conspiracy to falsely implicate a shop owner in a case under N.D.P.S. Act and when shop owner submitted to their demands he was discharged – Complaint u.s. 120-B, 195, 196, 342, 347, 357, 368, 388, 458, 482, I.P.c. and Sec. 17, 58 (1), (2) of NDPS Act – Held – there is no connection between official duty and offence – No sanction is required for prosecution – Registration of F.I.R. and investigation legal and proper. B]Cri. P.C. Sec. 156 – Investigation against accused Addl. High Court Judge – Whether prior consultation with Chief Justice is necessary prior filling of F.I.R. against a High Court Judge as has been laid down by Supreme Court in K. Veerswami's case (1991) (3) SCC 655) – Held – In K. Veerswami's case Supreme Court observed that the Judges are liable to be dealt with just the same as any other person in respect of criminal offence and only in offence regarding corruption the sanction for criminal prosecution is required – the directions issued by Hon'ble Supreme Court are not applicable in instant case. C]The applicant – Ram Lal Addl. High Court Judge	2001 CRI. L. J. 800	924

	hatched criminal conspiracy – The Bar Association submitted a representation to Hon'ble Chief Justice of India on 11-09-1997 requesting to not to confirm Raman Lal as Judge of the High Court – Later on he was transferred to Principal Judge of city Civil and Sessions Court at Ahmedabad – S.P. (C.I.D.) Jaipur sent a questionnaire through the registrar, Gujrat High Court to accused Addl. High Court Judge – Chief Justice granted permission to I.O. to interrogate – Later on I.O. sent letter to applicant to remain present before Chief Judicial Magistrate at the time of filing the charge-sheet – Applicant filed petition before High Court challenging it – Petition of applicant was rejected by High Court and Supreme Court in limine – No relief is required to be granted to petitioner in view of the facts of the case. D]Conspiracy – I.P.C. Sec. 120 (B) – Apex court made it clear that an inference of conspiracy has to be drawn on the basis of circumstantial evidence only because it becomes difficult to get direct evidence on such issue – The offence can only be proved largely from the inference drawn from acts or illegal ommission committed by them in furtherance of a common design – Once such a conspiracy is proved, act of one conspirator becomes the act of the others – A Co-conspirator who joins subsequently and commits overt acts in furtherance of the conspiracy must also be held liable – Proceeding against accused cannot be quashed. E]Jurisdiction – Continuing offence – Held – Where complainants allegations are of stinking magnitude and the authority which ought to have redressed it have closed its eyes and not even trid to find out the real offender and the clues for illegal arrest and harassment are not enquired then he can not be let at the mercy of such law enforcing agencies who adopted an entirely indifferent attitude – Legal maxim Necessiatas sub lege Non contineture Quia Qua Quad Alias Non Est Lictum Necessitas facit Lictum, Means necessity is not restrained by laws – Since what otherwise is not lawful necessity makes it lawful – Proceeding proper cannot be quashed.		
129	Contempt of Supreme Court by High Court- High Court passed order in breach of Supreme Court directions- It is contempt of order of Supreme Court by the High Court	2010-SCC-6-417 , 2010-AD(CR)-3-353	954
130	A] Action against Judicial Officer causing illegal arrest– Magistrate acting illegally and without jurisdiction in the matter of arrest is not protected – Magistrate has no absolute	1969-AIR(PAT)-0-194	955

	protection regard to his act of illegal arrest. B] First class Magistrate issued letter to appear and directed to show cause against prosecution on the petition filed by another person – When petitioner appeared he was detained to custody – The bail bond furnished by the petitioner were rejected by the Magistrate deliberately – Petitioner claimed that due to such illegal, unauthorized and malafide conduct of the Magistrate in arresting him, he has lowered in the estimation of the public and claimed for the damage – The action of the Magistrate by putting the petitioner under arrest for realinsing the certificate dues by adopting questionable and unlawful method is highly deplorable – It was unbecoming of a Magistrate – It is relevant to investigate to find out the motive, the propriety and the legality of the action of the Magistrate in arresting the petitioner – It is not a judicial act although exercised during the Judicial proceedings – The Magistrate exercised its power with the ulterior object of coercing the petitioner. C] At page 178 of the 14th Edition of Salmond on Torts it is said - "The wrong of false imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him without lawful justification from exercising his right of leaving the place in which he is." In my opinion, defendant No. 1 has committed the wrong of false imprisonment in this case. D] But - "Wherever protection of the exercise of judicial powers applies, it is so absolute that no allegation that the acts or words complained of were done or spoken mala fide, maliciously, corruptly, or without reasonable or probable cause suffices to found an action." Further it has been pointed out under the title "Liability of Magistrates" at page 160 of Volume 25 of Halsbury's Laws of England, 3rd Edition, that - "Protection is afforded by common law and by statute to justices in respect of acts done in the execution of their duty as such; but this protection does not extend to cases where they have acted either maliciously and without reasonable and probable cause, or		

	without or in excess of their jurisdiction, and in such cases they are liable to an action for damages at the suit of the party "aggrieved," A similar passage occurs at page 768 of Volume 38 of the Halsbury's Laws of England, 3rd Edition - A Magistrate or other person acting In a judicial capacity is not liable for acts done within his jurisdiction, but he is liable to an action for false imprisonment If he unlawfully commits a person to prison in a matter in which he has no jurisdiction, provided that he has knowledge, or the means of knowledge of the facts which show that he has no jurisdiction."		
131	Equality before law and equal protection of law – constitution of India Article 14 – criminal trial – Held- article 14 assures to the citizen equality not only in respect substantive law but also procedural law- the procedure is still available where these substantive right of relief and defence secured- when two persons are equally situated (para4)	1956-ILR(BOM)-0-930 , 1956-CRLJ-0-1297	978
132	Contempt of Courts Act (32 of 1952), S.3 - CONTEMPT OF COURT - Criminal Contempt committed by judicial officer - Standard of proof - Revision petition against interim order by Magistrate was pending before High Court - No stay was granted - the Magistrate instead of waiting result of order by High Court passed order in favour of to respondents - A petition in the High Court complaining that R-l, R-2, R-3, R-4 and R-5 had committed contempt of the High Court within the meaning of Section 3 of the Contempt of Courts Act, 1952 and prayed that the respondents be punished for committing that contempt - The High Court found them (including R-3, the Magistrate) guilty of contempt of Court. On appeal to Supreme Court — Held, the Magistrate was aware that P's revision petition against his interim orderwas then pending in the High Court. In such a situation, the prudent course for him was to postpone the making of any final order in regard to the subject matter till the final disposal of the revision petition by the High Court. It would also have been proper for him to issue notice to 'P' and give an opportunity of being heard before making any order-the Magistrate had at the most committed only a technical contempt of High Court, in absence of any mens rea penal action was not called for. (Para 32,33)	1976 CRI. L. J. 641 = AIR 1976 SUPREME COURT 859	985

133	JUDICIAL PROPRIETY – Whenever petition relating to the subject matter is pending before Higher Courts and even if no stay is granted in the case then also it is matter of propriety that the Judges of lower courts should stay their hands away and wait till further orders to be passed by High Court – The order passed by family court during pendency of petition before High Court is illegal and therefore quashed.	2007-AIR Bom R-3-219 , 2007-BCR-3-279	993
134	Code Of Criminal Procedure. 1973:- S.190 – Illegal cognizance by Magistrate – The complaint disclosed no offence but the Magistrate going out of the way and for extraneous consideration issued process against the accused – The order of Magistrate does not show that how he come to the conclusion that how and what offence disclosed - observation by Magistrate that it is a case for full fledged trial is illegal - it appears that for some reasons not on record the learned Magistrate took cognizance of offence without having been himself satisfied that any offence was in fact committed. The order of learned Magistrate if read in its entirety, clearly shows that the Magistrate was aware that complaint discloses no offence and in spite of having become aware, he issued the process for reasons which can only be extraneous – proceeding quashed – Accused granted compensation of Rs. 10,000/-	2002 LAWS(BOM) - 3-26, MHLJ-2002-2-830	995
135	(B) Constitution of India, Art.141 - SUPREME COURT - PRECEDENT - Obiter dictum by Supreme Court - Is expected to be obeyed and followed. (Para 19) (D) Constitution of India, Art.226, Art.14 - ADMINISTRATIVE TRIBUNAL - NATURAL JUSTICE - Powers of Court - Drawing its own conclusions by Court on basis of the notings in files without giving parties, against whom inferences were drawn any opportunity to explain the same - Violative of basic rule of natural justice.	AIR 1995 SUPREME COURT 1729 = 1995 AIR SCW 2706	999
136	Judicial Discipline – Judgement of another High court – Observations of trial Magistrate that the judgement of Kerala High Court is not binding on him – Further observing the legality and correctness of the judgement of another High Court is against the judicial discipline and propriety – Registrar General directed to take suitable action against concerned Judge. (Paras 42, 43, 44, 45)	2011 (4) AIR Bom R 238	1009
137	PRECEDENT - Precedents - Rule of per incuriam - When applies -Rule of per incurium can be applied where a Court omits to consider a binding precedent of the same	AIR 2000 SUPREME COURT 1729	1019

	Court or the superior Court rendered on the same issue or where a Court omits to consider any statute while deciding that issue. (Para 8)	= 2000 AIR SCW 1561	
138	(A) Precedents - Courts of co-ordinate jurisdiction should have consistent opinions in respect of identical set of facts or on a question of law - If this rule is not followed instead of achieving harmony in the judicial system, it will lead to judicial anarchy - Hence like questions should be decided alike, otherwise on same question of law or same set of facts different persons approaching a court may get different orders – Supreme Court judgment in Hari Singh case followed. (Para [13]) (B) Constitution of India , Art.226 - Criminal P.C. (1973), S.482 - Quashing of proceedings under S.420, IPC - Court can quash proceedings even if discharge application is either not filed or is pending, if no offence is disclosed by the complaint - On facts held issue of process and further proceedings could not be sustained and the dispute was of a civil nature.	2004 ALL MR (Cri) 1802	1021
139	Section 156(3) Cr.P.C.- requirement of application of mind by the Magistrate before exercising jurisdiction under Section 156(3) Cr.P.C. – Held, The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted.	2013	1030
140	Code of Criminal Procedure, 1973 S.482 S.2O2 S.200 Indian Penal Code, 1860 S.506(2) S.386 S.452 S.451 Complaint case has to be decided urgently - issue Of process - Validity - Process issued after over one year of complaint splitting the offences - Held, Section 200 does not permit the Magistrate to wait for such a long time on a complaint filed by the complainant under Section 200 I.P.C.It should bear in mind that Section 200 cr.P.C.Is an alternative protection for a citizen who suffers, against the reluctant attitude of the police either to entertain his complaint or a police officer May be baised against the accused.In that circumstances, a complaint filed under Section 200 should be Acted with a sense of urgency.Here, an year has been taken.The complaint was filed on 5-2-90 and verification has been taken for	1999(0)ALLMR(CRI)8; 1999(0)CRLJ 554; 1999(1)MHLJ 377	1038

	the reasons best known to the Magistrate only on 6-3-1990 and the Actual verification process started on 5-6-1990 and again evidence was called for on 2-2-1991.Ultimately, the endorsement was made by the advocate on 2-4-1991 and the order was passed for issuing summons against the petitioner on 2-4-1991.The time spent by the Magistrate is not in the ordinary course of business of the Court.Such delay is not admissible in the light of the provisions of Sections 200, 202, 203, and 204 of cr.P.C.The Magistrate cannot split offences according to the wishes of the complainant as is done in this case.The procedure adopted by the Magistrate is clearly an instance of mis-carriage of justiceand liable to be Quashed.		
	VOLUME – II		
114	Cr. P.C. – Section 111, 117 – Magistrate has no power to arrest and detain a person – His power is to require to show cause and if necessary start enquiry – Powers are often misused by untrained Magistrates – Directions issued for safety of citizens – Sufficient time shall be given to arrange for surety – If any person is sent to Jail then the Executive Magistrate shall sent a copy of the order to the Principal DistrIct Judge, Who shall go through the order and if finds case of revision shall intervene SUO-MOTU u.s. 397 of Cr. P.C. – The copy of order must also be sent to superior officers also.	2009-MhL.J. (Cri)-3-155 , 2009-MhL.J.-5-723	1073
142	(A) Criminal P.C. (2 of 1974), S.110, S.41, S.482 - Chapter proceedings - Quashing of - Petitioner arrested and chapter proceedings initiated against him on basis of pendency of criminal cases and statement of witnesses etc. - Said statement of witnesses recorded three months prior to arrest - No case of emergency - Arrest of petitioner and initiation of chapter proceedings against him - Is illegal. (Paras 29, 31, 32) (B) Constitution of India, Art.21, Art.226 - DETENTION - Compensation - Illegal detention - Arrest of petitioner and chapter proceedings initiated against him found illegal - Further petitioner detained for non furnishing interim bond - Petitioner entitled to compensation for his arrest – Compensation of Rs. 4,000/- granted.	1999 CRI. L. J. 2676	1077
143	(A) Cr. P.C. Section 106 to 110 – Mandatory procedure must be followed – Passing of final order without show cause notice is illegal proceeding quashed.	2001-ALLMR(CRI)-0-2079 , 2001-MhL.J.-	1089

	(B) Petitioner was tortured in police custody causing him serious injury – He was detained illegally without following the procedures provided under sections III and 116 – Compensation of Rs. 20,000 granted.	4-601,(2002) 104 BOMLR 34	
144	(A) Cr. P.C. 1973, Sections 106 to 110 – Power to direct security for peace and good behavior – It is of nature being direct interference with liberty of individual – hence order must reflect application of judicial mind by magistrate – The order must be a reasoned and speaking order. (B) Cr. P.C. 1973 , Section 116 (3) – Execution of bond – Amount of bond should not be excessive – The bond should be of such amount for which there is fair probability of being able to find security – The bond shall not be excessive. (C) 'Cross – Surety' – The Magistrate have no right to aske for surety from caste, creed and religion. (D) Cr. P.C. 1973, Section 106 to 116 – constitution of India, Article 22 (I) Enquiry in to chapter cases – Discouraging a person to engage lawyer of his own choice violates Article 22 (I) of constitution – It not only obstructs the course of justice but also pollutes the same and is contempt of court. (E) Depriving and discouraging a person to engage lawyer – if special executive Magistrate and its staff finds inconvenience about peresence of lawyer with a person it means that they wants to extort money.	2006 (2) B. Cr. C. 489, 2006 (5) Mh L.J. 243	1102
145	Cr. P.C. – Section 107 – Condition imposed by Magistrate that the sureties must be from particular faith/community and well educated is arbitrary – Proceedings quashed	(1999) 101 BOMLR 566	1113
146	Protection of Human Rights Act, 1993 – Custodial Death – Illegal arrest – Section 151 of Cri. P.C. – The victim was asenior citizen of 78 years old – He was illegally detained by P.S.O. U.S. 151 of cri. P.C. under directions of S.P Wardha Smt. Ashwati Dorje – The Victim was not granted bail by the Tahsildar Deepak Karande – The victim died in jail – The son of victim filed petition before state Human Rights commission, Mumbai through Shri. Nilesh C. Ojha National President of Manav Adhikar Suraksha Parishad – Commission accepted the contention of the petitioner and directed Home secretary to take action against Smt. Ashwati Dorje, S.P. Wardha	2010-TLMHH-0-510 ,	1116

	Shri. Deepak Karande, Tahsildar, Wardha and Shri V.D. Boite Jail Supreintendant, Wardha. The petitioner filed Writ petition challenging the legality of the order - It has been held by High court that the order is legal and does not require interference.		
147	Cr. P.C. – Section 111, 110 (e) (g) – Direction to furnish interim bond without recording reasons in writing. The sub-section (3) of section 116 specifically requires that the Magistrate is required to record reasons in writing – The express statutory provisions are completely ignored by the Magistrate and the entire proceedings have been conducted contrary to the provision of the code – Such order is liable to be quashed.	2009-Mh L J(Cri)-3-47 , 2009-ALLMR(CRI)-0-2929	1118
148	Cr. P.C. – Section 107 – Interim bond – Held in proceedings u.s. 107 there can be no insistence to execute a interim bond – Order illegal – Liable to be quashed.	2006-MH L J (Cri)-1-655	1121
149	Cr. P.c. S. 110 – Police has no power to arrest a persion against whom proceeding u.s. 110 is initiated – The Magistrate if thinks proper can issue a production warrant – Similarly the action of the Magistrate in calling upon the peititioner to execute a bond even though the enquiry had not commenced is without jurisdiction.	2000 Cr. L.J. 1888	1123
150	(A) Cr.P.C. – Section 111, 116 – For the purpose of this section the allegation against a person being so dangerous and habitual offender must be supported by evidence of general (repute) (B) Cr.P.C. – Section 251 – It mandates that particulars of offence must be put to accused and he will be asked whether he plead guilty or not – The P.I. acting as Executive Magistrate without following the procedure straightway asked the petitioner to execute a bond which is in printed cyclostyled form – The procedure is unjust, unfair and contarary to law – Roznama of case proves malafideds of P.I. – Proceeding is liable to be quashed – copy of order forwarded to Home Secretary.	2006-MH L J(Cri)-1-265 , 2006-Cri.L.J.-0-1135	1125

151	(A) Cr. P.C. – Section 110 – Notice – Printed Cycostyled Proforma used by Magistrate – Shows non-application of judicial mind and is abuse of process of court – The proceeding based on such vague notice is quashed. (B) The notice issued by Magistrate is based on report of station officer – Nothing material to show how applicant was so dangerous and despirate – Notice is vague – Entire proceeding vitiated .	2008-JIC-2-418 , 2008-ADJ-4-529	1134
152	Cr. P.C. – Section 107, 151 – Dispute between two parties – Complaint disclosed no Cognizable offence – Police Officer to help the criminals detained the petitioner U.S. 151 of Cr. P.C. – Held, proceeding against petitioner is illegal and unlawful – Proceeding quashed – Petitioner gratned with a token compensation of Rs. 50,000/- for illegally detaining him – Commissioner directed to initiate proceeding against erring police personels.	2009-Chand Cri C-1-153 , 2008-Cr. L.J.-2333	1137
153	Cr. P.C. – Section 151 – Illegal proceeding and wrongful confinement – A token compensation of Rs. 50,000 granted to petitioner.	2009-Chand Cri.C.-1-149 , 2008-AD(Cr)-3-165	1134
	-: CHAPTER = :- **LAW RELATING TO PROSECUTION AGAINST POLICE MISUSING POWER TO HARASS PEOPLE**		
154	Cr. P.C. – Section 151 – Illegal proceeding and wrongful confinement – A token compensation of Rs. 50,000 granted to petitioner.	2009-Chand Cri.C.-1-149 , 2008-AD(Cr)-3-165	1139
155	Cri. P.C. Sec. 340 – False entries in case diary by the Police Officer – Police Officials interpolated the entries in the case diary to create false story to falsely implicate the accused – Accused detained for possessing illegal arms – Evidence of official making arrest not supported by independent witnesses – Time of arrest interpolated – Order of conviction liable to be set aside – Show cause notice issued to Police Officer for Prosecution under section 193, 195, 211 of I.P.C. – Commissioner of police directed to keep the Daily Diary Book in sealed cover until further orders.	1998 CRI. L. J. 2908 , AIR 1998 SC 2023, 1998 AIR SCW 1877	1147

156	Police Atrocities – Police falsely implicated a Journalist who published certain articles against some police officer working in the Traffic Department of the Police at Solapur – Police cooked up a false story of offering of bribe by the applicant and offence u.s. 12, 7 of the prevention of corruption Act was registered against him – Noticing from the nature of allegations the police custody of the accused was not at all necessary – The case was not handed over to Anti-Corruption bureu – It is a glaring example wherein police machinery has attempted to take vengeance against the petitioner – The commissioner of Police shown undue interest in the matter and has acted in contravention of practice of transferring the investigation to Anti Corruption Bureu – Held – Show cause notice issued to Shri. Himmatrao Deshbhratar, Commissioner of Police, Solapur as to why action should not be taken against him for acting contrary to the law and causing undue hardship to a citizen thereby depriving him of his personal liberty as guaranteed under Article 21 of the constitution of India – Notice also issued to Shri. Shirish S. Tandalekar A.C.P. and Shri. Vikas R. Ramugade P.I. who sought police custody of the petitioner as to why action should not also be taken against them for abuse of the powers vested in them.	2011	1150
157	Unfair Investigation – Abuse of Power by Police – False implication of accused in a serious charge of murder – Police arresting the petitioner in a charge of murder and extorting false voluntary statement by torture - The victim is found alive -Held - State is liable to pay compensation even no bias has been pleaded by the petitioner – Rs. 50,000 to each is awarded as compensation- state is free to take action against police officers responsible for such highly illegal acts, so that police personal will discharge duty/obligation in right direction and without involving innocent persons in grave crimes, as in this case, and will transperacy and accountability so that the confidence of the public be reposed on police.	1999 CRI. L. J. 1915	1152
158	Cri. P.C. Sec. 482 – Quashing of F.I.R. and investigation – F.I.R. is registered by the Police to harass the accused who is persuing the case against Dy. S.P. – Offence u/s 420 of I.P.C. registered – Held, When the Police machinery is used for ulterior purposes then such F.I.R. and investigation has to be quashed even if the F.I.R. disclose a cognizable offence – The subsequent investigation had negativated it – The very manner in which an unusually quick and spontaneous investigation	1991 CRI. L. J. 1963	1157

	had commenced portrays the abuse of police power – The Power to quash had to be necessarily exercised for the investigation locking in bonafides – The liberty of an individual so sacred and sacrosanct has be protected zealously by the Court as observed by Hon'ble Supreme Court in AIR 1982 SC 949 – The F.I.R. and all proceedings quashed.		
159	(A) Cr. P.C. – S. 482 – Tainted investigation – Quashing of investigation which is tainted and baised, suffers from irregualtities and conducted in malafide exercise of power by police causing serios prejudice and harassment to any party then such investigation is vitiated and any other order passed by investigating agency on basis of such vititated investigation is laible to be quashed – charge sheet is quashed. (B) Article 20, 21 of the constitution – Fair investigation – Investigation must be fiar, transparent and judicious – Police cannot be permitted to harass any party on basis of tainted investigation – Such tainted investigation has to be quashed- fresh investigation may be ordered from other investigation agencies.	2011 (1) SCC (Cri) 336, 2010-TLPRE-0-595	1169
160	A]One sided Investigation – Police is bound to investigate the plea of accused also – A dishonest, unfair or one sided investigation violate the constitutional guarantee and justify interference by Court of Law – Such proceeding has be quashed B]To put an accused person to long lasting trial on an incomplete and one sided investigation and promise to consider full facts only when they are brought before the court at defence stage amounts to ignoring default of the I.O. and clothe him with the authority to harass accused. It may even amount to judicial sanction of substitution of rule of law by the Police Raj, and subversion of our constitutional ideals. These consequences deserve notice of the Session Judge while interpreting his own authority and jurisdiction in the matter. [Note :-The same principle is reiterated by Hon'ble Supreme Court in the case 2007 ALL MR (Cri) 555 (SC) where, it has been held that,	1190 CRI.C.J.2257	1181
161	Criminal P.C.(1973), S.24-Duty of Prosecution – It is not the job of prosecution to try only for the convition of accused, but it is their duty to place all the facts on record- The proceedings before trial Court show that the prosecution has been not fair at all to the accused-	2007 ALL MR (CRI.) 648, LAWS(BOM)-2007-1-17	1185

	prosecution and it has to be stated that the trial was not at all fair. Both the prosecution and trial court are to be blamed for this lapse-FOR all these reasons, this appeal is required to be allowed and the accused is entitled to be acquitted.		
162	Constitution of India, Article 21—Fair Trial—Prosecution withholding statements of witness who do not support prosecution case- Held, prosecution cannot convert itself in to persecution- withholding statements of witness who do not support prosecution case would amount to jeopardize concept of fair trial- the investigating agency and the prosecution both represent the State. Every action of the State is legally required "to be fair, just and reasonable".	2007(1) B.Cr.C.143= LAWS(BOM)-2006-12-114	1188
163	Contempt of lawful order by Police – Officer – The police officer arrested the accuse even if he was granted bail by the Court – The Police officer was found to be guilty of contempt of Court – He was sentenced to imprisonment of 7 days – While confirming the sentences Hon'ble Supreme Court observed that, (1) Police Officers are supposed to be the members of a disciplined force. It is of utmost importance to curb any tendency in them to flout orders of the court. It is more so when flouting of order results in deprivation of personal liberty of an individual. If protectors of law, to take revenge, defy court orders they will have to be sternly dealt with and appropriate punishment inflicted also with a view to send a message across the board that such an act cannot be countenanced. (2) The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. If the orders of the court are disobeyed with impunity by those who owe an obligation to the society to preserve the rule of law, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute. (3) Lastly, it was contended that instead of imprisonment, fine be imposed on the appellant. In a matter of this nature, where a police officer, disregarding the bail order, arrests a person because case against him is of alleged assault on one of police official, we do not think that mere sentence of the fine would meet the ends of justice. No interference is called for in the judgment and order in the High Court. The appeal is accordingly dismissed.	2003-AIR(SC)-0-657 , 2003-SCC-1-644	1197
164	Contempt of Courts Act (70 of 1971), S.12(3) - CONTEMPT OF COURT - BAIL - POLICE ATROCITIES -	1993 CRI. L. J. 3311	1200

	Deterrent punishment - Police officials arresting person in violation of order of anticipatory bail passed by Court - Art. 21 of Constitution violated - Sentence of fine would not meet ends of justice, especially when condemner was police official - Civil imprisonment for seven days awarded – Police officer are protector of Law – If they violates the law they should be punished severely.		
165	Cri. P.C. Sec. 197 – Abuse of Power by police – Sanction for prosecution – Complainant went to lodge F.I.R. at Police Station – Officer in charge of Police station did not register F.I.R. but tore it and abused complainant – Held – Refusal to receive complaint and toering it can not be considered as official duty – Rather it is a serious lapse on the on his part – The police officer by refusing to record the information has not only omitted or neglected to perform his official duty but also thereby facilitated an offender to escape from the criminal liability – Such police officer cannot be protected – They has to face the prosecution – No sanction is required for prosecution of such Police Officers.	2010 CRI. L. J. 60	1207
166	[A]Article 226 of constitution of India - Prosecution of erring Police Officer for their criminal negligence – Petitioners daughter died due to harassment by accused – The Police officer's conduct was to shield the real culprits and allowing him to got scot free – Appropriate action is required to be taken against erring police officers and personnel – Including disciplinary action and criminal proceedings – They would also liable to pay costs of Rs. 10,000/- to the petitioner. [B]Prosecution of Police under I.P.C. 201. Bombay Police Act 145 (2) (c) (d). - Mere availability of alternate remedy is not an absolute bar for exercise of writ jurisdiction to direct initiation of criminal proceedings against erring police officers. [c] The reply affidavit filed by the police officer is a classic example of how all these three police officers are in connivance with each other in attempt to justify their deliberate inaction – The members of the public who approach the police authorities with the hope and expectation that the wrongdoers should be punished, would lose trust in the police department, if such erring police officers are not punished – Govt. directed to take action – Failure to do so by the Govt. The petitioner is at liberty to approach the court afresh	2008-MhLJ(Cri)-3-182 , 2008-BCR(Cri)-2-273	1209

167	(A) Criminal P.C. (2 of 1974), S.154 - FIR - F.I.R. against police - Written complaint to Commissioner of Police disclosing information regarding commission of cognizable offence against Police Officers - It has to be registered as F.I.R. in terms of S.154 of Code. In such type of cases , Commissioner of Police should ensure that inquiry was done by independent agency such as C.I.D. - Enquiry by officers associated with same Police Station should not be ordered if done is illegal (Para 14,15)	2004 CRI. L. J. 2278	1228
168	Criminal P.C. (2 of 1974), S.197 - SANCTION FOR PROSECUTION – Abuse of power by police during investigation - No sanction is required – Held -- the Deputy Suprintendent of police was alleged to have - In respect of prosecution for excesses or misuse of authority, no protection can be demanded by the public servant concerned - Where the Deputy Superintendent of Police was alleged to have committed acts of extortion and criminal intimidation while conducting investigation of case the acts cannot be said to be part of the duties of the Investigating Officer while investigating an offence entitling him to get protection of S. 197- No sanction is required.	2009 CRI. L. J. 1318	1243
169	India Penal code sec. 341, 342 – Conviction of Police Officer for illegally Summoning a accused/witnesses – Held –The Police Officer cannot Summon a woman or a male under fifteen years of age – Such persons must be asked to attend interrogation at the place where they reside – This is mandatory provision of section 160 of Cr. P.C. – The Police Officer by calling the witnesses at police station kept them under wrongful restraint - The Police Officer is guilty under section 341 of I.P.C. – His conviction is proper.	1971-SCC-3-945 , 1972-SCC(Cr)-0-193	1247
170	(A) Cri. P.C., S. 156 (3) – Registration of F.I.R. against police officer on the complaint sent to police station by Magistrate – Held- Police officer bound to register an offence and proceed to investigate in to crime. (B) Cr. P.C. 197 – Sanction – Held- for investigation no sanction is required – Preparation of false record of investigation cannot be a part of duty done in discharge of official duty –IF in such cases protection is granted to the police officer then they can show the investigation having been carried out even sitting at home	2007-MHLJ(Cri)-2-960 ; 2007-AIRBomR-5-547; 2007 ALL MR (crI.)2737	1251
171	A] Penal Code section 201,218,468 –	1975-	1256

	Prosecution of police Officer – Preparation of incorrect and forged record of investigation of the case with the fraudulent and dishonest intention of misleading his superior officers and inducing them to do or omit to do the legal and lawful actions – Held – The accused police officer framed the record in a manner which he knews to be incorrect with intent to save or knowing to be likely that he will thereby save the true offender from legal punishment is liable to be punished u.s 218/ 468 of I.P.C. – The Co-accused who facilitated and intentionally aided in preparation of the false and forged record is also liable to be convicted B] The position of accused A-2 was very different. He was a Police officer and as such was expected to discharge the duties entrusted to him by law with fidelity and accuracy. He was required to ascertain the cause of the death and to investigate the circumstances and the manner in which it was brought about. His duty was to make honest efforts to reach at the truth. But he flagrantly abused the trust reposed in him by law. He intentionally fabricated false clues. laid false trails, drew many red herring across the net smothered the truth, burked the inquest, falsified official records and shortcircuited the procedural safeguards. In short, he did everything against public justice which is by Section 201, Penal Code. The other circumstantial evidence apart the series of these designed acts of omission and commission on the part of A-2, were eloquent enough to indicate in no uncertain terms that A-2 knew or had reasons to believe that Kalarani's death was homicidal.	AIR(SC)-0-1925 , 1975-SCC-2-570	
172	I.P.C. 499, 500 – False entries by Police officer in the enquiry report – Complainant filed complaint at Police station – The Police investigatin Officer send 'B' summary report stating that the complaint was mischivious, vexatious and flase – The said 'B' summary report was challenged before High Court- High Court held that the complaint was not flase and 'B' summary report prepared by the I.O. was not proper – Thereafter the complainant filed complaint u.s. 500 of I.P.C. – The trial Court issued the process against the accused police officer – The order of issue process is challenged on grund of exception embodied in S. 499 – Defence of action done in good faith was taken – Held – No case of exceptions is made out to grant any relief to accused police officer – Proceeding against him not to be quashed.	2004-ALLMR(CRI)-0-65 , 2003-TLMHH-0-112	1269

173	A]I.P.C. 193 – Prosecution of S.P. and other Police personnel – I.O. during enquiry illegally detained a minor boy and warned that he could be released only when his father surrender before Police - Petition filed before Supreme Court – Report is called form S.P. – False and misleading report submitted by S.P. – Supreme Court being doubtful of report called the report from C.B.I. – It proved the malafides of S.P. – S.P. is guilty u.s. 193 of I.P.C. and	AIR 1996 SC 2326	1271
174	Prosecution of Police Officer (S.P.) for filing false affidavit/ enquiry report before Court – A undertrial prisoner was brutally beaten by Police who died up – Bar Association send letter to Supreme Court – Treated as writ – Court called report from S.P. – S.P. A.K. Sinha Kasshyap filed a false report to save guilty police officer – Court not satisfied with reply called report from C.B.I. – C.B.I. pointed out the disdendful role played by S.P. said to be against all tenents of law and morality – The report and affidavit submitted by S.P. ound to be false/ fabricated – Supreme *Court* issued a Show cause notice to S.P – In reply to the notice S.P. again try to mislead to court and try to justified his illegal acts – S.P. is guilty of ontempt of Court sentenced to imprisonment for three months.	1996-AIR(SC)-0-1925 , 1996-SCC-9-74	1286
175	Constitution of India – Art. 21 – Torture and harassment by police officer – Compensation of Rs. 2 Lacs - A boy was summoned by Police – The investigation was going to be done without registering of offence – The boy did not return to home – National Human Rights Commission called enquiry from S.P. of Amravati Gramin – S.P. filed enquiry report and try to defend guilty police officers – The commission did not find police version convincing – Commission ordered a sopot enquiry on 5/03/1998 – During enquiry commission recorded finding that without registering the offence at the police station the boy was called at the police station which is illegal and there was a manipulation in the entries recorded in the station diary – High Court ordered investigation by C.I.D. by officer not below the rank of S.P. – Held that – Though the boy was picked up by police no ground of arrest were informed to him and instead doubtful entries have been made in the stationdiary to show that boy absconded from the police station.	2005-All MR(Cri)-0-1638	1298
176	A]Constitution of India, Arts 21, 226 – Police atrocities – A triabal girl of 13 years age falsely implicated by police in Criminal case by alleging that she is having links with naxalites – Court acquitted her for want of evidence – Detention found to be illegal – Victim entitled to	2006-MHLJ(Cri)-1-452 , 2006-CrLJ-0-2202, 2006 ALL MR	1306

	compensation – Rs. 5 lakhs awarded as compensation. B]Police Attrocities – There is lack of accountability of the Police force is also major factor in custodial violence – The Police are policed mostly by themselves and therefore the police personnel committing excesses on citizen are not going to be punished – They succeed to manage in getting away slot free – In present case the illegal detention of the minor girl cannot be said to have been done without facit consent of senior police officials – The state was expected to conduct fair enquiry and made offer before the court their willingness to punish all those officer who were connected with the investigation and prosecution – It is unfortunate that instead doing so the state tried to cover their misdeeds therefore they are bound to compensate petitioner. C] Police Torture – Delay in filing petition – Held – Victim approaching Court after some assistance from organization (NGO) – State can not oppose the petition on ground of delay and latches – state is supposed to protect fundamental and human rights of a citizen. Further we have no hesitation to add that the fact brought on record does go to show that the petitioner had no access to justice though she suffered flagrant violation of her fundamental rights under Articles 21 and 22 of the constitution of India and human rights till Non-governmental Organisation intervened in her matter and look her issue not only with the State Government but also sought assistance of the National and States Human Rights commissions.	(Cri)1018	
177	Constitution of India, Art. 21 – Fundamental rights – Violation by Police – Compensation – Appellant a was prosecuted u.s. 420 of I.P.C. – Raid was conducted in his house – He was handcuffed – Photograph of handcuff – Published in newspaper – His sister was shocked and expired when she saw his photograph with handcuff in newspaper – He was unnecessary handcuffed by the police – After trial the applicant was acquitted – Held – Compensation of Rs. 70,000/- awarded to the appellant to be paid by state.	2008 CRI. L. J. 3281	1320
178	Illegal arrest and detention by Police – Writ petition filed before High Court – Superintendent of Police and Home Secretary though served with notice did not appear before High Court in petition – Petitioner was arrested and detained and after some period of time he was allowed to leave Police station – The respondent who did not shown their appearance in the petition said to have admitted allegations against them – The allegations	2010 All MR. (Cri) 2849	1325

	against them are unrebutted – Compensation of Rs. 1,00,000/- (One Lakh) granted to petitioner to be paid by guilty Police officers.		
179	Constitution of India Art 21 – Personal liberty - Violation of – Handcuffing and parading the accused through streets for investigation – Held, even though the accused was charged under case of Murder the police have no right to handcuff him and parade through the streets – It was alleged by the police that the accused had long criminal record but not a single case was pointed out in which he was convicted – The accused was subjected to wholly unwarranted humiliation and indignity which cannot be done to any citizen of India irrespective of whether he was accused of minor offence or major offence – the action of Police Inspector was unjustified – Accused entitled to compensation – Rs, 10,000 awarded as compensation would be paid by police Inspector	1991-Cri.L.J.-0-2344, 1990-BCR-2-242 .	1327
180	Contempt of Courts Act, 1971 – S. 12 – Accused was Handcuffed and produced before Magistrate after being paraded from station to District Court – Keeping in view of fact that charges u/s 220, IPC have already been framed against police personal and departmental action also taken against guilty police personal – No need to take further action.	2000-AIR(SC)-0-3632 , 2000-ALT(Cri)(SC)-1-36	1336
181	Violation of human rights - Petition against handcuffing and parading the accused in public by Police - Petition registered as Public Interest Litigation - It would be improper after a lapse of almost three years to shut the doors of the Court and direct that the petitioners should seek reliefs elsewhere or approach the Human Rights Commission – Compensation of Rs. 15,000/- is granted to each accused. (Para 15)	2006 ALL MR (Cri) 1241	1338
182	A]Protection of Human Rights – Abuse of power by Govt. officers, Police Illegal Confinement and brutal torture by Revenue officer – Victim lodge report to police – Police conducted biased enquiry – The accused R.D.O. was allowed to continue to work as RDO in the very same jurisdiction during the enquiry period is highly illegal – Tahsildar/Trainee Magistrate and Police constable and sub-Inspector of Police helped the accused by exceeding their limit – When the statutory authority, namely Police failed to perform their duty under section 154 of Cri. P.C., it is the bounden duty of the High Court to invoke the power u.s. 482 of Cr. P.c. to give suitable direction to register FIR and investigate – The judiciary which is the sentinel of the great liberty of citizens would certainly intervene in the cases where the human dignity is wounded in order to uphold human values and to protect the rights guaranteed under the constitution – Dy. S.P. ,	2001 CRI. L. J. 4092	1347

	C.I.D. was directed to register FIR and take suitable action against the concerned officials. B]No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment is a part of Universal Declaration of Human Rights. C]The victim was beaten brutally by the RDO and Policemen. He was produced before trainee Magistrate and remand order was obtained even without recording his complaint of torture – the primary report called from the CID support the allegations of petitioner. D]Human Rights commission – The petitioner sent a petition to the Commission which was referred to the collector – Collector sent a report to the commission to drop the action as allegations were not proved so commission closed the case and directed the victim that if aggrieved he can approach to any other courts for vindication of his rights – dropping of enquiry by Human Rights Commission is a no obstacle for the proposed registration of FIR against guilty officers – The judiciary cannot keep quiet by shutting its eyes to the illegalities commited by govt. officials.		
183	Contempt of Court by police Officer – In a petition to transfer investigation the respondent I.O. Shri Mandar Dharmadhikari – Asstt-P.O., Cuff Parade. Police Station Mumbai, made a false statement with ulterior motive that the petition will be dismissed – It is an act of interference with the administration of justice – the apology tendered by I.O. at belated stage is nothing but mere realization of the contemnor that his adventure has turned into a misadventure as he failed in misleading the Court to get the petition dismissed – I.O. is guilty of committing Criminal Contempt – Cost of Rs. 50,000/- imposed imprisonment till rising of court ordered. B]Contempt of Courts Act (1971), SS. 2 (c) (ii), 13 – Criminal contempt – Making a false statement in judicial proceeding or filing false affidavit before Court or the other statements which result in misleading the court or disclose even an attempt to deceive the court, could result in mischievous consequence to the administration of justice and warrant criminal contempt. C]Abuse of process of court – Abusing the court's process may mean different types of acts – Most serious example is an act which is intended to deceive the Court,	2005 CRI. L. J. 765	1362

	for example by deliberate suppression of facts or by the presentation of falsehood is as much abuse of Court's process as the act of bringing frivolous and vexatious and oppresive proceedings. D] The concept of criminal contempt was well explained in the matter of Hastings Mill Limited v. Hira Singh reported in 1978 Cri LJ 560. Shri Justice A. K. Sen, speaking for the Division Bench of the Calcutta High Court		
184	[A] Constitution of India Art. 21 & 22 custodial violence Guidelines regarding Arrest – Violation of – Failure to Comply with requirements of guidelines laid down by Supreme court shall apart from rendering the concerned official liable for departmental action also render him liable to be punished for contempt of Court and the proceedings for it may be instituted in any High court of India having territorial jurisdiction. [B] PROOF OF CUSTODIAL TORTURE – Held – It is impossible to have direct evidence of custodial torture by the police – It is difficult to secure evidence against the policemen responsible for resorting to third degree method since they are in charge of police station records which they can manipulate – The witnesses are either police men or co-prisoners who are highly reluctant as prosecution witnesses due to fear of retaliation by the superior officers of the Police – The Courts are required to change their outlook and attitude particularly in cases involving custodial crimes - They should adopt a realistic approach rather than a narrow technical approach so that the guilty should not escape – The victim of the crime should have satisfaction that ultimately the Majesty of law has prevailed.	1997 (1) SCC 416	1374
185	Criminal P.C. (2 of 1974), S.160, S.91 - SUMMONS - PERSONAL APPEARANCE and Attendance of witnesses - Enforcement of - Petitioners were residents of Delhi and said to be acquainted with facts of case - Were summoned for their personal attendance by police officer at Shillong - Since police officer making investigation can enforce attendance of persons u/S.160 only if witness resides within limits of his or adjoining police station - Hence, notices issued seeking personal attendance were liable to be quashed. (Para 5)	2010 CRI. L. J. 56	1397
186	(A) Delhi Police Act (1978), S.140 - Offence by Police Officer - Bar to prosecution lodged after three months - Shelter of period of three months can be taken only if act done by police officer is under colour of duty - Case	2011 CRI. L. J. 2908	1402

	of murder by police officials - Will not fall within expression 'colour of duty' occurring in S. 140. (Paras 35, 36, 42) (B) Penal Code (45 of 1860), S.300, Exception 3 - MURDER - POLICE OFFICERS - Death by police officials - Benefit of exception 3 to S.300 - Obligation to prove an exception is on preponderance of probabilities but it nevertheless lies on defence - Accused police party had fired without provocation at car killing two innocent persons and injuring one - Incident occurred on account of mistaken identity of deceased as wanted criminal by police party - Defence of police party that deceased had first resorted to firing - Found unacceptable as it was proved, that 7.65 mm pistol had been surreptitiously placed in car to create defence - Though police party was acquitted to plant pistol in car on grounds that it was not possible to pinpoint culprit who had done so - This can, by no stretch of imagination, be taken to mean that pistol had been planted in car has been disbelieved by High Court - Accused police party not entitled to benefit of exception 3 to S. 300. (Para 14)		
	-: CHAPTER = :- **LAW RELATING TO PROSECUTION AGAINST MEDIA**		
187	A]Cr. P.C. Sec. 154 – F.I.R. registered against a Newspaper's Editor – The Newspaper published some news items regarding involvement of a person in an incident about prosecution by women – On the basis of newspaper reporting an enquiry was launched by Police – During enquiry the news item was found to be flase against the person – On the basis of enquiry report F.I.R. registered against Editor of news Paper under Sections 465, 467, 471 and 120-B of I.P.C. as the C.D. on basis of which news was published was also found to be interpolated – Editor challenged the F.I.R. by filing petition – Held that – the F.I.R. and proceedings are legal and proper and cannot be qushed. B]Necessary Party – Allegation of malafides in petition against a person who is not respondent can not be accepted.	2006 CRI. L. J. 3643	1428
188	PUBLICATION OF NEWS WITH ATTRACTIVE HEADING AMOUNTS TO DEFAMATION ,- In view of that, the imputation published in "the BRIEF" has to be viewed,- The petitioner has published that imputation as alleged by the complainant. The matter starts with heading in	MHLJ-4-705 , 2004-BCR(Cri)-1-450	1442

	very big letters "the Director behind barsl" It is sure to invite anybody's attention by its nature itself. In that case the person looking to it would be gathering the impression that the aged director has gone behind the bars. Prima facie it would create a stigma to him. The petitioner has not published the remaining portion of the item in the same size of the letters. The remaining portion of the matter is in small letters. The remaining portion of the matter is in small letters. Even that also starts with some sentences which are prima facie damaging the reputation of the aged director who has been reported to be behind bars. The said heading has been decorated with exclamation mark. That has given more strength to the impact which is likely to be created by it. The reporting of the talk ensued between the Brief spokesperson and Shri kapadia (original complainant) has been mentioned in the said news item at last but one paragraph. Before reading that paragraph one has to read paragraph 1 and paragraph 2. WHILE considering a complaint of defamation, the Court has to consider the imputation as a whole and the prima facie impact which is likely to be created by it also. In the present case, the impact would create a prima facie case in favour of respondent Kapadia. Therefore, this Court does not find that the Trial Court has committed any error in issuing the process against the petitioner Mr. Anil Thakeraney, because the defence which the present petitioner may take, will have to undergo the process of judicial consideration. He would be obliged to make out a case that he published the said matter with due care and caution. IT is to be noted that whoever publishes the account of a judicial proceeding, is under an obligation to publish it correctly and in a sober way. There has to be no addition to create "mirch masala" to it at the cost of the person against whom such matter has been published. But tendency of printing Court proceedings by giving pungent heading is at increasing trend. The prestige lost once cannot be restored later on and, therefore, the legislature has put alarms of caution by providing explanations, exceptions and illustrations to section 499 of the I. P. C. Everybody has an important right to live in the society with dignity and remark slinging has been decided to be curbed out by Legislature and, therefore, section 499 has come with its faces as it is. Whoever endeavours in publishing anything against anybody has to be careful enough to see that he commits no offence and he remains well		

	within four corners of the exceptions satisfactorily.		
	-: CHAPTER = :- **HOW TO USE PROVISIONS OF SECTION 340 OF CR.P.C. TO PROSECUTE THE PERSON WHO FILES FALSE AND MISLEADING SAY / DOCUMENTS IN COURT AND ALSO FALSE COMPLAINT BEFORE COURT AND POLICE**		
189	Criminal P.C., Sec. 340 – Forged documents filed during Civil Proceedings – Preliminary enquiry before filing complaint – There is no obligation on Court to afford on opportunity of hearing to claimants/ land owners who sought big amount of compensation by producing forged sale deeds – Order for initiation of prosecution proceeding before Magistrate can be passed directly – Opportunity of hearing would be accused is not required to be given.	2002 CRI. L. J. 548 (AIR 2002 SC 236 = 2001 AIR SCW 4910)	1446
190	(A)Contempt of Courts Act, 1971 — S. 2(c) — Criminal contempt — Filing of false affidavit intentionally — Held, amounts to contempt of court — On facts held, *P* by making a false statement on affidavit with the intention of inducing the Supreme Court not to pass any adverse order against NOIDA Authorities had committed contempt of court (Para 7) (B)Contempt of Courts Act, 1971 — S. 12 — filing false affidavit intentionally — He submitting that apology tendered should be accepted and/or in any event fine would suffice — Held on facts, apology tendered was worthless since it was not genuine and bona fide and was tendered only after it was found that false statement had been made on oath — did not on his own point it out — Further held, it was only an attempt to get out of consequences of having been caught — Hence, sentence of simple imprisonment for one week imposed	2010-SCC(Cr)-3-586 , 2003-AIR(SC)-0-2723,	1451
191	A]Criminal P.C. (2 of 1974), S. 340 – IPC, 193 – Filling of false affidavit in judicial proceedings – Order directing prosecution of accused for offence under S. 193 of I.P.C. – Accused coming with defence of bonafide mistake – Held – Court cannot examine defence of accused - Order passed by Addl. District Judge does not require any interference B] Filing of false affidavit – Effect of – It needs to be highlighted that filing a false affidavit or giving a false evidence in a Judicial proceeding is a serious matter – Supreme Court in AIR 1995 SC 795 observed that,	1999 CRI. L. J. 4743	1454
192	Cri. P.c. S. 340 – 195- Petitioner filed Civil suit – In reply to the suit the respondent officer of Amritsar	2002 CRI. L. J. 4485	1456

	Improvement Trust filed a false and misleading reply in Court to frustrate claim of petitioner – Thereafter petitioner filed application under section 340 of Cri. P.C. – Respondent officer filed application of adducing defence evidence which is allowed by Civil Judge – Held- During course of enquiry under sec. 340 of cr. P.c. the Court cannot grant permission to accused to produce defence evidence the order is illegal, hence set aside.		
193	Criminal P.C. Sec. 340, 341 – Filing of false affidavit in civil suit – Proceeding under Sec. 340 of Cri. P.C. – The main civil suit was at the end stage and fixed for final arguments held Merely because civil suit was pending that did not prevent the civil Judge from entering in to an enquiry - The Civil Judge should register such application as Miscellaneous Judicial case and then proceed to decide the application according to the provisions of Sec. 340 of Cr. P.C. – Civil suit and application under section 340 of Cr. P.C. has to be decided independently.	2007-ALLMR(CRI)-0-2281 , 2007-MHLJ(Cri)-2-860	1459
194	Cri. P.C. Section 340, 195 – F.I.R. and investigation in the matter documents related to proceedings before Court is barred – F.I.R. and all proceeding are abuse of process of Court – Hence quashed – The proper procedure is to approach before the concerned Court.	2007-ALLMR(CRI)-0-3401 , 2007-MHLJ(Cri)-2-701	1461
195	Criminal P.C. (5 of 1898), S.476 - FORGERY - CONTRACT - Suit on forged contract - Party found to have committed forgery - - Expediency of prosecuting accused.- Where it was found as a fact that in the suit on a contract the party, had committed acts of deliberate forgery in concocting a false contract in support of his claim, such a person is obviously a danger to society and this is a typical case where the Court should file a complaint under S. 476 Cr. P.C.	AIR 1959 ANDHRA PRADESH 204	464
196	Constitution of India , Arts. 32,226-Malafides- Pleadings- If allegations of malafides remain unrebutted and unanswered court is bound constrained to accept them.	2009 ALL SCR (O.C.C) 193=AIR 1986 SC 872	1470
197	Criminal P.C. (2 of 1974), S.191, S.192, S.193 - The course adopted by the applicant is impermissible and his application is based on mis-conception of law and facts. No. litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived or frivolous petitions- We	1996 CRI. L. J. 3983 = AIR 1996 SC 2687 = 1996 AIR SCW 3356	16471

	have referred to the history of the case only to show how the applicant has, thanks to the permissiveness of the judicial system, filed one petition after another to question the validity-.(para 6&11)		
198	Evidence Act (1 of 1872), S.44 - EVIDENCE - JUDGMENT - FRAUD - Proceeding in court - Fraud on Court by litigant - Withholding of vital document relevant to well as on the opposite party.	AIR 1994 SUPREME COURT 853 =	1472
199	Malice in law— Natural justice— Mala fide— Malice in fact and malice in law— Difference between the two concepts— But question of malice immaterial where discretionary power is used for unauthorised purpose— Malice in law is different from malice in fact and may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause - Held, gross abuse of legal power to use a rule to a purpose and in a manner unwarranted by it - Order infected with an abuse of power as is based on nonexisting facts (Para 5)	(1979) 2 Supreme Court Cases 491	1476
200	A) Practice and Procedure— Abuse of process— New creed of dishonest litigants, misleading court and suppressing facts noticed and strongly deprecated— No relief should be granted to such persons- A litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final .	(2010) 2 Supreme Court Cases 114	1477
	-: CHAPTER = :- **LAW RELATING TO PROSECUTION OF GOVERNMENT PLEADERS AND ADVOCATES**		
201	I.P.C. 466, 193 – A Vakil was sentenced to two rigorous imprisonment of 5 years for filling document containing false statement – Held, If Legal practitioner signs a document it is presumed that he fixes signatory with knowledge of contents – A Vakil so signing cannot plead that he did not know the contents – A man who signs his name to a document makes himself responsible in every way – He is bound to answer for every word, line, sentence and paragraph, and it will be no defence that somebody else wrote it and he only signed it – signature implies association and carries responsibility – He will be bound by all the implications arising from it just as much as if he had written every word – Practitioners must realize that if they associate themselves with statements which they know to be dishonest and untruthful for the purpose of misleading	A.I.R. 1927 ALLAHABAD 45 (FULL BENCH)	1494

	the Court then they should be punished - practitioner suspended.		
201	Advocates Act – Professional ethics – Resolution of Bar Association that none of its members will appear for a particular accused is against constitution – Such resolution is in fact, a disgrace to the legal community – All such resolutions of Bar Association in India are declared as null and void – The right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country – It is the duty of lawyer to defend irrespective of consequences – To put quietus to the FIR against both the parties stands quashed – Without going in to merits of controversy compensation of Rs. 1,50,000/- awarded to appellant and F.I.R. against him also quashed.	AIR 2011 SC (Criminal)193	1498
202	[A]Change of Advocate – A litigant must have the freedom to change his advocate when he feels that the advocate engaged by him is not capable of handling the case or his conduct is prejudicial to the case of the litigant for any other reason – If for whatever reason the client does not want to continue the engagement of a particular advocate then that advocate is bound to return the brief to the client – It is absolute right of the litigant to get back his brief – The advocate cannot withhold the brief for any reason including his outstanding fee – Failure to observe this procedure is a professional misconduct and the advocate is liable for action. [B]Civil P.C. order 3, Rule 4 (1) – Article 22 (1) of the constitution – Right to have advocate of his choice – Held- Supreme Court in earlier decision (in AIR 1966 SC 1910) made it clear that the word 'of his choice' in Article 22(1) indicate that the right of the accused to change an advocate whom he once engaged in the same case, cannot be whittled down by that advocate by withholding the case bundle on the premise that he has to get fees for the services already rendered to the client. [C]Professional Misconduct – Advocates Act Sec.35 – Professional Misconduct may consist in betraying the confidence of a client, in attempting by any means to practice a fraud or deceive the court or the adverse party or his counsel, and any conduct which tends to bring reproach on the legal profession – OR – Anything done which would be regarded as disgraceful or dishonorable by his professional brethren of good repute and competency. [D]Quantum of Punishment – As the Supreme court had not pronounced any Judgment on this issue earlier therefore the advocate would have bonafidely believed in the light of	2000 SCC (7) 264 SUPREME COURT	1503

	decisions of certain High courts that his act is legal – Therefore, it is not desirable to impose a harsh punishment – A reprimand would be Sufficient in the interest of justice – However it is made clear that the lesser punishment imposed now need not, be counted as a precedent.		
203	Advocate to gain private profit and to gain ulterior purposes filed petition and claiming it to be in the interest of public-official document annexed to the petition but no explanation is given as to how he come in possession thereof –the attractive brand name of public interest litigation should not be used for suspicious product of mischief and it should not be publicity oriented or founded on personal vendetta – Bar Council and Bar Association directed to ensure that no member of the bar becomes party as petitioner file frivolous petitions- no one should be permitted to bring disgrace to the noble profession and high traditions of the bar. Imposition of cost Rs 25000/ on advocate is proper- Copy of order sent to Bar Council for necerry action against advocate.	2005-ALLMR-5-270 , 2005-AIR(SC)-0-540	1510
204	[A]Criminal Trial – Representation by Advocate without filing vakalatnama – Like in Civil cases the advocate need not to file Vakalatnama in criminal cases – Filing of memo of appearance is sufficient – Court should be liberal in such type of cases – The prosecution have no right to put objection on the memo of appearance by the advocate. [B]Failure by Junior Advocate to file Vakaltnama and memo of appearance on behalf of accused can be no ground for the court to reject the application for exemption filed by the junior advocate – The act of Magistrate rejecting the application and issuing N.B.W. is illegal – Order is set aside and N.B.W. recalled.	2003 CRI. L. J. 350	1515
205	Cri. P.C. Sec 4 (1) (r) and Sec. 205 – Appearance of advocate without vakalatnama – District Magistrate rejected application on ground that no Vakalatnama is filed by said advocate – Held – Rejection of application by ADM is illegal – In criminal cases the advocate need not to file Vakalatnama – the advocate can act on behalf of accused without any formal vakalatnama in his favour – His own declaration of his being authorized by the accused is sufficient – The act of Addl. Dist. Magistrate is highly illegal – Such order betray a lamentable lack of judicial mind and approach – Judge is warned that he shall not pass such puerile orders hereafter and waste time not only of his own but also of higher Courts – Order of A.D.M. is quashed and set aside.	1975 CRI. L. J. 1808	1516
206	Central Reserve Police Force Act (66 of 1949), S.9 - CRIMINAL PROCEDURE CODE - Opportunity to be defended	2003 CRI. L. J. 4302	1517

	by lawyer of choice of accused is constitutional mandate- Non providing opportunity to defend the case by engaging lawyer of choice of accused - Offends provisions of S. 303 of Cri. P.C. and Arts. 22 and 14of Constitution-trial vitiated – Conviction set aside.		
207	Constitution of India, Art.226 - Criminal P.C. (5 of 1898), S.304 - COURT OF SESSIONS – Right of accused to be defended by advocate during trial - Duty is cast on public prosecutor to bring it to notice of Court, so that Court can appoint somebody to defend accused – Non following the procedure entire trial is vitiated- even if the accused at one stage intimated that he would have his own defence but on the date of hearing he is undefended, a duty is cast on the public prosecutor to bring it to the notice of the Court so that the Court can appoint somebody to defend the accused. If none is available as per the list, a gentleman of the Bar present in Court may be requested to defend the accused. The object underlying this provision is that no accused who is accused of a charge which may lead to the extreme penalty under the law should be deprived of a defence. Otherwise this leads to inadequate defence of the accused persons before the court of session and the entire trial is vitiated for the accused not having got a proper and fair trial. (Para 7)	1970 CRI. L. J. 396 (V. 76, C. N. 91)	1522
208	Advocate Act – There is no total bar for the private person/non advocate to represent the case of litigant - Court can allow power of attorney holder of a party to appear before the Court. It is the choice of the party to decide who should represent him or her and such right having been assured in terms of Article 19(1) (A) of the constitution of India and there being no bar for non-advocate being allowed to represent a party in a proceeding – Supreme Court Judgment AIR 1978 SC 1019 relied and referred to.	2004-BCR-5-196 , 2004-MhLJ-2-810	1525
209	Contempt of Court by Advocate - Criminal contempt – Malicious statement made by an Advocate before Court during pendency of cases is criminal contempt – He is an advocate and not layman – He made statement with having knowledge that the malicious statement is per se contemptuous – Mere offer of unconditional apology by contemnor should not allow him to go scot-free – Contemnor advocate liable to be punished – Fine of Rs. 2000/- imposed and in default to go 3 months imprisonment.	2002 CRI. L. J. 788	1530
210	Duty of Advocates towards Court – Held, he has to act fairly and place all the truth even if it is against his client – he should not withhold the authority or documents which tells against his client – It is a mistake to suppose that he is a mouthpiece of his client to say that he wants – He is supposed to disregard with instruction of his client which	1987-SCC-3-258	1532

	conflicts with their duty to the Court. (para 10, 11 & 12)		
211	Contempt of Courts Act (1971), S.23 - Contempt of Courts (CAT) Rules (1992), Rr.10, 11, 12 - Advocates Act (1961), Ss.30, 34, 49 - Right to appear in Advocate's robes before Court is statutory right - It is available to person who appears in his capacity as Advocate for any other party and not in his own cause.	2011 ALL MR (Cri) 381	1538
212	Advocates Act (25 of 1961), Ss. 38, 35 – Advocate attested forged affidavit causing wrongful loss to party – Respondent – On basis of that forged document income tax clearance certificate obtained – Bar council failed to take stern action but only condemned the conduct of advocate – Held, Reprimand was no punishment strict sense – Supreme Court criticized the lenient view taken by the Bar Council - It has been held that if this not a profession misconduct then it would be time to wind up this jurisdiction – The act of advocate is of unbecoming of member of noble profession-advocate is guilty of gross professional misconduct and must be suspended from practice for five years.	1985-AIR(SC)-0-28 , 1984-SCC-Supp1-571	1539
213	A. Criminal Procedure Code, 1973 — Ss. 301, 302 and 225 & 24 — Duty of the Public Prosecutor to act fairly and not merely to obtain conviction by any means fair or foul — If the accused is entitled to any legitimate benefit the Public Prosecutor should make it available to him or inform the court even if the defence counsel overlooked it . B. Criminal Procedure Code, 1973 — Ss. 301 and 302 — Unlike S. 302, S. 301 is applicable to all courts of criminal jurisdiction- Right of private counsel to conduct prosecution in a Sessions Court — Prosecution in sessions case cannot be conducted by anyone other than the Public Prosecutor — Role of private counsel is limited to act under the direction of the Public Prosecutor — However, he can submit written arguments after closure of the evidence with prior permission of the court.	(1999) Supreme Court Case 467	1551
214	Criminal P.C. (1973), Ss.239, 301, 302 -Application for discharge - First informant- No right to address orally - Opportunity of hearing cannot be refused to him - His role will be limited and he cannot take place of Public Prosecutor - He cannot be allowed to take over the control of prosecution by allowing to address the court directly	2012 ALL MR (CRI) 1624, LAWS(BOM)-2012-2-115	1558

215	(A) Criminal P.C. (2 of 1974), S. 438 – Anticipatory bail- Application for – Has to be decided expeditiously – Court deciding application for anticipatory bail has to balance right of applicant of his liberty – Investigating expected to be ready with reply at earliest point of time and to cooperate with court for early disposal of application of anticipatory bail – Pendency of such applications for considerable length of time seriously prejudices applicant in case no interim protection is granted. (Paras 18,19) (B) Criminal P.C. (2 of 1974) ,S. 438- Anticipatory bail- Complainant/first informant is entitled to be heard by court while deciding application for anticipatory bail- However , his rights are not unfettered and cannot be construed as giving him liberty to make submissions for any length of time –Interest of justice would be served if he is called upon to file his say, in writing containing facts and legal submissions pointing out as to why anticipatory bail should not be granted – If such a course is adopted , it would save valuable time of court(Para 21)	2013 Cri. L. J. (NOC)301	1565
	-: CHAPTER = :- **PROTECTION FOR ADVOCATES**		
216	Contempt of Courts Act (32 of 1952), S.1 - CONTEMPT OF COURT -Threatening by a party to prosecute plaintiff's Advocate in course of argument before Judge- The threat was intended to operate upon the mind of the Advocate so that he should flinch from performing his duties towards his client amounts to contempt of Court - Not words but conduct is essence of matter- Disrespect or disregard to an advocate in certain circumstances so as to deter him from discharging his duties would amount to contempt of Court. Conduct which is intended or calculated to bring pressure upon a party and his advocate, not to pursue the matter according to his choice, amounts to interference with the administration of justice even though such threat is not direct, in the sense that the contemner specifically asserted that he would take such action- In Nandlal Bhalla v. Kishori Lal, 48 Cri LJ 757 (Lah) the Inspector of Police issued threats and used insulting language towards an advocate. It was held that the Advocate was threatened in the performance of his duties, and although there was no contempt of the Court directly, there was contempt inasmuch as an officer of the Court such as an advocate appearing for the party- In (1824) 1 Hog 134 an insult was given to a counsel while he was attending in the Master's office, which was situated within the precincts of the Court. It was held that "Advocates who appear for the parties being officers of Court, any abuse or insult or aspersions	AIR 1966 BOMBAY 19 (Vol. 53, C. 5)	1574

	cast on them, which would interfere with the course of administration of justice, must necessarily be held to amount in contempt of Court."		
217	A) Advocates — Duties — Legal opinion rendered by advocate — Negligent or improper legal advice or opinion — Criminal liability cannot be fastened — Criminal conspiracy to defraud Bank — Panel Advocate of Bank when can be made liable for such criminal conspiracy — Need for evidence to show that lawyer in question aided or abetted the other conspirators — Held, although a lawyer owes an unremitting loyalty to clients interest, however , merely because his legal opinion may not be acceptable (in present case respondent Panel Advocate had been given ownership documents of conspirators' pledged properties, for vetting), he cannot be fastened with criminal prosecution in absence of tangible evidence that he had aided or abetted other conspirators — At the most, he may be liable for gross negligence or professional misconduct if established by evidence — In present case, there being no such tangible evidence against respondent, criminal proceedings against him, held, rightly quashed . B) Tort Law — Negligence — Professional negligence — Standard of requisite skill applicable — Held, a professional's only assurance which can be given by implication is that: (1) he is possessed of the requisite skill in that branch of profession which he is practising, and (2) while undertaking performance of the task entrusted to him, he would exercise his skill with reasonable competence —A professional may thus be held liable for negligence on one of the two findings viz. either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable. C) Criminal Procedure Code, 1973 — Ss. 227, 228 and 209 — Framing of charge /Discharge of accused — Exercise of jurisdiction— Held, Judicial Magistrate enquiring into a case is not to act as a mere post office or mouth piece of the prosecution and has to arrive at a conclusion whether the case before him is fit for commitment of accused to Court of Session — He is entitled to sift and weigh materials on record, but only to see whether there is sufficient evidence for commitment, not whether there is sufficient evidence for conviction — If Magistrate finds no prim a facie evidence or evidence placed on record is totally unworthy of credit, it is his duty to discharge accused at once — While exercising jurisdiction under S. 227, Magistrate should not make a roving enquiry into pros and cons of the matter or weigh the evidence as if he were conducting a trial (para 14)	(201) 3Supe meCo urtCas es(Cri) 1183	1589

218	A] Wrongful arrest & detention in police custody – IPC Ss. 420 & 471 Cr.P.C. S.41-Police Officer is not expected to act in a mechanical manner and in all cases to arrest accused as soon as report of cognizable offence is lodged – Existence of power to arrest is another thing & justification for exercise of it is another thing there must be some reasonable justification in opinion of officer effecting arrest that it was necessary and justified – Except in heinous offences arrest should be avoided – If Police Officer issue notice to a person to attend the Police Station and not leave the station without permission would do – offence u.s. 420, 471, 468 of IPC are not herious offences – Arrest illegal. B] Compensation- Petitioner was arrested by respondent Police Officer in case registered U/s 420, 468, 471. If IPC – Offences are not heinous offences - Arrest found malafide and mischievous & not protected by element of good faith – Infringement of fundamental right of a citizen cannot stop by giving a mere declaration – Compensatory relief is to be provided under – Cost of Rs. 25,000/- imposed on Police Officer who arrested the petitioner.	2004(I) Crimes 1 (Bom) (DB) = 2003-BCR(Cri)1655,	1602
219	(A) Criminal P.C. (2 of 1974), S.437(5) - BAIL – Accused an advocate - Application for bail - Rejected by Magistrate - Copies for rejection order made available within few hours - On same day application for release on bail filed before Sessions Court - Such fact could not disentitle Sessions Judge to pass order allowing bail application - More so when applicant was advocate and to avoid revolt by members of bar, the order could have been passed - Moreover as the accused- applicant was an advocate, to avoid situation like the members of the Bar going up in arms and rising in revolt against the Judicial Officers as soon as one of their colleagues is either remanded to custody or is refused the prayer for bail the order for allowing bail could have been passed. It could have been one of the reasons for directing the release of the accused on the same day on which his prayer was rejected by the Chief Judicial Magistrate.	2007 CRI. L. J. 2890	1603
	-: CHAPTER = :- SOME LANDMARK CASES HANDLED BY NGO THROUGH NATIONAL PRESIDENT AND AUTHOR OF THIS BOOK ADV. NILESH OJHA		
	-: CHAPTER = :- PROSECUTION OF PUBLIC / GOVT. SERVANTS		

220	Cri. P.c. 439, 437, Bail – Bail is the Rule and Jail an exception – Accused entitled for presumption of innocence till he is convicted – constitutionally protected liberty of accused must be respected unless detention becomes necessary – If any accused is detained before conviction then it will put unnecessary burden on state to keep a person who is not proved guilty – Normally bail should be granted to accused – Apprehension of tampering of evidence without sound proof could not be accepted and this ground could not be considered in each case to deny the bail.	2012 (1) SCC (Cri) 26	1642
221	Cr. P.C. 151- Illegal Arrest – Petitioner Lady and her son were detained and sent to Judicial custody alleging that she wants to commit suicide –Held, we are constrained to come to the conclusion that the petitioners on the day they were called to the police station had not taken any steps at committing suicide. In fact, the petitioners had withdrawn such a threat. The petitioners were called to the police station under a false pretext that an offence would be wregistered on the basis of the report of the first petitioner. We find no reason to question the case of the petitioners that they were detained in the police station and, thereafter, suddenly produced in the court of the Magistrate and to their dismay learnt that they had been arrested. There was no impending threat of the petitioners for committing suicide and in passing, therefore, we may say that their arrest and detention itself was not justified - the authorities have committed a blatant violation of the directives of the Supreme Court in D. K. Basu's case and the petition on that score deserves to succeed - petition is partly allowed. We direct the respondents to pay each of the petitioners an amount of Rs.3,00,000/- (Rupees Three Lakhs Only) within a period of eight weeks	13th June 2013	1644
222	Protection of Human Rights Act, 1993 – Custodial Death – Illegal arrest – Section 151 of Cri. P.C. – The victim was asenior citizen of 78 years old – He was illegally detained by P.S.O. U.S. 151 of cri. P.C. under directions of S.P Wardha Smt. Ashwati Dorje – The Victim was not granted bail by the Tahsildar Deepak Karande – The victim died in jail – The son of victim filed petition before State Human Rights commission, Mumbai through Shri. Nilesh C. Ojha National President of Manav Adhikar Suraksha Parishad – Commission accepted the contention of the petitioner and directed Home secretary to take action against Smt. Ashwati Dorje, S.P. Wardha Shri. Deepak Karande, Tahsildar, Wardha and Shri V.D. Boite Jail Supreintendant, Wardha. The petitioner filed Writ petition challenging the legality of the order - It has been held by High court that the order passed by State Human Rights commission is legal and does not require interference.	2010-TLMHH-0-510	1654

223	A. Inference regarding mala fide exercise of power — When can be made — Undue haste — Allegedly public authority awarding similar work to contractor without inviting tenders (when there was no urgency for said haste) — On account of such haste in the absence of any urgency, Court can draw an adverse inference regarding the conduct of said public authority — Therefore, it is a matter of investigation to find out whether there was any ulterior motive – C.B.I. directed to conduct preliminary enquiry.B. Constitution of India — Arts. 32, 14 and 21 — Public Interest Litigation (PIL) — Alleged corruption by public servant — Preliminary CBI inquiry — (public servant) allegedly indulging in illegal, arbitrary and colourable exercise of power for favouring himself in allotment and conversion of land and also favouring contractors in awarding tenders and illegally "extending" contractual work for large sums - Respondent 4 awarding to same contractor additional work worth crores more than the original work without inviting fresh tenders, without following prescribed procedure and without verifying as to whether contractor was eligible for said additional work — Said award of contract, held, is not permissible — Awarding the contract under the garb of so-called extension amounts to doing something indirectly which may not be permissible to be done directly — Work being worth in crore more than the amount of original contract cannot be termed as an "addition" or "additional work" C. Administrative Action — Administrative or Executive Function — Doctrine of public trust and manner of utilisation of power vested in State and public authorities, reiterated — Actions of State or its instrumentality must be reasonable and fair and must be exercised for a bona fide purpose Constitution of India—Arts. 14 and 21 The State or the public authority which holds the property for the public or which has been assigned the duty of grant of largesse, etc., acts as a trustee and, therefore, has to act fairly and reasonably. A public authority is ultimately accountable to the people in whom the sovereignty vests. (Para 38)	(2011) 2 Supreme Court Cases (Cri) 1015 (2011) 6 Supreme Court Cases 508	1666
224	(A)CONTEMPT OF COURT – deliberate attempt on the part bureaucracy to circumvent order of court and try to take recourse to one justification or other– this shows complete lack of grace in accepting the order of the Court -this tendency of undermining the court's order cannot be countenanced –in democracy the role of Court cannot be subservient to the administrative fiat – the executive and legislature had to work within constitution framework and judiciary has been given role of watch dog to keep the legislature and executive within check- the appellant office flouted order of this court is guilty of contempt of court.	2005-RAJLW-1-84 , 2004-CCC(SC)-4-295	1680

NOTES OF ARGUMENTS

(FOR REFRENCE)

FOR GETTING ANTICIPATORY AND REGULAR BAIL
REJECTION OF POLICE CUSTODY
(FOR ALL CASES INCLUDING MURDER)

It is constitutional mandate that **'Every accused is presumed to be innocent unless proved guilty by the competent Court.'** The police officer/prosecution agency is not a judge to decide who is right and who is wrong.

Hon'ble Supreme Court in the landmark Judgement in **Siddharam Mehetre –Vs- State of Maharashtra 2011 (1) SCC (Cri) 514** specifically laid down the guidelines in the nature of direction that the arrest should be avoided and investigation can be done by issuing notice to the accused. The above guidelines are irrespective of the nature of offences, Because Hon'ble Supreme Court granted anticipatory bail in Murder case in abovesaid case. While deciding issue of avoiding PCR i. e. custodial interrogation, Hon'ble Supreme Court observed as under,

> **A. Anticipatory Bail - Code of Criminal Procedure S. 438 - General guidelines including Murder case - I.P.C. S. 302 - Frivolity in prosecution should always be considered - If there is some doubt then accused is entitled to order of bail - It has to be examined that whether the complainant has filed a false or frivolous complaint on earlier occasion - Whether there is family dispute between them - If connivance between the complainant and investigating officer is established then action be taken against investigating officer.**
>
> **B. Accused is innocent unless proved guilty by the court - The rate of conviction is less than 10% then Police should be slow in arresting the accused. - The National Police commission's Report suggest that nearly 60% of the arrest are unjustified - The power of arrest is one of the chief sources of corruption of police - Therefore it is suggested that the accused be directed to join the investigation and only when the accused does not co-operate with the investigating agency then only the**

accused be arrested - When court is of the opinion that the accused had joined the investigation and not likely to abscond then custodial interrogation (PCR) should be avoided - The accused should be granted anticipatory bail.

C. The gravity of charge and the exact role of the accused must be properly comprehended. - The I.O. Must record the valid reasons which led to the arrest - These remark and observations of the arresting officer has to be properly evaluated by the court while dealing with the bail applications - Power of police regarding arrest is another thing but its justification is altogether a different thing.

Hon'ble Bombay High Court in the landmark Judgement in **Shashikant Goma Patil –Vs- State of Maharashtra 2013 ALL MR (Cri)2112** 'blaid down that even if prima facie case of involvement of accused is made out then also bail can be granted if further detention of accused is not essential from the point of view of investigation. In **2013 ALL MR (Cri.)1347** It is ruled that for filing application for anticipatory bail there is no need that the F.I.R. should be registered. Application is maintainable even if F.I.R. is not registered and applicant apprehends arrest.

As Per amended provisions of Cr.P.C. and as per law laid down by Hon'ble Supreme Court in the Case of Ku.Hema Mishra-vs-State **2014 ALL MR (Cri) 1503** (S.C) in the case where punishment is upto seven years such as 419,420 etc then police cannot arrest straight a way to the accused and investigation can be done by issuing notice to accused.

Division Bench of Hon'ble Bombay High Court in the case of **Antonio S. Mervyn –Vs-State 2008 ALL MR (CRI) 2432** laid down that the investigation has to be made without touching the offender – The question of touching the offender would arise only while submitting the charge-sheet. Arrest before completion of investigation is illegal & compensation of Rs. 25,000/- granted to accused – State directed to take action against police officer responsible for violation of fundamental rights of accused. The Principles of above ruling appreciated by Hon'ble High Court in the case of **G.N.Gawade –Vs- State 2012 ALL MR (Cri) 3942 (Bom) (DB)** also in the case of **Dinkarrao R. Pole –Vs-State of Maharashtra 2004 (1) Crimes 1 (Bom) (DB)** Hon'ble Bombay High Court

imposed cost of Rs. 25,000/- on Police Officer who arrested the accused in case under section 420, 471, 468 of IPC holding that as per law except in heinous crimes arrest should be avoided.

Constitution Bench of Hon'ble Supreme Court in the landmark Judgement on **12th Nov 2013** in **Lalita Kumari –Vs- Govt. of U.P. in Writ Petition (Crl.) No. 68 of 2008** specifically laid down the guidelines in the nature of direction that the arrest should be avoided and investigation can be done by issuing notice to the accused.

> **The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediatelyExcept in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do**(Para 100)
>
> **It is also relevant to note that in Joginder Kumar vs. State of U.P. & Ors. (1994) 4 SCC 260, this Court has held that arrest cannot be made by police in a routine manner.**
>
> Some important observations are reproduced as under:-
>
> > "20…No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and

not to leave the Station without permission would do." (Para 99)

Considerations for Regular Bail u.s. 439, 437 of Cr.P.C. and Anticipatory Bail u.s. 438 of Cr.P.C. are substantially same – Therefore the case laws of any bail are applicable to each other [**2012 Cri.L.J. 2101, 1989 Cri.L.J. 252 (Bom)**]

In **Sanjay Chandra –Vs- C.B.I. 2012 (1) SCC (Cri) 26** Hon'ble Supreme Court held, that

(**A) Cri. P.c. 439, 437, Bail – Bail is the Rule and Jail an exception – Accused entitled for presumption of innocence till he is convicted –** constitutionally protected liberty of accused must be respected unless detention becomes necessary – If any accused is detained before conviction then it will put unnecessary burden on state to keep a person who is not proved guilty – Normally bail should be granted to accused – Apprehension of tampering of evidence without sound proof could not be accepted and this ground could not be considered in each case to deny the bail.

B) Discretion while granting bail – The Jurisdiction to grant bail has to be exercised on the basis of well settled principles and not in arbitrary manner- The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken.

C) Criminal Procedure Code, 1973 – Ss. 437 and 439 – Prejudices which may be avoided in deciding bail matters – Public Scams, scandal and heinous offences – Public sentiments and disapproval of alleged misconduct – Bail, held, ought not be denied to teach lesson to a person whose offence is yet to be proved – Conditional bail, is a solution in such types of cases**.**

D) The approach adopted by the trial court and affirmed by the High Court, is a denial of the whole basis of the Indian system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. Bail is the rule and committal to jail an exception. Refuse of bail is a

restriction on the personal liberty of the individual guaranteed under Article 21 of the constitution. When there is a delay in trail, bail should be granted to the accused.

Hon'ble **Bombay High Court** in **CRIMINAL APPLICATION NO.514 OF 2013 Lalit Soni ..Vs. .. Union** held that ;

Index Note – Bail - Sections 406 and 420 of the Indian Penal Code (IPC) read with Section 34 - The learned Magistrate directed the applicants to be released on bail - The Sessions Judge canceled the bail granted by the Magistrate- High Court confirmed order of Magistrate granting Bail- Held, Bail is not to be refused merely because a *prima facie* case exists-

It is not possible to accept the reasoning of the learned Sessions Judge - The principles governing grant of bail are well settled. Grant of bail is discretionary. The law does not favour pretrial detention for an unduly long period. It is also well settled that the power to refuse bail is not to be exercised, as if punishment before the trial, is being imposed - All said and done, the elementary principle that 'pretrial detention can never be punitive in nature', has not undergone any change over the years- Bail is not to be refused merely because a *prima facie* case exists (except in cases of statutory prohibition, as imposed by some special statutes) Bail is not to be refused merely because a *prima facie* case exists (except in cases of statutory prohibition, as imposed by some special statutes) - The learned Sessions Judge overlooked the basic concept of bail and rather unnecessarily criticized the order passed by the learned Magistrate - The orders passed by the learned Sessions Judge, canceling the bail granted to the applicants, are set aside - The applicants shall remain on bail. (Para 8,9,13,14)

Moreover Hon'ble Supreme Court (3-Judge Bench) in the case of **Chandraswami –Vs- C.B.I. 1997 Cri. L.J. 3124** laid down that whenever accused appears or brough before the court and if the offences are not covered by c/s (i) and (ii) of Sec. 437 (i) of Cri.P.C. then the accused would be released on bail. [e.g. in cases of I.P.C. 420, 471 etc.] Hon'ble Bombay High Court in the case of **Khemlo Sawant –Vs- State 2002 BCR (1) 689** also held that in all cases except punishable with death or for life the bail is rule and jail is an exception. (Head Note and Para 13)

In a landmark judgement in the case of **Ambarish R. Patnigire – Vs. – State of Maharashtra 2010 ALL MR (Cri) 2775 (Bom)** Hon'ble Bombay High Court clarified that when punishment is up to life only then Magistrate can grant bail(e.g. IPC Sec. 326,

409,467), only when the punishment is in alternative for Death then only the considerations are different.

Merely because investigation agency would like to interrogate the accused bail cannot be refused. It cannot be said that granting of bail would hamper the investigation of the case **1996 Cri.L.J. 863**

In the case of **Harsh Sawhney –Vs- Union Territory AIR 1978 SC 1016** (3 – Judge Bench) Hon'ble Supreme Court held that for search and recovery accused need not be in custody. It is further held that the investigation can be completed by directing accused to appear for interrogation whenever reasonably required. Hon'ble High Court in the case of **Jeet Ram ...**Versus... **State of Himachal Pradesh 2003-ALLMR(CRI)(JOUR)-0-59 , 2003-Cri.L.J.-0-736, held that ;**

(A) Bail – Murder Case – I.P.C. 302 – Mere gravity of offence and severity of punishment is no ground for rejection of bail - The nature of evidence, part played by the accused and the likely hood of the accused absconding has to be taken in to account – the allegations against accused are that they hold the deceased and other accused pelted stones – It does not mean that accused have common intention of murder - Accused entitled to get bail.

Hon'ble Supreme Court in the case of **2010(1) SCC(CRI.)884 Ravindra Saxena .Vs.. State** held that The defence put forward by accused cannot be ignored. This is the position settled in catena of decisions capulizwd as undef ;

1) **2010 (1) SCC (Cri) 884**
The defence put forward by accused cannot be ignored.

1) **2008 (4) B.Cr. C. 716 (SC)**
Shamiullah – Vs-Supt. Narcotic

Art. 21-Bail – When two views are possible in respect of commission of crime, justifying or not justifying the grant of bail then the view which leans in farour of accused must be faroured.

2) **2002 ALL MR (Cri) 573**
Bail – Two Set of evidences inconsistent with each other – one incriminating the accused while other indicating his absence at relevant time on the spot –Accused deserves to be granted bail.

3) 2009 ALL MR (Cri)433
Bail - Conflicting version of the accused and prosecution – case made out for bail

In **2010 Cri.L.J. 1435** (SC) it is ruled that Court has inherent power to grant interim bail to a person pending final disposal of the bail application. It should be decided on same day if petitioner surrender before Court. (Cr.P.C. Sec. 437)

The case Laws are not for the purpose of reference of the Lower Courts but they are the established principles of law binding on lower judiciary and even on the police officers.

Even Obiter Dicta of the Supreme Court are binding on all courts in absence of direct pronouncement of the judgement by Supreme Court on that particular subject **(Jinraj Paper Udyog –Vs- Dinesh Associates 2008 ALL MR (Cri) 89)**

Therefore the observation of Hon'ble Supreme court in **Siddharam Mhetre's case 2011 SCC (Cri) 514** are binding on all. If any lower court fails to follow the same then such Magistrates are liable to be punished under contempt of Courts's act.

Hon'ble Bombay High Court in the case of **Farooq –Vs- State (2012 ALL MR (Cri) 271).** Held that,

> *"Arrest of accused – Non compliance of direction by High Court and Apex Court – Non granting bail to accused – The Session Judge was shown with the order passed by the Supreme Court and Bombay High Court but the Sessions Judge did not follow the guidelines without justifiable reasons or recording any reason in writing - Held, if any Sessions Judge is found not to follow the directions besides taking administrative action against such learned Sessions Judge, he shall be liable for contempt of this Court.*
>
> *1)* ***2012 ALL MR (Cri) 271 (Bom.) (D.B).***
> *Farooq –Vs- State.*

In **Rabindra Nath Singh –Vs- Pappu Yadav case (2010 (3) SCC (Cri) 165** Hon'ble Supreme Court held that the High Court committed contempt of Court in not following the guidelines of Supreme Court in the concerned bail matter.

[Same is the view taken by Hon'ble Bombay High Court in the case of **State of Maharashtra through S. S. Nirkhee, District & Sessions Judge, Wardha –Vs- R.A. Khan, chief Judicials Magistrate, Gadchiroli , contemnor. 1993 Cri. L.J. 816 (Bom) (DB)]**

In the case of **SPENCER & COMPANY LTD –Vs- VISHWADARSHAN DISTRIBUTORS PVT. LTD (1995) 1 SCC 259** it is held that the Supreme Court's order even if is only in the form of a request instead of explicit command or direction it is a judicial order and is binding and enforceable throughout the territory of India – In case of

flouting of the order by High Court, it is open to Supereme Court to initiate Contempt proceedings against the erring Judges of High Court.

If the subordinate courts, Tribunals and aurhtorities within the territory of particular High Court refuse to carry out the directions given to them by the High Court the result will be chaos in the administration of justice and the very democracy founded on rule of law crumbles. **[1996 Cri. L.J. 564]**

Even the judgement of other High Courts of India are also binding on all Sub-ordinate Courts in Maharashtra in absence of direct pronouncement of judgement by Bombay High Court on that subject.

In recent judgement in the case of **Maharashtra Govt. through G.B. Gore Vs. Rajaram Digamber Padamwar & Anr. 2011 (4) AIR (Bom) R. 238** Hon'ble Bombay High Court directed action against sessions Judge for not obeying judgement of Kerala High Court.

Hon'ble Bombay High Court in the case of **M/s. Shri Srinivasa Cut Pieces Cloth Shop, Rajahmundri, (A.P.) & Anr.Vs. State of Maharashtra & Anr.2004 ALL MR (Cri) 1802** ruled that the court of Co-ordinate jurisdiction should have consistant openion on same set of facts and point of law. If this procedure is not followed then instead of achieving harmony it may lead to judicial anarchy as different person approaching different Judge may get different orders in like matters.

Therefore even a order passed Sessions Judge in granting bail can be used as precedent before another Sessions Judge.

REJECTION OF PCR : - The case laws of anticipatory bail are applicable to reject PCR. [See **Siddharam Mehetre –Vs- State of Maharashtra 2011 (1) SCC (Cri) 514, AIR 1978 SC 1016, 2001 ALL MR (CRI.) 1892, 2008 ALL MR (CRI.) 2432, 2004 (1) CRIMES 1 (BOM), 2012 ALL MR (CRI.) 68 ETC.**]

The case laws of Anticipatory bail application are applicable for rejecting the prayer of Police for PCR i. e. custodial interrogation.

In the case of **Harsh Sawhney –Vs- Union Territory AIR 1978 SC 1016** (3 – Judge Bench) Hon'ble Supreme Court held that for search and recovery accused need not be in custody. It is further held that the investigation can be completed by directing accused to appear for interrogation whenever reasonably required.

Application for Police custody should be by officer not below the rank of Police Sub inspector **(2010 Supreme Court Devender kumar .Vs. State of Haryana)**

FULL BENCH of Hon'ble MADRAS HIGH COURT in the case of **Selvanathan alias Raghavan .. VERSUS..State by Inspector of Police, 1988 MAD LW(CRL.)503** Every person subjected to arrest is entitled to a copy of FIR free of cost at

the time of arrest. In case the Magistrate is not satisfied that the requirements have not been complied with, he can limit the remand in the first instance. A request for remand to police custody shall be accompanied by an affidavit by setting out briefly the prior history of the investigation and the likelihood of further clues which the police expect to derive by having the accused in custody, sworn by the investigating or other police officer, not below the rank of a Sub Inspector of Police .

> The Magistrates shall not grant remands to the police custody unless they are satisfied that there is good ground for doing so and shall not accept a general statement made by the investigating or other Police Officer to the effect that the accused may be liable to give further information, that a request for remand to police custody shall be accompanied by an affidavit by setting out briefly the prior history of the investigation and the likelihood of further clues which the police expect to derive by having the accused in custody, sworn by the investigating or other police officer, not below the rank of a Sub Inspector of Police and that the Magistrate after perusing the affidavit and satisfying himself about the request of the police officer, shall entrust the accused to police custody and at the end of the police custody, the Magistrate shall question the accused whether he had in any way been interfered with during the period of custody

(2010 Supreme Court Devender kumar .Vs. State of Haryana) Section 167(1) Cr.P.C. which provide that an application for police remand can be made only by an officer not below the rank of Sub- Inspector - The reason given by the High and directing the arrest of the Appellants on the ground that disclosures have been made by the Appellants and that their police custody was necessary for recovery of the same, is, in our view, not sufficient for the purpose of cancellation of bail- Order passed by the learned Magistrate restored and order passed by the High Court set aside.

Criminal Manual Chapter I (4) &(5) Remand staes as under : -

1) It is observed that Magistrates allow remand of the accused to custody under Section 167 of the Code of Criminal procedure. 1973. Or allow remand under Section 309 of the Code of Criminal Procedure. 1973. Without satisfying themselves that there are reasonable grounds for such remand. The law requires that Magistrates should not allow remand in such cases without being satisfied that there are really good grounds for it Magistrates should not, therefore, allow remand applications as a matter of course, but only after being satisfied that

further time is really necessary for the purpose of investigation. In this connection, the attention of all the Courts is invited to the rulings reported in A.I.R 1975 SC 1465 Natabar Parida V. State of Orissa, and 78 B.L.R. 411 State of Maharashtra v. Tukaram Shiva Patil.

2) In this connection attention of the Magistrates is drawn to the provisions of Section 167 (1) of the Code of Criminal Procedure. 1973 which makes it obligatory on the police to send copies of entries in the diary relating to the case when forwarding the accused for the purposes of remand. Magistrates should invariably insist upon copies of such entries and material should be carefully examined by the Magistrates in order to satisfy themselves that there are good grounds for remand.

3) While it is not intended to fetter the discretion of the Magistrates in matters of remand, the following general principles are stated for their guidance:-

   i) A ramand to police custody of an accused person should not ordinarily be granted unless there is reason to believe that material and valuable information would thereby be obtained, which cannot be obtained except by his remand to police custody.

   ii) Where a remand is required merely for the purpose of verifying a statement made by the accused, the Magistrate should ordinarily remand the accused person to Magisterial custody.

   iii) If the Magistrate thinks that it is not necessary for purposes of investigation to remand the accused to police custody, he should place the accused person in Magisterial custody : and in case he has no jurisdiction to try the offence charged, he should issue orders for forwarding the accused person to a Magistrate having jurisdiction.

   iv) If the Magistrate thinks that the police not only require more time for their investigation but that for some good reason they require the accused person to be present with them in that investigation the Magistrate may remand him to police custody, but while doing so, he must record the reasons for his order.

Remand execution:- State must show that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters. Madhu Limaye v. State of Bihar. AIR 1969 SC 1014: 1969 Cri. L.J. 1440 : (1969) 1 SCC 292: (19669) 1 SCWR 470.

BAIL DURING REMAND/PCR:-

As per law laid down by Hon'ble Bombay High Court in the case of **Krushna Guruswami Naidu v. The State of Maharashtra 2011 CRI. L. J. 2065** Bail Application is maintainable even if filed during period of police remand granted by Magistrate - Sessions Court cannot reject application for bail on that ground - Bail application should be entertained and considered on merits even if there is order of police remand.

Discretion :- The next question commonly faced by the advocates and citizens is regarding unjustified use of discretion by Magistrate/Judge while refusing or granting the bail.

The Law in this regard is clear that the Judge is not having any uncountrolled discretion.

Hon'ble Supreme Court in the case of **Sundarjas Kanyalal Bhathija and others –Vs- The Collector, Thane, Maharashtra AIR 1990 SUPREME COURT 261** held that,

> **Constitution of India, Art.141- PRECEDENTS - Judges are bound by precedents and procedure - They could use their discretion only when there is no declared principle to be found, no rule and no authority - where a single judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure - it is the duty of judges of superior courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Sub-ordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute- One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. (Paras 17, 20)**

The Judge/Magistrate who exercise discretion are expected to bear in mind that : as per Judgement of Hon'ble Supreme Court in the case of **Sanjay Chandra –Vs- C.B.I. 2012 (1) SCC (Cri) 26** held that,

1) DISCRETION : Cri. P.C. Sec. 437 and 439 – Bail – The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in arbitrary manner – (para 37)

> Any order devoid of reasons would suffer from non-application of mind. In the case of **Gudikatil Narasimhulu V. Public Prosecutor, (1978) 1 SCC 240,** V.R. Krishna Iyer, J., sitting as Chamber Judge, Enunciated the principles of bail thus:

"3. What, then, is "judicial discretion" in this bail context ? In the elegant words of Benjamin Cardozo : "The Judge, even when he is free, is still not wholly free. He is not to innovate at Pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remain.

Sanjay Chandra –Vs- C.B.I. 2012 (1) SCC (Cri) 26

2) "Discretion when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful, but legal and regular"

[Tingley –Vs- Dalby, 14 NW 146]

3) "An appeal to a Judge]s discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with established principles of law."

Gudianti Narsimha –Vs- Public Prosecutor, High Court 1978 Cri. L.J. 502.

APPLICABILITY OF CASE LAW :- Magistrate bound to explain case law relied by parties in his order or judgement :-

When there are some extraneous factor affecting the judiciary either it may be 'Media' or anything then even if the accused who entitles to get bail, is denied his right by some of the courts even they did not quote the case Laws given by counsel for the applicants. It is advisable that the case laws should be filed on record by way of 'purshish' or 'written Notes of Arguments'. This minimizes the practice of misuse of judicial process and violation of fundamental rights of the accused.

Criminal Manual Chapter VI (52) Citation of cases reads as under;

All refrence in judgments to rulings of Superior Courts cite both the names of the parties as well as the number of the volume and the page of the report. **e.g. Narayanan v. State (76 Bom. L.R. 690)**

Whenever any authority is relied by the counsel then it is bounded duty of the judge to meticulously examine the issues and rulings in support thereof. Simply listing the

rulings in the judgement without going in to the ratio decidendi of the same is illegal [**Adarsh Graming Sahakari Patsanstha –Vs- Dattu R. Paithankar 2010 (1) Crimes 714 (Bom)]**

Also in the case of the **Bank of Rajasthan Ltd. –Vs- Shyam Sunder Tapariya 2006 ALL MR (Cri) 2269** it has been laid down that the judge Should recorded short reasons demonstrating how the case law is applicable to the case. The conduct of judge about passing of cryptic orders even without mentioning full title of the judgement and citation thereof is illegal. Courts are expected to exhibit from their conduct and their orders concern for justice and not casualness.

In the case of **Dattani & Co.. Versus.. Income Tax Officer TAX APPEAL NO. 847/2013 (21/10/2013)** it has been laid that

> **Whenever any decision has been relied upon and/or cited by the assessee and/or any party, the authority/tribunal is bound to consider and/or deal with the same and opine whether in the facts and circumstances of the particular case, the same will be applicable or not. In the instant case, the tribunal has failed to consider and/or deal with the aforesaid decision cited and relied upon by the assessee- Under the circumstances, all these appeals are required to be remanded to the tribunal to consider in accordance with law and on merits.**

In **Dwarikesh Sugar Industries –Vs- Prem Heavy Industries AIR 1997 SC 2477** Hon'ble Supreme Court laid down that

> **Judicial Adventurism** – High Court ignoring various laws settled by Supreme Court – – When a position in law is well settled as a result of pronouncement of Supreme Court then it would be judicial impropriety for the sub ordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position – The observation of High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it to avoid to follow the law laid down by the Supreme Court – Such judicial adventurism cannot be permitted - The tendency of the subordinate courts in not applying the settled principles and passing whimsical

order granting wrongful and unwarranted relief to one of the parties is strongly deprecated – It is the time that such tendency should be stopped (Para 32)

(So if any judge/Magistrate did not follow the guidelins and ratio laid down by Superior courts then you may make complaint and even may ask for action under Contempt of Courts act against the concerned Judge.)

Honb'le High Court in the case of **1967 CR.L.J. 1297** held that,

" Indeed there is no explanation as to why the learned Magistrate did not take appropriate steps to see the matter – His helpless ness or his indifference in this matter whichever be the position reflects a most unsatisfactory state of affairs – **The Ld Magistrate seems to have clearly adopted an attitude of un-judicial indifference towards the judicial proceeding in his court.**

The fact that the accused belongs to a respectable family and that there is no danger of his absconding were not considered by the learned sessions judge to be the only consideration for granting bail.

1967 CR.L.J. 1297

RESPONSIBILITY OF GOVERNMENT PLEADER

Hon'ble Supreme Court in the case of **Capt. Amrinder Singh Vs. Prakash Singh Badal 2009 (3) Crimis 174 (SC)** specifically laid down that the public prosecutor should not act merely on the dictates of the state but he should act fairly and place truth before the court as he is also an officer of the Court.

Full Bench of Hon'ble Supreme Court in the case of **Shiv Kumar --*Versus*- Hukam Chand And Another (1999) 7 Supreme Court Cases 467** observed as under

Criminal Procedure Code, 1973 — Ss. 301, 302 and 225 & 24 —Duty of the Public Prosecutor to act fairly and not merely to obtain conviction by any means fair or foul — If the accused is entitled to any legitimate benefit the Public Prosecutor should make it available to him or inform the court even if the defence counsel overlooked it.

Also relied on: (2013) 2 Supreme Court Cases (Cri) 978

where it has been laid down that ;

> **Duty of the Public Prosecutor to act fairly- He is not a mouthpiece of investigating agency and should scrupulously avoid suppression of material available establishing innocence of accused – He should refuse to use evidence obtained by wroungful means.**

Full Bench of Hon'ble Bombay High Court in the case of **STATE OF MAHARASHTRA Vs JAGAN GAGANSINGH NEPALI 2011 ALL MR (Cri) 2961 (Full Bench)** held that,

> Misuse of Power by police officials as well as Presiding Officers and Public Prosecutors of the Designated courts – held – As has been held by constitution Bench of Apex Court in Prakash Bhutto's Case [(2005) 2 SCC 409] it is many time noted that the prosecution unjustifiably invokes the provisions of the Special Act's like TADA Act with an oblique motive of depriving the accused persons from getting bail – The public prosecutors and the Presiding Officers of the Court are cautioned to act objectively – Public prosecutors are prosecutors on behalf of public and not the police – The Presiding Officers of the Designated Court have been assigned the role of the sentinel on the quivive – They expected to discharge their judicial functions keeping in view the fundamental rights particularly of the personal right and liberty of the citizen – These are essential for achieving legislative intent – The above observation of Apex court is sufficient to caution police officials as wells as Presiding Officers from misusing the Act.

In **E.S. Raddi Vs. The Chief Secretary 1987 (3) SCC 258** Hon'ble Supreme Court observed the duties of the senior Counsel some of the portion of para is as follows :

> As *an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession,* ***he must not withhold authorities or documents which may tell*** **against his clients** ***but which the law or the standards of his profession require him to produce.*** *By so acting he may well incur the displeasure*

or worse of his ***lost his client would*** **or** *might seek legal redress if that were open to him.*

The law of bail is much clear in the case of Siddharam Mehatre's case (2011) (Supra).Moreover as per the ratio laid down by 3-Judge Bench of Hon'ble Supreme Court in the case of **Chandraswami Vs. C.B.I. 1997 Cri. L.J.3124** ,it has been made clear that whenever the accused appears or brought before the court and offence committed by him is not punishable for death or life then the accused normally entitled to be released on bail.

That being the position of the law then it was expected from the advocate like Govt. Pleader that he should at his own bring this legal position to the notice of the Court and fairly contend that the accused entitled to be released on bail however appropriate conditions may be imposed. As being counsel of prosecutor what he can do that he should have made strong efforts for early disposal of the case and nothing more.

The role of the prosecutor in any criminal trial (whether at the instance of the State or of a private party) is to safeguard the interests of both the Complainant and the accused. The right to be heard includes the right to be represented by an able spokesman of one's confidence. This right belongs to the Complainant and to the accused, both. The Complainant also needs assistance. The prosecutor is bound by law and professional ethics and by his role as an officer of court to employ only fair measures.

Hon'ble High Court in the case of ***Seethalakshmi -Vs- State 1991 Cri.L.J. 1037*** **held that,**

"161 This Court has on several occasions pointed out that affidavits should not be treated in a light-hearted fashion and prepared in a hap-hazard manner. Every litigant should understand that an affidavit is a sworn statement and it takes the place of deposition. Responsibility of Government officials is much more in this regard. Their affidavits are not intended just to point out the flaws in the case of the opponent. Their affidavits should always place all the facts before the Court whether such facts would support the contention of the Government in the case or not."

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-: CHAPTER = 2 :-

CASE LAWS ON ANTICIPATORY BAIL AND REGULAR BAIL

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Cross Citation : 2013 ALL MR(CRI) 2112 = LAWS(BOM)-2013-1-190

BOMBAY HIGH COURT

Coram: - A.M.THIPSAY J.

Decided on January 18, 2013

Criminal Bail Application No. 7 of 2013

Shashikant Goma Patil .....Vs..... State Of Maharashtra

==========

Criminal Procedure Code S. 439- Bail - Can be granted even if prima facie case exists against accused - Held, there exists a prima facie case of cruelty against the applicants- It appears that the deceased Minal committed suicide -There is no suspicion that the death of the said Minal is homicidal - However since the applicants are in custody since 12 December 2012 i.e. for around one month their further detention does not seem to be essential from the point of view of investigation - Keeping this in mind, the applicants are ordered to be released on bail in the sum of Rs.30,000/- each with one surety in like amount, on the conditions.

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Advocates: - Nitin Sejpal , Pooja Bhojane , S.V.Sonawane , Prashant M. Patil

JUDGEMENT

1. HEARD Mr.Nitin Sejpal, learned counsel for the applicants. Heard Ms.S.V.Sonawane, learned APP for the State. Heard Mr.Prashant Patil, learned counsel who sought intervention on behalf of the First Informant to oppose the grant of bail.

2. I have gone through the First Information Report and glanced through the statements recorded during investigation. There exists a prima facie case of cruelty against the applicants. It appears that the deceased Minal committed suicide. There is no suspicion that the death of the said Minal is homicidal.

3. The applicants are in custody since 12 December 2012. Their further detention does not seem to be essential from the point of view of investigation.

O R D E R

The applicants are ordered to be released on bail in the sum of Rs.30,000/-each with one surety in like amount, on the condition to attend the concerned police station, and make themselves available for investigation/interrogation, as and when required by the Investigating Officer.

Application allowed.

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Cross citation : 2011 (1) SCC (Cri.) 514; 2011 (I) SCC 694

SUPREME COURT OF INDIA

Hon'ble Judge(s) : Dr. Dalveer Bhandari And K.S.P. Radhakrishnan, JJ.

Siddharam Satlingappa Mhetre -Versus- State of Maharashtra And Others

Criminal Appeal No. 2271 of 2010, decided on December 2, 2010.

==========

A. Accused is presumed to be innocent unless proved guilty by the court - The rate of conviction is less than 10% then Police should be slow in arresting the accused. - The National Police commission's Report suggest that nearly 60% of the arrest are unjustified - The power of arrest is one of the chief sources of corruption of police - Therefore it is suggested that the accused be directed to join the investigation and only when the accused does not co-operate with the investigating agency then only the accused be arrested - When court is of the opinion that the accused had joined the investigation and not likely to abscond then custodial interrogation (PCR) should be avoided - The accused should be granted anticipatory bail.

B. Anticipatory Bail - Code of Criminal Procedure S. 438 - General guidelines including Murder case - I.P.C. S. 302 - Frivolity in prosecution should always be considered - If there is some doubt then accused is entitled to order of bail - It has to be examined that whether the complainant has filed a false or frivolous complaint on earlier occasion - Whether there is family dispute between them - If connivance between the complainant and investigating officer is established then action be taken against investigating officer

C. The gravity of charge and the exact role of the accused must be properly comprehended. - The I.O. Must record the valid reasons which led to the arrest - These remark and observations of the arresting officer has to be properly evaluated by the court while dealing with the bail applications - Power of police regarding arrest is another thing but its justification is altogether a different thing.

D. Proper course of action to be adopted by court - After evaluating records of the case if anticipatory bail is to be granted - at

first interim bail should be granted and notice should be issued to Public Prosecutor - After hearing both the parties court my grant Anticipatory bail or reject it.

E. Anticipatory Bail - Duration of - Anticipatory bail granted should ordinarily be continued till end of trial of the case-

F. Cr. P.C. & 438 & 437 - The plentitude of S. 438 must be given its full play - There is no requirement that accused must make out a 'Special case' for exercise of power to grant anticipatory bail-

G. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

H. Anticipatory Bail – Judges with good track record only to be entrusted with such work – Both individual and society have vital interest in such orders.

I. Guidelines to the Police/ Investigation Officer – Personal libety is a very precious fundamental right which can not be disturbed by the police in routine manner. The investigation can be done by following the guidelines below

In case, the State consider the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive.

1) *Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.*

2) *Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.*

3) *Direct the accused to execute bonds; 4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.*

5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

6) Bank accounts be frozen for small duration during investigation.

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d. Chronological list of cases cited

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2. (2008) 10 SCC 1 : (2009) 1 SCC (L&S) 943, Official Liquidator v. Dayanand
3. (2008) 1 SCC 632 : (2008) 1 SCC (Cri) 277, Naresh Kumar Yadav v. Ravindra Kumar
4. (2007) 4 CTC 1 (Mad), Palanikumar v. State
5. (2006) 4 SCC 1 : 2006 SCC (L&S) 753, State ofKarnataka v. Umadevi (3)
6. (2005) 4 SCC 303 : 2005 SCC (Cri) 933, Adri Dharan Das v. State of W.B.
7. (2005) 3 SCC 1 : 2005 SCC (L&S) 327, S. Pushpa v. Sivachanmugavelu
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13. (2001)4 SCC 448, Bharat Petroleum Corpn. Ltd. v. Mumbai Shramik Sangha
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21. (1994) 4SCC260: 1994 SCC (Cri) 1172, Joginder Kumar w. State of U.P.
22. (1994) 3 SCC 569 : 1994 SCC (Cri) 899, Kartar Singh v. State of Punjab
23. (1994) 3 SCC 394 : 1994 SCC (Cri) 740, P. Rathinam v. Union of India

24 (1991) 4 SCC 312, Thota Sesharathamma v. Thota Manikyamma

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26. (1989) 4 SCC 418 : 1989 SCC (Cri) 732, N. Meera Rani v. Govt. of T.N.
27. (1989) 2 SCC 754, Union of India v. Raghubir Singh
28. 1987 AC 514 : (1987) 2 WLR 606 : (1987) 1 All ER 940 (HL), R. V. Secy, of State for the Home Deptt., expBugdaycay
29. (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103, Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly
30. (1985) 2 SCC 597 : 1985 SCC (Cri) 297, Pokar Ram v. State ofRajasthan
31. (1981) 1 SCC 608 : 1981 SCC (Cri) 212, Francis Coralie Mullin v. UTofDelhi

32. (1980) 3 SCC 526: 1980 SCC (Cri) 815, Prem Shankar Shuklav. Delhi Admn.
33. (1980) 2 SCC 593 : 1980 SCC (L&S) 197, Gujarat Steel Tubes Ltd. v. Mazdoor Sabha
34. (1980) 2 SCC 565 : 1980 SCC (Cri) 465, Gurbaksh Singh Sibbia v. State of Punjab
35. (1978) 1 SCC 248, Maneka Gandhi v. Union of India
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37. (1976) 3 SCC 693 : 1976 SCC (L&S) 484, B.C. Roy v. M.P. Industrial Court
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39. (1972) 4 SCC 86, Karmiv.Amru
40. 1972 SCR 889 (Can SC), Currv.R.
41. (1972) 45 Inter LR 446, M. v. United Nations & Belgium
42. (1969) 2 SCC 586, Badri Prasad v. Kanso Devi
43 AIR 1964 SC 334 : (1964) 1 Cri L.J. 257 : (1964) 4 SCR 921, Rameshwar Shaw v. District Magistrate, Burdwan
44. AIR 1963 SC 1756 : (1964) 2 SCR 104, P.H. Kalyani v. Air France
45. AIR 1963 SC 1295 : (1963) 2 Cri L.J. 329, Kharak Singh v. State of U.P.
46. AIR 1950 SC 27 : (1950) 51 Cri L.J. 1383, A.K. Gopalan v. State of Madras
47. 1947 KB 842 : (1947) 2 All ER 193 (DC), Huddersfield Police Authority v. Watson
48. 1944 KB 718: (1944) 2 All ER 293 (CA): 1946 AC 163 : (1946) 1 All ER 98 (HL), Young v. Bristol Aeroplane Co. Ltd.
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JUDGEMENT

DR. Dalveer Bhandari, J.

1. Leave granted.

2. This appeal involves issues of great public importance pertaining to the importance of individual's personal liberty and the society's interest.

3. The society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of bails dovetails 2 two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand absolute adherence of the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.

4. Brief facts which are necessary to dispose of this appeal are recapitulated as under. The appellant, who belongs to the Indian National Congress party (for short `Congress party') is the alleged accused in this case. The case of the prosecution, as disclosed in the First Information Report (for short `FIR'), is that Sidramappa Patil was contesting election of the State assembly on behalf of the Bhartiya Janata Party (for short `BJP'). In the FIR, it is incorporated that Baburao Patil, Prakash Patil, Mahadev Patil,

Mallikarjun Patil, Apparao Patil, Yeshwant Patil were supporters of the Congress and so also the supporters of the appellant Siddharam Mhetre and opposed to the BJP candidate. 3

5. On 26.9.2009, around 6.00 p.m. in the evening, Sidramappa Patil of BJP came to the village to meet his party workers. At that juncture, Shrimant Ishwarappa Kore, Bhimashankar Ishwarappa Kore, Kallapa Gaddi, Sangappa Gaddi, Gafur Patil, Layappa Gaddi, Mahadev Kore, Suresh Gaddi, Suresh Zhalaki, Ankalgi, Sarpanch of village Shivmurti Vijapure met Sidramappa Patil and thereafter went to worship and pray at Layavva Devi's temple. After worshipping the Goddess when they came out to the assembly hall of the temple, these aforementioned political opponents namely, Baburao Patil, Prakash Patil, Gurunath Patil, Shrishail Patil, Mahadev Patil, Mallikarjun Patil, Annarao @ Pintu Patil, Hanumant Patil, Tammarao Bassappa Patil, Apparao Patil, Mallaya Swami, Sidhappa Patil, Shankar Mhetre, Usman Sheikh, Jagdev Patil, Omsiddha Pujari, Panchappa Patil, Mahesh Hattargi, Siddhappa Birajdar, Santosh Arwat, Sangayya Swami, Anandappa Birajdar, Sharanappa Birajdar, Shailesh Chougule, Ravi Patil, Amrutling Koshti, Ramesh Patil and Chandrakant Hattargi suddenly came rushing in their direction and loudly shouted, "why have you come to our village? Have you come here to oppose our Mhetre 4 Saheb? They asked them to go away and shouted Mhetre Saheb Ki Jai."

6. Baburao Patil and Prakash Patil from the aforementioned group fired from their pistols in order to kill Sidramappa Patil and the other workers of the BJP. Bhima Shankar Kore was hit by the bullet on his head and died on the spot. Sangappa Gaddi, Shivmurti Vjapure, Jagdev Patil, Layappa Patil, Tammaro Patil were also assaulted. It is further mentioned in the FIR that about eight days ago, the appellant Siddharam Mhetre and his brother Shankar Mhetre had gone to the village and talked to the abovementioned party workers and told them that, "if anybody says anything to you, then you tell me. I will send my men within five minutes. You beat anybody. Do whatever."

7. According to the prosecution, the appellant along with his brother instigated their party workers which led to killing of Bhima Shanker Kora. It may be relevant to mention that the alleged incident took place after eight days of the alleged incident of instigation.

8. The law relating to bail is contained in sections 436 to 450 of chapter XXXIII of the Code of Criminal Procedure, 1973. 5

Section 436 deals with situation, in what kind of cases bail should be granted. Section 436 deals with the situation when bail may be granted in case of a bailable offence. Section 439 deals with the special powers of the High Court or the Court of Sessions regarding grant of bail. Under sections 437 and 439 bail is granted when the accused or the detenu is in jail or under detention.

9. The provision of anticipatory bail was introduced for the first time in the Code of Criminal Procedure in 1973.

10. Section 438 of the Code of Criminal Procedure, 1973 reads as under:

"438. Direction for grant of bail to person apprehending arrest.- (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

(i) the nature and gravity of the accusation;
(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
(iii) the possibility of the applicant to flee from justice; and
(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail: Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including -

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly,- make any inducement, threat or promise to anyperson acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1)."

Why was the provision of anticipatory bail introduced? – Historical perspective

11. The Code of Criminal Procedure, 1898 did not contain any specific provision of anticipatory bail. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether the courts had an inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power.

12. The Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code of Criminal Procedure enabling the High Court and the Court of Sessions to grant "anticipatory bail". It observed in para 39.9 of its report (Volume I) and the same is set out as under:

"The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

The Law commission recommended acceptance of the suggestion.

13. The Law Commission in para 31 of its 48th Report (July, 1972) made the following comments on the aforesaid clause:

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice. It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."

14. Police custody is an inevitable concomitant of arrest for non-bailable offences. The concept of anticipatory bail is that a person who apprehends his arrest in a non-bailable case can apply for grant of bail to the Court of Sessions or to the High Court before the arrest.

Scope and ambit of Section 438 Cr.P.C.

15. It is apparent from the Statement of Objects and Reasons for introducing section 438 in the Code of Criminal Procedure, 1973 that it was felt imperative to evolve a device by which an alleged accused is not compelled to face ignominy and disgrace 10 at the instance of influential people who try to implicate their rivals in false cases.

16. The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present section 438 Cr.P.C. The only two clear provisions of law by which bail could be granted were sections 437 and 439 of the Code. Section 438 was incorporated in the Code of Criminal Procedure, 1973 for the first time.

17. It is clear from the Statement of Objects and Reasons that the purpose of incorporating Section 438 in the Cr.P.C. was to recognize the importance of personal liberty and freedom in a free and democratic country. When we carefully analyze this section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court.

18. The High Court in the impugned judgment has declined to grant anticipatory bail to the appellant and aggrieved by the said 11 order, the appellant has approached this Court by filing this appeal.

19. Mr. Shanti Bhushan, learned senior counsel appearing for the appellant submitted that the High Court has gravely erred in declining the anticipatory bail to the appellant. He submitted that section 438 Cr.P.C. was incorporated because sometime influential people try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. He pointed out that in recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase.

20. Mr. Bhushan submitted that the appellant has been implicated in a false case and apart from that he has already joined the investigation and he is not likely to abscond, or otherwise misuse the liberty while on bail, therefore, there was no justification to decline anticipatory bail to the appellant.

21. Mr. Bhushan also submitted that the FIR in this case refers to an incident which had taken place on the instigation of the appellant about eight days ago. According to him, proper analysis of the averments in the FIR leads to irresistible 12 conclusion that the entire prosecution story seems to be a cock and bull story and no reliance can be placed on such a concocted version.

22. Mr. Bhushan contended that the personal liberty is the most important fundamental right guaranteed by the Constitution. He also submitted that it is the fundamental principle of criminal jurisprudence that every individual is presumed to be innocent till he or she is found guilty. He further submitted that on proper analysis of section 438 Cr.P.C. the legislative wisdom becomes quite evident that the legislature wanted to preserve and protect personal liberty and give impetus to the age-old principle that every person is presumed to be innocent till he is found guilty by the court.

23. Mr. Bhushan also submitted that an order of anticipatory bail does not in any way, directly or indirectly, take away from the police their power and right to fully investigate into charges made against the appellant. He further submitted that when the case is under investigation, the usual anxiety of the investigating agency is to ensure that the alleged accused should fully cooperate with them and should be available as and when they require him. In the instant case, when the appellant has already 13 joined the investigation and is fully cooperating with the investigating agency then it is difficult to comprehend why the respondent is insistent for custodial interrogation of the appellant? According to the appellant, in the instant case, the investigating agency should not have a slightest doubt that the appellant would not be available to the investigating agency for further investigation particularly when he has already joined investigation and is fully cooperating with the investigating agency.

24. Mr. Bhushan also submitted that according to the General Clauses Act, 1897 the court which grants the bail also has the power to cancel it. The grant of bail is an interim order. The court can always review its decision according to the subsequent facts, circumstances and new material. Mr. Bhushan also submitted that the exercise of grant, refusal and cancellation of bail can be undertaken by the court either at the instance of the accused or a public prosecutor or a complainant on finding fresh material and new circumstances at any point of time. Even the appellant's reluctance in not fully cooperating with the investigation could be a ground for cancellation of bail. 14

25. Mr. Bhushan submitted that a plain reading of the section 438 Cr.P.C. clearly reveals that the legislature has not placed any fetters on the court. In other words, the legislature has not circumscribed court's discretion in any manner while granting

anticipatory bail, therefore, the court should not limit the order only for a specified period till the charge-sheet is filed and thereafter compel the accused to surrender and ask for regular bail under section 439 Cr.P.C., meaning thereby the legislature has not envisaged that the life of the anticipatory bail would only last till the charge-sheet is filed. Mr. Bhushan submitted that when no embargo has been placed by the legislature then this court in some of its orders was not justified in placing this embargo.

26. Mr. Bhushan submitted that the discretion which has been granted by the legislature cannot and should not be curtailed by interpreting the provisions contrary to the legislative intention. The courts' discretion in grant or refusal of the anticipatory bail cannot be diluted by interpreting the provisions against the legislative intention. He submitted that the life is never static and every situation has to be assessed and evaluated in the context of emerging concerns as and when it arises. It is 15 difficult to visualize or anticipate all kinds of problems and situations which may arise in future. Law has been settled by an authoritative pronouncement of the Supreme Court

27. The Constitution Bench of this Court in Gurbaksh Singh Sibbia and Others v. State of Punjab (1980) 2 SCC 565 had an occasion to comprehensively deal with the scope and ambit of the concept of anticipatory bail. Section 438 Cr.P.C. is an extraordinary provision where the accused who apprehends his/her arrest on accusation of having committed a non-bailable offence can be granted bail in anticipation of arrest. The Constitution Bench's relevant observations are set out as under: "……..A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail".

28. Mr. Bhushan referred to a Constitution Bench judgment in Sibbia's case (supra) to strengthen his argument that no such embargo has been placed by the said judgment of the Constitution Bench. He placed heavy reliance on para 15 of Sibbia's case (supra), which reads as under: "15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a `Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to

refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

29. Mr. Bhushan submitted that the Constitution Bench in Sibbia's case (supra) also mentioned that "we see no valid reason for rewriting Section 438 with a view, not to expanding 17 the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal".

30. Mr. Bhushan submitted that the court's orders in some cases that anticipatory bail is granted till the charge-sheet is filed and thereafter the accused has to surrender and seek bail application under section 439 Cr.P.C. is neither envisaged by the provisions of the Act nor is in consonance with the law declared by a Constitution Bench in Sibbia's case (supra) nor it is in conformity with the fundamental principles of criminal jurisprudence that accused is considered to be innocent till he is found guilty nor in consonance with the provisions of the Constitution where individual's liberty in a democratic society is considered sacrosanct.

31. Mr. Mahesh Jethmalani, learned senior counsel appearing for respondent no. 2, submitted that looking to the facts and circumstances of this case, the High Court was justified in declining the anticipatory bail to the appellant. He submitted that the anticipatory bail ought to be granted in rarest of rare cases where the nature of offence is not very serious. He placed reliance on the case of Pokar Ram v. State of Rajasthan and Others (1985) 2 SCC 597 and submitted that in murder cases custodial interrogation is of paramount importance particularly when no eye witness account is available.

32. Mr. Jethmalani fairly submitted that the practice of passing orders of anticipatory bail operative for a few days and directing the accused to surrender before the Magistrate and apply for regular bail are contrary to the law laid down in Sibbia's case (supra). The decisions of this Court in Salauddin Abdulsamad Shaikh v. State of Maharashtra (1996) 1 SCC 667, K. L. Verma v. State and Another (1998) 9 SCC 348, Adri Dharan Das v. State of West Bengal (2005) 4 SCC 303 and Sunita Devi v. State of Bihar and Another (2005) 1 SCC 608 are in conflict with the above decision of the Constitution Bench in Sibbia's case (supra). He submitted that all these orders which 19 are contrary to the clear legislative intention of law laid down in Sibbia's case (supra) are per incuriam. He also submitted that in case the conflict between the two views is irreconcilable, the court is bound to follow

the judgment of the Constitution Bench over the subsequent decisions of Benches of lesser strength.

33. He placed reliance on N. Meera Rani v. Government of Tamil Nadu and Another (1989) 4 SCC 418 wherein it was perceived that there was a clear conflict between the judgment of the Constitution Bench and subsequent decisions of Benches of lesser strength. The Court ruled that the dictum in the judgment of the Constitution Bench has to be preferred over the subsequent decisions of the Bench of lesser strength. The Court observed thus:

"…….All subsequent decisions which are cited have to be read in the light of the Constitution Bench decision since they are decisions by Benches comprising of lesser number of judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution bench in Rameshwar Shaw's case (1964) 4 SCR 921"

34. He placed reliance on another judgment of this Court in Vijayalaxmi Cashew Company and Others v. Dy. 20 Commercial Tax Officer and Another (1996) 1 SCC 468. This Court held as under:

"……..It is not possible to uphold the contention that perception of the Supreme Court, as will appear from the later judgments, has changed in this regard. A judgment of a Five Judge Bench, which has not been doubted by any later judgment of the Supreme Court cannot be treated as overruled by implication."

35. He also placed reliance on Union of India and Others v. K. S. Subramanian (1976) 3 SCC 677 and State of U.P. v. Ram Chandra Trivedi (1976) 4 SCC 52 and submitted that in case of conflict, the High Court has to prefer the decision of a larger Bench to that of a smaller Bench.

36. Mr. Jethmalani submitted that not only the decision in Sibbia's case (supra) must be followed on account of the larger strength of the Bench that delivered it but the subsequent decisions must be held to be per incuriam and hence not binding since they have not taken into account the ratio of the judgment of the Constitution Bench.

37. He further submitted that as per the doctrine of `per incuriam', any judgment which has been passed in ignorance of or without considering a statutory provision or a binding precedent is not good law and the same ought to be ignored. A 21 perusal of the judgments in Salauddin Abdulsamad Shaikh v. State of Maharashtra, K. L. Verma v. State and Another, Adri Dharan Das v. State of West Bengal and Sunita Devi v. State of Bihar and Another (supra) indicates that none of these judgments have considered para 42 of Sibbia's case (supra) in proper perspective. According to Mr. Jethmalani, all subsequent decisions which have been cited above have to be read in the light of the Constitution Bench's decision in Sibbia's case (supra) since they are decisions of Benches comprised of

lesser number of judges. According to him, none of these subsequent decisions could be intended taking a view contrary to that of the Constitution Bench in Sibbia's case (supra).

38. Thus, the law laid down in para 42 by the Constitution Bench that the normal rule is not to limit operation of the order of anticipatory bail, was not taken into account by the courts passing the subsequent judgments. The observations made by the courts in the subsequent judgments have been made in ignorance of and without considering the law laid down in para 42 which was binding on them. In these circumstances, the observations made in the subsequent judgments to the effect that anticipatory bail should be for a limited period of time, must 22 be construed to be per incuriam and the decision of the Constitution Bench preferred.

39. He further submitted that the said issue came up for consideration before the Madras High Court reported in Palanikumar and Another v. State 2007 (4) CTC 1 wherein after discussing all the judgments of this court on the issue, the court held that the subsequent judgments were in conflict with the decision of the Constitution Bench in Sibbia's case (supra) and in accordance with the law of precedents, the judgment of the Constitution Bench is biding on all courts and the ratio of that judgment has to be applicable for all judgments decided by the Benches of same or smaller combinations. In the said judgment of Sibbia's case (supra) it was directed that the anticipatory bail should not be limited in period of time.

40. We have heard the learned counsel for the parties at great length and perused the written submissions filed by the learned counsel for the parties Relevance and importance of personal liberty

41. All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of 23 these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty.

42. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why "liberty" is called the very quintessence of a civilized existence.

43. Origin of "liberty"' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association

of fellow citizens so it was natural and necessary to man. Plato found his "republic" as the best source for the achievement of the self-realization of the people.

44. Chambers' Twentieth Century Dictionary defines "liberty" as "Freedom to do as one pleases, the unrestrained employment of natural rights, power of free chance, privileges, exemption, relaxation of restraint, the bounds within which certain privileges are enjoyed, freedom of speech and action beyond ordinary civility".

45. It is very difficult to define the "liberty". It has many facets and meanings. The philosophers and moralists have praised freedom and liberty but this term is difficult to define because it does not resist any interpretation. The term "liberty" may be defined as the affirmation by an individual or group of his or its own essence. It needs the presence of three factors, firstly, harmonious balance of personality, secondly, the absence of restraint upon the exercise of that affirmation and thirdly, organization of opportunities for the exercise of a continuous initiative.

46. "Liberty" may be defined as a power of acting according to the determinations of the will. According to Harold Laski, liberty was essentially an absence of restraints and John Stuard Mill 25 viewed that "all restraint", qua restraint is an evil". In the words of Jonathon Edwards, the meaning of "liberty" and freedom is: "Power, opportunity or advantage that any one has to do as he pleases, or, in other words, his being free from hindrance or impediment in the way of doing, or conducting in any respect, as he wills."

47. It can be found that "liberty" generally means the prevention of restraints and providing such opportunities, the denial of which would result in frustration and ultimately disorder. Restraints on man's liberty are laid down by power used through absolute discretion, which when used in this manner brings an end to "liberty" and freedom is lost. At the same time "liberty" without restraints would mean liberty won by one and lost by another. So "liberty" means doing of anything one desires but subject to the desire of others.

48. As John E.E.D. in his monograph Action on "Essays on Freedom and Power" wrote that Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization.

49. A distinguished former Attorney General for India, M.C. Setalvad in his treatise "War and Civil Liberties" observed that 26 the French Convention stipulates common happiness as the end of the society, whereas Bentham postulates the greatest happiness of the greatest number as the end of law. Article 19 of the Indian Constitution averts to freedom and it enumerates certain rights regarding individual freedom. These rights are vital and most important freedoms which lie at the very root of liberty.

50. He further observed that the concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the

individual and the enrichment of his personality are the true function and end of the state. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the state can reach their goal of perfection. In brief, according to this doctrine, the state exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The state exists for the benefit of the individual.

51. Mr. Setalvad in the same treatise further observed that it is also true that the individual cannot attain the highest in him 27 unless he is in possession of certain essential liberties which leave him free as it were to breathe and expand. According to Justice Holmes, these liberties are the indispensable conditions of a free society. The justification of the existence of such a state can only be the advancement of the interests of the individuals who compose it and who are its members. Therefore, in a properly constituted democratic state, there cannot be a conflict between the interests of the citizens and those of the state. The harmony, if not the identity, of the interests of the state and the individual, is the fundamental basis of the modern Democratic National State. And, yet the existence of the state and all government and even all law must mean in a measure the curtailment of the liberty of the individual. But such a surrender and curtailment of his liberty is essential in the interests of the citizens of the State. The individuals composing the state must, in their own interests and in order that they may be assured the existence of conditions in which they can, with a reasonable amount of freedom, carry on their other activities, endow those in authority over them to make laws and regulations and adopt measures which impose certain restrictions on the activities of the individuals.

52. Harold J. Laski in his monumental work in "Liberty in the Modern State" observed that liberty always demands a limitation on political authority. Power as such when uncontrolled is always the natural enemy of freedom.

53. Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book "The Development of Constitutional Guarantee of Liberty" that whatever, `liberty' may mean today, the liberty is guaranteed by our bills of rights, "is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust that society to individuals."

54. Blackstone in "Commentaries on the Laws of England", Vol.I, p.134 aptly observed that "Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law".

55. According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that, "Personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other

physical coercion in any manner that does not admit of legal justification." [Dicey on Constitutional Law, 9th Edn., pp.207-08]. According to him, it is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.

56. Eminent English Judge Lord Alfred Denning observed: "By personal freedom I mean freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person…. It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live."

57. Eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol.18 (1978), p.133 observed that "liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body". Right to life and personal liberty under the Constitution

58. The deem it appropriate to deal with the concept of personal liberty under the Indian and other Constitutions.

59. The Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individual such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the state. The inclusion of a Chapter in Constitution is in accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes.

60. The framers of the Indian Constitution followed the American model in adopting and incorporating the Fundamental Rights for the people of India. American Constitution provides that no person shall be deprived of his life, liberty, or property without due process of law. The due process clause not only protects the property but also life and liberty, similarly Article 21 of the Indian Constitution asserts the importance of Article 21. The said Article reads as under:- "no person shall be deprived for his life or personal liberty except according to procedure established by law" the right secured by Article 21 is available to every citizen or non-citizen, according to this article, two rights are secured.

1. Right to life

2. Right to personal liberty.

61. Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

62. This court defined the term "personal liberty" immediately after the Constitution came in force in India in the case of A. K. 32

Gopalan v. The State of Madras, AIR 1950 SC 27. The expression personal liberty' has wider as well narrow meaning. In the wider sense it includes not only immunity from arrest and detention but also freedom of speech, association etc. In the narrow sense, it means immunity from arrest and detention. The juristic conception of `personal liberty', when used the latter sense, is that it consists freedom of movement and locomotion.

63. Mukherjea, J. in the said judgment observed that `Personal Liberty' means liberty relating to or concerning the person or body of the individual and it is, in this sense, antithesis of physical restraint or coercion. `Personal Liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. This negative right constitutes the essence of personal liberty. Patanjali Shastri, J. however, said that whatever may be the generally accepted connotation of the expression `personal liberty', it was used in Article 21 in a sense which excludes the freedom dealt with in Article 19. Thus, the Court gave a narrow interpretation to `personal liberty'. This court excluded certain varieties of rights, as separately mentioned in 33

Article 19, from the purview of `personal liberty' guaranteed by Art. 21.

64. In Kharak Singh v. State of U.P. and Others AIR 1963 SC 1295, Subba Rao, J. defined `personal liberty, as a right of an individual to be free from restrictions or encroachment on his person whether these are directly imposed or indirectly brought about by calculated measure. The court held that `personal liberty' in Article 21 includes all varieties of freedoms except those included in Article 19.

65. In Maneka Gandhi v. Union of India and Another (1978) 1 SCC 248, this court expanded the scope of the expression `personal liberty' as used in Article 21 of the Constitution of India. The court rejected the argument that the expression `personal liberty' must be so interpreted as to avoid overlapping between Article 21 and Article 19(1). It was observed: "The expression `personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19." So, the phrase `personal liberty' is 34 very wide and includes all possible rights which go to constitute personal liberty, including those which are mentioned in Article 19.

66. Right to life is one of the basic human right and not even the State has the authority to violate that right. [State of A.P. v. Challa Ramakrishna Reddy and Others (2000) 5 SCC 712].

67. Article 21 is a declaration of deep faith and belief in human rights. In this pattern of guarantee woven in Chapter III of this Constitution, personal liberty of man is at root of Article 21 and each expression used in this Article enhances human dignity and values. It lays foundation for a society where rule of law has primary and not arbitrary or capricious exercise of power. [Kartar Singh v. State of Punjab and Others (1994) 3 SCC 569].

68. While examining the ambit, scope and content of the expression "personal liberty" in the said case, it was held that the term is used in this Article as a compendious term to include within itself all varieties of rights which goes to make up the "personal liberties" or man other than those dealt within several clauses of Article 19(1). While Article 19(1) deals with particular 35 species or attributes of that freedom, "personal liberty" in Article 21 takes on and comprises the residue.

69. The early approach to Article 21 which guarantees right to life and personal liberty was circumscribed by literal interpretation in A.K. Gopalan (supra). But in course of time, the scope of this application of the Article against arbitrary encroachment by the executives has been expanded by liberal interpretation of the components of the Article in tune with the relevant international understanding. Thus protection against arbitrary privation of "life" no longer means mere protection of death, or physical injury, but also an invasion of the right to "live" with human dignity and would include all these aspects of life which would go to make a man's life meaningful and worth living, such as his tradition, culture and heritage. [Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others (1981) 1 SCC 608]

70. Article 21 has received very liberal interpretation by this court. It was held: "The right to live with human dignity and same does not connote continued drudging. It takes within its fold some process of civilization which makes life worth living 36 and expanded concept of life would mean the tradition, culture, and heritage of the person concerned." [P. Rathinam/Nagbhusan Patnaik v. Union of India and Another (1994) 3 SCC 394.]

71. The object of Article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essentially for a person or a citizen. A fruitful and meaningful life presupposes full of dignity, honour, health and welfare. In the modern "Welfare Philosophy", it is for the State to ensure these essentials of life to all its citizens, and if possible to non-citizens. While invoking the provisions of Article 21, and by referring to the oft-quoted statement of Joseph Addision, "Better to die ten thousand deaths than wound my honour", the Apex court in Khedat Mazdoor Chetana Sangath v. State of M.P. and Others (1994) 6 SCC 260 posed to itself a question "If dignity or honour vanishes what remains of life"? This is the significance of the Right to Life and Personal Liberty guaranteed under the Constitution of India in its third part.

72. This court in Central Inland Water Transport Corporation Ltd. and Another v. Brojo Nath Ganguly and 37 Another (1986) 3 SCC 156 observed that the law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and justice, and unless there is anything to the contrary in the statute, Court must take cognizance of that fact and act accordingly.

73. This court remarked that an undertrial prisoner should not be put in fetters while he is being taken from prison to Court or back to prison from Court. Steps other than putting him in fetters will have to be taken to prevent his escape.

74. In Prem Shankar Shukla v. Delhi Administration (1980) 3 SCC 526, this court has made following observations: "……. The Punjab Police Manual, in so far as it puts the ordinary Indian beneath the better class breed (para 26.21A and 26.22 of Chapter XXVI) is untenable and arbitrary. Indian humans shall not be dichotomised and the common run discriminated against regarding handcuffs. The provisions in para 26.22 that every under-trial who is accused of a non-bailable offence punishable with more than 3 years prison term shall be routinely handcuffed is violative of Articles 14, 19 and 21. The nature of the accusation is not the criterion. The clear and present danger of escape breaking out of the police control is the determinant. And for this there must be clear material, not glib assumption, record of reasons and judicial oversight and summary hearing and direction by the court where the victim is produced. … Handcuffs are not summary punishment vicariously imposed at police level, at 38 once obnoxious and irreversible. Armed escorts, worth the salt, can overpower any unarmed under- trial and extra guards can make up exceptional needs. In very special situations, the application of irons is not ruled out. The same reasoning applies to (e) and (f). Why torture the prisoner because others will demonstrate or attempt his rescue? The plain law of under-trial custody is thus contrary to the unedifying escort practice. (Para 31)

Even in cases where, in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reason for doing so. Otherwise, under Article 21 the procedure will be unfair and bad in law. The minions of the police establishment must make good their security recipes by getting judicial approval. And, once the court directs that handcuffs shall be off, no escorting authority can overrule judicial direction. This is implicit in Article 21 which insists upon fairness, reasonableness and justice in the very procedure which authorities stringent deprivation of life and liberty. (Para 30)

It is implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limbs, it is sadistic, capricious, despotic and demoralizing to humble a man by manacling him. Such arbitrary conduct surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable so to do unless the State is able to make out that no other practical way of forbidding escape is available, the prisoner being so dangerous and desperate and the circumstances so hostile to safekeeping. (Para 23) Whether handcuffs or other restraint should be imposed on a

prisoner is a matter for the decision of the authority responsible for his custody. But there is room for imposing supervisory regime over the 39 exercise of that power. One sector of supervisory jurisdiction could appropriately lie with the court trying the accused, and it would be desirable for the custodial authority to inform that court of the circumstances in which, and the justification for, imposing a restraint on the body of the accused. It should be for the court concerned to work out the modalities of the procedure requisite for the purpose of enforcing such control."

75. After dealing with the concept of life and liberty under the Indian Constitution, we would like to have the brief survey of other countries to ascertain how life and liberty has been protected in other countries.

UNITED KINGDOM

76. Life and personal liberty has been given prime importance in the United Kingdom. It was in 1215 that the people of England revolted against King John and enforced their rights, first time the King had acknowledged that there were certain rights of the subject could be called Magna Carta 1215. In 1628 the petition of rights was presented to King Charles-I which was the 1st step in the transfer of Sovereignty from the King to Parliament. It was passed as the Bill of Rights 1689.

77. In the Magna Carta, it is stated "no free man shall be taken, or imprisoned or disseised or outlawed or banished or any ways 40 destroyed, nor will the King pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land".]

78. Right to life is the most fundamental of all human rights and any decision affecting human right or which may put an individual's life at risk must call for the most anxious scrutiny. See: Bugdaycay v. Secretary of State for the Home Department (1987) 1 All ER 940. The sanctity of human life is probably the most fundamental of the human social values. It is recognized in all civilized societies and their legal system and by the internationally recognized statements of human rights. See: R on the application of Pretty v. Director of Public Prosecutions (2002) 1 All ER 1.

U.S.A.

79. The importance of personal liberty is reflected in the Fifth Amendment to the Constitution of U.S.A. (1791) which declares as under :-

"No person shall be…..deprived of his life, liberty or property, without due process of law." (The `due process' clause was adopted in s.1(a) of the Canadian Bill of Rights Act, 1960. In the Canada Act, 1982, this expression has been substituted by `the principles of fundamental justice' [S.7]. 41

80. The Fourteenth Amendment imposes similar limitation on the State authorities. These two provisions are conveniently referred to as the `due process clauses'. Under the above clauses the American Judiciary claims to declare a law as bad, if it is not in

accordance with `due process', even though the legislation may be within the competence of the Legislature concerned. Due process is conveniently understood means procedural regularity and fairness. (Constitutional Interpretation by Craig R. Ducat, 8 th Edn. 2002 p.475.).

WEST GERMANY

81. Article 2(2) of the West German Constitution (1948) declares:

"Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of the legal order."

Though the freedom of life and liberty guaranteed by the above Article may be restricted, such restriction will be valid only if it is in conformity with the `legal order' (or `pursuant to a law, according to official translation). Being a basic right, the freedom guaranteed by Article 2(2) is binding on the legislative, administrative and judicial organs of the State [Article 1(3)]. This 42 gives the individual the rights to challenge the validity of a law or an executive act violative the freedom of the person by a constitutional complaint to the Federal Constitutional Court, under Article 93. Procedural guarantee is given by Articles 103(1) and 104. Article 104(1)-2(2) provides: "(1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein……. (2) Only the Judge shall decide on the admissibility and continued deprivation of liberty."

82. These provisions correspond to Article 21 of our Constitution and the court is empowered to set a man to liberty if it appears that he has been imprisoned without the authority of a formal law or in contravention of the procedure prescribed there.

JAPAN

83. Article XXXI of the Japanese Constitution of 1946 says : "No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law." This article is similar to Article 21 of our Constitution save that it includes other criminal penalties, such as fine or forfeiture within its ambit.43

CANADA

84. S. 1(1) of the Canadian Bill of Rights Act, 1960, adopted the `Due Process' Clause from the American Constitution. But the difference in the Canadian set-up was due to the fact that this Act was not a constitutional instrument to impose a direct limitation on the Legislature but only a statute for interpretation of Canadian status, which, again, could be excluded from the purview of the Act of 1960, in particular cases, by an express declaration made by the Canadian Parliament itself (s.2). The result was obvious : The Canadian Supreme Court in R. v. Curr (1972) S.C.R. 889 held that the Canadian Court would not import `substantive reasonableness' into s.1(a), because of the unsalutary experience of substantive due process in the U.S.A.; and that as to `procedural

reasonableness', s.1(a) of the Bill of Rights Act only referred to `the legal processes recognized by Parliament and the Courts in Canada'. The result was that in Canada, the `due process clause' lost its utility as an instrument of judicial review of legislation and it came to mean practically the same thing as whatever the Legislature prescribes, – much the same as `procedure established by law' in Article 21 of the Constitution of India, as interpreted in A.K. Gopalan (supra). 44

BANGADESH

85. Article 32 of the Constitution of Bangladesh, 1972 [3 SCW 385] reads as under:

"No person shall be deprived of life or personal liberty save in accordance with law."

This provision is similar to Article 21 of the Indian Constitution. Consequently, unless controlled by some other provision, it should be interpreted as in India.

PAKISTAN

86. Article 9 Right to life and Liberty. – "Security of Person : No person shall be deprived of life and liberty save in accordance with law."

NEPAL

87. In the 1962 – Constitution of Nepal, there is Article 11(1) which deals with right to life and liberty which is identical with Article 21 of the Indian Constitution.

INTERNATIONAL CHARTERS

88. Universal Declaration, 1948. – Article 3 of the Universal Declaration says:

"Everyone has the right to life, liberty and security of person."

Article 9 provides:

"No one shall be subjected to arbitrary arrest, detention or exile."

Cl.10 says:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." [As to its legal effect, see M. v. Organisation Belge, (1972) 45 Inter, LR 446 (447, 451, et. Sq.)]

89. Covenant on Civil and Political Rights – Article 9(1) of the U.N. 1966, 1966 says:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

90. European Convention on Human Rights, 1950. – This Convention contains a most elaborate and detailed codification of the rights and safeguards for the protection of life and personal liberty against arbitrary invasion.

91. In every civilized democratic country, liberty is considered to be the most precious human right of every person. The Law Commission of India in its 177th Report under the heading `Introduction to the doctrine of "arrest" has described as follows: 46

"Liberty is the most precious of all the human rights". It has been the founding faith of the human race for more than 200 years. Both the American Declaration of Independence, 1776 and the French Declaration of the Rights of Man and the Citizen, 1789, spoke of liberty being one of the natural and inalienable rights of man. The universal declaration of human rights adopted by the general assembly on United Nations on December 10, 1948 contains several articles designed to protect and promote the liberty of individual. So does the international covenant on civil and political rights, 1996. Above all, Article 21 of the Constitution of India proclaims that no one shall be deprived of his right to personal liberty except in accordance with the procedure prescribed by law. Even Article 20(1) & (2) and Article 22 are born out of a concern for human liberty. As it is often said, "one realizes the value of liberty only when he is deprived of it." Liberty, along with equality is the most fundamental of human rights and the fundamental freedoms guaranteed by the Constitution. Of equal importance is the maintenance of peace, law and order in the society. Unless, there is peace, no real progress is possible. Societal peace lends stability and security to the polity. It provides the necessary conditions for growth, whether it is in the economic sphere or in the scientific and technological spheres."

92. Just as the Liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order. Both are equally important.

93. It is a matter of common knowledge that a large number of undertrials are languishing in jail for a long time even for allegedly committing very minor offences. This is because section 438 Cr.P.C. has not been allowed its full play. The 47

Constitution Bench in Sibbia's case (supra) clearly mentioned that section 438 Cr.P.C. is extraordinary because it was incorporated in the Code of Criminal Procedure, 1973 and before that other provisions for grant of bail were sections 437 and 439 Cr.P.C. It is not extraordinary in the sense that it should be invoked only in exceptional or rare cases. Some courts of smaller strength have erroneously observed that section 438 Cr.P.C. should be invoked only in exceptional or rare cases. Those orders are contrary to the law laid down by the judgment of the Constitution Bench in Sibbia's case (supra). According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the accused. The courts considering the bail application should try to maintain fine balance between the societal interest vis-`-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused that the accused is presumed to be innocent till he is found guilty by the competent court.48

94. The complaint filed against the accused needs to be thoroughly examined including the aspect whether the complainant has filed false or frivolous complaint on

earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

95. The gravity of charge and exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

96. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

97. A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage. Whether the powers under section 438 Cr.P.C. are subject to limitation of section 437 Cr.P.C.?

98. The question which arises for consideration is whether the powers under section 438 Cr.P.C. are unguided or uncanalised or are subject to all the limitations of section 437 Cr.P.C.? The Constitution Bench in Sibbia's case (supra) has clearly observed that there is no justification for reading into section 438 Cr.P.C. and the limitations mentioned in section 437 Cr.P.C. The Court further observed that the plentitude of the section must be given its full play. The Constitution Bench has also observed that the High Court is not right in observing that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by section 438 Cr.P.C. to a dead letter. The Court observed that "We do not see why the provisions of Section 438 Cr.P.C. should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable."

99. As aptly observed in Sibbia's case (supra) that a wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail. 51

100. The Constitution Bench in the same judgment also observed that a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to

submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall enlarged on bail.

101. The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the public prosecutor. After hearing the public prosecutor the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The public prosecutor or complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.

102. The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in Sibbia's case (supra).

103. It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the public prosecutor or the complainant on finding new material or circumstances at any point of time.

104. The intention of the legislature is quite clear that the power of grant or refusal of bail is entirely discretionary. The Constitution Bench in Sibbia's case (supra) has clearly stated that grant and refusal is discretionary and it should depend on the facts and circumstances of each case. The Constitution Bench in the said case has aptly observed that we must respect the wisdom of the Legislature entrusting this power to the superior courts namely, the High Court and the Court of Session. The Constitution Bench observed as under:

"We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognized over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the grounds that, after all "the legislature in, its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected."

GRANT OF BAIL FOR LIMITED PERIOD IS CONTRARY TO THE LEGISLATIVE INTENTION AND LAW DECLARED BY THE CONSTITUTION BENCH:

105. The court which grants the bail has the right to cancel the bail according to the provisions of the General Clauses Act but ordinarily after hearing the public prosecutor

when the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case.

106. The judgment in Salauddin Abdulsamad Shaikh (supra) is contrary to legislative intent and the spirit of the very provisions of the anticipatory bail itself and has resulted in an artificial and unreasonable restriction on the scope of enactment contrary to the legislative intention.

107. The restriction on the provision of anticipatory bail under section 438 Cr.P.C. limits the personal liberty of the accused granted under Article 21 of the constitution. The added observation is nowhere found in the enactment and bringing in restrictions which are not found in the enactment is again an unreasonable restriction. It would not stand the test of fairness and reasonableness which is implicit in Article 21 of the Constitution after the decision in Maneka Gandhi's case (supra) in which the court observed that in order to meet the challenge of Article 21 of the Constitution the procedure established by law for depriving a person of his liberty must be fair, just and reasonable.

108. Section 438 Cr.P.C. does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the concerned court would be fully justified in imposing conditions including direction of joining investigation.

109. The court does not use the expression `anticipatory bail' but it provides for issuance of direction for the release on bail by the High Court or the Court of Sessions in the event of arrest. According to the aforesaid judgment of Salauddin's case, the accused has to surrender before the trial court and only thereafter he/she can make prayer for grant of bail by the trial court. The trial court would release the accused only after he has surrendered.

110. In pursuance to the order of the Court of Sessions or the High Court, once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

111. The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating or concerned agency may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an application before the court and gets the relief from the court for a limited period and thereafter he has to surrender before the trial court and only thereafter his bail application can be considered and life of anticipatory bail comes to an end. This may lead to disastrous and unfortunate consequences. The applicant who may not have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. This finding of the said judgment (supra) is contrary to the legislative intention and law which has been declared by a Constitution Bench of this court in Sibbia's case (supra).

112. The validity of the restrictions imposed by the Apex Court, namely, that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail. This is contrary to the basic intention and spirit of section 438 Cr.P.C. It is also contrary to Article 21 of the Constitution. The test of fairness and reasonableness is implicit under Article 21 of the Constitution of India. Directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty.

113. It is a settled legal position crystallized by the Constitution Bench of this court in Sibbia's case (supra) that the courts should not impose restrictions on the ambit and scope of section 438 Cr.P.C. which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it.

114. It is unreasonable to lay down strict, inflexible and rigid rules for exercise of such discretion by limiting the period of which an order under this section could be granted. We deem it appropriate to reproduce some observations of the judgment of the Constitution Bench of this court in the Sibbia's case (supra).

"The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit in Article 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21. Therefore, while determining the scope of Section 438, the court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned Counsel, would be violative of Article 21, irrespective of whether it is imposed by legislation or by judicial decision.

Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence."

"I desire in the first instance to point out that the discretion given by the section is very wide. . . Now it seems to me that when the Act is so expressed to provide a wide discretion, … it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

"The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

115. The Apex Court in Salauddin's case (supra) held that anticipatory bail should be granted only for a limited period and on the expiry of that duration it should be left to the regular court to deal with the matter is not the correct view. The reasons quoted in the said judgment is that anticipatory bail is granted at a stage when an investigation is incomplete and the court is not informed about the nature of evidence against the alleged offender.

116. The said reason would not be right as the restriction is not seen in the enactment and bail orders by the High Court and Sessions Court are granted under sections 437 and 439 also at such stages and they are granted till the trial.

117. The view expressed by this Court in all the above referred judgments have to be reviewed and once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when the anticipatory bail granted by the court is cancelled by the court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused.

SCOPE AND AMBIT OF ANTICIPATORY BAIL:

118. A good deal of misunderstanding with regard to the ambit and scope of section 438 Cr.P.C. could have been avoided in case the Constitution Bench decision of this court in Sibbia's case (supra) was correctly understood, appreciated and applied.

119. This Court in the Sibbia's case (supra) laid down the following principles with regard to anticipatory bail:

a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.

b) Filing of FIR is not a condition precedent to exercise of power under section 438.

c) Order under section 438 would not affect the right of police to conduct investigation.

d) Conditions mentioned in section 437 cannot be read into section 438.

e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.

f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re- examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

120. The Law Commission in July 2002 has severely criticized the police of our country for the arbitrary use of power of arrest which, the Commission said, is the result of the vast discretionary powers conferred upon them by this Code. The Commission expressed concern that there is no internal mechanism within the police department to prevent misuse of law in this manner and the stark reality that complaint lodged in this regard does not bring any result. The Commission intends to suggest amendments in the Criminal Procedure Code and has invited suggestions from various quarters. Reference is made in this Article to the 41st Report of the Law Commission wherein the Commission saw `no justification' to require a person to submit to custody, remain in prison for some days and then apply for bail even when there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty. Discretionary power to order anticipatory bail is required to be exercised keeping in mind these sentiments and spirit of the judgments of this court in Sibbia's case (supra) and Joginder Kumar v. State of U.P. and Others (1994) 4 SCC 260.

Relevant consideration for exercise of the power

121. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honor.

122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice; iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34

and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of

genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

124. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

125. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available.

126. Irrational and Indiscriminate arrest are gross violation of human rights. In Joginder Kumar's case (supra), a three Judge Bench of this Court has referred to the 3rd report of the National Police Commission, in which it is mentioned that the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails. 66

127. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.

128. In case, the State consider the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive.

1) Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.

2) Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.

3) Direct the accused to execute bonds; 4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.

5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

6) Bank accounts be frozen for small duration during investigation. 67

129) In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer.

130. Exercise of jurisdiction under section 438 of Cr.P.C. is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications.

131. It is imperative for the High Courts through its judicial academies to periodically organize workshops, symposiums, seminars and lectures by the experts to sensitize judicial officers, police officers and investigating officers so that they can properly comprehend the importance of personal liberty vis-`-vis social interests. They must learn to maintain fine balance between the personal liberty and the social interests.

132. The performance of the judicial officers must be periodically evaluated on the basis of the cases decided by them. In case, they have not been able to maintain balance between personal liberty and societal interests, the lacunae must be pointed out to them and they may be asked to take corrective measures in future. Ultimately, the entire discretion of grant or refusal of bail has to be left to the judicial officers and all concerned must ensure that grant or refusal of bail is considered basically on the facts and circumstances of each case.

133. In our considered view, the Constitution Bench in Sibbia's case (supra) has comprehensively dealt with almost all aspects of the concept of anticipatory bail under section 438 Cr.P.C. A number of judgments have been referred to by the learned counsel

for the parties consisting of Benches of smaller strength where the courts have observed that the anticipatory bail should be of limited duration only and ordinarily on expiry of that duration or standard duration, the court granting the anticipatory bail should leave it to the regular court to deal with the matter. This view is clearly contrary to the view taken by the Constitution Bench in Sibbia's case (supra). In the preceding paragraphs, it is clearly spelt out that no limitation has been envisaged by the Legislature under section 438 Cr.P.C. The Constitution Bench has aptly observed that "we see no valid reason for rewriting section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court or the Court of Session but, for the purpose of limiting it".

134. In view of the clear declaration of law laid down by the Constitution Bench in Sibbia's case (supra), it would not be proper to limit the life of anticipatory bail. When the court observed that the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail, that means the life of section 438 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in Sibbia's case (supra) clearly observed that it is not necessary to re-write section 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under section 438 Cr.P.C. granting bail cannot be curtailed.

135. The ratio of the judgment of the Constitution Bench in Sibbia's case (supra) perhaps was not brought to the notice of their Lordships who had decided the cases of Salauddin Abdulsamad Shaikh v. State of Maharashtra, K. L. Verma v. State and Another, Adri Dharan Das v. State of West Bengal and Sunita Devi v. State of Bihar and Another (supra).

136. In Naresh Kumar Yadav v. Ravindra Kumar (2008) 1 SCC 632, a two-Judge Bench of this Court observed "the power exercisable under section 438 Cr.P.C. is somewhat extraordinary in character and it should be exercised only in exceptional cases. This approach is contrary to the legislative intention and the Constitution Bench's decision in Sibbia's case (supra).

137. We deem it appropriate to reiterate and assert that discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under section 438 Cr.P.C. should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject to the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

138. The judgments and orders mentioned in paras 135 and 136 are clearly contrary to the law declared by the Constitution Bench of this Court in Sibbia's case (supra). These judgments and orders are also contrary to the legislative intention. The Court would not be justified in re-writing section 438 Cr.P.C.

139. Now we deem it imperative to examine the issue of per incuriam raised by the learned counsel for the parties. In Young v. Bristol Aeroplane Company Limited (1994) All ER 293 the House of Lords observed that `Incuria' literally means `carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The `quotable in law' is avoided and ignored if it is rendered, `in ignoratium of a statute or other binding authority. The same

has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

"……. In Halsbury's Laws of England (4th Edn.) Vol. 26: Judgment and Orders: Judicial Decisions as Authorities (pp. 297-98, para 578) per incuriam has been elucidated as under:

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (Young v. Bristol Aero plane Co. Ltd., 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300. In Huddersfield Police Authority v. Watson, 1947 KB 842 : (1947) 2 All ER 193.); or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the terms of a statute or rule having statutory force."

140. Lord Godard, C.J. in Huddersfield Police Authority v. Watson (1947) 2 All ER 193 observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam.

141. This court in Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs. and Others (2000) 4 SCC 262 observed as under:

"The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

142. In a Constitution Bench judgment of this Court in Union of India v. Raghubir Singh (1989) 2 SCC 754, Chief Justice Pathak observed as under:

"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

143. In Thota Sesharathamma and another v. Thota Manikyamma (Dead) by LRs. and others (1991) 4 SCC 312 a two Judge Bench of this Court held that the three Judge Bench decision in the case of Mst. Karmi v. Amru (1972) 4 SCC 86 was per incuriam and observed as under: "…It is a short judgment without adverting to any provisions of Section 14 (1) or 14(2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in Badri Pershad v. Smt. Kanso Devi. The decision in Mst. Karmi cannot be considered as an authority on the ambit and scope of Section 14(1) and (2) of the Act." 74

144. In R. Thiruvirkolam v. Presiding Officer and Another (1997) 1 SCC 9 a two Judge Bench of this Court observed that the question is whether it was bound to accept the decision rendered in Gujarat Steel Tubes Ltd. v. Mazdoor Sabha (1980) 2 SCC 593, which was not in conformity with the decision of a Constitution Bench in P.H. Kalyani v. Air France (1964) 2 SCR 104. J.S. Verma, J. speaking for the court observed as under:

"With great respect, we must say that the above-quoted observations in Gujarat Steel at P. 215 are not in line with the decision in Kalyani which was binding or with D.C. Roy to which the learned Judge, Krishna Iyer, J. was a party. It also does not match with the underlying juristic principle discussed in Wade. For the reasons, we are bound to follow the Constitution Bench decision in Kalyani, which is the binding authority on the point."

145. In Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangra and others (2001) 4 SCC 448 a Constitution Bench of this Court ruled that a decision of a Constitution Bench of this Court binds a Bench of two learned Judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. 75

146. A Constitution Bench of this Court in Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 673 has observed that the law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

147. A three-Judge Bench of this court in Official Liquidator v. Dayanand and Others (2008) 10 SCC 1 again reiterated the clear position of law that by virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in State of Karnataka and Others v. Umadevi (3) and Others (2006) 4 SCC 1 is binding on all courts including this court till the same is overruled by a larger Bench. The ratio of the Constitution Bench has to be followed by Benches of lesser strength. In para 90, the court observed as under:- "We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed."

148. In Subhash Chandra and Another v. Delhi Subordinate Services Selection Board and Others (2009) 15 SCC 458, this court again reiterated the settled legal position that Benches of lesser strength are bound by the judgments of the Constitution Bench and any Bench of smaller strength taking contrary view is per incuriam. The court in para 110 observed as under:-

"Should we consider S. Pushpa v. Sivachanmugavelu (2005) 3 SCC 1 to be an obiter following the said decision is the question which arises herein. We think we should. The decisions referred to hereinbefore clearly suggest that we are bound by a Constitution Bench decision. We have referred to two Constitution Bench decisions, namely, Marri Chandra Shekhar Rao v. Seth G.S. Medical College (1990) 3 SCC 139 and E.V. Chinnaiah v. State of A.P. (2005) 1 SCC 394. Marri Chandra Shekhar Rao (supra) had been followed by this Court in a large number of decisions including the three-Judge Bench decisions. S. Pushpa (supra) therefore, could not have ignored either Marri Chandra Shekhar Rao (supra) or other decisions following the same only on the basis of an administrative

circular issued or otherwise and more so when the constitutional scheme as contained in clause (1) of Articles 341 and 342 of the Constitution of India putting the State and Union Territory in the same bracket. Following Official Liquidator v. Dayanand and Others (2008) 10 SCC 1 therefore, we are of the opinion that the dicta in S. Push pa (supra) is an obiter and does not lay down any binding ratio."

149. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength. In the instant case, judgments mentioned in paragraphs 135 and 136 are by two or three judges of this court. These judgments have clearly ignored a Constitution Bench judgment of this court in Sibbia's case (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under section 438 of Cr.P.C.. Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are per incuriam.

150. In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength.

151. In the instant case there is a direct judgment of the Constitution Bench of this court in Sibbia's case (supra) dealing with exactly the same issue regarding ambit, scope and object of the concept of anticipatory bail enumerated under section 438 Cr.P.C. The controversy is no longer res integra. We are clearly bound to follow the said judgment of the Constitution Bench. The judicial discipline obliges us to follow the said judgment in letter and spirit.

152. In our considered view the impugned judgment and order of the High Court declining anticipatory bail to the appellant cannot be sustained and is consequently set aside.

153. We direct the appellant to join the investigation and fully cooperate with the investigating agency. In the event of arrest the appellant shall be released on bail on his furnishing a personal bond in the sum of Rs.50,000/- with two sureties in the like amount to the satisfaction of the arresting officer.

154. Consequently, this appeal is allowed and disposed of in terms of the aforementioned observations.

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DATE : 11th JULY, 2013

HIGH COURT OF BOMBAY

CORAM: ABHAY M. THIPSAY, J.

CRIMINAL APPLICATION NO.514 OF 2013

WITH CRIMINAL APPLICATION NO.515 OF 2013

Lalit Laxmandas Soni And Anr ....Vs....The State Of Union Territory & Anr.

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Index Note – Bail - Bail is not to be refused merely because a prima facie case exists- Sections 406, 420,34 of IPC- The learned Magistrate directed the applicants to be released on bail - The Sessions Judge cancelled the bail granted by the Magistrate- High Court confirmed order of Magistrate granting Bail- Held, Bail is not to be refused merely because a prima facie case exists- It is not possible to accept the reasoning of the learned Sessions Judge - The principles governing grant of bail are well settled. - The law does not favour pretrial detention for an unduly long period. It is also well settled that the power to refuse bail is not to be exercised, as if punishment before the trial, is being imposed - All said and done, the elementary principle that 'pretrial detention can never be punitive in nature', has not undergone any change over the years- Bail is not to be refused merely because a *prima facie* case exists (except in cases of statutory prohibition, as imposed by some special statutes) - The learned Sessions Judge overlooked the basic concept of bail and rather unnecessarily criticized the order passed by the learned Magistrate - The orders passed by the learned Sessions Judge, cancelling the bail granted to the applicants, are set aside - The applicants shall remain on bail. (Para 8,9,13,14)

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Mr.B.D.Chauhan Advocate for the Applicants.
Mr.D.A.Nalawade Advocate for Union Territory / Respondent No.1.
Mrs.G.P.Mulekar APP for the State / Respondent No.2.

ORAL ORDER :

1 These two applications can be conveniently disposed of by this common order as the applicants in both the applications are the same and the questions needing determination are also same.

2 The applicants are the accused in two cases registered by Nani Daman Police Station. The cases are in respect of the offences punishable under Sections 406 and 420 of the Indian Penal Code (IPC) read with Section 34 thereof. In one case, i.e. C.R.No.30 of 2013, the applicants were apprehended on 24.1.2013. While they were in custody in that case, they were apprehended in C.R.No.101 of 2012 on 12.2.2013. The police completed the investigation of both these cases and filed chargesheets in both the matters. The learned Magistrate by two separate orders, one passed on 3.4.2013 and the other on 15.4.2013, directed the applicants to be released on bail in the sum of Rs.25,000/each. Aggrieved by the orders releasing the applicants on bail, the Union Territory of Daman moved the

Sessions court for cancellation of bail granted to the applicants. The Sessions Judge after hearing the parties, by two separate orders, passed on 9.5.2013, canceled the bail granted by the Magistrate to the applicants. The applicants, being aggrieved by this cancellation, have approached this
court, by way of the present application.

3 I have heard B.D.Chauhan, the learned counsel for the Applicants, and Mr.D.A.Nalawade, the learned Public Prosecutor for Union Territory. With the assistance of the learned Public Prosecutor, I have ascertained the nature of allegations against the applicants. Undoubtedly, the applicants are alleged to have committed the offences of cheating and defrauding a number of persons. The amount allegedly earned by the applicants by committing the offences in question is estimated to be around Rs.40 Lac. It also appears that this amount could not be recovered from, or at the instance of the applicants, in the course of investigation.

4 I have carefully gone through the orders passed by the learned Magistrate, as also the orders passed by the learned Sessions Judge.

5 The Magistrate, in his orders, observed that chargesheet had been filed and investigation was over. He also observed that the case would not be decided immediately, and that, it would take sometime for the disposal of the case. He also observed that the offences allegedly committed by the applicants were neither punishable with death nor imprisonment for life. Upon these considerations, he passed the bail orders.

6 The learned Sessions Judge observed that the applicants were involved in a financial fraud of huge amounts, and that, one of the applicants was arrested earlier in a crime registered in the year 2007. The view of the learned Sessions Judge was that the Magistrate had not passed any reasoned order and that the order passed by the Magistrate was "cryptic and vague." The Sessions Judge also observed that the order had been passed arbitrarily without considering the fact that *right of public at large and society was involved in the matter*, and that, the Magistrate had not considered the nature, seriousness of the offense, and the impact on the society. By terming the order of the Magistrate as *perverse*, he canceled the bail.

7 A substantial part of the order passed by the learned Sessions Judge consists of recording the contentions advanced by the learned Public Prosecutor and the learned counsel for the accused persons. He has also referred to, and reproduced, the observations made by the Supreme Court of India and various High courts in several reported cases on which reliance was placed by the Public Prosecutor. His reasoning, however, is found only in paragraph 12 of the impugned order, in which the learned Sessions Judge discussed the nature of allegations against the applicants, that there were two previous cases registered against the accused no.1, and that, the present offences were committed when the accused no.1 was on bail in a previous case. The learned Sessions Judge observed

> *".....the JMFC has not passed reasoned order. His order is cryptic and vague. He has released the respondents-accused on bail only on the ground that charge-sheet has been filed against them. He has not taken into consideration the material in the form of*

> *documents and the evidence of the witnesses brought on record before him. Therefore, the order passed by JMFC, Daman is not justifiable. JMFC, Daman has passed order arbitrarily without considering the fact that right of the public at large and society is involved in the matter. He has not considered the nature, seriousness of the offence and the impact on the society while deciding the application for bail. Therefore, in my opinion, the order under revision is perverse and cannot be sustained in law."*

8 It is not possible to accept the reasoning of the learned Sessions Judge. In the first place, it is difficult to hold that the learned Magistrate had not given any reasons for granting bail to the applicants. All the factors mentioned by the learned Magistrate, namely, that *the completion of investigation*, *the inability to proceed with the trial forthwith,* and the fact that *the offences were not punishable with death or imprisonment for life,* were relevant considerations, while deciding whether or not, to grant bail to the applicants.

9 The principles governing grant of bail are well settled. Grant of bail is discretionary. The law does not favour pretrial detention for an unduly long period. It is also well settled that the power to refuse bail is not to be exercised, as if punishment before the trial, is being imposed. It is only in cases of offences which are punishable with death or imprisonment for life, that the courts are ordinarily reluctant to release an accused on bail, but even that is not because the desire to inflict punishment upon the supposed offender before trial; but only because of the inherent possibility of the accused persons absconding in view of the severity of the punishment, that would be imposed upon an accused on conviction.

10 Moreover, it is also well settled that considerations for grant of bail and considerations for cancellation of bail are quite distinct and different. Rejection of bail in a nonbailable case at the initial stage and the cancellation of bail already granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. [See Dolatram v. State of Haryana, (1995) 1 SCC 349].

11 Though it cannot be said that bail once granted can be cancelled only on account of some supervening circumstances, for cancelling the bail once granted on other grounds, the order granting bail must appear to have been passed on totally irrelevant considerations or exhibit nonapplication of mind, or would be categorized as 'perverse.' The criticism of the order passed by the Magistrate as 'perverse', as done by the Sessions Judge, does not seem to be justified, as the grounds on which the Magistrate granted bail cannot be termed as irrelevant.

12 In **Bhagirath Singh Judeja vs. State of Gujarat, AIR 1984 Supreme Court of India 372**, Their Lordships of the Supreme Court have held that the only two material considerations for cancellation of bail are (i) Apprehension of the accused absconding, and (ii) of his tampering with prosecution witnesses.

13 The learned Sessions Judge did not discuss, in his order, as to whether there was any likelihood of the applicants absconding or not facing the trial, or tampering with the witnesses. Thus, he cancelled the bail without being satisfied on these aspects.It does not appear that the applicants would not be available to face the trial.

14 All said and done, the elementary principle that 'pretrial detention can never be punitive in nature', has not undergone any change over the years. Bail is not to be refused merely because a *prima facie* case exists (except in cases of statutory prohibition, as imposed by some special statutes). The learned Sessions Judge overlooked the basic concept of bail and rather unnecessarily criticized the order passed by the learned Magistrate. The orders passed by him give an impression that he refused bail because he was of the view that the accused appeared to have committed the alleged offences.

15 In my opinion, the cancellation of bail granted to the applicants, as done by the learned Sessions Judge, was not justified. The orders passed by the Sessions Judge, therefore, need to be interfered with, and the liberty of the applicants needs to be restored to them.

16 It, however, appears that the amount of bail fixed by the Magistrate is on a little lower side. It is customary, in case of an offense involving financial frauds, to fix the amount of bail somewhat higher.It would also be necessary to impose appropriate conditions upon the applicants, to reduce the possibility, if any, of their absconding, or not being available for trial.

17 The orders dated 9.5.2013, passed by the learned Sessions Judge, canceling the bail granted to the applicants, are set aside. The applicants shall remain on bail.However, the bail amount is enhanced to Rs.50,000/each, in each of the cases.

18 The learned counsel for the applicants submits that the applicants have already furnished a surety in the sum of Rs.25,000/ each, in both the cases. In that case, they would be required only to furnish an additional security in the sum of Rs.25,000/each, in each of the cases. This security may be offered by them by depositing cash of Rs.25,000/each,in each case, within a period of ten (10) days from today.

19 The applicants shall report to the learned Magistrate on the First and Third Monday of every calendar month, till the disposal of the case against them.

20 Should the court remain closed on any given Monday on account of a holiday, the applicants shall report to the learned Magistrate on the next working day.21 The applications are allowed in the aforesaid terms and stand disposed of accordingly.

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Cross citation : 2013 ALL MR (Cri) 2273

THE HIGH COURT OF JUDICATURE AT BOMBAY

ABHAY M.THIPSAY, J.

Shamil Saquib Nachan ..**V s .** The State of Maharashtra
Criminal Bail Application No.512 of 2013.
6th May, 2013**.**

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A) Bail - Interpretation – A case required to be put forth for bail, is less stronger than that would be required for a discharge - accused is not required to show sufficient grounds that case against him is not made out but to so only reasonable grounds- If accused is able to show the reasonable ground not sufficient grounds that case against him is not made out then bail can be granted - Judging existence of prima facie case **at stage of bail would be different from prima facie case at stage of framing a charge- an accused would never be required to put forth a stronger case for bail, than that would be required for a discharge - It is not that the court is required to come to a positive finding that the applicant for bail is not guilty of an crime before grant of bail.**

> A careful analysis of the relevant provisions and the observations made by the Supreme Court of India in the aforesaid case of Ranjitsing Sharma (supra), lead to the following conclusion about the correct legal position in that regard. For enabling the court to exercise its discretion in favour of a person accused of having committed an offence punishable under the M.C.O.C. Act, what is required is existence of reasonable grounds for believing that the applicant before the court is not guilty of an organized crime. The satisfaction that the "accused is not guilty" is not contemplated by the relevant provisions and what is required is the satisfaction that there are reasonable grounds for believing the accused to be not guilty. Again, the phrase "reasonable grounds" should not be confused with the phrase "sufficient grounds" It imports a lesser degree of satisfaction than "sufficient grounds." It cannot be lost sight of that the Special court would be entitled to discharge an accused if it considers that there is no sufficient ground for proceeding against the accused. Moreover, judging the existence of a prima facie case at the stage of bail, would not be the same as judging the existence of a prima facie case for proceeding against an accused by framing a Charge. (para 26)
>
> It is too obvious that an accused would never be required to put forth a stronger case for bail, than that would be required for a discharge. (para 28)

(B) Maharashtra Control of Organized Crimes Act (1999), S.21(4) - Unlawful Activities (Prevention) Act (1967), S.43D - Criminal P.C.

(1973), S.437 - Bail - Complaint of organized crime and terrorist act — Use of" phrase "reasonable ground" not to be confused with "sufficient grounds"-while evaluating of materials by court a little deeper probe into the matter would be required when the offence relates to special Act curtailing discretion of court in matters of grant of bail- Applicant alleged to be one of the conspirators to kill first informant - Materials against him consist of statement of four witnesses and Call Data Records(CDRs) - Inconsistent and not supporting prosecution case - **In fact raising doubts as these materials were gathered only after arrest of applicant — Then on what basis applicant was arrested, not made clear - Whether allegations against accused would constitute terrorist act, doubtful – Motives and objectives behind crime as alleged by prosecution, also conflicting and inconsistent – Reasonable grounds exist to believe that applicant not guilty – Bail application allowed**

The observations made by Their Lordships of the Supreme Court of India in the case of **Ranjitsing Brahmajeetsing Sharma v/s. State of Maharashtra and another, (2005) 5 Supreme Court Cases 294**, indicate that in view of the drastic provisions curtailing the discretion of the court in the matter of bail, a little deeper probe into the matter - than is ordinarily done at the stage of bail may be necessary in such cases to avoid injustice.

It was initially suggested that the offence in question was committed for pecuniary gain. Later on, it was suggested that it had been committed with the object of promoting insurgency. The case, as put forth, is that the accused no.1 Saquib Nachan was angry because of the acts of Manoj Raicha and wanted to kill him to take revenge of the acts of Manoj Raicha in getting the cattle brought for qurbani taken charge of, and send to goushala. It is also suggested that actually the firing was done with the intention of causing rift between Hindus and Muslims and with the intention that there should be communal riots. There is substance in the contention of the learned counsel for the applicant that the motives and objectives alleged by the prosecution behind the act of firing at Manoj Raicha, which is the basis of the case, are conflicting and inconsistent.

No importance to that was attached on the ground that the mobile telephone instrument need not necessarily be with the holder or the subscriber, all the time. Though this is theoretically possible, there is no evidence that the mobile telephone instruments were parted with by the other accused. The prosecution cannot throw the weight of the tower location for supporting the theory of the applicant's presence at the spot. no

importance to that was attached on the ground that the mobile telephone instrument need not necessarily be with the holder or the subscriber, all the time. Though this is theoretically possible, there is no evidence that the mobile telephone instruments were parted with by the other accused. The prosecution cannot throw the weight of the tower location for supporting the theory of the applicant's presence at the spot.

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Ms.Rebecca Gonsalves Advocate for the Applicant.

Mr.A.S.Gadkari APP for the State.

ORAL ORDER :

1 . The applicant is one of the six accused in M.C.O.C. Special bail Case No.10 of 2012, pending before the Special court under the Maharashtra Control of Organized Crime Act (hereinafter referred to as M.C.O.C. Act), Thane. The said case is in respect of offences punishable under Sections 120B, 153A, 307 of the Indian Penal Code B(IPC), offences punishable under the Arms Act, apart from the offences punishable under Sections 3(1)(ii), 3(2) and 3(4) of the M.C.O.C. Act. Additionally, the applicant and the other accused are alleged to have committed offences punishable under Sections 16 and 18 of the avk 1/27 ::: Downloaded on - 09/05/2013 23:38:13 ::: BA-512-2013Unlawful Activities (Prevention) Act, 1967, as amended till 2008 (hereinafter referred to as U.A.P. Act). By the present application, the applicant seeks bail.

2 . I have heard Ms.Rebecca Gonsalves, the learned counsel for the applicant, and Mr.A.S.Gadkari, the learned APP for the State. With the assistance of the learned counsel, I have gone through the bail application, the annexures thereto, and all the relevant parts of the charge-sheet. I have also been taken through the affidavit filed by the Investigating Officer for opposing the grant of bail.

3. The prosecution case has been described in Column No.16 of Form 5E of the printed prescribed proforma of the charge-sheet. In brief, it can be described as follows :

The first informant Manoj Raicha, Advocate, is an active member of the Vishwa Hindu Parishad, and Gowvansh Saurakshan Samiti. He had, in the past, got the cattle brought in Bhiwandi for Qurbani on the occasions of Muslim religious festivals, taken charge of and sent to Gowshala. The accused no.1 Saquib Nachan, therefore, formed a belief that Mohan Raicha was doing injustice on Muslims and entertained grudge against him. He had given threats to Manoj Raicha in the year 2011 in the court campus itself. Because of this grudge, the accused no.1 Saquib Nachan conspired with other accused, namely, accused no.2 Guddu alias Mohammad Hafiz Khan, accused no.3 Shamil Saquib Nachan i.e. the

applicant, accused no.4 Akif Atik Nachan, accused no.5 Tanveer Abdul Majid Zamindar and accused no.6 Abu Bakar Rashid Shaikh. In pursuance of the conspiracy, the accused no.6 Abu Bakar, fired at Manoj Raicha on 3.8.2012, causing injury to his shoulder, by a bullet.

4. How the incident which gave rise to this case, took place and how the investigation commenced, can be ascertained from the First Information Report (FIR). The facts, as narrated by Manoj Raicha, in FIR, are to the effect that on 3.8.2012, while he was travelling by his car, with his armed police bodyguard Achrekar - Police Constable No.3901 - three shots were fired at him from a fire arm. One bullet grazed his right upper arm. His bodyguard got down from the car, but could not see any one. Thereafter, Manoj and his bodyguard Achrekar, came to the police station and lodged a report on the basis of which, a case was registered in respect of offences punishable under Sections 307, & 120B of the IPC and offences punishable under the Arms Act, at avk 3/27 Nizampur Police Station, Bhiwandi. The investigation was then transferred to Crime Branch Bhiwandi, under the orders of Commissioner of Police, Bhiwandi, Thane, and thereafter, the provisions of Section 153A of IPC were added to the original FIR. In the course of investigation, it was revealed to the Investigating Officer that the attack on Manoj Raicha was a "part of larger conspiracy" and that the same was carried out at the instance of the accused no.1 Saquib Nachan. It was also revealed to be an act of an organized crimes syndicate. In the course of further investigation, it was also revealed that it was a "terrorist act" as contemplated under Section 15 of the U.A.P. Act, 1967.

5. Ms.Rebecca Gonsalves, the learned counsel for the applicant contended that the investigation is not at all sincere. She contented that no case of an offence punishable under the M.C.O.C. Act and / or the U.A.P. Act is made out. She submitted that, in any event, there is absolutely no material in the entire charge-sheet to make out a prima facie case of any offence against the applicant. It is submitted that the applicant has been falsely implicated in the present case. It is submitted that the applicant is a student of Engineering with no antecedents and has been implicated basically because he happens to be the son of Saquib Nachan (accused no.1), who was accused in a number of cases and has been convicted in one case previously. Mr.Gadkari, on the other hand, submitted that the provisions of the M.C.O.C Act and also of the U.A.P. Act have rightly been invoked, and applied to the present case. As regards the role of the applicant, he submitted, that the applicant is a conspirator and had conspired with the other accused to commit the offences in question. According to him, there is sufficient and satisfactory material to show the involvement of the applicant in the alleged offences.

6. Before proceeding further, it may be observed that there is much that can be said about the manner in which the facts of the case are mentioned in the charge-sheet. The emphasis is not on the incident of firing but the emphasis is on the activities of Manoj Raicha, as a member of the Vishwa Hindu Parishad and Gowvansh Saurakshan Samiti. The emphasis is on the criminal background of the accused no.1 Saquib Nachin, on his gang, on his alleged anti-national activities, on his having committed a number of serious offences such as bomb blasts etc. in the past, on it having been established that he has

connections with Kashmiri and Khalistani terrorists, etc. That, the accused no.1 had committed offences with the object of creating a rift between Hindus and Muslims and 'to cause communal riots, so that the sovereignty of the nation would be affected', that the intention of accused no.1 Saquib Nachan was 'to create anarchy and disorder in the country' and he desired that there should be outrage amongst the Muslims as well as the Hindus, etc. That, accused no.1 Saquib Nachin has written a book in which the government and the judiciary are criticized, suggesting that injustice is being done to Muslims. Thus the firing at Manoj Raicha, on the showing of the prosecution, is only an entirely small and an incidental - so to say - action of the accused no.1 Saquib Nachin, whose aims, ambitions and objects are quite different, and as mentioned above.

7. A number of contentions which are relevant for judging the prima facie truth of the prosecution case with respect to several material aspects thereof as projected by the investigating agency, have been raised by the learned counsel for the applicant. Indeed, much can be said about the prosecution case and the applicability of the offences punishable under the M.C.O.C. Act and the U.A.P. Act, to the facts of the present case. However, since I am dealing with a bail application and since the role attributed to the present applicant in the alleged offences is, admittedly, limited, I refrain from discussing the broader aspects and broader issues except where such discussion would be necessary in the context of the present bail application.

8. Apart from the contentions raised about the unreliability of the material against the applicant, the learned counsel for the applicant advanced a number of arguments suggesting that a doubt exists even as to whether the first informant was indeed fired at. She referred to the nature of injury sustained by Manoj Raicha; the location thereof, and the absence of any hole at that place on the shirt of Manoj Raicha. She also pointed out that though the FIR specifically states that the person or persons who fired at Manoj were not seen by him, or even by his bodyguard Achrekar, in the supplementary statement, Manoj Raicha claimed that his bodyguard had seen one person while running away. I have considered the matter. There is undoubtedly some substance in the contentions raised by the learned counsel. Interestingly, Manoj and his bodyguard had been together after the firing and had gone to the Police station together before lodging the FIR. The bodyguard was present when the FIR was being registered and inspite of this, a categorical statement that the bodyguard had not seen anyone, was made in the FIR. Prima facie, it is difficult to to accept that though the bodyguard had seen one person - supposed to be the assailant - running away after the incident of firing, the first informant, who was throughout with him, and had discussion with him after the incident, had gone with him to the Police station, would be sure that the bodyguard had not seen anyone and would categorically state so in the First Information Report, when the bodyguard had actually seen a person.

10. Coming to the role attributed to the applicant, admittedly, he is not the person who allegedly fired at Manoj Raicha. He is alleged to be one of the conspirators in respect of the conspiracy to attack and kill the first informant. The conspiracy was, allegedly, hatched

in a meeting which took place between the applicant and the other accused at Oye Punjabi Dhaba on the second or third day of the commencement of the holy month of Ramzan.

11. The learned APP did not dispute that the only material against the applicant consists of statements made by four persons and the Call Data Records (CDRs) in respect of his mobile telephone. statements of the said four persons recorded during investigation have been truncated suitably to prevent disclosure of identity of the said persons. This has been done on the ground that the case is in respect of offences under the M.C.O.C. Act, and that, there would be a danger to the life of the witnesses if their identity is revealed. These persons are, therefore, referred to as "A" "B" "C" and "D". h

12. According to the witness "A", whose statement has been recorded on 4.9.2012, he had met the accused no.5 Tanveer Abdul Zamindar sometime after two days from the commencement of the holy month of Ramzan, and it was suggested to him by the accused no.5 Tanveer that they both would go out in the night for dinner. Accordingly, at about 9.30 p.m., they met at a particular place where the accused no.5 Tanveer took "A" to Oye Punjab Dhaba, situate at Nasik Road, and they reached there at about 10.15 p.m. That, the accused no.4 Akif Nachan, the applicant, accused no.6 Abu Bakar, and accused no.2 Guddu, were already sitting there. During the talks, the applicant reportedly said as follows :

> "vCck cgqr xqLls eas gaSA vHkh jetku ds ckn esa cdjh bZn vkusokyh gaSA gjlky ds rjg vks dehuk eukst jk;pk gekjs tkuoj idMdj eqlyekuksa dks rdyhQ nsxkA" mldks dqN • h djds ;s lky mldks mMkuk gh gksxkA

Translated in English, it would read thus :

"Abba (meaning the accused no.1 Saquib Nachan) is very much disturbed. Now, after Ramzan, Bakr-Id will come. Like every year that kamina Manoj Raicha would get our animals caught and cause trouble to the Muslims." Some how he has to be killed this year.

(The last sentence is not in the inverted commas, though it is also projected as the utterance of the applicant. The learned APP could not explain why it is so.)

According to "A", Abu Bakar, thereafter, said that he would shoot Manoj Raicha. Thereupon, accused no.5 Tanveer Zamindar agreed to pay money to purchase a pistol. Thus, it was in the presence of witness "A" that a conspiracy to kill Manoj Raicha was hatched.

13. The statement of witness "A" was got recorded by a Magistrate under the provisions of Section 164 of the Code of Criminal Procedure (Code). In this statement, witness "A" did

not advance this version. He did not speak about any meeting in Oye Punjab Dhaba and on the contrary, did not even make a mention of the applicant. When this was pointed out by the learned counsel for the applicant, the learned APP pointed out that one more statement of the said witness, also under Section 164 of the Code, was recorded, wherein the witness has stated about accused no.5 Tanveer Zamindar having taken him to Oye Punjab Dhaba, and about this witness having met accused no.2 Guddu, the applicant, accused no.4 Akif, and accused no.6 Abu Bakar there. As per this statement, there was discussion among the accused persons that Manoj Raicha was acting against the Muslims, and that something was to be done in that regard; and then one of the accused persons said that Manoj Raicha would be required to be killed. Thus, though in this statement, this witness has gone near his version, reflected in his statement recorded under Section 161 of the Code, there is still, a marked difference in both the versions.

14. As regards witness "B", he is a person who happened to be present in the Oye Punjabi Dhaba on the third day of the holy month of Ramzan. That, he saw the applicant, accused no.4 Akif Nachan, accused no.5 Tanveer and two to four more persons in the Dhaba. The applicant and the others sat on a table behind the table on which witness "B" was sitting. They had, however, not seen the witness "B." At that time, witness "B" heard Akif Nachan talking about Manoj Raicha and saying that :

> lkfdc • kÃus cksyk gS dh "vks gjkeh eukst jk;pk gekjs rtdqcZkuh ds tkuoj vMkdj eqlyekuksadks rdyhQ nsrk gSA lkfdc• kÃus vks yyhr tSu, 'ksjsdj odhy dks tSls mMk;k, ou [kre dh;k oSls eukst jk;pk dks • h [kre djus ds yh;s cksys gSA

Translated in English, it would read thus :

Saquib Bhai has said that "harami Manoj Raicha was creating trouble for the Muslims by getting the cattle brought for qurbani. Saquib bhai has told to finish Manoj Raicha in the same manner in which he had finished Lalit Jain and Advocate Sherekar."

On this, the applicant, according to this witness said as follows : vCck cgqr xqLls esa gS A oks eukst jk;pk dks fdlh Hkh omgkye esa [kre dj.ks ds fy;s dqN Hkh djks A vkxs dk es laHkky yqaxkA

Translated in English, it would read thus : "Abba is very much upset. Do anything to kill Manoj Raicha, under any circumstances. Whatever would happen, I will take care of."

According to witness "B", accused no.5 Tanveer and the others agreed with the applicant and accused no.4 Akif Nachan, and started talking about a plan to kill Manjo Raicha. Since this witness found this objectionable, he (and the person with whom he had gone) left the Dhaba after taking parcel. Even the statement of this witness was recorded under Section 164 of the Code, and though the version therein is not identical, in that statement also, he implicated the applicant.

15. The statement of witness "C" shows that on 3.8.2012, after the incident of firing, accused no.6 Abu Bakar, and accused no.2 Guddu, came near a hotel and at that time, Abu Bakar told (to whom is not mentioned in the statement, but it may be presumed that it was to this witness) that 'he had fired towards Manoj Raicha, but had missed, and when he told this fact to the accused no.4 Akif Nachan and the applicant Shamil Saquib Nachan, they were very angry with them (accused no.6 Abu Bakar and accused no.2 Guddu) and left by saying that what answer they would give to Saquib bhai - (accused no.1).' 16 Similar is the statement of witness "D".

16. Thus, the material against the applicant consists of two circumstances. The first is that that the witnesses have seen and heard him and other accused, conspiring to kill Manoj Raicha; and the second is that, after the incident, the actual shooter Abu Bakar, allegedly said that when he informed the applicant and the co-accused - accused no.4 Akif Nachan that the target was missed, the applicant and Akif Nachan were very angry and questioned as to what reply they would give to accused no.1 Saquib bhai.

17. Undoubtedly, the material found in the charge-sheet is to be taken at face value at this stage. However, taking the material at face value does not mean that it has to be accepted as gospel truth. It also does not mean that no evaluation of the material at all is to be done at this stage. Though the evaluation of the material, as if it is evidence adduced during the trial (on the basis of which the judgment of acquittal or conviction is to be given) cannot be done at this stage, a limited evaluation thereof for ascertaining the existence of a prima facie case would be unavoidable. This would be all the more necessary, when the case relates to offences punishable under any Special Act, which contains provisions curtailing the discretion of the courts of law in the matter of grant of bail. **The observations made by Their Lordships of the Supreme Court of India in the case of Ranjitsing Brahmajeetsing Sharma v/s. State of Maharashtra and another, (2005) 5 Supreme Court Cases 294, indicate that in view of the drastic provisions curtailing the discretion of the court in the matter of bail, a little deeper probe into the matter - than is ordinarily done at the stage of bail may be necessary in such cases to avoid injustice.** This is particularly so, because, the scheme of the relevant provisions in the M.C.O.C. Act clearly requires participation of superior police officers at various levels.

18. If the prosecution case, as a whole, is considered, doubts can legitimately be entertained about the truth of the details regarding actual occurrence. This, coupled with the manner in which the case is projected, makes it prudent to see whether this material is corroborated by any other material in the charge-sheet, before coming to a conclusion about the existence of a prima facie case against the applicant. It is because, all these statements, which are the only statements showing the involvement of the applicant in the alleged offences, have been recorded after the arrest of the applicant on 29.8.2012. A question legitimately arises about the basis on which the applicant came to be arrested before this information (which is admitted to be the only material available against the applicant). rt

According to the version of the applicant, as reflected in the bail application, he came to be arrested on 29.8.2012, when he had gone to the court to meet his father Saquib Nachan (accused no.1), who was being produced before the court of Magistrate on that day, for obtaining his remand. Under the circumstances, the possibility of these statements having been tailored after the arrest of the applicant cannot be altogether be ruled out, and therefore, it would be necessary to see whether this material is corroborated by some other material.

19. **The learned APP submitted that the theory of a meeting at the Oye Punjabi Dhaba is corroborated by the CDRs in respect of the mobile telephone instruments belonging to the applicant and the other accused. According to him, the tower locations reflected in the CDRs show that the applicant was, at the material time, present at the spot** i.e. at Oye Punjabi Dhaba, and was also present near the spot of incident, on the date of commission of the offence. In this context, the learned counsel for the applicant pointed out that the CDRs of the other accused, who were supposedly present at that time, however, did not support the theory of they being present at Oye Punjabi Dhaba. The learned APP could not controvert this and could not show from the CDRs of the other accused persons that they were present at Oye Punjabi Dhaba. Infact, the learned APP conceded that the tower location in respect of the mobile telephone instruments of the other accused does not show the presence of any of them at Oye Punjabi Dhaba, but contended that the mobile telephone instruments 'could have been given by the accused to someone else' and 'it might not have been with the accused persons at that time.' It is clear that, that the tower location reflected in the relevant CDRs does not support the theory of the other accused being present at the Oye Punjabi Dhaba was noticed by the trial court also, but **no importance to that was attached on the ground that the mobile telephone instrument need not necessarily be with the holder or the subscriber, all the time. Though this is theoretically possible,** there is no evidence that the mobile telephone instruments were parted with by the other accused. **The prosecution cannot throw the weight of the tower location for supporting the theory of the applicant's presence at** Oye Punjabi Dhaba, but at the same time, refuse to attach any weight to the same circumstance, when it is sought to be used by the accused for supporting the theory of they being elsewhere. Infact, that the CDRs of the other accused, who were allegedly present in Oye Punjabi Dhaba , show their presence elsewhere, is a factor which leads to serious doubt to say least - about the theory of conspiracy. I refrain myself from going further and discussing whether this would prove fatal to the theory of conspiracy, but **I have no hesitation to record an observation - a rather guarded one - that the prosecution theory is certainly open to doubt.**

20. There are a number of other aspects which need to be kept in mind. The FIR shows that the bullets had been fired from the right side of the car by which Manoj Raicha was travelling, and that, one bullet had entered through right side window and had passed through the car, after grazing his right upper arm. Undoubtedly, an injury was sustained by him, but it is not of such a nature, as can be opined medically to have been caused only

by a fire arm. The shirt of Manoj Raicha was intact and no hole thereto was noticed. When this was pointed out to the court, the learned APP submitted that the sleeves Bhad been folded by Manoj Raicha, but certainly the matter would require further examination.

21. A perusal of the order passed by the trial court shows that it was argued before it that the statement attributed to witness "B" reproduced above, to the effect that "Abba bahut gusse mein hai. Abhi Ramzan ke baad mein Bakr-Id aanewali hai" is wrong and that not "Bakr-Id", but "Ramzan-Id" comes after the holy month of Ramzan. It was argued before the trial court that no Muslim would make such an erroneous statement, and therefore, it was doubtful whether such statement was indeed made. On this, the trial court reasoned that after Ramzan, after about two months thereafter, Bakr-Id also comes, and therefore, the statement that Bakr-Id will be coming after Ramzan would not be wrong. It is difficult to agree with this sort of reasoning. The time cycle goes on and on, and therefore, it is possible even to say that Ramzan-Id would come after Bakr-Id. However, this is not how persons express themselves ordinarily. I find substance in the contention raised in that regard. In my opinion, the prima facie unlikelihood of a Muslim saying that after Ramzan, Bakr-Id would come, ignoring the Ramzan-Id that would come before that, needs to be given due thought, and needs to be taken into consideration, as one of the factors relevant in judging the prima facie truth of the prosecution case.

22. The difficulty in granting bail arises primarily because of the application of the provisions of the M.C.O.C. Act and of the U.A.P. Act, to the facts of the present case, as both these statutes contain provisions curtailing the discretion of the court in the matter of grant of bail to a great extent. Coming to the provisions of the M.C.O.C. Act, Section 21(4) thereof, lays down that a person accused of having committed an offence punishable under the M.C.O.C. Act, is, (where the Public Prosecutor opposes the application) is not to be released on bail, unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence, and that, he is not likely to commit any offence while on bail. Similarly, subsection (5) of Section 43-D of the U.A.P. Act also lays down that a person accused of having committed certain offences under the said Act, shall not be released on bail if there are reasonable grounds for believing that the accusation against such person is prima facie true. How such phrases, curtailing the discretion of the court in the matter of releasing a person on bail should be construed, needs to be ascertained from other relevant provisions in such statutes.

23. So far as the provisions of Section 21(4) of the M.C.O.C. Act are concerned, the authoritative pronouncement of the Supreme Court of India in the aforesaid case of Ranjitsing Sharma (supra), lays down how the restrictive phrase appearing therein is to be construed.

24. In the said case, Their Lordships of the Supreme Court of India, held that the restrictions imposed by Section 21(4) of the M.C.O.C. Act on the power of the courts cannot be pushed too far. It is not as if a person can be released on bail only if there would be no grounds for proceeding against him at all on the charge of an offence

punishable under the M.C.O.C. Act. The said provisions are required to be interpreted in a reasonable manner. They cannot be interpreted in such a manner so as to make the grant of bail impossible. **It is not that the court is required to come to a positive finding that the applicant for bail is not guilty of an organized crime before grant of bail.**

25. A careful analysis of the relevant provisions and the observations made by the Supreme Court of India in the aforesaid case of Ranjitsing Sharma (supra), lead to the following conclusion about the correct legal position in that regard. **For enabling the court to exercise its discretion in favour of a person accused of having committed an offence punishable under the M.C.O.C. Act, what is required is existence of reasonable grounds for believing that the applicant before the court is not guilty of an organized crime. The satisfaction that the "accused is not guilty" is not contemplated by the relevant provisions and what is required is the satisfaction that there are reasonable grounds for believing the accused to be not guilty. Again, the phrase "reasonable grounds" should not be confused with the phrase "sufficient grounds" It imports a lesser degree of satisfaction than "sufficient grounds." It cannot be lost sight of that the Special court would be entitled to discharge an accused if it considers that there is no sufficient ground for proceeding against the accused.** If the court forms an opinion, that there is ground for presuming that accused has committed an offence punishable under the M.C.O.C. Act, a charge shall be framed against the accused. This is clear from the provisions of Section 9(4) of the M.C.O.C. Act, read with Sections 227 and 228 of the Code of Criminal Procedure. It cannot - even remotely - be suggested that the special provisions regarding grant of bail in the M.C.O.C. Act are to be interpreted in such a manner, so as to mean that it is only when there would be no sufficient grounds for proceeding against an accused, that he shall be released on bail. If such a view is taken, no person who has been granted bail, can ever be proceeded against, in respect of an offence punishable under the M.C.O.C. Act. Rather, there would be no question of granting bail, and an accused would be discharged at that stage itself. Since this is not intended or contemplated while enacting the relevant provisions regarding bail, the special provisions are to be interpreted by keeping in mind that the phrase "reasonable grounds for believing that he is not guilty of such offence" cannot be so construed as to make it irreconcilable with the existence of ground for presuming that he has committed such offence.

26. The restrictive provision under Section 43-D of the U.A.P. Act with respect to the grant of bail is not similar to the one contained in the M.C.O.C. Act, and has been worded differently. It contemplates that a person accused of having committed an offence punishable under Chapter IV and Chapter VI of the U.A.P. Act shall not be released on bail if there are reasonable grounds for believing that the accusation against such person is prima facie true. Perhaps, this phrase puts a greater restriction on the powers of the court than is put by the aforesaid provision of the M.C.O.C. Act. However, inspite of the difference in the phraseology, there would be no basic difference in the practical application of these provisions. All that these provisions lay down is that a person arrested

on the accusation of having committed the offence contemplated by the said provisions should not be released on bail, if there would be a prima facie case of such offence against him. If a rational and reasonable doubt is felt in that regard, then the court would not be precluded from granting bail even in such cases. **Moreover, judging the existence of a prima facie case at the stage of bail, would not be the same as judging the existence of a prima facie case for proceeding against an accused by framing a Charge.**

27. **It is too obvious that an accused would never be required to put forth a stronger case for bail, than that would be required for a discharge.** The tests that are applied at the time of bail cannot be as rigorous as are applied while considering the discharge of an accused from a particular case. The position as to when an accused can be discharged has not been changed by the legislature in cases of the offences punishable under the M.C.O.C. Act and the U.A.P. Act, inspite of introducing provisions curtailing the discretion of the court in the matter of grant of bail - although only in the event of the application being opposed by the Public Prosecutor.

28. In this case, the applicability of the provisions of M.C.O.C. Act and of theU.A.P. Act, is highly doubtful. I have examined the "prior approval" and the sanction granted under Section 23 of the M.C.O.C. Act, and much can be said on the applicability of the M.C.O.C. Act to the facts of the present case. The applicant has been charged also of having committed an offence punishable under Section 16 of the U.A.P. Act, namely, for "terrorist act". Going by the definition of a "terrorist act" under Section 16 of the Act, whether the allegations levelled against the applicant can be brought within the purview of the relevant provision, is - to say the least - is extremely doubtful. **It was initially suggested that the offence in question was committed for pecuniary gain. Later on, it was suggested that it had been committed with the object of promoting insurgency. The case, as put forth, is that the accused no.1 Saquib Nachan was angry because of the acts of Manoj Raicha and wanted to kill him to take revenge of the acts of Manoj Raicha in getting the cattle brought for qurbani taken charge of, and send to goushala. It is also suggested that actually the firing was done with the intention of causing rift between Hindus and Muslims and with the intention that there should be communal riots. There is substance in the contention of the learned counsel for the applicant that the motives and objectives alleged by the prosecution behind the act of firing at Manoj Raicha, which is the basis of the case, are conflicting and inconsistent.** Infact, considering the nature of an organized crime and the mens rea requisite for the same, it is difficult to hold that the same act or acts would also fall within the definition of a "terrorist act", the mens rea requisite for which, would be quite different from that in case of an organized crime. However, the matter may be left at that for the present, as, in any case, on facts, and on a fair reading of the material against the applicant; and considering the same in the light of the entire prosecution case, there are certainly reasonable grounds for believing that the applicant is not guilty of any of the alleged offences.

29. The applicant is a student. He is 21 years old. There are no antecedents.

30. In my opinion, the applicant should be released on bail, subject to certain conditions.

31. The application is allowed.

32. The applicant is ordered to be released on bail in the sum of Rs.15,000/-, with one surety in the like amount, on the condition to report to the office of the Investigating agency on every alternate Saturday, till the disposal of the case against him. C

The applicant may deposit cash of Rs.15,000/- in lieu of surety.

(ABHAY M. THIPSAY, J.)

LATER ON AT 3.00 P.M. :

After the order was pronounced in the morning session, Mr.Gadkari, the learned APP who was not present then, mentioned the matter and prayed for stay on the operation of the order. The counsel for the applicant is not present. Under the circumstances, the prayer to stay the operation of the order is rejected.

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Cross Citation : 2012 ALL MR (Cri.) 68

HIGH COURT OF BOMBAY

Coram : R.C. CHAVAN, J.

Manmohar Laxman Gavandha .....Vs.... State of Maharashtara
Criminal Application No. 930 of 2011.
23rd November, 2011

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Criminal P.C. (1973), S. 438 – Anticipatory bail – Grant of – Offence of abetment to commit suicide and hurt - Applicant alleged to have beaten up victim for not sharing expenses of treatment– Dead body of victim found after eight days – There was a chit in pocket of victim alleging that applicant among others was respondents for victims suicide – Held, applicant is not required to be in custody for purpose of investigation into alleged offence – Anticipatory bail granted to applicant subject to conditions. (Para 2,3)

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CASE CITED:

PARA

Siddharam Satilingappa Mhetra Vs. State of Maharashtara Ans Ors, 2010 ALL SCR 2725 : Special Leave Petition (Cri.) No. 7615 of 2009 Dt. 2/12/2010 3

Mr. NITIN SEJPAL, Advocate , for the Applicant Smt. V.R. Bhosale . APP, for the Respondent, State.

JUDGMENT

. Heard the learned counsel for the respective parties.

2. This is an application for anticipatory bail by a person, who apprehends arrest in connection with FIR No.I-35 of 2011 for the offences punishable under Sections 306, 323, 506 read with Section 34 of the Indian Penal Code registered with Jawahar Police Station. The victim was married to applicant's niece, Yogita and they were residing separately about one year prior to the incident. Yogita was not well. The applicant is alleged to have asked the victim to share expenses of treatment of Yogita and on this count is alleged to have beaten up the victim on 18th October, 2011. The victim was missing from 19th october, 2011 and his dead body was found on 26th October, 2011. There was a chit in the pocket of the victim which alleged that the applicant among others was responsible for the victim's suicide. The learned APP states that the chit has been sent to the hand writing expert. Even if the allegations are

taken at face value, it is not clear as to how the applicant is required to be in custody for the purpose of investigation into alleged abetment to commit suicide by the applicant. Therefore, application is allowed.

In the event of arrest, applicant be released on bail on his furnishing P.R.Bond of Rs.20,000/- with one or more solvent sureties in the aggregate sum of Rs.20,000/- on the following conditions.

(i) The applicant shall report at the Jawahar police station on 25th November, 2011 at 11.00 a.m. and thereafter, as and when required by the investigating officer.

(ii) The applicant shall make himself available for interrogation by a police officer as and when required.

(iii) The applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.

(iv) The applicant shall not leave India without the previous permission of the Court.

3. Criminal Application is disposed of. The order will remain in force till the trial is over with the only stipulation that if charge sheeted the applicant may furnish fresh bonds before the trial Court in view of the Judgment of the Supreme Court dated 2nd December, 2010 delivered in Special Leave Petition (Cri.) No.7615 of 2009 (Siddharam Satlingappa Mhetre vs State of Maharashtra And Ors.).

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Cross citation: 2012 (1) SCC (Cri) 26

SUPREME COURT OF INDIA

Hon'ble Judges: G. S. Singhvi and H.L. Dattu, JJ.

CRIMINAL APPEAL NO.2178 OF 2011 (Arising out of SLP (Crl.) No. 5650 of 2011)

Sanjay Chandra ...Vs.... C.B.I.

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A) Cri. P.c. 439, 437, Bail – Bail is the Rule and Jail an exception – Accused entitled for presumption of innocence till he is convicted – constitutionally protected liberty of accused must be respected unless detention becomes necessary – If any accused is detained before conviction then it will put unnecessary burden on state to keep a person who is not proved guilty – Normally bail should be granted to accused – Apprehension of tampering of evidence without sound proof could not be accepted and this ground could not be considered in each case to deny the bail.

B) Discretion while granting bail – The Jurisdiction to grant bail has to be exercised on the basis of well settled principles and not in arbitrary manner- The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken.

C) DISCRETION : Any order devoid of reasons would suffer from non-application of mind. In the case of Gudikatil Narasimhulu V. Public Prosecutor, (1978) 1 SCC 240, V.R. Krishna Iyer, J., sitting as Chamber Judge, Enunciated the principles of bail thus:

> *"3. What, then, is "judicial discretion" in this bail context ? In the elegant words of Benjamin Cardozo : "The Judge, even when he is free, is still not wholly free. He is not to innovate at Pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion*

informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remain.

D) Criminal Procedure Code, 1973 – Ss. 437 and 439 – Prejudices which may be avoided in deciding bail matters – Public Scams, scandal and heinous offences – Public sentiments and disapproval of alleged misconduct – Bail, held, ought not be denied to teach lesson to a person whose offence is yet to be proved – Conditional bail, is a solution in such types of cases.

E) The approach adopted by the trial court and affirmed by the High Court, is a denial of the whole basis of the Indian system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. Bail is the rule and committal to jail an exception. Refuse of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the constitution. When there is a delay in trail, bail should be granted to the accused.

F) Cr. P.C. Sec. 437, 439 – Change in circumstances – Pre-Charge and post – charge stages – SLP before supreme court dismissed before farming of charges – Bail application filed after framing charges – Held, is change in circumstances – Earlier order is no bar in granting bail to the appellant.

(para 19)

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J U D G M E N T

H.L. DATTU, J.

1) Leave granted in all the Special Leave Petitions.

2) These appeals are directed against the common Judgment and Order of the learned Single Judge of the High Court of Delhi, dated 23rd May 2011 in Bail Application No. 508/2011, Bail Application No. 509/2011 & Crl. M.A. 653/2011, Bail Application No. 510/2011, Bail Application No. 511/2011 and Bail Application No. 512/2011, by which the learned Single Judge refused to grant bail to the accused-appellants. These cases were argued together and submitted for decision as one case.

3) The offence alleged against each of the accused, as noticed by the Ld. Special Judge, CBI, New Delhi, who rejected bail applications of the appellants, vide his order dated 20.4.2011, is extracted for easy reference

Sanjay Chandra (A7) in Crl. Appeal No. 2178 of 2011 [arising out of SLP (Crl.)No.5650 of 2011]:

"6. The allegations against accused Sanjay Chandra are that he entered into criminal conspiracy with accused A. Raja, R.K. Chandolia and other accused persons during September 2009 to get UAS licence for providing telecom services to otherwise an ineligible company to get UAS licences. He, as Managing Director of M/s Unitech Wireless (Tamil Nadu) Limited, was looking after the business of telecom through 8 group companies of Unitech Limited. The first-come-first served procedure of allocation of UAS Licences and spectrum was manipulated by the accused persons in order to benefit M/s Unitech Group Companies. The cutoff date of 25.09.2007 was decided by accused public servants of Dot primarily to allow consideration of Unitech group applications for UAS licenses. The Unitech Group Companies were in business of realty and even the objects of companies were not changed to 'telecom' and registered as required before applying. The companies were ineligible to get the licences till the grant of UAS licences. The Unitech Group was almost last within the applicants considered for allocation of UAS licences and as per existing policy of first-come-first-served, no licence could be issued in as many as 10 to 13 circles where sufficient spectrum was not available. The Unitech companies got benefit of spectrum in as many as 10 circles over the other eligible applicants. Accused Sanjay Chandra, in conspiracy with accused public servants, was aware of the whole design of the allocation of LOIs and on behalf of the Unitech group companies was ready with the drafts of Rs. 1658 crores as early as 10th October, 2007."

Vinod Goenka (A5) in Crl. Appeal No. 2179 of

2011 [arising out of SLP(Crl)No.5902 of 2011] :

"5.The allegations against accused Vinod Goenka are that he was one of the directors of M/s Swan Telecom (P) Limited in addition to accused Shahid Usman Balwa w.e.f. 01.10.2007 and acquired majority stake on 18.10.2007 in M/s Swan Telecom (P) Limited (STPL) through DB Infrastructure (P) Limited. Accused Vinod Goenka carried forward the fraudulent applications of STPL dated 02.03.2007 submitted by previous management despite knowing the fact that STPL was ineligible company to get UAS licences by virtue of clause 8 of UASL guidelines 2005. Accused Vinod Goenka was an associate of accused Shahid Usman Balwa to create false documents including Board Minutes of M/s Giraffe Consultancy (P) Limited fraudulently showing transfer of its shares by the companies of Reliance ADA Group during February 2007 itself. Accused/applicant in conspiracy with accused Shahid Usman Balwa concealed or furnished false information to Dot regarding shareholding pattern of STPL as on the date of application thereby making STPL an eligible company to get licence on the date of application, that is, 02.03.2007. Accused/applicant was an overall beneficiary with accused Shahid Usman Balwa for getting licence and spectrum in 13 telecom circles. 12. Investigation has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications Ltd. got the GSM

spectrum under the Dual Technology policy, accused Gautam Doshi, Hari Nairand Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility on the date of application and till 18.10.2007.

13. Investigation has disclosed that accused Shahid Balwa and Vinod Goenka joined M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. as directors on 01.10.2007 and DB group acquired the majority stake in TTPL/ M/s Swan Telecom Pvt. Ltd. (STPL) on 18.10.2007. On 18.10.2007 a fresh equity of 49.90 lakh shares was allotted to M/s DB Infrastructure Pvt. Ltd. Therefore on 01.10.2007, and thereafter, accused Shahid Balwa and Vinod Goenka were incharge of, and were responsible to, the company M/s Swan Telecom Pvt. Ltd. for the conduct of business. As such on this date, majority shares of the company were held by D.B. Group."

Gautam Doshi (A9), Surendra Pipara (A10) and Hari Nair (A 11) in Crl. Appeal Nos.2180,2182 & 2181 of 2011 [arising out of SLP (Crl) Nos. 6190,6315 & 6288 of 2011] :

"7. It is further alleged that in January-February, 2007 accused Gautam Doshi, Surendra Pipara and Hari Nath in furtherance of their common intention to cheat the Department of Tele-communications, structured/created net worth of M/s Swan Telecom Pvt. Ltd., out of funds arranged from M/s Reliance Telecom Ltd. or its associates, for applying to Dot for UAS Licenses in 13 circles, where M/s Reliance Telecom Ltd. had no GSM spectrum, in a manner that its associations with M/s Reliance Telecom Ltd. may not be detected, so that DOT could not reject its application on the basis of clause 8 of the UASL Guidelines dated 14.12.2005.

8. In pursuance of the said common intention of accused persons, they structured the stake-holding of M/s Swan Telecom Pvt. Ltd. in a manner that only 9.9% equity was held by M/s Reliance Telecom Ltd. (RTL) and rest 90.1% was shown as held by M/s Tiger Traders Pvt. Ltd. (later known as M/s Tiger Trustees Pvt. Ltd. – TTPL), although the entire company was held by the Reliance ADA Group of companies through the funds raised from M/s Reliance Telecom Ltd. etc.

9. It was further alleged that M/s Swan Telecom Pvt. Ltd. (STPL) was, at the time of application dated 02.03.2007, an associate of M/s Reliance ADA Group / M/s Reliance Communications Limited / M/s Reliance Telecom Limited, having existing UAS Licenses in all telecom circles. Investigations have also disclosed that M/s Tiger Traders Pvt. Ltd., which held majority stake (more than 90%) in M/s Swan Telecom Pvt. Ltd. (STPL), was also an associate company of Reliance ADA Group. Both the companies has not business history and were activated solely for the purpose of applying for UAS Licenses in 13 telecom circles, where M/s Reliance Telecom Ltd. did not have GSM spectrum and M/s Reliance Communications Ltd. had already applied for dual technology spectrum for these circles. Investigation has disclosed that the day to day affairs of M/s Swan Telecom Pvt.

Ltd. and M/s Tiger Traders Pvt. Ltd. were managed by the said three accused persons either themselves or through other officers/consultants related to the Reliance ADA group. Commercial decisions of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were also taken by these accused persons of Reliance ADA group. Material inter-company transactions (bank transactions) of M/s Reliance Communications/ M/s Reliance Telecommunications Ltd. and M/s Swan Telecom Pvt. Ltd. (STPL) and M/s Tiger Traders Pvt. Ltd. were carried out by same group of persons as per the instructions of said accused Gautam Doshi and Hari Nair.

10. Investigations about the holding structure of M/s Tiger Traders Pvt. Ltd. has revealed that the aforesaid accused persons also structured two other companies i.e. M/s Zebra Consultancy Private Limited & M/s Parrot Consultants Private Limited. Till April, 2007, by when M/s Swan Telecom Pvt. Ltd. applied for telecom licenses, 50% shares of M/s Zebra Consultancy Private Limited & M/s Parrot Consultants Private Limited, were purchased by M/s Tiger Traders Pvt. Ltd. Similarly, 50% of equity shares of M/s Parrot Consultants Private Limited & M/s Tiger Traders Private Limited were purchased by M/s Zebra Consultancy Private Limited. Also, 50% of equity shares of M/s Zebra Consultancy Private Limited and M/s Tiger Traders Private Limited were purchased by M/s Parrot Consultants Private Limited. These 3 companies were, therefore, cross holding each other in an interlocking structure w.e.f. March 2006 till 4th April, 2007. 11. It is further alleged that accused Gautam Doshi, Surendra Pipara and Hari Nair instead of withdrawing the fraudulent applications preferred in the name of M/s Swan Telecom (P) Limited, which was not eligible at all, allowed the transfer of control of that company to the Dynamix Balwa Group and thus, enabled perpetuating and (sic.) illegality. It is alleged that TRAI in its recommendations dated 28.08.2007 recommended the use of dual technology by UAS Licencees. Due to this reason M/s Reliance Communications Limited, holding company of M/s Reliance Telecom Limited, became eligible to get GSM spectrum in telecom circles for which STPL had applied. Consequently, having management control of STPL was of no use for the applicant/accused persons and M/s Reliance Telecom Limited. Moreover, the transfer of management of STPL to DB Group and sale of equity held by it to M/s Delphi Investments (P) Limited, Mauritius, M/s Reliance Telecom Limited has earned a profit of around Rs. 10 crores which otherwise was not possible if they had withdrawn the applications. M/s Reliance Communications Limited also entered into agreement with M/s Swan Telecom (P) Limited for sharing its telecom infrastructure. It is further alleged that the three accused persons facilitated the new management of M/s Swan Telecom (P) Limited to get UAS licences on the basis of applications filed by the former management. It is further alleged that M/s Swan Telecom (P) Limited on the date of application, that is, 02.03.2007 was an associate company of Reliance ADA group, that is, M/s Reliance Communications Limited/ M/s Reliance Telecom Limited and therefore, ineligible for UAS licences.

12. Investigation has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications Ltd. got the GSM spectrum under the Dual Technology policy, accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid

Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility on the date of application and till 18.10.2007.**"**

4) The Special Judge, CBI, New Delhi, rejected Bail Applications filed by the appellants by his order dated 20.04.2011. The appellants moved the High Court by filing applications under Section 439 of the Code of Criminal Procedure (in short, "Cr. P.C."). The same came to be rejected by the learned Single Judge by his order dated 23.05.2011. Aggrieved by the same, the appellants are before us in these appeals.

5) Shri. Ram Jethmalani, Shri. Mukul Rohatgi, Shri Soli J. Sorabjee and Shri. Ashok H. Desai, learned senior counsel appeared for the appellants and Shri. Harin P. Raval, learned Additional Solicitor General, appears for the respondent-CBI.

6) Shri. Ram Jethmalani, learned senior counsel appearing for the appellant Sanjay Chandra, would urge that the impugned Judgment has not appreciated the basic rule laid down by this Court that grant of bail is the rule and its denial is the exception. Shri. Jethmalani submitted that if there is any apprehension of the accused of absconding from trial or tampering with the witnesses, then it is justified for the Court to deny bail. The learned senior counsel would submit that the accused has cooperated with the investigation throughout and that his behavior has been exemplary. He would further submit that the appellant was not arrested during the investigation, as there was no threat from him of tampering with the witnesses. He would submit that the personal liberty is at a very high pedestal in our Constitutional system, and the same cannot be meddled with in a causal manner. He would assail the impugned Judgment stating that the Ld. Judge did not apply his mind, and give adequate reasons before rejecting bail, as is required by the legal norms set down by this Court. Shri. Jethmalani further contends that it was only after the appellants appeared in the Court in pursuance of summons issued, they were made to apply for bail, and, thereafter, denied bail and sent to custody. The learned senior counsel states that the trial Judge does not have the power to send a person, who he has summoned in pursuance of Section 87 Cr.P.C to judicial custody. The only power that the trial Judge had, he would contend, was to ask for a bond as provided for in Section 88 Cr.P.C. to ensure his appearance. Shri. Jethmalani submits that when a person appeared in pursuance of a bond, he was a free man, and such a free man cannot be committed to prison by making him to apply for bail and thereafter, denying him the same. Shri. Jethmalani further submits that if it was the intention of the

Legislature to make a person, who appears in pursuance of summons to apply for bail, it would have been so legislated in Section 88 Cr. P. C. The learned senior counsel assailed the Judgment of the Delhi High Court in the 'Court on its own motion v. CBI', 2004 (I) JCC 308, by which the High Court gave directions to Criminal Courts to call upon the accused who is summoned to appear to apply for bail, and then decide on the merits of the bail application. He would state that the High Court has ignored even the CBI Manual before issuing these directions, which provided for bail to be granted to the accused, except in

the event of there being commission of heinous crime. The learned senior counsel would also argue that it was an error to have a "rolled up charge", as recognized by the Griffiths' case (R vs. Griffiths and Ors., (1966) 1 Q.B. 589). Shri.Jethmalani submitted that there is not even a prima facie case against the accused and would make references to the charge sheet and the statement of several witnesses. He would emphatically submit that none of the ingredients of the offences charged with were stated in the charge sheet. He would further contend that even if, there is a prima facie case, the rule is still bail, and not jail, as per the dicta of this Court in several cases.

7) Shri. Mukul Rohatgi, learned senior counsel appearing for the appellant Vinod Goenka, while adopting the arguments of Shri. Jethmalani, would further supplement by arguing that the Ld. Trial Judge erred in making the persons, who appeared in pursuance of the summons, apply for bail and then denying the same, and ordering for remand in judicial custody. Shri. Rohatgi would further contend that the gravity of the offence charged with, is to be determined by the maximum sentence prescribed by the Statute and not by any other standard or measure. In other words, the learned senior counsel would submit that the alleged amount involved in the so-called Scam is not the determining factor of the gravity of the offence, but the maximum punishment prescribed for the offence. He would state that the only bar for bail pending trial in Section 437 is for those persons who are charged with offences punishable with life or death, and there is no such bar for those persons who were charged with offences with maximum punishment of seven years. Shri. Rohatgi also cited some case laws.

8) Shri. Ashok H. Desai, learned senior counsel appearing for the appellants Hari Nair and Surendra Pipara, adopted the principal arguments of Shri.Jethmalani. In addition, Shri. Desai would submit that a citizen of this country, who is charged with a criminal offence, has the right to be enlarged on bail. Unless there is a clear necessity for deprivation of his liberty, a person should not be remanded to judicial custody. Shri. Desai would submit that the Court should bear in mind that such custody is not punitive in nature, but preventive, and must be opted only when the charges are serious. Shri. Desai would further submit that the power of the High Court and this Court is not limited by the operation of Section 437. He would further contend that Surendra Pipara deserves to be released on bail in view of his serious health conditions.

9) Shri. Soli J. Sorabjee, learned senior counsel appearing for Gautam Doshi, adopted the principal arguments of Shri. Jethmalani. Shri. Sorabjee would assail the finding of the Learned Judge of the High Court in the impugned Judgment that the mere fact that the accused were not arrested during the investigation was proof of their influence in the society, and hence, there was a reasonable apprehension that they would tamper with the evidence if enlarged on bail. Shri. Sorabjee would submit that if this reasoning is to be accepted, then bail is to be denied in each and every criminal case that comes before the Court. The learned senior counsel also highlighted that the accused had no criminal antecedents.

10) Shri. Haren P. Raval, the learned Additional Solicitor General, in his reply, would submit that the offences that are being charged, are of the nature that the economic fabric

of the country is brought at stake. Further, the learned ASG would state that the quantum of punishment could not be the only determinative factor for the magnitude of an offence. He would state that one of the relevant considerations for the grant of bail is the interest of the society at large as opposed to the personal liberty of the accused, and that the Court must not lose sight of the former. He would submit that in the changing circumstances and scenario, it was in the interest of the society for the Court to decline bail to the appellants. Shri. Raval would further urge that consistency is the norm of this Court and that there was no reason or change in circumstance as to why this Court should take a different view from the order of 20th June 2011 in Sharad Kumar Etc. v. Central Bureau of Investigation [in SLP (Crl) No. 4584- 4585 of 2011] rejecting bail to some of the co accused in the same case. Shri. Raval would further state that the investigation in these cases is monitored by this Court and the trial is proceeding on a day-to-day basis and that there is absolutely no delay on behalf of the prosecuting agency in completing the trial. Further, he would submit that the appellants, having cooperated with the investigation, is no ground for grant of bail, as they were expected to cooperate with the investigation as provided by the law. He would further submit that the test to enlarge an accused on bail is whether there is a reasonable apprehension of tampering with the evidence, and that there is an apprehension of threat to some of the witnesses. The learned ASG would further submit that there is more reason now for the accused not to be enlarged on bail, as they now have the knowledge of the identity of the witnesses, who are the employees of the accused, and there is an apprehension that the witnesses may be tampered with. The learned ASG would state that Section 437 of the Cr.P.C. uses the word "appears", and,

therefore, that the argument of the learned senior counsel for the appellants that the power of the trial Judge with regard to a person summoned under Section 87 is controlled by Section 88 is incorrect. Shri. Raval also made references to the United Nations Convention on Corruption and the Report on the Reforms in the Criminal Justice System by Justice Mali math, which, we do not think, is necessary to go into. The learned ASG also relied on a few decisions of this Court, and the same will be dealt with in the course of the judgment. On a query from the Bench, the learned ASG would submit that in his opinion, bail should be denied in all cases of corruption which pose a threat to the economic fabric of the country, and that the balance should tilt in favour of the public interest.

11) In his reply, Shri. Jethmalani would submit that as the presumption of innocence is the privilege of every accused, there is also a presumption that the appellants would not tamper with the witnesses if they are enlarged on bail, especially in the facts of the case, where the appellants have cooperated with the investigation. In recapitulating his submissions, the learned senior counsel contended that there are two principles for the grant of bail – firstly, if there is no prima facie case, and secondly, even if there is a prima facie case, if there is no reasonable apprehension of tampering with the witnesses or evidence or absconding from the trial, the accused are entitled to grant of bail pending trial. He would submit that since both the conditions are satisfied in this case, the appellants should be granted bail.

12) Let us first deal with a minor issue canvassed by Mr. Raval, learned ASG. It is submitted that this Court has refused to entertain the Special Leave Petition filed by one of the co-accused [Sharad Kumar Vs. CBI (supra)] and, therefore, there is no reason or change in the circumstance to take a different view in the case of the appellants who are also charge- sheeted for the same offence. We are not impressed by this argument. In the aforesaid petition, the petitioner was before this Court before framing of charges by the Trial Court. Now the charges are framed and the trial has commenced. We cannot compare the earlier and the present proceedings and conclude that there are no changed circumstances and reject these petitions.

13) The appellants are facing trial in respect of the offences under Sections 420-B, 468, 471 and 109 of Indian Penal Code and Section 13(2) read with 13(i)(d) of Prevention of Corruption Act, 1988. Bail has been refused first by the Special Judge, CBI, New Delhi and subsequently, by the High Court. Both the courts have listed the factors, on which they think, are relevant for refusing the Bail applications filed by the applicants as seriousness of the charge; the nature of the evidence in support of the charge; the likely sentence to be imposed upon conviction; the possibility of interference with witnesses; the objection of the prosecuting authorities; possibility of absconding from justice.

14) In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test.

In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

15) In the instant case, as we have already noticed that the "pointing finger of accusation" against the appellants is 'the seriousness of the charge'. The offences alleged are economic offences which has resulted in loss to the State exchequer. Though, they contend that there is possibility of the appellants tampering witnesses, they have not

placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor : The other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Indian Penal Code and Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the Constitutional Rights but rather "recalibration of the scales of justice." The provisions of Cr.P.C. confer discretionary jurisdiction on Criminal Courts to grant bail to accused pending trial or in appeal against convictions, since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. This Court, in Kalyan Chandra Sarkar Vs. Rajesh Ranjan- (2005) 2 SCC 42, observed that

"under the criminal laws of this country, a person accused of offences which are non-bailable, is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law. But even persons accused of nonbailable offences are entitled to bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such accused on bail, where fact situations require it to do so."

16) This Court, time and again, has stated that bail is the rule and committal to jail an exception. It is also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution. In the case of State of Rajasthan v. Balchand, (1977) 4 SCC 308, this Court opined:

"2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative.

3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime. Even so, the record of the petitioner in this case is that, while he has been on bail throughout in the trial court and he was released after the judgment of the High Court, there is nothing to suggest that he has abused the trust placed in him by the court; his social circumstances also are not so unfavourable in the sense of his being a desperate character or unsocial element who is likely to betray the confidence that the court may place in him to turn up to take justice at the hands of the

court. He is stated to be a young man of 27 years with a family to maintain. The circumstances and the social milieu do not militate against the petitioner being granted bail at this stage. At the same time any possibility of the absconsion or evasion or other abuse can be taken care of by a direction that the petitioner will report himself before the police station at Baren once every fortnight."

(17) In the case of Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240, V.R. Krishna Iyer, J., sitting as Chamber Judge, enunciated the principles of bail thus:

"3. What, then, is "judicial discretion" in this bail context? In the elegant words of Benjamin Cardozo: "The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains." Even so it is useful to notice the tart terms of Lord Camden that "the discretion of a Judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable...." Perhaps, this is an overly simplistic statement and we must remember the constitutional focus in Articles 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a growing awareness that the working of the bail system requires a second look from the point of view of correct legal criteria and sound principles, as has been pointed out by Dr Bottomley.

6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the Court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erle. J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the Court may reasonably presume, some evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged. Lord Campbell, C.J. concurred in this approach in that case and Coleridge J. set down the order of priorities as follows: "I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his

appearance at trial .... It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a

determination on that point three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted. In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death."

7. It is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

8. Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being.

9. Thus the legal principles and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record – particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant is therefore not an exercise in irrelevance.

13. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding — if that be so — of innocence has been recorded by one Court. It may not be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, if enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and sociogeographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal."

(18) In Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118, this Court took the view: "22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to subsection

(3) of Section 437 Cr PC if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not

accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

24. Section 439(1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), Cr PC against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out."

19) In Babu Singh v. State of U.P., (1978) 1 SCC 579, this Court opined: "8. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden on the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit Court I had to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law".

The last four words of Article 21 are the life of that human right.

16. Thus the legal principle and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record—particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance.

17. The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorizing it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice—to the individual involved and society affected.

18. We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. In the United States, which has a constitutional perspective close to ours, the function of bail is limited, "community roots" of the applicant are stressed and, after the Vera Foundation's Manhattan Bail Project, monetary surety ship is losing ground. The considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible.

20. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding — if that be so — of innocence has been recorded by one Court. It may be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, it enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record

and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal."

20) In Moti Ram v. State of M.P., (1978) 4 SCC 47, this Court, while discussing pre-trial detention, held:

"14. The consequences of pre-trial detention are grave. Defendants presumed innocent arc subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family."

21) The concept and philosophy of bail was discussed by this Court in Vaman Narain Ghiya v. State of Rajasthan, (2009) 2 SCC 281, thus:

"6. "Bail" remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term "baiulare", meaning "to bear a burden". Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states: "… when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance." Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more

restraint on others to keep off from us, the more liberty we have. (See A.K. Gopalan v. State of Madras)

8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."

22) More recently, in the case of Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694, this Court observed that "(j)ust as liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order. Both are equally important." This Court further observed :

"116. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case." This Court has taken the view that when there is a delay in the trial, bail should be granted to the accused [See Babba v. State of Maharashtra, (2005) 11 SCC 569, Vivek Kumar v. State of U.P., (2000) 9 SCC 443, Mahesh Kumar Bhawsinghka v. State of Delhi, (2000) 9 SCC 383].

23) The principles, which the Court must consider while granting or declining bail, have been culled out by this Court in the case of Prahlad Singh Bhati v. NCT, Delhi, (2001) 4 SCC 280, thus:

"The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of the evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

24) In State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21, this Court held as under:

"18. It is well settled that the matters to be considered in an application for bail are whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati v. NCT, Delhi and Gurcharan Singh v. State (Delhi Admn.)]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar v. Rajesh Ranjan: (SCC pp. 535-36, para 11)

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh and Puran v. Rambilas.)"

22. While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima facie case is necessary."

25) Coming back to the facts of the present case, both the Courts have refused the request for grant of bail on two grounds :- The primary ground is that offence alleged against the accused persons is very serious involving deep rooted planning in which, huge financial loss is caused to the State exchequer ; the secondary ground is that the possibility of the accused persons tempering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property, forgery for the purpose of cheating using as genuine a forged document. The punishment of the offence is punishment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration. The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by

the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required. This Court in Gurcharan Singh and Ors. Vs. State AIR 1978 SC 179 observed that two paramount considerations, while considering petition for grant of bail in non-bailable offence, apart from the seriousness of the offence, are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses. Both of them relate to ensure of the fair trial of the case. Though, this aspect is dealt by the High Court in its impugned order, in our view, the same is not convincing.

26) When the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial, the question is : whether the same is possible in the present case. There are seventeen accused persons. Statement of the witnesses runs to several hundred pages and the documents on which reliance is placed by the prosecution, is voluminous. The trial may take considerable time and it looks to us that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that accused should be in jail for an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter us from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. We do not see any good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet. This Court, in the case of State of Kerala Vs. Raneef (2011) 1 SCC 784, has stated :-

"15. In deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as stated in Para 2 of his counter-affidavit), and we see no reason why he should be denied bail. A doctor incarcerated for a long period may end up like Dr. Manette in Charles Dicken's novel A Tale of Two Cities, who forgot his profession and even his name in the Bastille."

27) In 'Bihar Fodder Scam', this Court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period more than six months as on

the date of passing of the order, was of the view that the further detention of the appellants as pre-trial prisoners would not serve any purpose.

28) We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardize the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI.

29) In the view we have taken, it may not be necessary to refer and discuss other issues canvassed by the learned counsel for the parties and the case laws relied on in support of their respective contentions. We clarify that we have not expressed any opinion regarding the other legal issues canvassed by learned counsel for the parties.

30) In the result, we order that the appellants be released on bail on their executing a bond with two solvent sureties, each in a sum of `5 lakhs to the satisfaction of the Special Judge, CBI, New Delhi on the following conditions :-

a. The appellants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts or the case so as to dissuade him to disclose such facts to the Court or to any other authority.

b. They shall remain present before the Court on the dates fixed for hearing of the case. If they want to remain absent, then they shall take prior permission of the court and in case of unavoidable circumstances for remaining absent, they shall immediately give intimation to the appropriate court and also to the Superintendent, CBI and request that they may be permitted to be present through the counsel.

c. They will not dispute their identity as the accused in the case.

d. They shall surrender their passport, if any (if not already surrendered), and in case, they are not a holder of the same, they shall swear to an affidavit. If they have already surrendered before the Ld. Special Judge, CBI, that fact should also be supported by an affidavit.

e. We reserve liberty to the CBI to make an appropriate application for modification/recalling the order passed by us, if for any reason, the appellants violate any of the conditions imposed by this Court.

31) The appeals are disposed of accordingly.

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2010-MH L.J.(CRI)-1-283 , 2010-Crimes(Sc)-1-30, 2010 (I) SCC (Cri) 884

SUPREME COURT OF INDIA

Hon'ble Judge(s) : Tarun Chatterjee and Surinder Singh Nijjar, JJ.

Ravindra Saxena ….V/S…. State Of Rajasthan
Dec 15,2009

A) Bail – Cr. P.C. SS. 438 - The defence put forward by accused cannot be ignored – The plea of accused that the dispute between him and complainant is purely of a Civil nature – Anticipatory bail is therefore granted to the petitioner.

B) Anticipatory Bail – Cr. P.C. SS. 438 -– 173 – Grant of anticipatory bail after charge – sheet is filed – Anticipatory bail can be granted at any time so long the applicant has not been arrested - The merits of these issues shall have to be assessed at the time of the trial of the accused persons and denial of anticipatory bail only on the ground that the challan has been presented would not satisfy the requirements of Sections 437 and 438 cr. P. C.

THE salutary provision contained in section 438 Cr. P. C. was introduced to enable the Court to prevent the deprivation of personal liberty. It cannot be permitted to be jettisoned on technicalities such as "the challan having been presented anticipatory bail cannot be granted". We may notice here some more observations made by this Court in the case of Gurbaksh Singh (supra) :

> "we find a great deal of substance in Mr tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been

imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein. "

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JUDGEMENT

(1.) LEAVE granted.

(2.) THE application filed by the appellant seeking anticipatory bail has been rejected for the third time by the High Court of Rajasthan, Jaipur Bench. On the basis of the complaint made by one Karan/karani Singh an FIR has been registered against the appellant i. e. FIR No. 107/2007 dated 3. 5. 2007 Jaipur City, Police Station Vidhyadhar Nagar under Section 420, 467, 468, 120-B IPC. It is alleged that the complainant agreed to purchase the flats being Flat Nos. 101 and 101a from the appellant and his father the necessary consideration was received by the accused Nos. 1 and 2. The same flats were subsequently sold to somebody else. It is, therefore, alleged that the appellant has committed offences under Section 420, 467, 468, 120-B IPC. Amar Nath Saxena (father of the appellant); the Appellant i. e. , Ravindra saxena; Shrimati Sharada Devi and Pradeep

maheshwari and accused numbers 1 to 4 in the FIR. According to the appellant the investigation in the FIR was taken over by Samunder Singh, ASI, who happened to be a close relative of the complainant. Therefore, the criminal process is being abused at the instance of the investigating officer.

(3.) AT the time of the hearing of the matter the learned counsel for the appellant pointed out that the father of the complainant is a retired police officer. The complainant is a property dealer. The parties are well known to each other. They have commercial transactions with each other. In fact, the criminal complaint has been filed in order to pressurize the appellant for not to pursue the civil litigation pending between the parties. The complainant has already filed a suit for specific performance on 07. 5. 2007 on the same cause of action. Since, the appellant was being pressurized to compromise in the civil litigation he filed an application for anticipatory bail. He also filed the complaint in the Bar council of Rajasthan against some Advocates who had been compelling the appellant. Even then Session Judge rejected his application for anticipatory bail on 13. 07. 2007.

(4.) THEREAFTER, on the basis of a complaint made by Amarnath Saxena, FIR being no. 207/2007 dated 2. 08. 2007 has been registered against the Kami Singh and others at police Station Sadar, Jaipur, under Section 448, 456, 457, 420, 467, 468, 471, 380, 120-B IPC.

(5.) BEING unsuccessful before the Sessions Judge, the appellant moved an application for anticipatory bail before the High court in the earlier case, which was dismissed by the High Court, as well on 13. 08. 2007. The appellant also sought quashing of the FIR in a petition filed under Section 482 Cr. P. C. before the High Court of Rajasthan. This was also rejected by the High Court. The appellant again moved application for anticipatory bail which was rejected by the High Court on 24. 03. 2008. Therefore, the appellant approached this Court by way of petition for special leave to appeal, which was disposed of on 12. 2. 2009 with the following order:

"this special leave petition is filed against an order of the High Court dismissing the second bail application of the petitioner under Section 438. Cr. P. C. On the prayer of Mr. S. K. Jain, learned counsel appearing for the petitioner, the special leave petition is dismissed as withdrawn with liberty to the petitioner to apply for third bail application before the high Court. If such an application for bail is moved the concerned Court shall decide it on the same day. "

(6.) IN view of the above, the appellant moved the third application for anticipatory bail. This has again been dismissed by the high Court with the following observations: *'in the facts and circumstances, therefore, the case of the petitioner cannot said to have improved with the filing of the challan against him when prima facie case has been found against the accused petitioner. "

(7.) WE are of the considered opinion that the approach adopted by the High Court is wholly erroneous. The application for anticipatory bail has been rejected without considering the case of the appellant solely on the ground that the challan has now been presented.

(8.) WE may notice here that the provision with regard to the grant of anticipatory bail was introduced on the recommendations of the Law Commission of India in his 41st report dated 24. 09. 1969. The recommendations were considered by this Court in a constitution Bench decision in the case of Gurbaksh Singh Sibbia and others vs. State of Punjab, 1 (1980) 2 SCC 565. Upon consideration of the entire issue this Court laid down certain salutary principles to be followed in exercise of the power under Section 438 cr. P. C. by the Sessions Court and the High court. It is clearly held that the anticipatory bail can be granted at any time so long as the applicant has not been arrested. When the application is made to the High Court or court of Sessions it must apply its own mind on the question and decide when the case is made out for granting such relief. In our opinion, the High Court ought not to have left the matter to the Magistrate only on the ground that the challan has now been presented. There is also no reason to deny anticipatory bail merely because the allegation in this case pertains to cheating or forgery of a valuable security. The merits of these issues shall have to be assessed at the time of the trial of the accused persons and denial of anticipatory bail only on the ground that the challan has been presented would not satisfy the requirements of Sections 437 and 438 cr. P. C.

(9.) IN our opinion, the High Court committed a serious error of law in not applying its mind to the facts and circumstances of this case. The High Court is required to exercise its discretion upon examination of the facts and circumstances and to grant anticipatory bail "if it thinks fit". The aforesaid expression has been explained by this Court in Gurbaksh Singh's case (supra) as follows:

"the expression "if it thinks fit", which occurs in Section 438 (1) in relation to the power of the High Court or the court of Session, is conspicuously absent in Section 437 (1). We see no valid reason for rewriting Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the high Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of

course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal. "

(10.) THE salutary provision contained in section 438 Cr. P. C. was introduced to enable the Court to prevent the deprivation of personal liberty. It cannot be permitted to be jettisoned on technicalities such as "the challan having been presented anticipatory bail cannot be granted". We may notice here some more observations made by this Court in the case of Gurbaksh Singh (supra) :

"we find a great deal of substance in Mr tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over- generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein. "

(11.) IN our opinion, the High Court erred in not considering the application for anticipatory bail in accordance with law. The defence put forward by the appellant cannot be obliterated at this stage itself. We are also of the opinion, that the submission of the learned counsel for the appellant that the dispute herein is purely of a civil nature cannot be brushed aside at this stage. We, therefore, grant anticipatory bail to the appellant in the case pending on the basis of FIR No. 107/2007 registered at Police Station Vidhyadhar Nagar, Jaipur City under Section 420, 467, 468, 120-B IPC now pending only under Section 420 and 120-B IPC. It is directed that in the event of arrest the appellant shall be released on bail to the satisfaction of the Investigating officer. It is also directed that the appellant shall join investigation as and when required.

(12.) THE impugned order is set aside and the appeal is allowed.

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Cross citation : [2003] Crimes(SC) 302= [2003]2 SCC 649

SUPREME COURT OF INDIA

(From Bombay High Court)

N. Santosh Hegde & B.P. Singh, JJ.

M.C. Abraham & Anr. - Vs- State of Maharashtra & Ors.

Criminal Appeal Nos. 1346-47 of 2002 (Arising out of SLP (Crl.) Nos. 231 -232 of 2002)

With

Criminal Appeal Nos. 1348-49 of 2002 (Arising out of SLP (Crl.) Nos. 301-302 of 2002)

With

Criminal Appeal Nos. 1350-51 of 2002 (Arising out of SLP (Crl.) Nos. 310-311 of 2002)

With

Criminal Appeal No. 1352 of 2002 (Arising out of SLP (Crl.) No. 868 of 2002)

Decided on 20-12-2002

CRIMINAL PROCEDURE CODE : S. 438, 173(8), S.190, S.41 - Indian Penal Code, 1860- Section 406 and 409/34 – Rejection of anticipatory bail does not mean that accused should be arrested –Anticipatory Bail applications under Section 438 Cr.P.C. rejected –High Court directing State to arrest the directors of MAPL

Held : High Court in exercise of its writ jurisdiction, cannot direct the investigating officer or the State to arrest the accused in a case which is still at the stage of investigation- The mere fact that the bail applications of some of the appellants had been rejected is no ground for directing their immediate arrest - orders passed by High Court is over-stepping the para-meters of judicial interference in such matters. In the first place, arrest of an accused is a part of the investigation and is within the discretion of the investigating officer. Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant

There was no justification for the High Court to direct the State to arrest the appellants against whom the first information report was lodged, as it amounted to unjustified interference in the investigation of the case. The mere fact that the bail applications of some of the appellants had been rejected is no ground for directing their immediate arrest. In the very nature of things, a person may move the Court on mere apprehension that he may be arrested. The Court may or may not grant anticipatory bail depending upon the facts and circumstances of the case and the material placed before the Court. There may, however, be cases where the application for grant of anticipatory bail may be rejected and ultimately, after investigation, the said person may not be put up for trial as no material is disclosed against him in the course of investigation. The High Court proceeded on the assumption that since petitions for anticipatory bail had been rejected, there was no option open for the State but to arrest those persons. This assumption, to our mind, is erroneous. A person whose petition for grant of anticipatory bail has been rejected may or may not be arrested by the investigating officer depending upon the facts and circumstances of the case, nature of the offence, the background of the accused, the facts disclosed in the course of investigation and other relevant considerations.

Held consequently : We have, therefore, no doubt that the order dated 10th January, 2002, in so far as it directs the arrest of the appellants, must be set aside. So far as the order dated 11th January, 2002 is concerned, it gives an impression that the High Court has held that it was not open to the investigating officer, in view of the order passed by the High Court dated 7th September, 2001 rejecting the anticipatory bail petitions of some of the appellants, to treat the case as C summary as it has been found that no funds had been misappropriated. By the impugned order dated 16th January, 2002 the High Court has in fact shown its anxiety to see that the "State expeditiously conclude the investigation in the case and file charge-sheet". (Para 15)

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Counsel for the Parties :

For the Appellants : R.F. Nariman, Sr. Advocate, M.N. Upadhyay, Ms.Meenakshi Orgra and Jay Savla, Advocates. For the Respondents : R.B. Masodkar, S.S. Shinde, V.N. Raghupathy,

JUDGMENT

B.P. Singh, J.-Special leave granted in all matters.

2. These appeals arise out of three orders passed by the High Court of Bombay, Nagpur Bench, Nagpur in Writ Petition (Crl.) No. 380/2001, a writ petition filed in public interest, dated 10th, 11th, and 16th January, 2002. The aforesaid writ petition has been filed by the Maharashtra Antibiotics & Pharmaceuticals Employees Association and others in which a grievance has been made that though the Provident Fund Commissioner has lodged a complaint against several Directors of the Maharashtra Antibiotics & Pharmaceuticals Ltd. (hereinafter referred to as MAPL), the investigation has made no progress on account of the fact that the Directors are government servants and enjoy considerable influence. In the aforesaid writ petition the impugned orders have been passed on different dates which are the subject matter of challenge before this Court. Criminal Appeals arising out of S.L.P. (Crl.) Nos. 301-302 of 2002; Criminal Appeals arising out of S.L.P. (Crl.) Nos.310-311 of 2002 and Criminal Appeals arising S.L.P. (Crl.) Nos.231-232 of 2002 are directed against the orders of the Court dated 10th January, 2002 and 1 lth January, 2002. Shri. A. K. Dhote, appellant in Criminal Appeals arising out of S.L.P. (Crl.) Nos.301-302 of 2002 is the Managing Director of MAPL. The appellants in Criminal Appeals arising out of S.L.P. (Crl.) Nos.310-311 of 2002, Shri J.F. Salve and Sh. Vijay Khardekar are the Directors on the Board of MAPL nominated by the State Industrial and

Investment Corporation of Maharashtra Ltd. (hereinafter referred to as the SICOM). Similarly the appellants in Criminal Appeals arising out of S.L.P. (Crl.) Nos.231-232 of 2002, Sh. M.C Ambraham and Sh. J.K. Dattagupta are part time Directors of MAPL having been appointed as part time Directors on the Board of Management by the President of India.

3. Criminal Appeal arising out of SLP (Crl.) No.868 of 2002 is directed against the order of the High Court dated 16th January, 2002 and the appellants therein are Shri J.F. Salve and Sh. Vijay Khardekar, who are nominees of SICOM on the Board of MAPL.

4. MAPL is a joint venture of the Government of India and the State of Maharashtra and it is not in dispute that it has been declared to be a sick industry by the Board for Industrial and Financial Reconstruction(hereinafter referred to as the BIFR) on 14th January, 1997. It appears that a complaint has been lodged by the Provident Fund Commissioner against the Directors of MAPL alleging offences under sections 406 and 409/34IPC.

5. It appears that some of the accused persons had moved the High Court for grant of anticipatory bail under section 438 of the Code of Criminal Procedure being Criminal Application Nos. 940, 975 and 976 of 2001. Those petitions were rejected by the High Court by its order dated 7th September, 2001. The orders rejecting those petitions have not been appealed against.

6. On 10th January, 2002 the High Court passed the first impugned order observing that it was shocking that the writ petitioners had to approach the High Court seeking directions against the State to act on the complaint lodged by the Provident Commissioner against the Directors of MAPL. Despite the fact that their applications for grant of anticipatory bail had been rejected by the High Court, by a reasoned order, they had not been arrested. The High Court, therefore, felt that in the circumstances, the only course open to the respondent-State was to cause Their arrest and prosecute them. The High Court thereafter passed the following order :-

"We therefore, direct the respondent-State to cause arrest of those Accused and produce them before the Court on or before 14.1.2002. On their failure to do so we will be constrained to summon the Commissioner of Police, Nagpur, Pune and Mumbai to appear before this Court in person and explain that as to why they are not able to cause arrest of these persons.

Merely because accused are government servants/officials they do not enjoy any immunity from arrest if they have committed an offence. It is expected of the State to be diligent in prosecuting such offenders without discrimination.

The order be communicated to the Principal Secretary, Home Department, Government of Maharashtra and also to the Commissioner of Police of three cities who will be solely responsible for failure to comply with the orders of this Court. Learned A.P.P. is directed to communicate the orders by Fax, Wireless message in addition to other mode of service and even inform them on telephone S.O. 16.1.2002. Authenticated copy be furnished to A.P.P.".

This is the first order challenged by the appellants before us.

7. It appears that on the next date i.e. 11th January, 2002 an application filed on behalf of respondents 1 & 2 in the writ petition for modification of the order dated 10th January, 2002 came up for hearing before the Court in which certain additional facts were sought to be brought to the notice of the Court, namely - that the complainant himself had written to the investigating officer by his letter dated 1st August, 2001 that Shri M.C. Abraham, Chairman of MAPL and part time Director Shri J.K. Dattagupta were appointed by the Government of India and as such they were not concerned with day to day working of the establishment and before the complaint should be restricted to other accused persons including these two. The High Court was surprised as to how such a letter would be issued to the investigating officer, because the question as to whether they were concerned with day to day affairs of the company was a matter which had to be considered by the Court taking cognizance of the offence. Some other submissions were also urged on the basis of Section 41-A of the State Financial Corporation Act but the same were also rejected. Lastly, it was urged before the High Court that the investigating officer had taken an opinion from the Assistant Director and Public Prosecutor, Nagpur who was of the view that the matter deserved to be treated as C summary as no funds have been found to be misappropriated. The High Court observed that this could not be the reason for not proceeding further in the matter

particularly in view of the observations made by the Court in the order dated 7th September, 2001 rejecting the applications for grant of anticipatory bail. The application for modification was accordingly dismissed.

8. The third order was passed on 16th January, 2002. It appears that the order directing arrest of the appellants herein was appealed against before this Court and this Court by order dated 14th January, 2002 passed an interim order staying the directions of the High Court to arrest the appellants. The High Court noticed the order passed by this Court. It directed the respondent/State to take necessary steps in the matter subject to interim order passed by the Supreme Court. In this connection it was
observed :-

"Our anxiety is to see that the State expeditiously conclude the investigation in the case and file Charge-sheet. We may again remind the State of the order passed by this Court while rejecting the pre-arrest bail application on 7,9.2001 and should not show any laxity in the investigation".

9. Counsel for the appellants submitted before us that the orders dated 10th January, 2002 and 11th January, 2002 result in unjustified interference with the investigation of the case, and having regard to the well defined para-meters of judicial interference in such matters, the directions made by the High Court deserve to be quashed. He submitted that the High Court in exercise of its writ jurisdiction, cannot direct the investigating officer or the State to arrest the accused in a case which is still at the stage of investigation, nor can it direct the investigating agency to submit a report before the Magistrate as directed by the High Court. We find considerable force in the submission urged on behalf of the appellants. The observations of the Supreme Court in State of Bihar and another Vs. J.A.C. Saldanha and others: (1980)1 SCC 554 in this regard deserve notice. In that case, on the basis of the first information report, the case

was investigated and a final report was submitted exonerating the accused. The matter had engaged the attention of the Government and even while the matter was under consideration of the Government, the final report was submitted. The investigating officer who had taken over from the earlier investigating officer moved the Court with a prayer that the final report already filed, may not be acted upon and that the report of the police, after completion of further investigation, which had been directed by the government in the case, be awaited. The Chief Judicial magistrate passed an order whereby he decided to await the report of further investigation. This order was challenged before the High Court and a Full Bench of the High Court allowed the writ petition and gave various directions to the learned Additional Chief Judicial Magistrate how to dispose of the case. It further held that the Additional Chief Judicial Magistrate was in error in postponing the consideration of the final report already submitted.

10. The contention before this Court was that the High Court was in error in exercising jurisdiction under Article 226 of the Constitution at the stage when the Additional Chief Judicial Magistrate who had jurisdiction to entertain and try the case, had not passed upon the issues before him, by taking upon itself the appreciation of evidence involving facts about which there was an acrimonious dispute between the parties and giving a clean bill to the suspects against whom the first information report was filed. In this connection this court relied upon the observations of the Privy Council in King Emperor Vs. Khwaja Nazir Ahmad: 1944 LR 71 IA 203, which reads thus:-

"In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in

an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the Court s functions begin when a charge is preferred before it, and not until then".

11. Reference was also made to the observations of this Court in S.M. Sharma Vs. Bipen Kumar Tiwari: (1970)3,SCR 946 wherein this Court observed:

"It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal power".

12. This Court held in the case of J.A.C. Saldanha (supra) that there is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved by the executive through the police department, the superintendence over which vests in the State Government. It is the bounden duty of the executive to investigate, if an offence is alleged, and
bring the offender to book. Once it investigates and finds an offence having been committed, it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the Court requesting the Court to take cognizance of the offence under section 190 of the Code of Criminal Procedure, its duty comes to an end. On a cognizance of the offence being taken by the Court, the police function of investigation comes to an end subject to the provision contained in Section 173(8), then commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons

charged with the crime. In the circumstances, the judgment and order of the High Court was set aside by this Court.

13. Tested in the light of the principles aforesaid, the impugned orders dated 10th January, 2002 and 1 1th January, 2002 must be held to be orders passed by over-stepping the para-meters of judicial interference in such matters. In the first place, arrest of an accused is a part of the investigation and is within the discretion of the investigating officer. Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. The section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the Court has no role to play. Since the power is discretionary, a police officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection.

14. In the instant case the appellants had not been arrested. It appears that the result of the investigation showed that no amount had been defalcated. We are here not concerned with the correctness of the conclusion that the investigating officer

may have reached. What is, however, significant is that the investigating officer did not consider it necessary, having regard to all the facts and circumstances of the case, to arrest the accused. In such a case there was no justification for the High Court to direct the State to arrest the appellants against whom the first information report was lodged, as it amounted to unjustified interference in the investigation of the case. The mere fact that the bail applications of some of the appellants had been rejected is no ground for directing their immediate arrest. In the very nature of things, a person may move the Court on mere apprehension that he may be arrested. The Court may or may not grant anticipatory bail depending upon the facts and circumstances of the case and the material placed before the Court. There may, however, be cases where the application for grant of anticipatory bail may be rejected and ultimately, after investigation, the said person may not be put up for trial as no material is disclosed against him in the course of investigation. The High Court proceeded on the assumption that since petitions for anticipatory bail had been rejected, there was no option open for the State but to arrest those persons. This assumption, to our mind, is erroneous. A person whose petition for grant of anticipatory bail has been rejected may or may not be arrested by the investigating officer depending upon the facts and circumstances of the case, nature of the offence, the background of the accused, the facts disclosed in the course of investigation and other relevant considerations.

15. We have, therefore, no doubt that the order dated 10th January, 2002, in so far as it directs the arrest of the appellants, must be set aside. So far as the order dated 11th January, 2002 is concerned, it gives an impression that the High Court has held that it was not open to the

Investigating officer, in view of the order passed by the High Court dated 7th September, 2001 rejecting the anticipatory bail petitions of some of the appellants, to treat the case as C summary as it has been found that no funds had been misappropriated. By the impugned order dated 16th January, 2002 the High Court has in fact shown its anxiety to see that the "State expeditiously conclude the investigation in the case and file charge-sheet". We are afraid; such a direction cannot be sustained in view of the settled principle

of law on the subject. It is not necessary for us to multiply authorities but we may only refer to Abhinandan Jha and others Vs. Dinesh Mishra: AIR 1968 SC 117, where this Court observed thus:-

"Then the question is, what is the position, when the Magistrate is dealing with a report submitted by the police, under Section 173, that no case is made out for sending up an accused for trial, which report, as we have already indicated, is called, in the area in question, as a final report ? Even in those cases, if the Magistrate agrees with the said report, he may accept the final report and close the proceedings. But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case, in our opinion, the Magistrate will have ample jurisdiction to give directions to the police, under S. 156 (3), to make a further investigation. That is, if the Magistrate feels, after considering the final report, that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation under Section 156(3). The police, after such further investigation, may submit a charge-sheet, or, again submit a final report, depending upon the further investigation made by them. If ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute an offence, he can take cognizance of the offence, under section 190(l)(b), notwithstanding the contrary opinion of the police, expressed in the final report .... The functions of the Magistracy and the police, are entirely different, and though, in the circumstances mentioned earlier, the Magistrate may or may not accept the report, and take suitable action, according to law, he cannot certainly infringe (sic impinge?) upon the jurisdiction of the police, by compelling them to change their opinion, so as to accord with his view. . ,

Therefore, to conclude, there is no power, expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a charge-sheet, when they

have sent a report under section 169 of the Code, that there is no case made out for sending up an accused for trial".

16. The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to dis-agree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation.

17. In the instant case the investigation is in progress. It is not necessary for us to comment on the tentative view of the investigating agency. It is the statutory duty of the investigating agency to fully investigate the matter and then submit a report to the concerned Magistrate. The Magistrate will thereafter proceed to pass appropriate order in accordance with law. It was not appropriate for the High Court in these circumstances to issue a direction that the case should not only be investigated, but a charge sheet must be submitted. In our view the High Court exceeded its jurisdiction in making this direction which deserves to be set aside. While it is open to the High Court, in appropriate cases, to give directions for prompt investigation etc., the High Court cannot direct the investigating agency to submit a report that is in accord with its views as that would amount to unwarranted interference with the investigation of the case by inhibiting the exercise of statutory power by the

investigating agency.

18. In these circumstances, therefore, we set aside the direction contained in the order of the High Court dated 10th January, 2002 directing the arrest of the appellants. We also set aside the direction made by the High Court directing the investigating agency to submit a charge-sheet. However, the investigating agency must promptly take all necessary steps, conclude the investigation and submit its report to the concerned Magistrate. It is open to the investigating agency to submit such report as it considers appropriate, having regard to the facts and circumstances of the case and result of the investigation. After such a final report is submitted by the investigating agency, the concerned Magistrate will proceed to deal with the matter further in accordance with law without being influenced by any observation made by the High Court in the impugned orders.

19. The appeals are allowed in the above terms.

(N.K.R.) Appeals allowed accordingly.

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Cross citation : 2009 ALL MR (Cri) 2923

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
Coram : V. M. KANADE, J.

Yogesh Ramchandra Baldawa ....Vs.... State of Maharashtra

Criminal Application No.91 of 2009

9th January, 2009.

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Penal Code (1860), S.366-A - Criminal P.C. (1973), S.438 - Anticipatory bail - Grant of- Applicant eloped with girl of 17 years 8 months on date of complaint - Girl gone with applicant willingly - Applicant 18 years of age as of today -Application for grant of anticipatory bail allowed. (Para 4)

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JUDGMENT :- Heard Counsel for the applicant and APP for the State.

2. The application was filed by one Mrs. Sushama Waichal in which she had alleged that the applicant had eloped with her daughter and the complaint under Section 366(A) was registered vide C.R. No.78/2008 at the Jaysingpur Police Station.

3. Counsel for the applicant submits that the prosecutrix was 17 years 8 months 11 days old on the date on which the complaint was filed and that she had an affair with the applicant and both of them wanted to get married which was opposed by the parents of the girl. The prosecutrix>also has given a letter to that effect to the police station. Counsel for the applicant submits that she had also filed an application for quashing the# complaint vide Criminal Application No.4300 oi 2008 in this Court which is pending.
He submitted that the prosecutrix is present in the court. The learned Counsel submitted that since the applicant and the prosecutrix belonged to two different communities, there was opposition on the part of the parents of the prosecutrix.

4. Taking into consideration the facts and circumstances of the case, in my view,

prima facie case is made out by the applicant for grant of anticipatory bail. The prosecutrix admittedly was above 16 years of age and she had gone with the applicant willingly. The applicant is above 18 years of age as of today . she has no objection if the anticipatory bail is granted. The Investigating Officer has informed the learned APP that in fact, now the father and mother of the prosecutrix have no objection if the girl is married to the applicant. Hence , the applications is allowed.

5. In the event of the arrest of the applicant, the applicant be released on personal bond of Rs.5,000/- with one or two sureties in the like amount.

6. The application is disposed of.

Ordered accordingly .

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1989 CRI. L. J. 252
BOMBAY HIGH COURT
(PANAJI BENCH (GOA))

Coram : 1 Dr. G. F. COUTO, J. (Single Bench)
Criminal Misc. Appln. No. 122 of 1987, D/- 14 -9 -1987.
Devidas Raghu Naik, Applicant v. The State, Opposite Party.

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(A) Criminal P.C. (2 of 1974), S.438, S.439 - BAIL - Bail - Grant of - Factors to be considered - Are substantially same whether application is under S.438 or S.439- the principle that governs S.439 as regards the maintainability of the application is also attracted to an application under S.438- The only distinction is that in a case under S.438 the person who approaches the court apprehends arrest, whereas under S.439 such person approaches the court after his arrest

(B) Criminal P.C. (2 of 1974), S.438 - ANTICIPATORY BAIL - Anticipatory bail - Arrest of accused for purpose of investigation not needed - Anticipatory bail granted.

In the present case, the applicant was charged of illegal felling of the trees in Government land. Some logs were recovered from his saw mill He apprehended that he may be arrested for a non-bailable offence. Documents showed that the applicant had transported the logs after obtaining necessary passes from the authorities. In the circumstances, there was no need to arrest the applicant for the purpose of investigation. Thus from the facts of the case, the application under S.438 for granting of anticipatory bail was maintainable. (Paras 10, 11)

(C) Criminal P.C. (2 of 1974), S.439 - HIGH COURT - COURT OF SESSIONS - - Jurisdiction of High Court and Sessions Court is concurrent - Refusal by Session Court to grant bail is no bar to High Court in dealing bail application - High Court in exercise of its original jurisdiction can grant bail.

The power given by S.439, Cr.P.C., to High Court or to the Sessions Court is an independent power and thus when High Court acts in the exercise of such power, it does not exercise any revisional jurisdiction, but its original special jurisdiction to grant bail. This being so, it becomes obvious that although under S.439 Cr.P.C., concurrent jurisdiction is given to High Court and Sessions Court, the fact that the Sessions Court has refused a bail under S.439 does not operate as a bar for High Court in entertaining a similar application under S.439, on the same fact and for the same offence. However, if a party first moves the High Court and High Court has dismissed the application, then the decorum and the hierarchy of the Courts require that if the Sessions Court is moved with a similar application on the facts, the said application be dismissed 1978 Cri LJ 129 (SC) and 1986 Cri LT 1742 (Ker), Rel. on. 1979 Cri LJ 288 (Cal), Dissented from. (Para 7)

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Cases Referred : Chronological Paras
1986 Cri LJ 1742 (Ker) (Rel. on) 3, 6
1979 Cri LJ 288 (Cal) (Diss. from) 4, 5
1978 Cri LJ 129 : AIR 1978 SC 179 (Rel. on) 3, 7
M.B. D'Costa, for Applicant; G.U. Bhobe, Public Prosecutor, for the State.
Judgement
ORDER :- This application under S.438 Cr.P.C. is filed by one Devidas Raghu Naik on the grounds that it appears that an incident of illegal felling of trees had taken place and therefore, criminal proceedings had been instituted. Some people who are on inimical terms with the applicant had falsely and maliciously implicated him in the said incident and, therefore, he apprehends that he may be arrested for a non-bailable offence regarding the said ducting of the trees. He further states that he has moved an application for anticipatory bail before the Sessions Court, Margao, but the same was dismissed by Order dated 10th September, 1987.
2. In view of the above statement that a similar application for the same facts had been moved before the Sessions Court Margao, and dismissed, the question arose whether the present application under S.438, Cr.P.C. was maintainable.
3. Mr. Bruto D'Costa, the learned counsel appearing for the applicant, placing reliance on the decision of the Kerala High Court in Gopinath v. State of Kerala, 1986 Cri LJ 1742 and of the Supreme Court in 'Gurcharan Singh v. State', AIR 1978 SC 179 : (1978 Cri LJ 129), submitted that the powers for granting anticipatory bail are concurrent and both the High

Court and the Sessions Judge lave jurisdiction to deal with and dispose such application irrespective of the circumstances of one of them having been moved in the first instance. However, the learned counsel submitted that an account of the decorum of the Courts, if the High Court as first approached and refused to grant anticipatory bail, the Sessions Judge should always dismiss she application and he proper remedy in such circumstances is to approach the High Court itself for variation of its earlier order.

4. In his turn, Mr. Bhobe, the learned Public Prosecutor placing reliance on the decision of the Calcutta High Court in 'Amiya Kumar Sen v. State of West Bengal', 1979 Cri LJ 288 urged that the present application is not maintainable.

5. In Amiya Kumar Sen's case, a Division Bench of the Calcutta High Court addressed itself to the very same question that falls for my determination. After analysing grammatically the provision of S.438 and in particular, the word "or" appearing therein, observed that the said word has four meanings and it means : (i) a strong alternative; (ii) that ii has little or no alternative force; (iii) that it introduces an alternative name of synonym and (iv) that it is used for "otherwise". The learned Judges the held the vice that the word "or" occurring in S.438, Cr. P.C. has the meaning of "alternative" unlike what happens with similar words that appear in Ss.439 and 397. Cr. P.C. On the basis of this reasoning, the Division Bench of the Calcutta High Court held the view that a fresh

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application under S.438, Cr.P.C. is not maintainable when one similar application had been already disposed of and dismissed either by the Sessions or the High Court.

6. A different view was, however, taken by a single Judge of the Kerala High Court in Gopinath's case (1986 Cri LJ 1742) (above). The learned Judge held that the word "or" occurring in Sections 397, 438 and 439 has always an alternative meaning add that there is no reason whatsoever to hold that the said word means "and" in S.397 and 439, as held by the Calcutta High Court in the abovementioned authority. Dealing with the said case, the learned Judge of the Kerala High Court observed as under :-

"With due respect to the learned Judge who decided that case I beg to disagree. I do not think that the Section was intended to give a restricted forum in the sense that when one forum is chosen the jurisdiction of the other is excluded. There cannot be any dispute that an accused is Having the freedom to approach the Court of Session or the High Court under S.438. But the question is only whether an accused who approached the Court of Session and got defeated is precluded from moving the High Court for the same relief. I am of the view that he is not precluded. The fact that the concerned person is given the freedom of applying to the High Court or the Court of Session need not necessarily mean that when the option has become final and the approach to the High Court is thereafter barred. By the use of the word 'or' in Sub-Sec. (1) the legislature has invested the Court of Session and the High Court with concurrent jurisdiction. If the accused makes an application to the Sessions Judge and the same is rejected, nothing in the Code prevents him from making a subsequent application to the High Court. That jurisdiction of the High Court is original and not revisional."

The learned Judge further observed that identical words are used in other provisions of the Cr. P.C. namely in Ss.397(1), 398 and 439 and that there is no basis for treating the conjunction 'or' in those provisions in contradistinction with the same conjunction used in S.438 and therefore if those conjunctions are used in the non-alternative sense as equivalent to 'and' there is no reason why a different interpretation is necessary in the case of S.438

7. The above view of the learned single Judge of the Kerala High Court appears to the to be correct. In fact, it is now well settled that there is no bar whatsoever for a party to approach either the High Court or the Session Court with an application for an ordinary bail

made under S.439, Cr. P.C. The power given by S.439 to the High Court or to the Sessions Court is an independent power and thus, when the High Court acts in the exercise of such power it does not exercise any revisional jurisdiction, but its original special jurisdiction to grant bail. This being so, it becomes obvious that although under S.439, Cr. P.C. concurrent jurisdiction is given to the High Court and Sessions Court, the fact that the Sessions Court has refused a bail under S.439 does not operate as a bar for the High Court entertaining a similar application under S.439 on the same facts and for the same offence. However, if the choice was made by the party to move first the High court and the High Court has dismissed the application, then the decorum and the hierarchy of the Courts require that if the Sessions Court is moved with a similar application on the facts, the said application be dismissed. This can be inferred also from the decision of the Supreme Court in Gurcharan Singh's case (1978 Cri LJ 129) (above) :

8. There is no substantial difference between S.438 and S.439 as regards the appreciation of the case as to whether or not a bail is to be granted. The only distinction is that in a case under S.438 the person who approaches the Court apprehends that he may be arrested without any justification or basis, whereas under S.439 such person approaches the Court after his arrest. This being so, the principles that govern S.439 as regards the maintainability of the application are also attracted to an application under S.438, Cr. P.C.

9. Coming now to the of the case, the learned Public Prosecutor placed for my perusal the investigation papers. From the said investigation it appears that there exists a prima facie case implicating the applicant

@page-CriLJ255

in the theft or the felling of the trees in Government land. In fact, references to him are made by several witnesses and it appears that some logs had been recovered from the saw-mill. However, Mr. Bruto D'Costa produced some documents showing that the applicant had transported the said logs to his saw-mill after obtaining the necessary passes from the authorities. It is his case that he is not in any manner involved in the illegal cutting of the trees and in any event, his arrest by the Police is not necessary for the purposes of the investigation.

10. Admittedly, the logs had been already seized by the police and in the circumstances, it appears to me that Mr. B. D'Costa is right then he submits that in the circumstances there is no need whatsoever to arrest the applicant for the purposes of investigation. The same can be done without his arrest provided the applicant appears before the Police as and when necessary.

11. The result, therefore, is that this application is allowed and consequently, the Police Officer investigating the offence of the cutting of the trees in question is directed to release the applicant on bail, in case of his arrest in connection with this case. The applicant to sign a bail bond of Rs. 5,000/- with one surety for the like amount. He should make himself available to the Police as and when necessary for a period of 10 days from today, from 9 a.m. to 6 p.m. everyday. He should not leave the area of Goa without prior permission of this Court.

Application allowed.

Cross Citation :- 2014 ALL MR (Cri)543

BOMBAY HIGH COURT
(BENCH AT AURANGABAD)
ABHAY M. THIPSAY, J.

Dinesh Hilal Mahajan .Vs. The State of Maharashtra,

CRIMINAL WRIT PETITION NO. 811 OF 2013
18th October , 2013.

Advocate for Petitioners : Mr.Ghanekar Nilesh S.
APP for Respondent : Mr.V.P. Kadam,
Mr.C.R. Deshpande, Adv. (For assistance of APP).

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Criminal P.C. (1973), S. 438- Anticipatory bail- Breach of condition – Accused failed to remain present before police station on one date- Held, on a single failure to attend police station, bail would not be automatically cancelled – If there is a failure to comply with a condition , the court is required to seek explanation from the accused persons and then decide whether the failure was willful and deliberate- And whether for that lapse , the extreme step of cancellation of bail should be taken or not .

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Cross Citation :- 2014 ALL MR (Cri)581

BOMBAY HIGH COURT

ABHAY M. THIPSAY, J.

Dattatraya Prabhakar Avantkar
Vs.
The State Of Maharashtra

Criminal Bail Application No.1197 Of 2013
7th AUGUST, 2013.

Mr.Kakasaheb J. Tandale Advocate for the Applicant.
Mrs.S.D.Shinde APP for the State.
Investigating Officer Mr.S.S.Gaja, A.P.I., Baramati Taluka Police Station, present in the court.

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Criminal P.C. (1973), S.437- Bail- Application for Allegation that applicant deceived in respect of Rs.6 lac due to which three persons in a family committed suicide - Prima facie, commission of suicide for money belonging to others, does not appeal to reason- That apart, applicant is in custody since 45 days –Investigation agency not able to trace amount except Rs.1 Lac from applicant – Bail granted subject to certain conditions.(para 6,7,8)

P.C. :

1.Heard Mr.Kakasaheb Tandale,the learned counsel for the applicant, and Mrs.S.D. Shinde,the learned APP for the State.

2.The learned APP has shown to me the papers of investigation that has been carried out so far.

3.On 21.6.2013, one Hanumant K. Mhasvadkar, his wife and his daughter, commit tedsuicide by consuming poison. His son Rahul Mhasvadkar lodged a report with Baramati Taluka Police Station, alleging that the suicide had been committed because the deceased Hanumant had been deceiv ed by the present applicant and two others.The first informant supported his alleg ation on the strength of a suicide note left by the deceased. As per this suicide not e, the deceased had paid an amount of Rs.65Lac to the applicant and two others for securing jobs for various persons. However, as these persons could not

get the job, the deceased was under mental stress, and therefore, put an end to his life.

4. Obviously, the amount of Rs.65 Lac allegedly paid to the applicant and two others – one Raju Kulkarni and one Bharti Bodke, did not belong to the deceased. It is not in dispute that these amounts were collected by the deceased from a number of p ersons bypromising them that he would secure jobs for them. The learned APP co ncedes that the investigation that has been carried out, shows that the persons w ho had paid the monies had been dealing with the applicant and two others. It, however, appears, that those persons were after the deceased for repayment of the amount.

5.Under the circumstances, the possibility of the deceased having committed suici de because of the demands of the persons, from whom he had collected the monies, to repay the monies to them, cannot be ruled out. Prima facie, that the deceased committed suicide because the monies of others were lost, does not appeal to reason.

6.In any case, the applicant is in custody since 45 days. So far, theinvestigation agency has not been ableto trace where the amount has gone. I am informed that only an amount of about Rs.1 Lac has b een recovered from the applicant. On the contrary, it appears that the deceased h imself had purchased some property. Investigation in that regard is in progress. T his is a fit case where the applicant should be released on bail.

7 .The application is allowed.

8.The applicant is ordered to be released on bail in the sum of Rs.30,000/-, with o ne surety in the like amount, on the condition to report to the concerned Police sta tion and make himself available for investigation / interrogation, as and when requ ired by the Investigating Officer.

(ABHAY M. THIPSAY, J.)

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Cross Citation: 2014 ALL MR(Cri)654
IN THE HIGH COURT OF JUDICATURE OF BOMBAY
(BENCH AT AURANGABAD)

ABHAY M. THIPSAY, J.
Ashok Yadavrao Chavhan
-VS-
The State of Maharashtra

CRIMINAL APPLICATION NO. 1494 OF 2013
23rd December,2013

Advocate for Applicant : Mr. J.J. Patil
APP for Respondent No.1: Mr. G.R. Ingole
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A) Criminal Manul (Bomaby High Court), chap.I Para 3-III – Treatment of arrested person by police – Magistrate is not barred from taking cognizance of offence when victim narrates the incident. (para 9,10)

B) Penal Code (1860),Ss.323,324-Criminl P.C.(1973), S.2(d)-Assault by police on arrested person-Filing of Complain by Magistrate in his official capacity–Held , anybody can set criminal law in motion save and except where there is a statutory bar- Ss.323 and 324 IPC do not lay down an such bar- No requirement that complaint be filed by specified person –Hence, complaint in instant case cannot be quashed though it is true that magistrate was supposed to take cognizance and not to lodge complaint.

C) Criminal P.C. (1973), Ss.2(d) ,190-Complaint –Complaint as to police ill –treatment filed by one Magistrate before another Magistrate – It cannot be said that same was not a complaint within meaning of S.2(d)- Only a Police report" is excluded from category of complaint – Even assuming that it was not a complaint, it can certainly be treated as 'information received from any person as contemplated underS.190- Therefore, Magistrate to whom such complaint or information is given , can proceed further on that basis.
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BOMBAY HIGH COURT

SADHANA S.JADHAV,J.

CRIMINAL BAIL APPLICATION NO. 992 OF 2013

Sooraj Aditya Pancholi
Vs
The State of Maharashtra
1st July, 2013

Mr. A.P.Mundargi, Senior Advocate, a/w Ms. Shweta Sangtani, & Mr. Shrikant Shivade,Advocates, for the applicant.
Mr. Yashpal Thakur i/b. Mr. Salim Shaikh, Advocate for the complainant.
Ms. P.P.Shinde, APP, for the State.

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A) **Bail – cash surety instead of solvent surety – Oral prayer accepted- Counsel for applicant submits that it is difficult to obtain a solvency certificate therefore prayers for permission to furnish cash surety –Held , oral prayer is accepted – Applicant to submit solvency certificate within three weeks. (para 16)**

B) Cr.P.C. Sec.439- Bail- Suicide of Actress Jiah Khan-Applicant Sooraj Pancholi-IPC 306 Charge sheet not filed –Investigation in progress- Prosecution alleges the conduct of applicant to delete messages from his cell phones – The cell phones have been sent to forensic laboratory – Held ,It cannot be said that the applicant had attempted to cause disappearance of evidence –The papers of the investigation reveal that the I.O has recorded the statement of most of the relevant witness known to the applicant and the deceased and therefore the applicant deserves bail –Bail granted.

==========P.C.

Heard the learned Senior Counsel for the applicant, the learned APP and also the learned Counsel for the original complainant. Perused the papers of investigation.

2. It is the case of prosecution that on 3rd June, 2013, Nafisa Jiah Khan had committed suicide in her house by hanging. She was a young and bright artist. A/D/Mp/61/2013 was registered. Investigation was set in motion.

3. On 10th June, 2013, the mother of Nafisa @ Jiah Khan lodged a report at the Juhu Police Station, alleging therein that on 8th June, 2013, a condolence meeting was to be held for offering condolence to Nafisa @ Jiah Khan. The mother of the victim was aware that her daughter used to write poems and, therefore, she wanted to read out poems to persons who had gathered at the condolence meeting. While searching for the poems, the daughter of the complainant came across the letters which were not addressed to anybody, in particular. Neither they were extracts of her daily diary. It is alleged that the complainant was shocked and had read the contents of the said pages. After going through the contents of the letter, the complainant realized that the deceased was harassed by the present applicant. The complainant has alleged that she was aware that her daughter was in a live-in-relationship with the present applicant. She had no objection to the same. According to her, in February 2013, when Jiah had visited her at London, Jiah had disclosed to her mother that the applicant does not respect her and humiliates her in public life. She has further alleged that when Jiah was in London, she used to receive phone calls from the applicant. They used to send messages each other. On returning from London, Jiah had disclosed to her mother that with the efforts of the applicant, she had regained her confidence. her passions. She was stable and all was well between the applicant and Jiah. She had also disclosed that they used to receive the meals from the house of Sooraj. It was only when they were in a bad mood or when a discordant note had struck between them that the applicant used to abuse Jiah. On 3rd April, 2013, the complainant returned to India. The applicant used to visit their house.

The applicant used to take the complainant and her daughter for dinners regularly. He had confessed before the complainant that he was deeply in love with Jiah. He had also confessed that he would not be able to live without her and that he cannot imagine a life without her. The complainant had gone for dinner along with the applicant and the deceased on more than 2 – 3 occasions. She has narrated that on 18th May, 2013, Jiah had left the house along with her bag and baggage and thereafter the applicant had called upon the complainant and with her permission, he had visited her house. It is alleged that the applicant informed the complainantthat Jiah had missed the flight and, therefore, she had reached his house i.e. the house of his parents. It is further alleged that he had informed the complainant about the relations between them. He had also disclosed to the complainant that since he has to pursue his career seriously, he would not be able to give ample time to Jiah and, therefore, she is in a depressed state of mind. The

complainant informed her that she was not depressed and she appears to be in normal. However the complainant convinced the applicant that in such profession ups and downs are quite obvious and, therefore, they should engage themselves in some activities so that they do not remain depressed. The complainant had disclosed to th applicant that Jiah was hoping to meet Salman Khan. The complainant had also expressed her suspicion that the focus of the applicant has

shifted from her daughter and that he has focused on his career more than her daughter. However, she had further cautioned him that her daughter was deeply involved with the applicant and, therefore, he should boost her career also. He had further disclosed that he would be more than happy if she can meet people and pursue her career. It was on that occasion that the applicant had informed the complainant and asked her whether she

knew that on one occasion, Jiah had attempted to commit suicide by cutting her veins. The complainant had told him that it would be a criminal case. However, he informed her that he had called a private doctor and they had treated her. The applicant had also informed the complainant that Jiah is more involved in him than her own career. The complainant had told him that he would be partly responsible for the same. She had warned him that if he wants to pursue his career, then in that eventuality he
should not have approached her or loved her. The applicant had expressed his dilemma over the said issue. On 28th May, 2013 also the complainant had told the applicant that he should not play games with her. He replied that he was confused. The complainant was insisting upon her daughter to pursue her career and focus on her career instead of the applicant. On that day, Jiah had shown her mother the message which was given by the applicant which reads thus :-
"I want to start life with you, ham pahele jaise jindagi gujarenge, I love you, I will marry you, will have our home". The complainant had allegedly cautioned her daughter against the same.
According to the complainant, on 3rd June, 2013, Jiah returned to the house of the complainant and informed her that there is a good news and that is she would be selected by the producer-director who had taken audition of her dances at Hyderabad. Thereafter, mother and daughter went for shopping. Jiah then visited her brother, whereas the complainant went to the house of her friend viz. Anju. She returned from her friend's house at about 10.45 p.m. At about 11.15 p.m., the complainant returned home. She was shocked when she saw that her daughter had hanged herself to the ceiling fan of the house.

4. A.D. No.61/2013 was registered. In the A.D. Enquiry, it was learnt that Jiah went into depression as she had been rejected by the directors at Hyderabad. It is pertinent to note that upon learning of the death of Jiah, the applicant and his parents had visited the house of the complainant. The victim's mobile was seized in the A.D. Enquiry. Certain messages were noted down by the Investigating Officer. In the A.D. Enquiry, there was no evidence to hold the applicant responsible for the death of Jiah.

5. It is only on 7th June, 2013, for the first time that after reading the contents of the letter, it was revealed that the applicant had been responsible for the suicidal death of Jiah and, therefore, an offence punishable under Section 306 of the Indian Penal Code was registered against the applicant. He was arrested on 10th Jue, 2013. The Remand Yadi dated 11th June, 2013 would reveal that Jiah was telephonically informed that there was no chance of her being selected in the
audition for which she had performed at Hyderabad. Therefore, she had committed suicide. However, in the course of investigation, the Investigating Officer had raided the house of the applicant i.e. the premises where they lived together before she committed suicide in her mother's house. The application for bail filed by the present applicant was rejected by the Sessions Court and hence the application falls for consideration before this Court.

6. In the course of hearing of this application, the learned Senior Counsel for the applicant has submitted that no offence punishable under Section 306 of IPC can be attributed to the present applicant as he had not instigated her to commit suicide nor he had aided her to commit suicide. The learned Counsel for the applicant further submitted that to attract an offence punishable under Section 306 of IPC, the accused should have committed an act which would connote complicity of the accused in the commission of suicide of the victim. It is further submitted that although there was a live-in-relationship between the applicant and the deceased, no presumptionunder Section 113A of the Evidence Act can be drawn as the deceased was not a legally-wedded wife of the applicant. The learned Counsel further submits that what has to be appreciated at this stage is whether there is a nexus between the cause and the object. He has further submitted that probability of existence of a nexus between a cause and object
suffers a setback, no presumption can be drawn that the applicant is responsible for the suicidal death of the victim. The learned Senior Counsel has further submitted that they were into the live-in-relationship by volition. It cannot be said that irrespective of the acts of applicant, the deceased had no other alternative but to commit suicide. It is apparent from the facts of the case that the mother of the deceased had arrived in India two months before Jiah committed
suicide. After her arrival also, Jiah had shown message to her mother which clearly indicated that the applicant and Jiah were deeply in love with each other. The letters which were seized from the house of the applicant would show that the deceased was deeply in love with the applicant. The deceased was about
three years elder in age to the applicant. She had clearly stated in those letters which were addressed to the applicant that she was deeply romantic. She had given credit to the applicant for making her stable in life. She had further assured him that she would help him whatever way he wants and make him and his father proud. She felt obliged as he had helped her. It is not known as to why the deceased had expressed her apology to the applicant. She has further stated "I am
deeply romantic and a genuine yet complex person". "Take care of me, Love me, I am just a lost girl, but I feel safe with you." In the letters which were found by the sister of the deceased and which were not addressed to anybody. It has been allegedly stated that the applicant had shattered her dreams, that she had lost herself in his love and yet he happened to torture her everyday. It is also stated that she had aborted a baby. One thing is clear that this script had never reached the applicant and they were in their original form in the house of the victim and therefore, it cannot be said that the emotions which were reflected in the letter had ever reached to the applicant.

7. The learned Counsel who appears for the complainant has stated that Jiah was harassed by the applicant to such an extent that she had o alternative bu to commit suicide.

8. The Counsel for the complainant has placed reliance upon the Judgment and order of the Hon'ble Apex Court in the case of Chitresh Kumar Chopra vs. State (Govt. of NCT of

Delhi) AIR 2010 SC 1446. In particular, he has drawn the attention of this Court to para 16 of the Judgment :-

"16. In the background of this legal position, we may advert to the case at hand. The question as to what is the cause of a suicide has no easy answers because suicidal ideation and behaviours in

human beings are complex and multifaceted. Different individuals in the same situation react and behave differently because of the personal meaning they add to each event, thus accounting for

individual vulnerability to suicide. Each individual's suicidability pattern depends on his inner subjective experience of mental pain, fear and loss of self-respect. Each of these factors are crucial and exacerbating contributor to an individual's vulnerability to end his own life, which may either be an attempt for self-protection or an escapism from intolerable self."

One cannot be oblivious of th fact that the said judgment and order was delivered in a case where the accused were seeking discharge from the case. In the present case, this Court is hearing an application under Section 439 of Cr.PC. The Hon'ble Apex Court has specifically observed in para 16 that "each individual 's suicidability pattern depends on his inner subjective experience of mental pain, fear and loss of self-respect. Each of these factors are crucial and exacerbating

contributor to an individual's vulnerability to end his own life, which may either be an attempt for self-protection or an escapism from intolerable self."In the present case, it cannot be ignored that Jiah had suicidal tendency. On an earlier occasion, she had attempted to commit suicide and at that time it was the applicant who had called upon a doctor. He had treated her and had tried to get her out of the said depression. The complainant was not even aware of such an incident until the applicant disclosed to her. According to the Counsel for the complainant, sister of the deceased was aware that Jiah had undergone medical termination of pregnancy. There is nothing to indicate that they had at any point of time questioned the applicant about it and the said actswere out of volition and therefore it cannot be said that the applicant had forced her to undergo medical termination of pregnancy or otherwise. The learned Counsel for the complainant has relied upon the Judgment of the Apex Court in the case of Ram Pratap

Yadav vs. Mitra Sen yadav and Anr. (2003) 1 SCC 15, where the Hon'ble Apex Court has observed in para 7 that although an application under Section 439 before a High Court is not an appeal from the order of Sessions Court even then it is incumbent upon the Courts to consider the reasons for rejection of the bail application by the Sessions Court. In this respect, he has drawn attention of this Court to the observation of the Sessions Court in para 9 of the order. The

Sessions Court has referred the incident of the applicant sending messages to the deceased a few minutes before she committed suicide. This Court has gone through the text of the SMS which was received by the deceased at 11.21 p.m. on 3.6.2013. The alleged message would reveal that there was some misunderstanding between the applicant and the deceased on the ground that the

applicant had been to meet another female friend and the deceased had suspected him. It is clear that she was extremely obsessive and possessive about the applicant. Thereafter,

the female friend had also sent a message to the deceased that there has been some mis-communication and that there was nothing serious, and had further told the deceased that she should not misunderstand her and that she would visit her on the next day. She had also tendered an apology for creating a misunderstanding. The text of the said message would show that there was an exchange of abuses in a fit of rage fury since there was misunderstanding between the applicant and the deceased. The complainant has alleged that in fact on 3.6.2013 the applicant had sent a bouquet to the deceased with a card indicating that their relationship had come to an end and therefore she committed suicide as she was left with no alternative remedy.

9. Upon perusal of the papers and investigation, it appears that the Investigating Officer has recorded the statement of the servant of the applicant and the deceased. He has categorically stated that on 3.6.2013, the applicant had paid him Rs.1,000/- and asked him to purchase a bouquet. He had purchased a bouquet. The applicant had annexed the bouquet with the card saying "Best of Luck" and the bouquet was to be given to the deceased by the domestic help. It
appears that the complainant has misunderstood it to be an indication of breaking of relations. The learned Counsel for the applicant submits that in fact since Jiah was pursuing her career, she had given audition at Hyderabad and therefore the applicant had extended best wishes to her and the same was construed by the complainant as a demonstration of betrayal. It is a matter ofrecord that on 3.6.2013, the applicant had not met the deceased. The learned APP submits that on 3.6.2013, Jiah desperately wanted to meet the applicant, however, he was trying to avoid her. When she called up, he had asked for some period, later informed her that he was with his father and therefore could not talk to her.

10. The applicant has been in custody since 10th June, 2013 till today. The learned APP submits that the investigation is in progress and therefore, the applicant does not deserve bail at this stage. She has further submitted that he had deleted messages received by him and the said cell phones have been sent to Cyber Cell, Kalina Laboratory for retrieving the data which was allegedly deleted by the applicant. It cannot be said at this stage that the applicant had attempted to cause disappearance of evidence or else he could have made every attempt to destroy the letters received by him. The cell phones have been sent to the Government Laboratory and there is no scope for the applicant to tamper with the evidence or to delete the same at this stage.

11. The learned Counsel for the applicant submit that the process of retrieving takes a few minutes ant therefore it cannot be a ground for further incarceration of the applicant. No doubt, it is an unfortunate incident that a young girl has committed suicide. It appears that she was the victim for her sentiments. She could not overcome her emotions. The applicant cannot be held
solely responsible for the same. The deceased could have always walked out of the relationship. She could not overcome her sentiments and her love for the applicant, for which he cannot be held responsible. He was also pursuing his career in acting and

admittedly could not devote sufficient time for the deceased. There were misunderstandings between the applicant and the deceased just before she committed suicide. On the earlier occasion, when she tried to commit suicide, the applicant had saved her. He had helped her to come out of the depression. It cannot be said that on 3.6.2013, he had acted in any manner which could reflect a mens rea that he wanted her to commit suicide and therefore in the absence of any mens rea , instigation or aid it cannot be said that the applicant had driven her to commit suicide on that day.

12. The learned APP and the Counsel for the complainant fairly submits that now the report of the Forensic Laboratory in respect of the call details and the report of the handwriting expert tis awaited.

13. The learned Senior Counsel for the applicant submits that for that purpose, incarceration of th applicant would be unwarranted and unjustified and therefore, he seeks bail. The papers of the investigation reveal that the Investigating Officer has recorded the statements of most of the relevant witnesses known to the applicant and the deceased and, therefore, this Court is of the opinion that he deserves bail.

14. The observations made hereinabove are prima facie in nature and are restricted to the application under Section 439(1) of Cr.P.C. and shall not be considered in any other proceeding or at the time of trial.

15. In these circumstances, the applicant has made out a prima facie case for grant of bail on imposing certain conditions :-

O R D E R

(i) The application is allowed.
(ii) The applicant be enlarged on bail on furnishing P.R. Bond in the sum of Rs.50,000/- and one or two solvent sureties in the like amount.
(iii) Upon being released, the applicant shall surrender his Passport to the Investigating Officer. The applicant shall not leave Mumbai without prior permission of the Investigating Officer.
(iv) The applicant shall not tamper with the evidence and shall not contact any of the common friends of the deceased and the applicant.
(v) The applicant shall report to the Juhu Police Station every alternate day between 2 p.m. to 4 p.m. for one month from the date of release.
(vi) Any breach of conditions by the applicant shall entitle the prosecution to seek the relief under Section 439(2) of Cr.P.C.
(vii) The applicant shall give his address and cell phone numbers to the Investigating Officer.

16. At this stage, the learned Counsel for the applicant submits that it is difficult to obtain a solvency certificate immediately and that would render the order of release would be futile and result into further incarceration inspite of the order of grant of bail and,

therefore, he prays that the applicant shall be permitted to furnish cash surety of Rs.50,000/- and that he would submit the solvency within three weeks from the date of release. The oral prayer is granted.Application stands disposed of.
(SMT.SADHANA S.JADHAV, J.)

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Cross Citation : 2007 ALL MR (Cri) 1693

HIGH COURT OF BOMBAY

B. H. MARLAPALLE, J.

Sunil Laxman Patil….Vs….State of Maharashtra
Criminal Application No.232 of 2007
31st January, 2007.

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Criminal P.C. (1973), S.438 - Anticipatory bail - Grant of - Rape case - Delay in lodging complaint - Sections 328, 376 and 383 of IPC - It is alleged by the complainant /prosecutrix that she was, under false representation, made to travel by the accused with him - she was taken to a hotel and offered some drink and on consumption of said drink she started feeling giddiness, next day, she noticed that she was subjected to sexual intercourse- complaint was lodged against accused of inducing her to have sexual intercourse with him and she further threatened on that count to pay a sum of Rs.5 Lacs - Complaint filed almost about 9 months after the alleged incident - Prosecutrix aged 27 years, possessing degree - It is a fit case to grant anticipatory bail. [Para (2)]

==========Ms.

Mallika In Gale, for Applicant. . Mr. Y. S. Shinde, APP, for State.

JUDGMENT: - Heard Mr. Ingale the learned counsel for the applicant who claims to be a student of second year LL.B. at Manichdnci Pahade Law College, Aurangabad ._ He is of the age of 26 years and prays for the protection of anticipatory bail in respect of C.R. No.5 of 2007 registered With the Deccan Police Station at Pune. Said C.R. has been registered for the offences punishable under Sections 328, 376 and 383 of IPC on 4-1- 2007. It is alleged by the complaint - prosecutrix that on 8-3-2006 she was, under false representation, made to travel by the accused with him on the Journey from Mumbai-Aurangabad via Pune and at Pune they broke the Journey, she was taken to a hotel and offered some drink at about 10.30 p.m. and on on 9-3-2006 when she woke up and recovered, she noticed that the accused and herself were in bed and she was subjected to sexual intercourse. When she questioned the accused he again had forced her in Sexual intercourse. Having realised that she was misrepresented, she came out of the hotel and came back to her home at Mumbai.

2 The complaint has been lodged for the first time, as per her, on 4-1-2007. However, the applicant states that on 26-8-2006 he was © With All Maharashtra Law Reporter,MLunbai 400052 24/10/2013 threatened by the complainant that a complaint was lodged against him already of inducing her to have sexual intercourse with him by making a false promise of marriage and she further threatened the accused on that count *to* pay a sum of Rs.5 lacs. He states that two police constables approached him on 28-8-2006 and he had moved an anticipatory bail application before the Sessions Court at Pune on 4-9-2006. The said application came to be withdrawn on the basis of the investigation report filed by the police and more particularly stating that the C.R was not Registered.

3 I have perused the investigation papers, including the F.I.R. The prosecutrix is of the age of 27 years, possesses a degree in law. The complaint of an incident that took place in the night of. 8-3-2006 and in the morning of 9-3- 2006 has been filed on 4-1-2007 i.e. almost about 9 months later. Consequent to the order passed by this court on 23-1-2007 it is stated by the learned counsel for the applicant that applicant has been reporting to the Deccan Police Station, except on 26-1-2007'. I am satisfied that this is a fit case to grant anticipatory bail.

4 Hence the application is allowed and it is directed that in case the applicant is taken in custody in comiection with C.R. No.5 of 2007 registered with Deccan Police Station, Pune, he shall be released on bail forthwith on furnishing a PR bond in the sum of Rs.3,000/- with one solvent surety in the like amount and on the further condition that he shall report to the Deccan Police Station on every Sunday between 3 p.m. to 5p.m. for a period of four weeks from today.

Application allowed.

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Cross Citation :2010 ALL MR (Cri) 92

BOMBAY HIGH COURT

A. P.DESHPANDE,J.

Shiney Suraj Ahuja ….Vs…. State of Maharashtra

Criminal Application No.4170 of 2009

1st October, 2009.

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(A) **Criminal P.C. (1973), S.439 - Penal Code (1860), Ss.376, 342, 506(2) - Bail - Grant of - While considering the bail application, the Court is not supposed to deal with the submissions in minute details and pronounce correctness or otherwise of the same - Applicant in custody since last 3-1/2 months - No need for any custodial interrogation at this stage- Bail granted with conditions**

B) while dealing with the bail application the well recognized two guiding factors assume greater significance and the same are (1) possibility of the Applicant fleeing from justice in the event he is enlarged on bail and (2) possibility of the Applicant tampering with the evidence. Having regard to the family background of the Applicant coupled with the fact that the Applicant is permanent resident of Mumbai engaged in acting in the films and being possessed of immovable property at Mumbai, it can be safely assumed that the possibility of Applicant fleeing from justice does not exist. It is also so found by the Sessions Judge. So far as the possibility of tampering of evidence is concerned, the same cannot be ruled out for the reason that the Applicant is more resourceful and better placed as compared to the prosecutrix who is a maid servant. Hence, appropriate conditions will have to be imposed so that the apprehension of the prosecution is properly addressed. On prima facie consideration of the evidence and material on record a case for grant of bail , made out and hence, is entitled to be released on bail. (Paras [_9 to_J_2])

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Mr. SHIRISH GUPTE, Sr. Counsel i /b Mr. M. S. MOHITE & Mr. SHRIKANT SHIVADE & Mrs. NEHA BHIDE, Advocates for the Applicant.

Ms. S. D. SHINDE, APP for the Respondent/State.

A. P. DESHPANDE, J.:- This is an application moved for grant of bail under Section 439 of the Code of Criminal Procedure by the Applicant who is a film actor, against whom crime has been registered bearing Crime No.188/2009 for commission of the offences under Sections 376 506(2) of the Indian Penal Code on lodging of an FIR by one Madhun Josm with the Oshiwara Police Station on 14.06.2009. The Applicant came to be arrested on the same day and is in custody since then till date.

2. It is the case of the prosecution that the prosecutrix Madhuri Joshi who is aged about 20 years was working as maid servant at the residential premises of the Applicant since 07.05.2009 and her working hours were from 9:00 am to 6:00 pm. Besides the prosecutrix, two other employees were also working at the residence of the Applicant. One of them was Sangita who was a fulltime servant and used to reside in the same flat of the Applicant whereas other was a cook who used to visit twice a day for preparing the food. One of the witnesses by name Smt. Rekha Mane is acquaintance of the prosecutrix and as the prosecutrix was unemployed at the relevant point of time, Rekha Mane intimated that there is vacancy at the residential premises of the Applicant and hence, the prosecutrix could seek the appointment as a maidservant. The Applicant's family comprises of self. wife and a girl child aged about 1 and 1/2 year. About 8 days prior to the occurrence of incident, wife and daughter of the Applicant had gone io D-lh' and were not in the flat on the date when the incident took place. According to the First Information Report, a day prior to the incident i.e. on 13.06.2009 the Applicant was in the flat. The cook after preparing the food had left. By about 12 O'clock Sangita had gone to see her sister and thus, the Applicant and the prosecutrix alone were in the flat. By about 3:30 pm the Applicant had asked the prosecutrix to switch on the cork of the water tab which was located on the loft. Usually this work was being performed by Sangita but as she was not at home, the prosecutrix was asked by the Applicant to do the same. Hence, the prosecutrix climbed up for reaching the loft taking support. of the basin and wooden-rest with a view to switch on the tab at which point of time the present Applicant had held the legs of prosecutrix near ihe ankle. The prosecutrix told the Applicant not to touch her and she came do^n o^{r} her own. It is also stated that the prosecutrix informed the Applicant that she does not like being touched. The Applicant told her that "I am holding you so that you should not fall". But as the prosecutrix protested, the Applicant had left her. After the duty hours were over on that day the prosecutrix left the place along with Rekha Mane as usual.

On the next day i.e. on 14.06.2009 the prosecutrix had reached the residence of Applicant in the company of Rekha Mane. The Applicant was at the residence on that day. At about 3:00 p.m. Sangita, the other servant, after seeking permission from the Applicant had gone to Church and the prosecutrix was washing the utensils in kitchen. At that time, the Applicant was rearranging the cassettes and CDs in his bedroom. The Applicant called the prosecutrix , hence, the prosecutrix washed her hands and went to the bed room. After she entered the bedroom the Applicant locked the door. It is stated in the First Information Report that the sliding windows of the bedroom were already locked. The prosecutrix asked the Applicant as to why is he closing the door and in response to the same, the Applicant asked the prosecutrix to sit on the bed. The Applicant held her hand and made her sit on the bed. The Applicant made the prosecutrix lay on the bed and he mounted on her. The prosecutrix raised an alarm and shouted, at that time, the Applicant had held both the hands of prosecutrix above her head and pressed her legs by his legs. The prosecutrix claims to have continued shouting and hence, the Applicant picked up a pillow from the bed and gagged her mouth. The prosecutrix continued her efforts to raise alarm even in that situation, hence, the Applicant allegedly threaten the prosecutrix with death and removed the pillow from her mouth. The Applicant then removed his cloths and the cloths from the person of prosecutrix and forcibly committed sexual intercourse. After the Applicant committed rape, the prosecutrix put on the cloths. The Applicant confined the prosecutrix in the bedroom upto 5:00 pm by administering the threats. Thereafter, the prosecutrix went to the kitchen and was seated there for sometime as she was stunned. While the prosecutrix was sitting in the kitchen, the door bell rang and the prosecutrix opened the door. Rekha Mane was there in the lobby and according to the First Information Report, the prosecutrix narrated the incident to the said witness Rekha Mane. Rekha Mane tried to console the prosecutrix and took the prosecutrix to the residence of one Adarsha Gupta and his wife. The prosecutrix narrated the incident in brief to them. Along with Mr. & Mrs. Gupta, the prosecutrix in the company of Rekha Mane reached the Police Station and lodged the First Information Report.

3. In the backdrop of the facts and circumstances narrated in the First Information Report, the learned senior counsel Shri. Gupte appearing for the Applicant has submitted that in the first place, sexual intercourse itself is not established. To bring home the point, my attention is invited to the statement of prosecutrix recorded under Section 164 of the Code of Criminal Procedure. In the said statement according to the learned counsel for the Applicant, there is no mention of any sexual intercourse or rape and what is

mentioned in the said statement is that the Applicant has committed " Atyachar " on the prosecutrix. In the submission of the learned counsel for the Applicant, the word " Atyachar " would mean atrocity and not rape or intercourse. Barring use of the said word " Atyachar " the alleged act of rape or forcible sexual intercourse has not been stated. It is then submitted that the medical examination of the prosecutrix would reveal that there were no injuries found on the person or private parts of the prosecutrix. However, on local examination of the private parts, hymen was found torn at 3 positions i.e. 3 O'clock, 6 O'clock and 9 O'clock. The tears at 3 O'clock and 9 O'clock positions were healed and this suggests that the prosecutrix was used to sexual intercourse.

4. My attention is also invited to the chemical analyzer's reportreceived from the Forensic Science Laboratory, Mumbai. The said report dated 26.06.2009 deals with 13 articles submitted to the laboratory. Articles at Items Nos.l to 6 are the cloths worn by the prosecutrix at the time of alleged commission of the crime whereas articles at Items Nos.7 and 8 were seized from the bedroom viz. the place of crime being the bed-sheet and pillow-cover whereas the articles at Items Nos.9 to 11 are the cloths worn by the Applicant at the time of incident and Articles Nos.l 2 and 13 are the quilt (Rajai) and curtain. No semen or blood was detected either on the cloths of the prosecutrix or the Applicant. The old blood stains were found at Exhibits-2 and 4 which appeared to be washed.

5. Heavily relying on the said chemical analyzer's report, the learned counsel for the Applicant has contended that in absence of detection of the blood or semen on the cloths of the Applicant or the prosecutrix, so also on the bed-sheet it is difficult to believe that any sexual intercourse was committed. No semen or blood stains are found on the person or private parts of the prosecutrix. The learned counsel for the Applicant has also taken an objection to the manner in which the investigation is conducted. It is submitted that there are four flats on each floor of the building. The prosecutrix claims to have shouted when the Applicant tried to commit rape and thus, it was obligatory on the part of the Investigating Officer to record the statements of the occupants of the adjoining flats. It is not in dispute that part of wall of the bedroom of the Applicant is common wall for two flats, one of the Applicant and other of his neighbour. It is then submitted that had the Investigating Officer recorded the statements of the neighbourers the case of prosecutrix that she shouted and raised an alarm would have been falsified. The submission is that the investigation is far from just and fair.

6. Relying on the circumstances referred to herein above, the earned counsel for the Applicant has submitted that in the first place no case of sexual intercourse was made out. Alternatively, it is submitted diat the consent cannot be ruled out. It is then emphatically submitted that the investigation is over and the charge-sheet has been filed. The continued detention of the Applicant in custody is not required. In his submission, if the Applicant is not released on bail his further detention in custody would partake the nature of punishment before conviction. It is then stated that the Applicant is ready and willing to abide by whatever conditions are imposed. It is pointed out that the Sessions Judge has already recorded the finding in favour of the Applicant that there are no chances of the Applicant fleeing from justice, however, the bail was refused to the Applicant by the Sessions Judge as he found the apprehension of the prosecution about possibility of tampering of evidence to be well founded. In that context, it is submitted that the Applicant is ready and willing to reside at Delhi where his parents
reside and thus, the possibility of tampering with the evidence can be taken care of.

7. Per contra, the learned APP has pointed out that the version of prosecutrix stands corroborated by the evidence of Rekha Mane to whom the prosecutrix had made immediate disclosure of the incident. It is also pointed out that vaginal smear on slides wrapped in paper was sent to the Forensic Science Laboratory and the report of the chemical analyzer clearly shows that the DNA extracted from (1) vaginal smear slides of victim Madhuri and (2) control blood sample of the Applicant was successfully typed at 16 male specific YSTR loci using PCR amplification technique. In the DNA typing, all 16 genetic systems analyzed with the PCR using male specific YSTR system the male haplotypes obtained in vaginal smear slides of victim Madhuri exactly matched with male haplotypes in control blood sample of the Applicant. Taking the support of the said DNA report, it is contended that the sexual intercourse is established and this piece of evidence strongly corroborates the version of the prosecutrix. It is also pointed out that in the medical examination of the Applicant, 03 abrasions were noticed, one on the left wrist, second at the base of right little finger and third at the base of right ring finger. The said injuries/abrasions are stated to be within 24 hours. It is submitted that the injuries would go to support the prosecution case of resistance by the prosecutrix which rules out consent.

8. According to the learned counsel for the Applicant, the said injuries/abrasions could be caused while undertaking the day to day work.

9. While considering the bail application, the Court is not supposed to deal with the submissions in minute details and pronounce of the correctness or otherwise of the same, however, the Court is expected to broadly consider the evidence, material and circumstances on record and then form an opinion as to whether the Applicant is entitled to be released on bail or otherwise. In the facts of the present case the well recognized two guiding factors assume greater significance and the same are (1) possibility of the Applicant fleeing from justice in the event he is enlarged on bail and (2) possibility of the Applicant tampering with the evidence.

10. Having regard to the family background of the Applicant coupled with the fact that the Applicant is permanent resident of Mumbai engaged in acting in the films and being possessed of immovable property at Mumbai, it can be safely assumed that the possibility of Applicant fleeing from justice does not exist. It is also so found by the Sessions Judge.

11. So far as the possibility of tampering of evidence is concerned, the same cannot be ruled out for the reason that the Applicant ismore resourceful and better placed as compared to the prosecutrix who is a maid servant. Hence, appropriate conditions will have to be imposed so that the apprehension of the prosecution is properly addressed.

12. With the risk of repetition it has to be stated that the investigation is over and the charge-sheet has been filed and the Applicant is in custody since last 03 and 1/2 months. There is no need for any custodial interrogation at this stage. On prima facie consideration of the evidence and material on record, I am of the view that the Applicant has made out ? case for grant of bail and hence, is entitled to be released on bail. I haste; that this observation is made only for the purpose of decision oi' the bail application. The concern of the prosecution about possibility of tampering of the evidence can be taken care of by putting the Applicant to terms.

13. Hence, I pass the following order:

(a) The Applicant shall be released on bail on executing a personal bond in a sum of Rs.50,000 /- with one or two sureties in the like amount subject to the condition that the Applicant shall not stay in Mumbai and shall stay at Delhi till conclusion of the trial. The Applicant shall inform and intimate his residential address of Delhi to the Superintendent of Jail so also to the Investigating Officer before his release from jail.

(b) The Applicant shall not leave India without prior permission of the Court. If the Applicant is possessing a passport, he shall deposit the same with the Investigating Officer immediately on his release from jail.

(c) The Applicant shall attend the nearest Police Station at Delhi once a week till conclusion of the trial with intimation to the Investigating Officer.

(d) The Applicant is permitted to enter city of Mumbai for attending the dates before the Sessions Court in the present case.

(e) The Applicant shall not directly or indirectly make any muucemeiiu threat or promise to any person acquainted with the facts of the case and shall not tamper with the evidence.

(f) Liberty is granted to the Applicant to apply for modification of terms after expiry of a period of six months.

(g) The Application is allowed and disposed of accordingly.

At this stage learned counsel for the applicant seeks permission to deposit bail amount in cash for a period of three weeks during which period the applicant would in a position to furnish surety. Permission prayed for is granted. Applicant is allowed to deposit bail amount in cash for a period of three weeks.

Application allowed.

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Cross citation: **1962 (1) Cri. L. J. 673**

TRIPURA HIGH COURT

Coram : 1 T. N. R. TIRUMALPAD, J.C. (Single Bench)

Criminal Ref. No. 17 of 1960, D/- 22 -3 -1961., reference made by S.J., Tripura, in Criminal Motion No. 69 of 1960.

Easih Mia and another….Vs…. Tripura Administration

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(A) Criminal P.C. (5 of 1898), S.167, S.496, S.497 - BAIL - INVESTIGATION - ARREST - Arrest illegal - Effect - It will be wrong for a Magistrate either to order detention of the accused u/S.167 or to call upon him to produce sureties if the arrest is illegal. (Para 15)

(B) Criminal P.C. (5 of 1898), S.498, S.514 - ARREST - BAIL - SURETY - Illegal arrest - Bail by Sessions Judge - Enforcement of bail bond against sureties. The bond taken on a bail granted by the Sessions Judge to a person who has been illegally committed to prison will itself be invalid and such an invalid bail bond cannot be enforced against the sureties. (Para 18)

(C) Criminal P.C. (5 of 1898), S.496 - BAIL - APPEARANCE - Bail bond - Construction - Person required to appear before court to answer charge - Person cannot be asked to appear before charge is framed. (Para 21)

Where a person and his sureties only undertook to appear before the court on each and every date to be fixed in future to answer the charge brought against him, the Court cannot call upon such person to appear before it before any charge was brought against him and he also is not bound to appear if the court fixes a date merely for appearance, but not to answer any charge brought against him. And there is no duty cast on the sureties to produce him in court, if the Court chooses to direct his production for no purpose whatsoever

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M.R. Choudhary, for Petitioners; R.K. Bhattacherjee, Govt. Advocate with M.C. Chakraborty, for Respondent.

JUDGEMENT

ORDER : In this reference the learned Sessions Judge has recommended that the orders of the District Magistrate dated 10-5-60 and 30-5-60, forfeiting the bail bond given by the two sureties for the appearance in Court of one Suruj Mia Bhuiya and calling upon the sureties to pay the penalty and ordering distress warrant for the realisation of the penalty, should be set aside.

2. To understand the points involved in this reference the following facts have to be stated :

Suruj Mia Bhuiya was arrested by the Sonamura Police , on 12-5-58 under Sec. 54 Cri. P. C. and under Sec. 4 of the Indian Passport Act and produced before the S. D. M. Sonamura on 13-5-58 with a report by a police officer that he was arrested under the said sections suspecting that he was a Pakistani national and that he had come to India with a view to commit some cognizable offence. The S. D. M. remanded him to custody, but subsequently on 26-5-58 granted him bail on condition that he lived within Sonamura town and reported to the O/C, Sonamura police station daily.

3. We find from the note paper of the S. D. M. dated 29-5-58 that Suruj Mia was immediately wanted at Agartala by the District Magistrate. I have searched the entire record and also given time to the Government Advocate to produce the order of the District Magistrate by which he directed the S. D. M. to produce the arrested person before him. At first, it was stated that it may have been by a Police Wireless message. Then I wanted the message to be produced. I was informed after a month's adjournment that there was no such order or message on record.

4. Suruj Mia on learning that he was wanted by the District Magistrate to appear before him duly presented himself before that officer on 2-6-58. The District Magistrate then directed him to be taken into custody. He moved for bail before the District Magistrate, but bail was refused on 18-6-58. I get even these details from the later order of the Sessions Judge in the bail application. The records relating to the order of arrest and refusal of bail by the District Magistrate are not forthcoming.

5. Thereupon Suruj Mia applied to the Sessions Judge Sri S. C. Talukdar and the Sessions Judge granted him bail on 4-7-58. A bail bond for Rs. 2000/- with two sureties of like amount was to be given to the satisfaction of the District Magistrate. Further conditions of the bail were that Suruj Mia should not stir out of the Municipal area of Agartala and must daily report to the O/C, Kotwali police station, but that he will report to the S. D. M. Sonamura whenever called for in connection with any case that may be started against him.

6. The District Magistrate then took bail and the petitioners were the two sureties. The bail bond did not mention the conditions laid down in the Sessions Judge's order but simply said that Suruj Mia will appear before the District Magistrate on each and every date to be fixed in future to answer to the charge brought against him and that he will continue to so attend Court until otherwise directed by the Court. Later the learned Sessions Judge on application by Suruj Mia but without notice to the sureties altered the condition and permitted Suruj Mia to stay with his parents at Sonamura, by his order dated 8-9-1958.

7. In the meantime, the District Magistrate appears to have got the records in the case from the S. D. M. Sonamura. I find from the records that they were sent through a police officer to the District Magistrate. But there is no written order by the District Magistrate calling for the records. On 1-6-59 the District Magistrate passed an order in the said record after hearing the lawyer for Suruj Mia that the case was pending for more than a year and no specific charge was brought against the accused till then and there was no reason to drag on the case and so he transferred the case to Sri N. Singh, Magistrate first class, Sonamura for speedy disposal.

8. On receipt of the records Sri N. Singh directed the sureties on 8-8-59 to produce Suruj Mia in Court. We are unable to know for what purpose

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he was directed to be produced, as he had no charge at all to meet and no charge-sheet had been filed by the police against him as required under Sec. 173 Cri. P. C. Any way the Magistrate passed the order. But the sureties were not able to produce him. So the Magistrate Sri N. Singh forfeited the bail bond and directed them on 5-10-59 to pay the penalty or to show cause under S. 514 Cri. P. C. The petitioners thereupon appealed to the District Magistrate under Sec. 515 Cri. P. C In that appeal, the District Magisrate set aside the order of the Magistrate as according to him the bond was for appearance before his Court and he alone could forfeit the bail bond.

9. After allowing the appeal on 15-2-60, he withdrew the case from the Magistrate Sri N. Singh to his own file and then issued notice on 17-2-60 to the sureties to produce Suruj Mia before him on 7-3-60. We are unable to know for what purpose the District Magistrate wanted Suruj Mia to be produced as even then no charge-sheet had been filed against him by the police. This was stated by the District Magistrate himself in his order dated 7-3-60 and he also brought it to the notice of the Superintendent of Police. But still no charge-sheet was filed till September 1960. Still he again called upon the sureties on 11-9-60 On their failure to produce the accused, to show cause why the bail bond should not be forfeited. The sureties pointed out to the District Magistrate that the bail bond was not worded in accordance with the order of the Sessions Judge and that it was, therefore, invalid and the District Magistrate had no jurisdiction to forfeit the bail bond. But that argument was not accepted by him and he directed them to pay the penalty on 10-5-60. Subsequently on 30-5-60 he directed the issue of distress warrant against the sureties.

10. It is under these circumstances that the sureties applied under Sec. 435 to Sri S. N. Banerjee, successor of Sri, S. C. Talukdar Sessions Judge and he made the reference under Sec. 438 Cri. P. C to this Court.

11. This case discloses a series of acts by the police and by Criminal Courts, which were totally unwarranted under the provisions of the Criminal Procedure Code.

The police in the first place had no authority to arrest Suruj Mia under section 54 Cr. P. C., or under section 4 of the Indian Passport Act. The report of the police officer dated 13-5-58 to the S. D. M. Sonamura showed that the arrest under section 54 Cr. P. C., and under section 4 of the Indian Passport Act was made because it was suspected that Suruj Mia was a Pakistani national and had come to India with a view to commit some cognizable offence.

12. A person cannot be arrested under section 54 Cr. P. C., either because he is suspected to be a Pakistani or because it is suspected that he came to India with a view to commit some cognizable offence. Under section 54 (1) first, a police officer can arrest a person who has been concerned in any cognizable offence or against whom credible information has been received or a reasonable suspicion exists of his having been so concerned. It is clear from this that a cognizable offence must have been committed and the person sought to be arrested must have been concerned with the said offence or at least reasonable suspicion existed of his having been so concerned. It is not enough to arrest under S. 54 that there was likelihood of a cognizable offence being committed in the future. There was no statement in the first report dated 13-5-58 by the police officer that any cognizable offence has been committed, So the arrest under S. 54 Cr. P. C., was illegal.

13. The police have, of course, powers of arrest to prevent the commission of a cognizable offence. But it is not under S. 54 Cr. P. C. In the case of vagabonds and habitual robbers,

an officer-in-charge of a police station can arrest a person found taking precaution to conceal his presence within the limits of such police station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizablel offence. This is under S. 55. Again under S. 151, Cr. P. C., a police officer knowing of a design to commit any cognizable offence may arrest, if it appears to such officer that the commission of the offence cannot be otherwise prevented. The first report, dated 13-5-58, by the police officer does not show that the conditions for the exercise of the power of arrest either under S. 55 or under S. 151 Cr. P. C., existed. In any case the arrest in our present case was not made under either of those sections. The arrest under S. 54 Cr. P. C., was, clearly, illegal.

14. Nor could a police officer arrest a person under S. 4 of the Indian Passport Act on suspicion that he is a Pakistani. An arrest under S. 4 can be made only for contravention or reasonable suspicion of contravention of any rule or order made under S. 3, of the said Act. Being a Pakistani, even if true, cannot be a contravention of the rules made under S. 3. What is prohibited under the rules framed under S. 3 is any person whether he is a Pakistani or any other national or even an Indian national entering India from outside without a valid Passport. Section 4 of the Indian Passport Act will not give the authority to a police officer to call upon any man inside India on suspicion that he is foreigner to produce his Passport or to arrest him in case he fails to produce it. A foreigner found inside India can be proceeded against under the Foreigners Act, but cannot be arrested under the Indian Passport Act, I have pointed this out in various decisions of mine.

15. Thus the arrest of Suruj Mia either under S. 54 Cr. P. C. or S. 4 of the Indian Passport Act was certainly illegal. When a person is thus brought before a Magistrate under arrest, it is the duty of the Magistrate to see that the arrest was legally made and if he finds that the arrest was illegal, it is his duty to direct the release of the person immediately. The Criminal Procedure Code has provided the production before a Magistrate under S. 167 as a check to prevent the abuse of the wide powers given to the police for arrest without warrant. It will be wrong for a Magistrate either to order detention of the accused under S. 167 Cr. P. C. or to call upon him to produce sureties under S. 496 or 497 Cr. P. C., if the

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arrest is illegal. At least, he has to be released on his executing a bond without sureties for his appearance under S. 496 or 497 Cr. P. C. Thus, the S. D. M. Sonamura was wrong in calling upon Suruj Mia to give sureties to support his bail. Since the very arrest of Suruj Mia was thus illegal, all the subsequent proceedings including the order for bail by the S. D. M. Sonamura, the subsequent commitment to custody by the District Magistrate, the grant of bail by the Sessions Judge, the forfeiture of the bail bond and the issue of distress warrant by the District Magistrate were all illegal. On that ground alone, this reference has to be accepted.

16. When once the S. D. M. Sonamura had released Suruj Mia on bail, the District Magistrate had no authority to direct that Suruj Mia should be produced before him. Nor had he any authority to take him into custody in the face of the bail given by the S. D. M. No provision in the Cr. P. C., has been pointed out which would give jurisdiction to the District Magistrate to do so. Section 497(5) Cr. P. C. authorises only a High Court or a Court of Sessions to cause the arrest of a person who has been released on bail and to commit him to custody. The District Magistrate had no such power. In this case, there was no application before the District Magistrate by the police to cancel the bail given by the S. D. M. Sonamura or to take Suruj Mia into custody again.

17. It is not known on what information the District Magistrate directed the production of Suruj Mia before him or caused him to be committed to custody when Suruj Mia appeared before him on 2-6-58. If he did so on getting any information given by the police under S. 62 Cr. P. C., there must be something on record to show it. But the learned Government Advocate was not able to produce any written order from the District Magistrate.

It is surprising that no written order at all was passed by him either calling upon the S. D. M. Sonamura to produce Suruj Mia before him or committing Suruj Mia to custody. He was dealing with the liberty of a citizen guaranteed under the Constitution and that too, not as an officer of the executive administration, but as a Judge of the Criminal Court. How can he act in such a cavalier fashion and issue oral orders in such matters?

18. Thus, when once Suruj Mia was released on bail under the orders of S. D. M. Sonamura, the commitment to custody of Suruj Mia by the District Magistrate was clearly illegal. This illegality again makes the subsequent bail proceedings illegal. Any bail bond taken as a result of such illegal procedure cannot therefore be enforced either against Suruj Mia or against any sureties. There was some duty cast on the Sessions Judge Mr. S. C. Talukdar when the matter came up before him on the motion of Suruj Mia for bail to see if his arrest and detention under the orders of the District Magistrate were in accordance with law. I have pointed out now that they were not in accordance with law.

It was the duty of the Sessions Judge when the matter came up before him in bail proceedings to have examined the records and taken action under S. 435 and reported the matter to this Court under S. 438 for action under S. 439 Cr. P. C. In merely releasing Suruj Mia on bail the learned Sessions Judge in a way accepted that the detention under the orders of the District Magistrate was legal. Still the bail bond taken on such bail granted by the Sessions Judge to a person who has been illegally committed to prison will itself be invalid and such an invaid bail bond cannot be enforced against the sureties. On that ground also this reference has to be accepted.

19. The bail bond was taken by the District Magistrate as directed by the Sessions Judge. Hence it has to be in conformity with the order granting bail. The Sessions Judge did not order that the bail bond was to be for appearance before the District Magistrate. In fact, there was no case pending before the District Magistrate against Suruj Mia. By illegally committing Suruj Mia to prison, the District Magistrate cannot say that there was any case before him against Suruj Mia. He did not pass any order transferring the proceeding pending before the S. D. M. Sonamura to his own file. The District Magistrate can, no doubt, transfer a case from the file of the S. D. M. Sonamura to his own file under S. 528 Cr. P. C. But under that section he can transfer only a case. There was no case at all against Suruj Mia. A case can be said to have arisen only when a Magistrate has taken cognizance of an offence under S. 190. That can be done in the present case only after the police have submitted a report under S. 173 Cr. P. C. That stage had not been reached.

All that the S. D. M. Sonamura did in this matter was to grant bail to Suruj Mia when he was produced before him under S. 167 Cr. P. C. Such a matter cannot be transferred by the District Magistrate under S. 528, Cr. P. C. Further, I have pointed out that no written orders were passed by the District Magistrate transferring the matter to his file. The procedure adopted appears to have been to intimate to the S. D. M. Sonamura orally through the police to direct the production of Suruj Mia before the District Magistrate and to send the record through the police officer. Such procedure is unheard of in a Court of law. He seems to have acted not as a judicial officer bound by law and legal procedure, but as an executive officer issuing oral instructions to a subordinate executive officer.

20. Thus there was no proceeding before the District Magistrate in respect of which he could have directed Suruj Mia to appear before him or taken him into custody. Hence he could not take a bail bond from Suruj Mia to appear before him. The learned Sessions Judge himself treated it as a matter pending before the S. D. M. Sonamura and directed in his order, dated 4-7-58, that Suruj Mia was to appear before the S. D. M. Sonamura whenever called in connection with any case that may be started against him. As no case had been started against Suruj Mia his appearance either before the District Magistrate or before the S. D. M. Sonamura did not arise at all.

21. When we turn to the bail bond in question, we find that what Suruj Mia and his sureties undertook therein was to appear before the Court on each and every date to be fixed in future, to

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answer the charge brought against him. It is clear from this that before any charge was brought against him the Court cannot call upon Suruj Mia to appear before it and Suruj Mia also is not bound to appear if the Court fixes a date merely for appearance, but not to anwer any charge brought against him. I have already pointed out that no charge till this date has been brought against Suruj Mia. On this ground also, even granting that the bail bond for appearance before the District Magistrate was valid, the time to direct the appearance of Suruj Mia had not arrived under the bail bond and there was no duty cast on the sureties to produce him in Court, if the Court chose to direct his production for no purpose whatsoever.

We can envisage the situation when no charge is brought against Suruj Mia for years and the Court goes on fixing dates after dates for his appearance and directs the sureties to produce him. Such an order by the Court will be totally meaningless and will be nothing but harassment. I cannot understand why either the S. D. M. or the District Magistrate should have directed the production of Suruj Mia in Court when there was no charge against him. There must be some purpose in an order of Court.

22. No doubt, the learned Sessions Judge in granting bail, had directed Suruj Mia not to leave the limits of Agartala town. But that was not included in the surety bond. If that had been violated, I cart understand a Court directing the production of Suruj Mia in Court. But the particular bail bond in question did not include that condition and on that bail bond which was only for his appearance on the day fixed to meet a charge brought against him, the Court cannot direct his production on the ground that he had left the limits of Agartala town.

23. On 1-6-59 the District Magistrate transferred the case to the file of Sri N. Singh, first class Magistrate, Sonamura. When the original transfer to his own file was illegal, this further transfer to the file of Sri N. Singh was equally illegal. The District Magistrate had stated in his order dated 1-6-59 that no specific charge was brought against Suruj Mia till then, though more than a year had passed. One fails to understand why he should have transferred the case to Sri N. Singh in such a situation. He could have himself directed the release of Suruj Mia. After all, when he found that Suruj Mia had no case at all to meet there was no point in continuing the bail or in transferring the case to Sri N. Singh. Nor was there any meaning in Sri N. Singh's calling on the sureties to produce the accused. He could have released Suruj Mia. Of course, the forfeiture of the bail bond by Sri N. Singh was beyond his jurisdiction.

24. The further transfer of the case to his file on 17-2-60 was another meaningless thing which the District Magistrate did. It was after this that he forfeited the bail bond himself on

the ground that he was the proper authority to forfeit the surety bond. I have pointed out in this order that he had no such authority not only to forfeit the surety bond but even to commit Suruj Mia to custody or to take bail from him. I have also pointed out that the learned Sessions Judge was himself wrong in having directed bail instead of reporting to this Court to take action under S. 439.

25. Thus the whole proceeding in this case from beginning to end has been illegally done by the police, by the S. D. M., and the District Magistrate. This case discloses that it is high time that the judiciary is separated from the executive and that criminal judicial posts should be manned by persons having knowledge and experience of law and legal procedure and having legal training. Executive officers put in charge of judicial work are apt not to do their duties in a judicial manner in accordance with statutory provisions. When even the District Magistrate to whom all the other Magistrates are subordinate can act in this executive fashion in respect of matters which are strictly judicial we can imagine the position of Magistrates subordinate to him. A copy of this order will go to the Tripura Administration. It will be well if the Tripura Administration will appoint as District Magistrate under S. 10, Criminal Procedure Code, a judicial officer having legal training and knowledge and experience of law and legal procedure, so that he may carry out the judicial functions of the District Magistrate under the Cr. P. C. This has been done in the Union Territory of Manipur.

26. The reference is accepted and the orders of the District Magistrate dated 10-5-60 and 30-5-60 are set aside.

Reference accepted.

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Cross Citation: 2002-BCR-(1)-689

BOMBAY HIGH COURT

Hon'ble Judge(s) : A.M.KHANWILKAR,J

KHEMLO SAKHARAM SAWANT ...Vs...STATE

Criminal Misc. Application 54 of 2001 Of, May 08,2001

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A) Cr. P.C. S. 437 – Bail – Bail is rule jail is exception – In case of offences not punishable in alternative with death, grant of bail is rule, and jail an exception- Observation made by sessions Judge that offence in question was serious one and therefore, applicant ought not to be released on bail – Held, while rejecting bail application the sessions Judge was more influenced by morality than the Principles of law – Accused directed to be released on bail – Court should not get swayed by perception of morality but should confine its decision to the requirement of law – In case of offences not punishable with death or imprison ment for life grant of bail is rule and jail is an exception.

B) Arrest of accused by police – Allegations of abaterment of offence having punishment up to 5 years – No arrest can be made in a routine manner – A person is not liable to arrest merely on the suspicion of complicity in an offence .

C) Unless principle offender is proceeded and arrested – The action against abater is illegal.

D) Bail –Adjournment – Held When accused is in jail , it would be wholly inaproperiate to again and again adjourn matter to another date .

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JUDGEMENT

(1.) HEARD both sides.

(2.) THIS application takes exception to the order passed by the Sessions Judge, North Goa, Panaji dated May 5, 2001, rejecting the application for bail preferred by the applicant herein.

(3.) BRIEFLY stated, a complaint was received in the Crime Branch, Panaji from Shri Vinay Tendulkar alleging that on 27-4-2001 while he was in the midst of a meeting with the people from his constituency, the applicant/accused approached him for a private talk along with one Deepak Parab and told him that they were sent by Tai, i. e. Smt. Nirmala Sawant, President of Congress (T) of Goa State and seven MLAs of BJP who had shown inclination to join Congress (I) and further that they decided to offered him ministerial berth and Rs. 15 lakhs in cash to split from BJP and support Congress (I) to form Government. On the basis of this complaint, which was registered as Crime No. 3/2001, the concerned Station Officer, forwarded the said report to the Magistrate at around 18. 30 hours and thereafter proceeded to investigate into the matter. It is stated that statements of two witnesses, have been recorded by the concerned Investigating Officer, namely, of Prasad Tendulkar (brother of the complainant) and Rajiv Naik (Personal Assistant of the complainant). It is stated that the Investigating Officer thereafter at around 11. 30 p. m. along with a posse of Police, visited the residential house of the applicant at Amona in Bicholim taluka and he was called upon to accompany the Police for investigation in connection with the said complaint. The record indicates that the applicant followed the police without any resistance, but it is stated that thereafter a group of 40 persons gheraoed the police and prevented them from taking away the applicant. There are certain allegations made in the affidavit about the conduct of the applicant at the relevant point of time. However, that is not the subject matter of the proceedings, for the offence alleged against the applicant, in the present case, is simpliciter under section 12 of the Prevention of Corruption Act. Undisputedly, the applicant was produced before the J. M. F. C. for the purpose of remand to police custody on 29th April, 2001 after he was arrested on 28th April, 2001 around 11. 30 p. m. It is not in dispute that the arrest was not pursuant to the warrant issued by the Court, but during the course of investigation by the concerned

Investigation Officer. When the applicant was produced before the Magistrate for Police remand on the ground that his custody was necessary for another 7 days for further investigation, the Magistrate was pleased to reject the said request and ordered judicial custody. The order directing the applicant to be kept in judicial custody has become final. The order does record that statements of witnesses have been recorded and that nothing requires to be recovered. Thereafter, on the next date, the applicant moved the Judicial Magistrate, F. C. , i. e. on 30th April, 2001 for grant of bail. The said application was however rejected on the same day by a reasoned order. The Judicial Magistrate dismissed the application, mainly on the ground that the co-accused was absconding.

(4.) AGAINST this order, the applicant preferred an application before the Sessions Judge, which has been rejected by the impugned order.

(5.) THE learned Addl. Public Prosecutor heavily placed reliance on the reasons recorded by the Sessions Judge and more particularly on the following:-- I would now deal with the contention that the offence with which the accused has been booked is not serious as contended by learned Advocate Lawande. I do not find much force in this contention and the submission is without sound basis. Corruption, bribery, horse trading have become the order of the day corroding the fabric of society in all walks of life and eroding peoples faith in a democratic governance; secured under the Constitution of India to its people justice, liberty and equality. Time and again it is seen that persons in the corridors of power abuse rather than use their power for common good. To say that offence is not serious like murder is adding insult to injury on a society torn between preserving values, and ethics and being drawn and swallowed in vortex of corruption in all walks of life. Like an offence of murder which is a crime against society, similarly corruption is an equally, if not more a serious offence than murder where there is invariably a motive. . . . . The applicant in the instant case as is revealed had obstructed his arrest and even otherwise it is a matter at large that the family of the applicant accused and other persons have already moved for Anticipatory bail apprehending their arrest in that connection. That aspect of the matter cannot weigh while disposing this application but it is referred to in passing to show the conduct of the applicant and what would be his subsequent demeanour, if set at a large, if at all. "

(6.) HEARD both sides at length and perused the record. At the outset, I have no hesitation in observing that the Sessions Court while rejecting the bail application, was more influenced by morality than law. This is evident from the observations made by the Sessions Court that the offence in question was serious enough and therefore the applicant ought not to be released on bail. The Sessions Court, has clearly overlooked that it is the privilege of the Parliament to decide which offence should be treated as serious or otherwise. The legislative intent of treating the offence serious is eloquent from the sentence provided for the said offence. In the present case, the punishment for offence under section 12 is minimum six months and may extend upto a period of five years. This offence, therefore, cannot be equated with a serious offence like murder, as has been observed the Sessions Court. The Court should not be swayed away by the perception of morality, but should confine its decision to the requirements of law. The present application was one for bail and the matter was not before the Sessions Court for trial and imposing of sentence on returning the finding of guilt. In case of bail, the law is well settled. The Apex Court, has time and again observed that bail is a rule and jail is an exception, particularly when the offence in question is not an offence which involves life or death sentence. The parameters for bail in such matters, are well settled.

(7.) MR. Kantak, appearing for the applicant, rightly relied on the decision reported in (Joginder Kumar v. State of U. P. and others), A. I. R. 1994 S. C. 1349, particularly in para 24 to contend that in the present case, the investigating agency had clearly exceeded its authority and acted contrary to the law enunciated by the Apex Court. Reliance has been placed on the following observations of the Apex Court :-

"the above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the persons complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a Police Officer issues notice to persons to attend the Station House and not to leave station without permission would do. "

(Emphasis supplied).

(8.) IN the present case Mr. Kantak has rightly criticised the action of arrest on the ground that no offence of abetment could be proceeded against the applicant unless the principal offender was booked. The learned Addl. P. P. submits that necessary action will be taken against the principal offender after investigation is complete. The only justification for such a stand seems to be because of the fact that the principal offender is a sitting M. L. A. If this be so, there was hardly any reason for the Investigating Officer to hasten the arrest of the applicant, who is undoubtedly charged only for the offence of abetment. Now that the Investigating Officer has already recorded statements of relevant witnesses and no other recovery is to be made as rightly observed by the J. M. F. C. , while ordering judicial custody; and in any case the applicant is in judicial custody since 29-4-2001, therefore, no fruitful purpose would be served by keeping him in jail. The applicant has reasonably good defence and as urged by Mr. Kantak, the present action against the applicant seems to be wholly unwarranted and inappropriate.

(9.) THE learned Addl. Public Prosecutor, on the other hand relied on the observations made by the Apex Court in the matter of (Shahzad Hasan Khan v. Ishtiaq Hasan Khan and another), reported in A. I. R. 1987 S. C. 1613. In para 7 of the said decision, the Apex Court observed thus :---

"The learned Judge also failed to consider the question that there were serious allegations of tampering of evidence on behalf of the accused persons. Vishram and Jagdish, two eye-witnesses had filed written applications before the trial Court making serious allegations

against Masod and Masroof brothers of respondent No. 1. They alleged that they had been kidnapped and their signatures and thumb impressions had been obtained on some blank papers and they were being threatened with dire consequences and they requested the Court for being granted police protection. One of the salutary principle in granting bail is that the Court should be satisfied that the accused being enlarged on bail will not be in a position to tamper with the evidence. When allegations of tampering of evidence are made, it is the duty of the Court to satisfy itself whether those allegations have basis (they can seldom be proved by concrete evidence) and if the allegations are not found to be concocted it would not be a proper exercise of jurisdiction in enlarging the accused on bail. In the instant case there were serious allegations but the learned Judge did not either consider or test the same. "

(10.) IN the present case, although the Investigating Agency has alleged that if the applicant is released on bail, he is likely to tamper with the evidence. This apprehension is totally misplaced, for the simple reason that having regard to the nature of the allegations in the complaint, the crucial evidence is that of the complainant himself. Therefore, in case the applicant, if released on bail, and attempts to bring any pressure on the complainant, that would be a good case for cancellation of bail, but it will result in miscarriage of justice to keep the applicant in custody on the basis of mere apprehension. It is not necessary for this Court to go into the correctness of the statements recorded by the Investigating Officer for the same will have to be done at the appropriate stage during the trial. For the time being, what is to be seen, is the nature of the offence; and the possibility of the applicant, if released on bail, making any attempt to tamper with the prosecution evidence or witnesses. As observed earlier, the complaint is simpliciter for an offence under section 12 of the Prevention of Corruption Act, and in that connection, necessary evidence has already been recorded by the Investigating Agency. Merely because co-accused is absconding, is not a sufficient ground to refuse bail in such matters especially when the principal offender has not been booked and the applicant is merely charged of abetment. In the circumstances, I have no hesitation in observing that the Sessions Court was clearly in error in refusing bail mainly being influenced by considerations other than law.

(11.) THE learned Addl. Public Prosecutor points out that on account of the conduct of the applicant, this is not a fit case, where he should be released on bail. In this connection, statement of P. I. Mamlatdar has been relied on to point out that the applicant threatened the said officer to sign a note mentioning that Mr. Mamlatdar had taken Rs. 10 lakhs from Mr. Manohar Parrikar for kidnapping and killing the applicant. It is not in dispute that the said allegation is subject matter of a complaint in a case which is registered as Crime No. 47/2001 before the Bicholim Police Station. The law will take its course in the said proceedings, for the allegations mentioned therein would be considered in those proceedings. I therefore refrain from making any observation regarding the correctness or otherwise thereof.

(12.) THE other circumstance relied upon by the learned Addl. Public Prosecutor is that when the applicant was being arrested by the Investigating Officer, a group of 40 persons who were none else but close relations of the applicant gheraoed the police and prevented them from taking the applicant. The learned Addl. Public Prosecutor fairly concedes that there is nothing on record to indicate that the said persons had gheraoed the Investigating Officer at the instance of or at the instigation of the applicant herein. It appears that the said persons on their own, on the spur of the moment, agitated before the police and in

the manner they thought appropriate. This circumstance, therefore, cannot be held against the applicant to refuse bail.

(13.) MR. Kantak, has made a grievance before this Court that although the bail application was preferred before the Sessions Court on 30th April, 2001 and was directed to be listed for hearing on 2nd May, 2001 and which was accordingly heard and arguments concluded, the Sessions Court instead of pronouncing the order on the same day, kept the matter for orders on 4th May, 2001. But eventually pronounced the order only on 5th May, 2001. In substance, the grievance is that if the Court had concluded the arguments, there was no valid reason for the Sessions Court to reserve the judgment in this matter and in any case having notified the date for orders as 4th May, 2001 , it was totally inappropriate to adjourn the matter to 5th May, 2001 to pronounce the order impugned in the present application running into only 11 pages. The approach of the Sessions Court obviously is inappropriate, particularly when the matter concerns liberty of any person much less a citizen. As observed earlier, the alleged offence in the present case is only under section 12 of the Prevention of Corruption Act and therefore it was wholly inappropriate for the Sessions Court to reserve the orders on bail application and thereafter again adjourn the matter to another date as has been done in the present case.

(14.) IN the circumstances, I have no hesitation in enlarging the applicant on bail, provided he is subjected to strict conditions. The learned Addl. Public Prosecutor has submitted that the applicant be directed to attend the Crime Branch, Panaji Police Station on daily basis till the investigation is completed between 5. 00 to 8. 00 p. m. and besides that the applicant should not enter the territory of Sanvordem Constituency during the investigation period.

(15.) IN my view, the applicant can be released on bail forthwith on the following conditions :--- (a) That the applicant shall furnish one security for an amount of Rs. 10,000/ -. The security be furnished to the satisfaction of the J. M. F. C. , Panaji; (b) The applicant shall also furnish a personal Bond for the like amount before the J. M. F. C. , Panaji; (c) The applicant shall not enter Sanvordem Constituency, during the progress of the investigation of the present case without prior permission of the J. M. F. C. , Panaji ; (d) Until the filing of the Police Report under section 173, the Applicant shall not leave the jurisdiction of this Court without prior intimation to the Investigating Officer as well as without prior permission of the J. M. F. C. , Panaji ; (e) The applicant shall report to the Investigating Officer at Crime Branch, Panaji daily between 5. 00 to 8. 00 p. m. , initially for a period of seven days from today, and if necessary, as and when called upon by the Investigating Officer in connection with the investigation of the present case and the applicant shall extend full co-operation during the course of investigation ; (f) The applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Investigating Officer or the Court; and (g) The applicant shall not commit an offence similar to the offence alleged to have been committed by him in the present case.
(16.) THE applicant is therefore directed to be released on bail forthwith in connection with Crime No. 3/2001 registered with the Crime Branch, Police Station, Panaji on the aforesaid conditions.

Order accordingly.

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Cross Citation: 2003 CRI. L. J. 3928

KERALA HIGH COURT

Hon'ble Judge(s) : R. BASANT, J.

Usman ... Vs... **The Sub-Inspector of Police and another,**
C.R.M.C. Nos. 3265 and 3391 of 2003, D/- 3 -5 -2003.

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(A) Criminal P.C. (2 of 1974), S.437, S.438 - BAIL - orders - Practice and procedure - Copies of orders in every bail application (whether regular or anticipatory) - Should be furnished to accused/counsel free of cost immediately after pronouncement of orders on same day as mandated in the S. 363(1), Cr.P.C.

(B) Criminal P.C. (2 of 1974), S.437, S.438 - BAIL - Disposal of application - Courts including Sessions Court should ensure that bail applications are disposed of within the outer limit of three working days. (Para 40(iii))

(C) Criminal P.C. (2 of 1974), S.438, S.439 - BAIL - ANTICIPATORY BAIL - High Court can exercise jurisdiction even if the Sessions Court were not called upon earlier to exercise such jurisdiction.

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Cases Referred : Chronological Paras

Puran v. Rambilas, 2001 Cri L.J. 2566 : AIR 2001 SC 2023 : 2001 AIR SCW 1935 : (2001) 6 SCC 338 16
Babu Premarajan v. Suptd. of Police, AIR 2000 Ker 417 : 2000 AIHC 4849 : (2000) 3 Ker LT 177 31
Y. Chandrasekhara Rao v. Y. V. Kamala Kumari, 1993 Cri L.J. 3508 (Andh Pra) 36
Gopinath v. State of Kerala, 1986 Cri L.J. 1742 : 1986 Ker LT 107 16
Iyya v. State of Karnataka, 1985 Cri L.J. 214 (Kant) : (1983) 2 Kant L.J. 8 35
Jagannath v. State of Maharashtra, 1981 Cri L.J. 1808 (Bombay) 35
Mohanlal v. Prem Chand, AIR 1980 Him pra 36 (FB) 36
K. Sivan Pillai v. Raja Mohan, 1978 Cri L.J. 743 : AIR 1978 Ker 131 : 1978 Ker LT 223 (FB) 33
Rajpal Singh v. State of Haryana, 1978 Cri L.J. 609 (Punj and Har) 35
Onkar Nath v. State, 1976 Cri L.J. 1142 (FB) (All) 36
Hajialisher v. State of Rajasthan, 1976 Cri L.J. 1658 (Raj) 35
M. Zacharia v. State of Kerala, 1974 Cri L.J. 1198 : 1974 Ker LT 42 34, 35

S. Narayan v. Kannamma Bhargavi, 1969 Cri L.J. 611 : AIR 1969 Ker 126 : 1968 Ker LT 495 (FB)
32
T. G. Rajendran for Petitioner; Smt. Noorji Noushad, Public Prosecutor, for Respondents.

JUDGEMENT

ORDER :- Does an accused apprehending arrest or arrested already have an unfettered option to approach this Court under Section 438 or 439, Cr. P.C. ? Cannot this Court in the interests of justice, expediency and convenience insist, (re)introduce and enforce compliance with the salutory and accepted rule of procedure that where two fora have concurrent powers the forum lower in the hierarchy must be approached before the doors of the superior one are knocked ? These interesting questions arise for determination in these Crl. MCs.

2. The facts scenario is simple. Crl. M.C. 3265 of 2003 is an application for anticipatory bail under Section 438, Cr. P.C.. The accused apprehends arrest in a crime registered under Sections 498-A and 306, I.P.C. Crl. M.C. 3391 of 2003 is a petition for regular bail under Section 439, Cr. P.C. where the accused has already been arrested on 4-4-2003 on the allegation that he has committed offences punishable under Section 55(a) of the Kerala Abkari Act.

3. As this Court sitting as the vacation Court entertained doubts about the desirability of approving the course adopted in many cases that came up for consideration of the accused approaching this Court directly with applications under Sections 438 and 439 without and before approaching the Court of Sessions which has concurrent jurisdiction under these statutory provisions, the learned Public Prosecutor and the learned Counsel were requested to advance arguments on this interesting legal question. Most of the counsel chose to adopt the very convenient course of getting their applications dismissed as withdrawn with liberty to move the Sessions Court. Considering the importance and the significance of the question raised, counsel who have appeared before me on 29-4-2003, 30-4-2003 and 2-5-2003 have all been permitted to advance detailed arguments if any on this question to assist the Court.

4. I shall first of all extract the relevant portions of the statutory provisions. "438. Direction for grant of bail to person apprehending arrest.- (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section, and that Court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail.

(2) .....

439. Special powers of High Court or Court of Session regarding bail.- (1) A High Court or Court of Session may direct-

(a) that any person the accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of S. 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified :

....."

(Emphasis supplied)

5. The learned Public Prosecutor contends that though there can be no dispute about the jurisdictional competence of this Court in appropriate and exceptional cases to entertain an application for anticipatory bail/bail under Sections 438/439, Crl. P.C. at the first instance itself that cannot be the rule. The learned Public Prosecutor relies on the well established and salutory rule of procedure that where two fora are vested with concurrent authority, the superior one can be approached by a party only after the inferior one is approached, except in exceptional cases. The learned Public Prosecutor submits that this rule must be adhered to in the interests of convenience, expedition, inexpensive justice, avoidance of conflict of decisions and of saving the time of the superior Court for more sublime pursuits. The learned Public Prosecutor submits that it definitely reduces expenses, at least in a substantial number of cases. At least the presumption is that if the case is a fit one where discretion can be invoked in favour of the petitioner, the Court of Session would and should as well, invoke the discretion. In that case the litigant would be saved of the unnecessary trouble of approaching the Superior Court. There is only one seat for the High Court of Kerala and that is situated almost at the middle of the State. It would be very inconvenient, more expensive and cumbersome for the parties to approach the High Court. Relatively therefore, it will certainly advance the interests of parties and save unnecessary expenses if the local District Courts in each district can entertain applications under Sections 438/439. So far as the State is also concerned, there can be saving of a lot of expenditure as officers have to come from outlying districts to the seat of the High Court to instruct the Prosecutor. In the interests of proper disposal of cases also it is very essential that the Prosecutor gets proper assistance so that he can be of useful assistance to the Court. It would serve the cause of efficient and prompt investigation as the investigating officers will not have to proceed to the seat of the High Court and the case diary will not have to be carried there to instruct the Prosecutor. It helps also in adoption of uniform standards in respect of applications/bail applications in each district. It also saves the time of this Court as it will not be flooded with applications for bail/anticipatory bail when relief can be obtained from the Court of Session itself. If only fit cases, where the discretion has not been exercised correctly by the Court of Session, come before the High Court for its consideration, the time of the High Court can be saved. In that process quicker disposal of applications for bail can also be ensured. The High Court also would get the advantage of application of mind by the Court of Session to the same facts earlier. In these circumstances the learned Public Prosecutor submits that it will be more advantageous if this Court follows a self-imposed rule of restriction that ordinarily applications under Sections 438/439 will be entertained by this Court only if and after the Court of Session has considered the application earlier.

6. My attention has been brought to many precedents showing that other High Courts have imposed such restrictions on themselves - reserving always the jurisdictional competence and the discretion to entertain an application for bail/anticipatory bail directly at the first instance if the peculiar facts of a given case warrant such a course.

7. As against this the learned Counsel for the petitioners contend that it is not permissible to impose any such fetter on the right of a litigant to approach the superior Court. The language of Section 438, Cr. P.C. shows that the option to file an application before the Court of Sessions or the High Court is left to the discretion of the applicant and not the Court. So far as Section 439 is concerned, though it does not refer to applications by the parties (and the powers can be exercised even in the absence of an application) both Courts have concurrent jurisdiction and by a process of interpretation or by imposing restrictions on itself the court cannot introduce any such fetters on the option conceded under Sections 438 and 439.

8. It is then contended that Sections 438 and 439 are concurrent powers. The High Court does not exercise appellate, revisional or supervisory jurisdiction under Sections 438 and 439. The jurisdiction in both these cases, of the High Court, is special and original and in these circumstances no such fetter can be placed on the option of the party. Under Sections 438/439 the petitioners are entitled to have first consideration by the High Court uninfluenced by any earlier consideration by the Sessions Court. If such a Rule were followed the High Court will never have the option/ability to consider facts without being influenced by an earlier consideration by a subordinate Court, it is urged.

9. It is then submitted that the rule that the lower forum having concurrent jurisdiction must be moved first is certainly not one of universal acceptance. Considering the language of Sections 438 and 439 such rule cannot be followed, it is urged.

10. It is contended that it may perhaps be permissible for Courts which have been following such a self-imposed rule to continue with the practice. But this Court having not imposed any such restriction on itself earlier, should not and need not introduce any such rule of practice for the future.

11. Some of the counsel contend that the question to be decided is one of signal significance. This is definitely not only an important or very important question but it is a crucial question of general public importance. Hence this Court sitting as a vacation Court may not decide the issue and may make a reference to the Division Bench under the relevant provisions of the Kerala High Court Act, it is submitted.

12. The counsel further urged that if such a practice were introduced, the accused will have to suffer the evil consequences of the laws delays. It would hurt their interest. Some of the Sessions Courts take a minimum of 10 to 15 days before an application under Sections 438/439 is finally disposed of. There is inevitable delay in furnishing copies thereafter also. In these circumstances the introduction of such a self-imposed rule would jeopardise the interests of the accused persons in custody/facing the prospect of arrest.

13. Finally it is contended that wherever the Legislature had wanted such restrictions to be imposed on the exercise of concurrent jurisdiction, that has been made clear in the respective statutory provisions. Reliance is placed on Section 399(3), Cr. P.C. where it is said that if one Court having concurrent jurisdiction has exercised its jurisdiction, the other will not be entitled to invoke such powers. Reliance was also placed on the proviso to Section 407(2), Cr. P.C. to contend that wherever the legislature wanted the superior Court not to exercise such concurrent jurisdiction before the subordinate Court exercises such powers, it is made clear in the provision itself. In these circumstances by a process of

interpretation such restrictive rule may not be introduced placing fetters on the powers of the Court, it is urged.

14. It is submitted that under the Criminal Procedure Code or the Kerala High court Act or under the relevant Rules framed there is no provision by which it can be insisted that the Sessions Court must be moved before the High Court is moved for grant of bail/anticipatory bail. In these circumstances there can be no question of introduction of a self-imposed rule restricting the powers of the High Court, it is argued.

15. My attention has been drawn to various precedents on the point also. I shall advert to them later.

16. At the very outset I must note that the powers vested in the High Court and the Court of Session under Sections 438 and 439, Cr. P.C. are concurrent. The powers are equal and identical. There is of course the difference that the command of the High Court would run over a larger geographical area. So far as the nature of the relief is concerned both Courts have exactly identical equal and concurrent powers. This is a very serious distinction when we consider the other analogous provisions as also precedents. Any relief which the High Court can grant under Sections 438/439 can also be granted by the Court of Session. This is explicit from the language of the statutory provisions. It is evident from precedents also.

16-A. I do also agree that the powers of the High Court are not appellate, revisional or supervisory under Sections 438 and 439. It is a special original jurisdiction which the High Court exercises under Sections 438 and 439. It is by now trite and the decisions reported in Gopinath v. State of Kerala, 1986 Ker LT 107 : (1986 Cri L.J. 1742) and Puran v. Rambilas, (2001) 6 SCC 338 : 2001 Cri L.J. 2566 : (AIR 2001 SC 2023) make it very clear that notwithstanding the fact that the powers are concurrent the High Court can exercise such powers even after the Sessions Court exercises such powers earlier.

17. There can also be no doubt about the jurisdictional competence of the High Court to entertain an application under Sections 438/439 at the first instance. The question is only whether a self-imposed rule of restriction can be introduced in the procedure. In an appropriate case, notwithstanding any such self-imposed restriction the High Court will be at liberty to entertain the application at the first instance.

18. Under Sections 438 and 439 a very wide discretion is conferred on the superior Courts. The legislature has chosen to confer such discretion without any limitations. As to how the discretion must be exercised and what restrictions must be imposed is certainly left to the courts concerned. It is trite that in appropriate cases the High Court would be justified in not entertaining an application under Sections 438/439 itself and can direct the Court of Sessions to consider such application or refer the parties to the Sessions Court. All that I intend to note is that such a self-imposed restriction on sound judicial discretion is certainly not outside the amplitude of the discretion conferred under Sections 438 and 439, Cr. P.C.

19. I find merit in the submission of the learned Public Prosecutor that in actual practice the imposition of such a restriction while exercising the discretion would advance the interests of justice convincingly. Experience shows that considerable amount of time in this Court is wasted for the Public Prosecutor to get instructions and to enable him to

peruse the case diary. The officers of the State have to undertake unnecessary and avoidable trips to the seat of the High Court to bring the case diary and to instruct the Public Prosecutor. Often this Court finds that proper assistance is not available from the Public Prosecutor on account of want of instructions and their inability to have access to and peruse the case diary. The travelling up and down of the case diary does interfere with proper and prompt investigation also. Unnecessary delay, inconvenience and expenses are caused to the parties also when relief which could have been obtained from the Court of Session is unnecessarily sought from this Court.

20. The argument that the party has an unfettered option to choose the forum does not appeal to me. The legislature when it conferred concurrent jurisdiction must be presumed to have been aware of the salutory Rule of procedure that ordinarily the superior Court's time and resources will be and can be called in aid only after the Court of lower jurisdiction is moved. From the language of Sections 438 and 439 according to me it would be imprudent to jump to the conclusion that an unfettered option was conferred on the applicant in an application under Sections 438 and 439, Cr. P.C.

21. I do not find much merit in the contention that if the Sessions Court once applies its mind, the High Court will not be able to apply its mind independently. That proposition does not appeal to me as correct or reasonable. In the hiearchy of Courts it must be presumed that the superior Courts do have the judicial competence and ability to exercise their discretion appropriately whether the subordinate Court has earlier considered the question or not. It will be apposite to note that powers under Sections 438 and 439 are vested only in superior Courts like the Court of Session and the High Court which are presumed to be manned by experienced and competent personnel. The fact that a subordinate Court has already applied its mind does not appeal to me as a sufficient reason to assume that the superior Court will not be able to apply its mind independently and properly. That it has the result of application of mind by another authority having concurrent jurisdiction is to be reckoned only as an advantage and not certainly as a fetter or disadvantage.

22. Reference to Sections 399(3) and 407(2) does not also lead me to any contra conclusion. Section 399(3) is a peculiar provision which after conferring concurrent powers takes away the powers of the authority if the other authority having concurrent powers has already exercised its powers. That restriction cannot and does not apply to applications u/Ss. 458/459, Cr. P.C.. That cannot lead to the conclusion that in all cases where there is conferment of concurrent powers on two fora no self-imposed restrictions can apply. Similarly the powers under Sections 406 and 407 cannot certainly be reckoned as concurrent. Separate conferment is made of the power of transfer on the Court of Session and the High Court under these provisions. The proviso to S. 407(2) cannot in these circumstances help the Court to conclude that no self-imposed restriction can be made in the matter by the Court in the absence of an identical salutory stipulation in Ss. 438 and 439, Cr. P.C.

23. The argument that such a self-imposed restriction cannot be placed and that would run against the intent of the legislature cannot also obviously succeed as the salutory rule has been tested by the times and has been accepted and followed by Courts in the absence of exceptional reasons. The legislature when it conferred concurrent powers on the Court of Session and the High Court must be presumed to have known and assumed that the provision will be understood and interpreted consistent with the well

accepted rules of interpretation and that the salutory rule of procedure referred above shall also be followed while construing the statutory provision.

24. Coming to the delay I am appalled to hear the submission that some Sessions Court take as many as 10 to 15 days on an average to dispose of applications under Sections 438/439, Cr. P.C.. The system must hang its head down in shame if that submission were factually correct. Liberty of an individual is given paramount importance under the system of laws in which we function. If Courts of Session do not imbibe the sublime respect for liberty which the system mandates, it would be a very unfortunate state of affairs. If such a practice exists it must certainly be discontinued forthwith. Every application for bail, whichever be the Court, must ideally be disposed of on the same date as its filing. But sometimes to comply with the requirement of giving notice and getting instructions, it may be necessary to deviate from that ideal rule. But even then there can be no justification for a bail application remaining without disposal beyond a period of three working days. That must be the outer limit whatever be the hierarchy of the Court.

25. Similarly it is submitted that it takes a long period of time to get copy applications complied with. I am shocked to hear submissions on this sad state of affairs also. Order in every bail application must be given to the party/counsel by the Court on the date on which such orders are pronounced. It must be the duty of the system to ensure this. It would be unreasonable to deny the party the advantage of a copy on the date of the order. Lip service to the cause of liberty will not suffice. A person is entitled to know immediately why his application for bail is dismissed. He is entitled thereafter to seek his relief before Superior Courts. Fetters cannot be placed on such rights by the unreasonable delay in furnishing copies. The law has already accepted this obligation to furnish copies on the date of pronouncement of the order. Order XX, Rule 6-B, C.P.C. and Section 363(1), Cr. P.C. recognise and accept this requirement. If that be so I can find no reason why the principle should not be followed in the matter of furnishing copies of orders in bail/anticipatory bail applications also.

26. It is submitted that separate applications are insisted for copies. This is totally unnecessary. It is common knowledge that any person who makes an application before Court would be interested in getting copy of the order passed on such application. The Court-fee collected must definitely and certainly include or deemed to include the requisite expenses for furnishing copy also. If necessary court-fees may have to be increased. But certainly it is puerile to insist on a separate application for a copy of the order from a party. At any rate here it must certainly be insisted that copies of orders in bail and anticipatory bail applications must be furnished free of cost to the party - simultaneously with the pronouncement of the orders.

27. It is submitted that at the Sessions Court the Prosecutors do not have as much and efficient assistance as is available to the Law Officers of the High Court. In the Magistrate's Court also, such assistance is not available. In these circumstances it is submitted that unnecessary and avoidable delay would unfortunately occur if the claimants have to approach the Sessions Court for the relief under Sections 438 and 439, Cr. P.C.. This again should not occur and should not in any way contribute to the delay in disposal of applications under Sections 438 and 439. It is the responsibility of the system to make sure that such delay is avoided.

28. Appropriate safeguards can be insisted to avoid such delay in the disposal of bail/anticipatory bail applications and the furnishing of copies and in these circumstances the delay aspect cannot stand against the acceptance of such a salutory self-imposed procedural rule of restriction.

29. It is submitted that there is no practice available in the High Court of Kerala. All the relevant precedents were considering only the advisability of continuing with an existing practice. A new practice may not be introduced by this Court by accepting such a rule, it is urged. It is true that such a rigid rule has not been insisted by this Court. But that again cannot persuade me to hold that it is not necessary to adhere to such a salutory procedural rule of self-imposed restriction if the same is found to be proper, legal and advantageous.

30. That no rules under the Cr. P.C., the High Court Act and Rules impose such a restriction is not at all relevant. If such a rule of restriction can be imposed it is in exercise of the wide discretion available to the Court under Sections 438 and 439. When the High Court has powers to entertain applications under Sections 438 and 439 and exercise their discretion, the power or the jurisdiction to impose such a salutory rule is inherent in such powers itself. It is not necessary to trace such power outside such discretion or under the relevant rules.

31. I do not find merit in the submission that the question must be referred to a Division Bench for its decision. The decision reported in Babu Premarajan v. Supdt. Of police, (2000) 3 Ker LT 177 : (AIR 2000 Ker 417) does not at all mandate that a single Judge who has powers under the relevant provisions of the Kerala High Court Act must refer the matter to a Division Bench for decision even if the question raised be one which is important, very important or one of public importance. I do not find any reason therefore to adjourn the matter for hearing by a Division Bench. Certainly if necessary the matter will have to be considered by a Division Bench/Larger Bench later.

32. I now come back to the precedents cited at the bar. Two rulings of the Full Bench of this Court have first been cited. The earlier one reported in S. Narayan v. Kannamma Bhargavi, 1968 Ker LT 495 (FB) : 1969 Cri L.J. 611 : (AIR 1969 Ker 126) does not at all support the contention that such self-imposed restriction cannot be made. In fact the said decision stems from the fact that the revisional powers available under the former Criminal Procedure Code to the Court of Session and the High Court in the matter of revision are not really concurrent - joint and equal in authority. The operative portion of the said decision clearly shows that in respect of matters where concurrent jurisdiction is available such a rule can be imposed. I extract below the relevant operative portion.

..... "We are of the view that it would be improper to compel a party having a strong case in his favour under S. 439 of the Code, to approach first the Sessions Judge or the District Magistrate. He should not be compelled to do so except in cases where the Sessions Judge or the District Magistrate is capable of passing effective orders, as in a case of discharge or dismissal of complaint. In all other revisional matters the aggrieved party may approach this Court direct, if so inclined....."

(Emphasis supplied)

33. The next Full Bench ruling reported in K. Sivan Pillai v. Rajamohan, 1978 Ker LT 223 : 1978 Cri L.J. 743 : (AIR 1978 Ker 131) (FB) was rendered taking into account Section 399(3), Cr. P.C. which mandates that though both Courts are vested with concurrent jurisdiction one cannot exercise such jurisdiction if the other has already exercised such jurisdiction. The Court had in the said decision certainly accepted the rule of salutory practice requiring the party to resort to the lower forum before moving the higher one, so long as the two fora are available for resort. In the instant case, it is by now trite, that the petitioner/accused will be at liberty to move the High Court even after he has unsuccessfully sought relief from the Court of Session. The reason which prompted the Full Bench to hold that such a rule of restriction need not be imposed in the matter of revisions after the 1973 amendment, is therefore not available in this case.

34. In the decision reported in M. Zacharia v. Sate of Kerala, 1974 Ker LT 42 : (1974 Cri L.J. 1198), a Division Bench of this Court has certainly accepted the principle that in respect of bail applications 'frog leaping' cannot be permitted and the party is obliged to move the Magistrate/Sessions Court before coming to the High Court. Of course the fact scenario was slightly different as the petitioner in that case had chosen to surrender before the High Court even before appearing before the Magistrate/Court of Session. But that distinction in facts is not very crucial while considering the dictum laid down. It is very clearly held in the said decision that a petitioner/claimant cannot be allowed "to frog leap the Magistrate and Sessions Judge and make a direct approach to the High Court for bail". The decision in 1974 Ker LT 42 still holds the field and this Court is bound by the same.

35. Reference has been made to decisions rendered by other Courts. Though the counsel were specifically requested to research, no other binding precedent of the Supreme Court or this Court (other than 1974 Ker LT 42) having a direct bearing on the question has been traced. There is conflict of views among other High Courts. The Rajasthan High Court in Hajialisher v. State of Rajasthan, 1976 Cri L.J. 1658, the Punjab and Haryana High Court in Rajpal Singh v. State of Haryana, 1978 Cri L.J. 609, the Bombay High Court in Jagannath v. State of Maharashtra, 1981 Cri L.J. 1808, Karnataka High Court in 1985 Cri L.J. 214 : Iyya v. State of Karnataka, (1983) 2 Kant L.J. 8 have held that such a rule of self-imposed restriction is perfectly justified while exercising the discretion under Sections 438 and 439, Cr. P.C.

36. The contra view has been taken by a Full Bench of the Allahabad High Court in Onkar Nath v. State, 1976 Cri L.J. 1142. I have gone through the said decision in detail. All that the Full Bench of the High Court of Allahabad disapproved was a rigid imposition of the rule. A reading of the entire decision clearly shows that their Lordships did approve of the salutory rule of procedure obliging the Sessions Court having concurrent jurisdiction considering the exercise of discretion first before the High Court is called upon to exercise such jurisdiction. My attention has also been drawn to a detailed judgment rendered by a Division Bench of the Andhra Pradesh High Court reported in Y. Chandrasekhara Rao v. Y. V. Kamala Kumari, 1993 Cri L.J. 3508 as also the decision of the Himachal Pradesh High Court (Full Bench) reported in Mohanlal v. Prem Chand, AIR 1980 Him Pra 36. These also according to me do not at all lay down that such a self-imposed restriction should not be placed in the matter of exercise of discretion u/Ss. 438 and 439, Cr. P.C. The Andhra Pradesh High Court was considering the practice of the registry refusing to send up petitions to the Bench. That of course is improper. No one can perhaps dispute the fact that the High Court retains its jurisdiction to entertain an application under Sections 438

and 439, Cr. P.C. That discretion cannot certainly be surrendered to the Registry. It has to be exercised by the Court. 1993 Cri L.J. 3508 (Andh Pra) and AIR 1980 Him Pra 36 can only be understood to mean that the Judges are obliged to consider request for grant of anticipatory bail even when the High Court is moved without and before moving the Court of Session. That is far from saying that ordinarily and unless exceptional reasons exist the High Court would exercise such discretion if and only after the Sessions Court having concurrent jurisdiction is moved earlier. At any rate I prefer to accept the former view.

37. After an anxious consideration of all the relevant precedents and statutory provisions I am of opinion that the following conclusions emerge :-

i. There is absolutely no want of jurisdictional competence for the High Court to consider and exercise powers in an application for bail/anticipatory bail under Section 438/439, Cr. P.C. at the first instance. It can exercise such jurisdiction even if the Sessions Court were not called upon earlier to exercise such jurisdiction.

ii. Following the salutory procedural self-imposed rule of restriction, a High Court shall not ordinarily (and except under exceptional circumstances) exercise its powers under Sections 438 and 439, Cr. P.C. without and before the Sessions Court having concurrent jurisdiction is moved for identical relief.

iii. Needless to say the High Court must be very careful and circumspect in identifying such exceptional cases. Myriad are the facts scenarios and the real life situations possible. The High Court should not refuse to invoke its powers/discretion under Sections 438 and 439 merely because the Court of Session has not been moved if circumstances warrant the exercise of such powers in the interests of justice and in the interests of the sacrosanct right to liberty of the individual. Without intending to be exhaustive I may mention that the need to settle a question of law of general public importance, the need to protect the interests of an accused apprehending arrest in more than one Sessions Division within a State, the incompetence of the Sessions Court to afford adequate and effective relief in a given case for whatever reason, shall certainly bring the case within the class of exceptional cases where this salutory rule will not apply. Other exceptional circumstances if any which may be there, do not occur to me now.

38. Having thus attempted to ascertain the law I shall consider the facts of these cases specifically. I do not find any special or sufficient reasons in the facts and circumstances revealed in Crl. M.C. 3265 and 3391 of 2003 which can bring the cases within the category of exceptional cases where the salutory Rule should not apply in the interest of justice. When requested pointedly to bring to my notice exceptional reasons if any the counsel do not strain to contend that such exceptional reasons exist. It is in these circumstances not necessary to advert to the facts in greater detail in this common order.

39. I place on record my appreciation for the assistance rendered to this Court by various counsel including the counsel appearing for the petitioners in these petitions and the learned Public Prosecutor to resolve the controversy.

40. In the result these petitions are dismissed and the following directions are issued:-

i. Applications under Sections 438 and 439, Cr. P.C. shall hereafter be numbered by the Registry of this Court only when it is accompanied by the copy of the order of the Sessions Court (or memo/petition as indicated in clause (ii) below).

ii. If, it is not accompanied by copy of the order, such applications must be accompanied by a petition/memo explaining why copy is not produced or why the Sessions Court had not been moved earlier. The application shall be numbered by the Registry only after the Court in its discretion by order passed in such memo/petition directs such reception/numbering.

iii. Every application for bail/anticipatory bail must be disposed of by the respective subordinate Courts in the State on the date of receipt of the application itself ideally if moved with sufficient prior notice to the Prosecutor. At any rate all Courts including the Sessions Courts shall scrupulously ensure that bail applications are disposed of within the outer limit of three working days of their filing without fail.

iv. The Director General of Police shall ensure that a competent Police Officer is posted in every District to assist the District Public Prosecutor to liaison between the police and the Prosecutor and to ensure that relevant records and instructions are given to the Prosecutor promptly. Similarly every police station shall also depute a competent official to assist the Public Prosecutor in charge at the Court having local jurisdiction.

v. Copies of orders in every bail application (whether regular or anticipatory) shall be furnished to the accused/counsel free of cost and acknowledgment obtained from the respective counsel/accused (one copy in each application irrespective of the number of petitioners) immediately after pronouncement of orders on the same day as mandated in the case of judgments in Section 363(1), Cr. P.C.. It shall be the duty of the Presiding Officer of the Court to ensure this.

41. The Registry shall ensure that the directions above are complied with and communicated to all the criminal Courts and the officers concerned.

Order accordingly.

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Cross Citation: 1978 Cr. L. J. 744 = AIR 1978 SC 1016

SUPREME COURT OF INDIA

Hon'ble Judge(s) : V. R. KRISHNA IYER, JASWANT SINGH AND R. S. PATHAK, JJ.

(FULL BENCH)

HARSH SAWHNEY …Vs.. Union Territory Chandigarh

Criminal 110 Of 1978, Feb 20,1978

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Bail – No need of custody for Search and recovery - the State opposed the application for bail stating that the appellant's presence is necessary for making a search and recovery of certain documents – Held- accused need not be in custody for the purpose of search – contention of state rejected– Bail granted- it is made clear that the appellant shall appear for interrogation by the police whenever reasonably required, subject to her right under Article 20 (3) of the Constitution.

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JUDGEMENT

(1.) We have heard counsel on both sides. We are satisfied that this is a case where on the facts now placed before us, bail should be granted. The principles bearing on grant or refusal of bail have already been explained by this Court in Gurcharan Singh v. State (Delhi Adlhi.) (AIR 1978 SC 179) : (1978 Cri L.J. 129). On the basis of that decision this is clearly a case where the appellant is entitled to bail. Two grounds have been mentioned on behalf of the State, namely, the appellant's presence is necessary for making a search and recovery of certain documents. We do not think that the appellant has to be taken into custody for making a search of premises in her presence. This can be done without her being taken into custody. The other ground that is put forward is the appellant's presence as required by the police for interrogation in connection with investigation. We make it clear that the appellant shall appear for interrogation by the police whenever reasonably required, subject to her right under Article 20 (3) of the Constitution.

(2.) We allow the appeal and direct the appellant to be enlarged on bail on condition that she, with two sureties, will enter into a bond in a sum of Rupees 5,000/- and she will subject herself to condition for appearing before the Police for interrogation if called upon to do so subject to the condition under Article 20 (3). The bond of the appellant and of the sureties will be to the satisfaction of the Chief Judicial Magistrate, Delhi. This bail order will govern the case registered or Crime F.I.R. No. 285 of 1977 in Police Station (West), district Chandigarh and any offence arising out of it.

(3.) We further direct that the appellant shall not leave India without prior permission of this Court. …….Order accordingly.

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Cross Citation: 2001 ALL MR (Cri) 1892

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Hon'ble Judge(s) : S. S. PARKAR, J.

Mohammed Yakubdin Khan ..Vs. .. State of Maharashtra

Criminal Application No.209 of 2001 18th April, 2001. Shri. RAJENDRA ZARAPKAR, Adv. for the applicant ,Ms. USHA KEJRIWAL, APP for the State.

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Criminal P.C. (1973), S.438 - Anticipatory bail – Parity - Applicant apprehending his arrest in case where custodial interrogation is not necessary - Main accused arrested and released on bail - Applicant entitled to get anticipatory bail – Anticipatory bail granted.

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JUDGMENT:-

1. Heard both sides and perused the affidavit dated 8/3/2001 filed on behalf of the prosecuting agency.

2. This application is for anticipatory bail. There are four accused persons, out of whom two main accused were arrested and released on bail, one accused is at large and this applicant is accused NO.4 who is sought to be arrested.

3. Ms. Kejriwal, the learned APP states that accused Nos.l and 2 were arrested on 3rd January, 2001 at the Airport when they were to board the plane for New York. It transpired that accused No. 2 by name MS .Pino Kantilal Patel was trying to go to New York along with accused No.l Shamim Choudhari on the passport of the wife of Shamim Choudhari, accused no. 1. The tickets also were in the name of accused no, 1 and his wife. According to Ms. Kejriwal, the learned APP, the present applicant had bought two air tickets on 13th December, 2000 for New York in the name of accused no.l and his wife knowing that accused no. 1* s wife was not going to travel to New York but instead accused no.2 was to go to New York on the passport of wife of accused no.l representing that she was his wife.

4. In my view, this applicant was concerned only for the purchase of the two air tickets as told to him by accused no.l and accordingly he bought two tickets in the name of accused no.l and his wife. He was not concerned whether the accused no. 1 was going abroad with his wife or he was taking someone else on the passport of his wife. The misrepresentation was made by accused nos. 1 and 2 who were arrested and released on bail. Pursuant to the direction of this court given on 25th January 2001 the applicant had reported to the IO for the purpose of interrogation. This, is not a case where the custodial

interrogation is necessary. Even if this applicant were to confess travel to New York on the passport of the wife of the accused no.l, which is not admissible in evidence, would not help the prosecution in any way. The main culprits are accused nos. 1 and 2 who were arrested and also released on cash bail of Rs.7000/- each. On behalf of the applicant it is further contended that the applicant has applied to withdraw himself as a surety previously stood for accused no.l in earlier criminal case and therefore the accused no.l was trying to involve the applicant falsely in this case.

5. In the circumstances, this application is allowed and in the event of his arrest the applicant is directed to be released in bail in the sum of Rs.15,000/- with one surety on condition that until filing of the chargesheet applicant shall report to the concerned police station if and when required. The applicant is given option to furnish cash bail ofRs.20,000/-.

Application Allowed

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SUPREME COURT OF INDIA

Hon'ble Judge(s) : Altamas Kabir and Cyriac Joseph, JJ.

Sumeet Saluja … -Vs- State of U.P. thr. CBI

Criminal Appeal No. 953 of 2011, [Arising out of SLP (Crl.) No. 1863 of 2011]

Decided on April 18, 2011

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Bail – Parity – Co-accused similarly placed granted bail – Appellant should be released on Bail – I.P.C. Section 120-B, 417, 420, 468, 471.

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JUDGEMENT

1. Leave granted.

2. This appeal is directed against the judgment and order dated 13th January, 2011, passed by the Allahabad High Court, rejecting the petitioner s prayer for grant of bail in Crl. Misc. Bail Application No. 34595 of 2010.

3. There are three accused in this case. Charge-sheet has been filed against all of them on 8th December, 2010, under Sections 120B, 417, 420, 468, 471 IPC and 132 and 135 of the Customs Act, P.S.C.B.I. Ghaziabad. While apart from the appellant, one of the other two accused, Mr. Surinder Singh has been granted bail after his arrest, the third accused, Cyan Chand filed a writ petition, being No. 37 of 2011, in this Court, in which directions have been given that he should not be arrested in connection with the case in question.

4. The present appellant is in custody since llth October, 2010, and it appears that he is similarly placed as the other two accused. Accordingly, the appeal is allowed.

5. Let the appellant be released on bail to the satisfaction of the trial court, upon such conditions, as may be considered necessary to ensure his presence at the time of trial. Such conditions may also include, reporting to the SHO of the local police station once every month until further orders and deposit of his passport to the court.

6. Since this matter involves a question of some importance as far as commercial crimes are concerned, let the trial be completed as quickly as possible, without unnecessary adjournments and delay

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Cross Citation: 2001(3) Crimes 188 (SC)

SUPREME COURT OF INDIA

Hon'ble Judge(s) : K.T. Thomas & R.P. Sethi, JJ.

Bashishth Singh & Anr. .....Vs..... State of Bihair

Criminal appeal No. 230 of 2001

(Arising out of SLP (Crl.) No. 235 of 2001 Decided on 26-2-2001)

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Criminal Procedure Code, 1973- Section 439 - Appellants Involved in case for which there was counter case—Appellants could be released on ball on bond of Rs. 25000/- with surety. (Para 1)

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Result : Appeal disposed of.

ORDER

1. Leave granted.

2. Appellants are involved in a case for which there is a cross-case (or counter-case as it can be called). The case against, the appellants is based on the FIR lodged by the complainant Ram Narain Singh. The counter-case was built up on the strength of the FIR lodged by the 2nd appellant. Both the cases were investigated but only in one case final report has been laid. Whatever be the position, we feel that this is a case where appellants can be let on bail during the trial period. We, therefore, order the appellants to be released on the bail on each of them executing a bond in a sum of Rs. 25,000/- with solvent sureties to the satisfaction of the Sessions Judge. Kaimur.

The appeal is disposed of accordingly. Appeal disposed of.
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Cross Citation: 2010 CRI. L. J. 1435

SUPREME COURT OF INDIA

Hon'ble Judge(s) : MARKANDEY KATJU AND DEEPAK VERMA, JJ.

Sukhwant Singh and Ors .. V/s .. State of Punjab.

S.L.P. (Cri.) No. 3529 of 2009, D/- 18 -5 -2009.

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Criminal P.C. (2 of 1974), S.437 - Interim bail during pendency of regular bail application - Court has inherent power to grant interim bail to a person pending final disposal of the bail application – It should be decided on same day when petitioner files before the court -When a person applies for regular bail then the court concerned ordinarily lists that application after a few days so that it can look into the case diary which has to be obtained from the police authorities and in the meantime the applicant has to go to jail. Even if the applicant is released on bail thereafter, his reputation may be tarnished irreparably in society. The reputation of a person is his valuable asset, and is a facet of his right under Article 21 of the Constitution. (Para 4)

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Cases Referred : Chronological Paras

2009 (4) Scale 77 (Ref.) 3

2008 AIR SCW 7788 : AIR 2009 SC 628 (Ref.) 3

JUDGEMENT

ORDER :-

1. Heard learned counsel for the petitioners.

2. This petition has been filed challenging the judgment and order dated 24.03.2009 of a learned Single Judge of the High Court of Punjab and Haryana at Chandigarh whereby the Application under Section 438 of the Cr. P.C., for grant of anticipatory bail has been dismissed.

3. We are not inclined to interfere with the impugned judgment and order. However, following the decision of this Court in the case of Kamlendra Pratap Singh v. State of U.P. and Ors. 2009 (4) SCALE 77, we reiterate that a Court hearing a regular bail application has got inherent power to grant interim bail pending final disposal of the bail application. In our opinion, this is the proper view in view of Article 21 of the Constitution of India

which protects the life and liberty of every person. When a person applies for regular bail then the court concerned ordinarily lists that application after a few days so that it can look into the case diary which has to be obtained from the police authorities and in the meantime the applicant has to go to jail. Even if the applicant is released on bail thereafter, his reputation may be tarnished irreparably in society. The reputation of a person is his valuable asset, and is a facet of his right under Article 21 of the Constitution vide Deepak Bajaj v. State of Maharashtra and Anr. JT 2008 (11) SC 609 : (2008 AIR SCW 7788).

4. Hence, we are of the opinion that in the power to grant bail there is inherent power in the court concerned to grant interim bail to a person pending final disposal of the bail application. Of course, it is in the discretion of the court concerned to grant interim bail or not but the power is certainly there.

5. In the present case, if the petitioners surrender before the Court concerned and makes a prayer for grant of interim bail pending final disposal of the bail application, the same shall be considered and decided on the same day.

6. With the above said observations, the petition stands disposed of.

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Cross Citation: 2010 ALL MR (Cri) 2030, 2009-Crimes (SC)-2-4 , 2009-SCC-4-437

SUPREME COURT OF INDIA

Hon'ble Judge(s) : Markandey Katju and VS. Sirpurkar, JJ.

Lal Kamlendra Pratap Singh ..Versus.. State of U.P.

March 23, 2009

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Cr. P.C. 437 – Interim bail should be granted pending disposal of final bail application since arrest and detention of a person cause irrepairable loss to a person's reputation.

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JUDGEMENT

(1.) Heard learned counsel for the parties.

(2.) Leave granted.

(3.) The appeal by Special leave has been filed against the impugned Judgment dated 3.9.2007 of the Allahabad High Court in Criminal Miscellaneous Writ Petition No. 13227/2007. The aforesaid writ Petition was filed for quashing the F.I.R. in case Crime

No.1133/2007 under Sections 467, 468, 471, 420, 409 and 218 IPC, Police Station Mahoba, District Mahoba, U.P.

(4.) By the impugned Judgment, the High Court refused to quash the F.I.R. but directed that if the appellant surrenders within 10 days, his bail application will be considered and disposed of expeditiously.

(5.) Aggrieved by that order this appeal has been filed.

(6.) By an interim order dated 30.11.2007 this Court directed that the petitioner shall not be arrested in the meanwhile.

(7.) We are today informed by Shri S.R.Singh, learned senior counsel appearing for the State of U.P. that charge sheet has been filed and congnizance has been taken and the case is now pending before the trial Court. In these circumstances, he submitted that we should not exercise our discretion under Article 136 of the Constitution of India for quashing the F.I.R.

(8.) Learned counsel for the appellant apprehends that the appellant will be arrested as there is no provision for anticipatory bail in the State of U.P. He placed reliance on a decision of the Allahabad High Court in the case of Amaravati Vs. State of U.P. 2005 Crl.L.J 755 in which a Seven Judge Full Bench of the Allahabad High Court held that the Court, if it deems fit in the facts and circumstances of the case, may grant interim bail pending final disposal of the bail application. The Full Bench also observed that arrest is not a must whenever an F.I.R. of a cognizable offence is lodged. The Full Bench placed reliance on the decision of this Court in Joginder Kumar Vs. State of U.P. 1994 Cr.L.J..1981.

(9.) We fully agree with the view of the High in Amaravati's case (supra), and we direct that the said decision be followed by all Courts in U.P. in letter and spirit, particularly since the provision for anticipatory bail does not exist in U.P. In appropriate cases interim bail should be granted pending disposal of the final bail application, since arrest and detention of a person can cause irreparable loss to a person's reputation, as held by this Court in Joginder Kumar's case (supra). Also, arrest is not a must in all cases of cognizable offences, and in deciding whether to arrest or not the police officer must be guided and act according to the principles laid down in Joginder Kumar's case (supra).

(10.) Since, charge sheet has been filed and cognizance has been taken, and on the facts of this case, in our opinion, this is not a fit case for quashing the first information report. The Appeal is dismissed, However, the appellant is granted time to appear before the trial Court on or before 15th April, 2009 and to file an application for bail. If such an application is filed, the trial Court shall consider the same on its own merits in accordance with law, and if it so deems fit, grant interim bail to the appellant pending the final disposal of his bail application.

(11.) Let a copy of this judgment be sent to the Registrar General of the Allahabad High Court who will circulate it to all Hon'ble Judges of the High Court and send copies to all District Judges in the State. Order accordingly.

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Cross Citation: 2008-All MR(Cri)-0-2432,

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : S.A.BOBDE, R.C.HAVAN, JJ.

Antonio Sebastiao Mervyn ..Vs.. State of Goa

Criminal Writ Petition 19 of 2001 Of Jul 30,2008

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I.P.C. section 186, 353, 356, 379 – Constitution of India, - Arts 226, 21 – Cri. P.C., (1973), S. 46 – Arrest – Power of Police to arrest the accused – Held, the investigation has to be made without touching the offender – The question of touching the offender would arise only while submitting a charge-sheet – Compensation of Rs. 25,000/- granted to accused – State directed to take action against police officer responsible for violation of fundamental rights of accused.

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JUDGEMENT

(1.) BY this petition, the petitioner seeks an enquiry into incidents from 28-4-1994 to 1-5-1994, a direction to initiate disciplinary proceedings against the guilty officers and claims compensation for the wrong done to him.

(2.) THE factual context, in which the petitioner was required to approach this Court, about which there can be no dispute, is as under: the petitioner, an employee of Public works Department, is owner of a property, in part whereof, respondent No. 9, a driver with the police department, resides. Respondent no. 9 filed a suit for a mandatory injunction, directing Public Works Department to release a water connection, without joining the petitioner as a party. Civil Court granted a temporary mandatory injunction on 31-3-1994 directing that water connection be provided within 30 days. On 28-4-1994, when Public works Department's employee went to provide connection through the petitioner's property, the petitioner obstructed and snatched pickaxe from a Public Works Department's employee. On complaint of the employee, respondent No. 4, p. S. I. Shirwaikar registered an offence. The petitioner too went to police station to lodge a report. He was arrested.

(3.) IT is not disputed by respondent no. 4 that he did handcuff the petitioner while taking the petitioner in a jeep, for effecting recovery of pickaxe, but claimed that he removed the handcuffs while alighting from the jeep. The petitioner however, alleges that he was handcuffed throughout and paraded as such in his neighbourhood. After the petitioner was bailed out, on 1-5-94 when the petitioner went to lodge another complaint of trespass, respondent No. 4 put the petitioner under arrest purportedly under section 151 of Criminal procedure Code. The petitioner complained of chest pain, and was taken in handcuffs to hospital, though according to police, he was not so handcuffed.

(4.) THE petitioner initially approached this Court by filing Writ Petition no. 18 of 1995 for similar reliefs. By judgment dated 14-1-1998, the petitioner was directed to approach the authority under the Protection of human Rights Act, 1993 for redressal of his grievances. The order mentions that in case compensation is not determined by the said authority, liberty was reserved to the petitioner to approach appropriate forum. The petitioner approached the Human Rights Court at South goa, which expressed inability to proceed with the complaint for want of necessary infrastructure and Public Prosecutor etc. It may be mentioned that the Public Prosecutor came to be appointed only after the special court under protection of Human Rights Act expressed its inability to proceed further in the matter. The petitioner then applied to said Court for making a reference under section 395 of Criminal procedure Code to this Court. The learned session Judge by his order dated 7-9-2000 declined to make a reference and this is how, the petitioner is again before us.

(5.) WE have heard both the learned senior Counsel for the petitioner and respondent number 4. We have also heard learned government Counsel for the respondent Nos. 1 and 2. Learned Counsel for the respondent No. 4, first, contended that the petition is barred by the principles of res judicata. since come of the issues raised by the petitioner in the present petition, had already been decided by this Court and other issues had not be raised by him in the earlier petition. We do not see as to how the petition is barred by the principle of res judicata or even constructive res judicata. since the grievance of the petitioner, namely, that his human rights were breached by being arrested and handcuffed without any justification, is yet to be redressed. We may point out that in the judgment dated 14-1-98, by which the earlier petition was disposed of, liberty was specifically reserved for the petitioner to approach appropriate forum if his claim for compensation was not decided. Since virtually none of his claims were decided, we find that the petitioner had justification to approach this Court by the present petition.

(6.) BY order dated 25-9-2002, in this petition, this Court directed Human Rights court, South Goa District, Margao to record evidence and give findings on the seven issues formulated by this Court, which read as under:

> (i) Whether the petitioner proves that on 28-4-94, after arresting the petitioner at 1. 30 p. m. and putting him behind bars; (a) The petitioner was not supplied with food or water; (b) The petitioner was not permitted to contact his family members or advocates; (c) The petitioner was not permitted to make use of phone to contact his family members; (d) Respondent No. 4 insisted that petitioner wears uniform provided to the prisoners. (ii) Whether the petitioner proves that on 28-4-1994 at about 3. 00 p. m. petitioner was handcuffed, taken in a jeep to his residence and paraded on the road adjoining his house in handcuffs in full view of the public with purported motive of recovery of certain objects and thereafter brought to the police station and kept behind bars upto 7. 30 p. m. without removing the handcuffs ? (iii) Whether the petitioner proves that on 1-5-1994 after arresting the petitioner at about 10. 30 p. m. he was handcuffed whilst lodged behind bars ? (i v) Whether the petitioner proves that on 1-5-1994 no vehicle was provided to the petitioner to take him to the Hospicio Hospital and on the contrary he was paraded on the streets of Margao in handcuffs from police station to margao post office ? (v) Whether the petitioner proves that he was taken to Hospicio Hospital of Margao in handcuffs and the handcuffs were retained when he was shifted to Goa Medical College where he was admitted to prisoners

ward and tied up with fetters and handcuffs to the bed till 8. 30 a. m. on 2-5-1994? (vi) Whether the arrests of the petitioner on 28-4-1994 and 1-5-1994 were legal and justified ? (vii) Whether handcuffing of the petitioner on 28-4-1994 and 1-5-1994 were justified ?

(7.) ACCORDINGLY, the learned Judge, human Rights Court and District Judge, South goa recorded evidence and rendered his findings on the seven issues referred to him by his order dated 2-5-2003. He answered issue nos. l to 5 in affirmative and issue Nos. 6 and 7 in negative, that is, in effect, he held in favour of the petitioner in all issues.

(8.) THE learned Senior Counsel for the respondent No. 4 contended that the learned district and Sessions Judge held against the respondents principally because of failure of the respondents to produce case diaries, which the learned Judge could have himself called in view of the provisions of Section 172 of Criminal procedure Code. First, we would reject the submission that the learned District and sessions Judge had based his findings principally on non-production of the case diaries. It was one of the grounds which he had considered. Further, there is no question of the case diaries being summoned by the District and session Judge, since at the time, when the session Judge was considering the issues referred to him, the criminal case which had been filed against the petitioner on the basis of offence registered, had already been disposed of by the Judicial Magistrate First Class by his judgment dated 14-7-97, whereby learned magistrate had acquitted the petitioner. Case diaries have significance till the case is under investigation or when trial is going on. Further, what was required to be produced before the learned Judge, in order to justify various actions of the respondents, was not the case diaries, but the station diaries, where all the activities in the police station are recorded. The station diary, lock-up register and arrest register, which had been referred to by the learned Judge in paragraph No. 53 of his order, could have been produced by the respondents before the learned judge and for such production, an order from the Court was not necessary. The learned Judge, therefore, rightly concluded that non-production of these documents in possession and power of the respondents, would lead to adverse inference.

(9.) WE would now proceed to analyse the contentions raised by the parties in relation to the incident itself. It has been observed by the learned Judge in paragraph No. 78 of the order that the petitioner was justified in obstructing Jose Fernandes and Jose Cardozo from digging his property and taking pickaxe from the hand of the Jose Cardozo, in exercise of the right of defence of property. The learned counsel for the respondents assailed this conclusion and submitted that Jose Fernandes and Jose Cardozo, the employees of Public works Department, were merely complying with mandatory directions issued by the learned civil Judge, Senior Division, Margao given in civil Miscellaneous application No. 442 of 1993 in Regular Civil Suit No. 253 of 1993, whereby the learned Judge had directed the defendants, the Public Works Department to give water connection to the plaintiff within 30 days from the order, which was delivered on 31st March, 1994.

(10.) THOUGH strictly, it is not necessary to go into the merits of the order by the learned civil Judge, it may be useful to observe that the dispute was not between the Public Works department and the plaintiff therein, but between the plaintiff therein, Akhtar Khan, and the petitioner herein, who is landlord of the property. Therefore, ordinarily, since the obstruction was not of the Public Works department, but of the landlord, the landlord should have been made a party to the suit, in which orders for altering the landlord's property were sought. Apart from this, when the petitioner obstructed in

execution of an order passed by the Civil Court, it would have been appropriate for the party aggrieved to approach the Civil Court for removal of such obstruction in execution of its order, and then after hearing the parties, the Court could have directed grant of police help for removal of obstruction. Here, without complaining to the Civil Court of obstruction by the petitioner and without inviting an adjudication on that aspect, the plaintiff therein approached the police, and police promptly jumped into action. The observations in paragraph No. 78 of the report of the learned Judge that the petitioner was justified in obstructing Jose Fernandes and Jose cardozo, may not have been strictly necessary, all the same, they do not vitiate the conclusions drawn by the learned Judge.

(11.) THIS takes us to the question whether the respondent No. 4 were justified in arresting the petitioner first, on 28-4-1994 on the complaint of the respondent No. 9, Akhtar khan, and again on 1-5-1994 under section 151 of Criminal Procedure Code. The learned senior Counsel for the petitioner submitted that the offences complained of, were trivial in nature and, therefore, there was absolutely no warrant for the arrest of the petitioner. Relying on the judgment of Supreme Court in the case of Jogindar Kumar Vs. State of U. P. , reported in (1994)4 Supreme Court Cases 260, he submitted that arrest itself was thoroughly unwarranted. In the case, the Apex Court was considering the question. of arrest of an advocate, and in paragraph No. 20 of the judgment observed as under : "in India, Third Report of the National police Commission at p. 32 also suggested : "an arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances : (i) The case involves a grave offence like murder, dacoity, robbery, rape etc. and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terro-stricken victims. (ii)The accused is likely to abscond and evade the process of law. (iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint. (iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through department instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines. . . . "

The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendation of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer

issues notice to person to attend the Station House and not to leave the Station without permission would do.

(12.) THE learned Senior Counsel for the respondent No. 4 submitted that offences for which the petitioner was arrested were punishable under Sections 186, 353, 356, 379 of the Indian Penal Code. Drawing our attention to the notification dated 27-6-73 issued by the government of Goa in exercise of powers under section 10 of Criminal Law (Amendment) Act, the learned counsel submitted that offence punishable under section 186 had been made cognizable and those under sections 188 and 506 were made non-bailable. However, we are concerned with the offence punishable under section 186, which continues to be bailable. Offences punishable under sections 353 and 356, too continue to be bailable, leaving only offence punishable under section 379 to be non-bailable. The learned Senior Counsel submitted that since the petitioner had committed a non-bailable offence, it was imperative for the respondent No. 4 to arrest the petitioner and, therefore, the arrest was fully justified. We have carefully, considered this submission and deem it necessary to reject it reiterating the observations of the Supreme Court in Jogindar kumar's case cited above. The police machinery must realise that it is obliged to conduct investigation, as far as possible, without touching the offender. The question of touching the offender would arise only while submitting a report under section 173 of Indian Penal Code, when the police are obliged to forward the accused along with charge-sheet. Therefore, in our view, merely because the allegation of the petitioner having committed theft of pickaxe was made, it was not necessary to arrest him, particularly when the petitioner had himself reported in the police station. It would be necessary for the State Government to bring this to the notice of all police officers so that the arrests at the drop of hat are avoided.

(13.) EVEN if for the sake of argument, it is presumed for a while that the respondent no. 4 had justification to effect arrest on 28-4-1994, there was absolutely no justification for arrest on 1-5-1994, as also to invoke the provisions of section 151 of Criminal Procedure code. Incidents after the arrest of the petitioner on 1-5-94 by invoking the provisions of section 151 of the Criminal Procedure Code, were more serious. The petitioner claims that he was handcuffed again and even when he was hospitalised, he was kept in the hospital in handcuffs. This fact has been deposed to by a doctor, who was examined before the learned judge. The contention of the learned Senior counsel for the respondents that Dr. Edwin gomes, witness No. 6, had no business to be in the hospital, since he was not on duty there, does not change the fact that the Dr. Gomes did see the petitioner in handcuffs in the hospital. There is absolutely no reason why the evidence of Dr. Gomes should be disbelieved. The learned judge, therefore, rightly held that the petitioner was unwarrantedly handcuffed.

(14.) AS for the incident dated 28-4-94, it may be useful to point out that the respondents have themselves admitted having handcuffed the petitioner, albeit for a short time. The claim of the respondents that the petitioner was handcuffed only when he was taken in the jeep, has to be rejected because it is thoroughly unnatural, apart from the fact that evidence is also to the contrary. Therefore, on facts, we do not find any reason to take a view different, from that of taken by the learned Judge and hold that the petitioner was handcuffed on 28-4-94 as well as on 1-5-94.

(15.) SECTION 46 of the Criminal procedure Code, which provides as to how the arrest is to be made, prescribes that the police officer shall actually touch or confine the body of

the person to be arrested, unless there be a submission to the custody by word or action. This implies that the arrest is to be effected by use of minimum force. In this case, the petitioner has himself come to the police station. It is not shown that the petitioner had any past criminal history to cause apprehension in the mind of the police officers that the petitioner would flee. The petitioner is shown to be an employee of the Government. In these circumstances, his handcuffing is totally unjustified. The petitioner was seemingly arrested and handcuffed in order to teach him a lesson for obstructing grant of water connection to respondent No. 9, who is a police driver, which in our view, amounts to abuse of powers and authority by concerned respondents.

(16.) IN view of this, accepting the report of the learned Judge, we hold that the petitioner has made out a case for grant of compensation for his unwarranted arrest as well as unnecessary handcuffing. In Arvinder Singh bagga Vs. State of U. P. and others, reported in AIR 1995 SUPREME COURT 117, on similar facts, a learned District Judge had been asked to conduct an enquiry and upon considering result of the enquiry, the Apex court had directed the State to pay compensation of Rs. 10,000/- to the victim. Following this precedent, and considering the fact that the petitioner was unwarrantedly arrested and handcuffed fourteen years ago, we direct the respondent No. 1 State of Goa to pay to the petitioner the compensation in a sum of rs. 25,000/- within a month of this order. It shall be open to the State to initiate appropriate disciplinary or other proceedings against the delinquent officers and recover the compensation so paid from such officers, in order to ensure that the State exchequer is not burdened on account of lapses on the part of its officers.

(17.) BEFORE parting with the judgment, we may observe that by and large the people of state of Goa are law abiding citizens, having respect for authority. It would be necessary for the State to ensure that this respect for authority is not eroded by any high handed actions on the part of its officers.

(18.) RULE in made absolute in the above terms.

Petition allowed.

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Cross Citation:2004(I) Crimes1 (Bom) (DB) = 2003-BCR(Cri)1655,

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : B.B.Vagyani, A.S.Bagga,JJ

Dinkarrao Rajarampant Pole ..V/s ..State of Maharashtra

Criminal Writ Petition 431 of 2001 Of, Mar 13,2003

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A] Wrongful arrest & detention in police custody – IPC Ss. 420 & 471 Cr.P.C. S.41-Police Officer is not expected to act in a mechanical manner

and in all cases to arrest accused as soon as report of cognizable offence is lodged – Existence of power to arrest is another thing & justification for exercise of it is another thing there must be some reasonable justification in opinion of officer effecting arrest that it was necessary and justified – Except in heinous offences arrest should be avoided – If Police Officer issue notice to a person to attend the Police Station and not leave the station without permission would do – offence u.s. 420, 471, 468 of IPC are not herious offences – Arrest illegal.

B] Compensation- Petitioner was arrested by respondent Police Officer in case registered U/s 420, 468, 471. If IPC – Offences are not heinous offences - Arrest found malafide and mischievous & not protected by element of good faith – Infringement of fundamental right of a citizen cannot stop by giving a mere declaration – Compensatory relief is to be provided under – Cost of Rs. 25,000/- imposed on Police Officer who arrested the petitioner.

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JUDGEMENT

(1.) HEARD petitioner in person, Mr. K. G. Patil, learned a. P. P. , for respondent Nos. 1 to 3 and Mr. S. G. Shinde, learned Advocate for respondent No. 4.

(2.) BEING aggrieved by the wrongful arrest and detention in the police custody by the respondent No. 3, the petitioner, a practising lawyer, has invoked extraordinary jurisdiction of this Court under Article 226 read with Articles 21 and 22 of the Constitution of India for grant of compensation and direction for submission of 'b' Final Report with prosecution against respondent No. 4 for having committed an offence punishable under section 211 of the Indian Penal code. In brief the facts giving rise to this Criminal Writ Petition are as under:

(3.) ONE Rajarampant had three sons from his first wife Yamunabai namely, vitthalrao, Shankarrao and Shrikrishnarao; and two daughters namely Babutai alias Saraswati and Shantabai. Madhukarrao is the son of Vitthalrao. Respondent No. 4 Sulabha Shendarkar is the married daughter of Shrikrishnarao, vitthalrao, Shankarrao and Shrikrishnarao are no more alive. Shrikrishnarao died in February 2000 Rajarampant is not alive and his first wife Yamunabai died prior to 1923. After death of Yamunabai, Rajarampant married second time to one Yamunabai. Petitioner, Bhaskar and Sushilabai are issues of yamunabai II.

(4.) HOUSE bearing No. 3-14-15 (C. T. S. No. 810/1) of Aurangabad was owned and possessed by Rajaram. It was his self acquired property, Rajaram executed a Will in favour of Yamunabai-II on 17-5-1963 and by the said Will, rajaram bequeathed whole of the house to her. Yamunabai, the real mother of the petitioner, executed registered Will on 12-5-1975 and bequeathed house property to the petitioner, Bhaskarrao and Madhukarrao. Garage was given to Sushilabai, the sister of the petitioner. During her lifetime, Yamunabai II sold the garage to one Satish Mehta. Yamunabai died on 18-9-1992. After her death, the names of the petitioner and other beneficiaries have been mutated in the relevant

records. Bhaskarrao sold his portion of the house to Vandana gadiya and Sarla Gadiya by registered sale deed. The petitioner and madhukarrao, the son of Vitthalrao, sold their respective portions of the house property to one Sajed by a registered sale deed dated 22-1-2001.

(5.) THE petitioner started his legal career as a lawyer at Aurangabad in the year 1951. He practised law till 23-12-1960. On 24-12-1960, the petitioner was appointed as Police Prosecutor. After retirement, the petitioner resumed his legal profession since 1989. Madhukar is a retired teacher.

(6.) IT is alleged by the petitioner that respondent No. 4 Sulabha, the daughter of Shrikrishnarao, who happens to be the step brother of the petitioner, filed false and frivolous First Information Report at City Chowk Police Station, aurangabad on 28-4-2001. According to petitioner, respondent No. 4 had absolutely no interest of whatsoever nature in the house property. However, respondent No. 4, in order to grab a share in the property, filed a false report in order to bring a pressure on the petitioner and Madhukar. Respondent No. 4 filed a report contending therein that petitioner and Madhukarrao sold the house property by committing forgery in the original registered Will of yamunabai II. Respondent No. 4 has also filed a civil suit in the Civil Court and thereby challenged the execution of Will by Yamunabai.

(7.) RESPONDENT No. 3 registered Crime No. 90/2001 under sections 420, 468 and 471 of the Indian Penal Code on the basis of First Information Report dated 28-4-2001, lodged by respondent No. 4. The crime was registered on the same day. Respondent No. 3, without application of mind, arrested the petitioner at 9. 35 p. m. on 28-4-2001 and kept him in the lock up throughout the night. The petitioner, a practising lawyer of 76 years of age, sustained a rude shock on account of his illegal arrest and detention. The respondent No. 3 produced the petitioner before the Judicial Magistrate at 3. 00 p. m. on 29-4-2001. The petitioner submitted application for grant of bail and same was allowed by the Judicial Magistrate. The petitioner was ultimately released on bail at 3. 45 p. m. on 29-4-2001.

(8.) THE Investigating Officer came to the conclusion on the basis of material collected so far that the petitioner, Madhukarrao and Sajed did not commit any offence. The Investigating Officer has come to the conclusion that the complaint lodged by respondent No. 4 was false. Therefore, the Investigating officer submitted a report under section 169 of the Criminal Procedure Code and moved the learned Magistrate for discharge of the petitioner, Madhukarrao and Sajed. Respondent No. 3 did not even ask for police custody. On the production of the petitioner before the Magistrate, M. C. remand was asked for. However, the Magistrate released the petitioner on bail. The Investigating officer has also submitted a report for grant of 'b' summary.

(9.) ACCORDING to the petitioner, the respondent No. 3, without verification of the correctness of the recitals of the complaint dated 28-4-2001, made a haste for his arrest without there being any justification for arrest and illegally detained him in the jail. The petitioner has made a serious grievance that he being the owner of the house property, should not have been arrested on the false and frivolous complaint lodged by respondent No. 4. According to him, there was no need of his arrest and detention in police custody. The petitioner has also made a serious grievance that the respondent No. 3 could have summoned the petitioner for production of document under section 91 of the Criminal

Procedure Code. The subsequent report of the Investigating officer submitted under section 169 of the Criminal Procedure Code and fur-ther report to the Magistrate for grant of 'b' summary, according to the petitioner, would clearly go to show that action of respondent No. 3 was illegal. Therefore, petitioner has claimed compensation from the State on the basis of doctrine of vicarious liability.

(10.) IN response to the notice, the respondent No. 3 has filed affidavit-in-reply. The respondent No. 3 has justified in his affidavit-in-reply the action of arrest of the petitioner. According to him, the arrest of the petitioner was very, much necessary in order to recover the forged document. The original Will executed by Yamunabai II was seized from the petitioner along with death certificate of Yamunabai. The specimen signature of the petitioner was also obtained for purpose of forwarding it to the handwriting expert in order to ascertain whether forgery was committed. The respondent No. 3 has specifically stated in para 6 of his affidavit that he acted in good faith while arresting the petitioner. According to him, he carried investigation impartially and in accordance with law. It is said that the petitioner is not entitled to get compensation for the acts which are committed in good faith. He has repeatedly played the same tune as to the registration of crime on the ground that complaint lodged by respondent No. 4 disclosed commission of cognizable offence.

(11) The respondent No. 4 has also filed affidavit-in-reply. Respondent No. 4 states in her affidavit-in-reply that sale deed executed by petitioner and madhukar is forged and bogus document and this document is prepared in order to deprive her legal right in the immovable property. According to her, a fraud was committed on the Government authorities by showing the name of madhukar as son of Rajaram and got prepared the P. R. Card of the house properly showing the name of Madhukar s/o Rajaram Pole. According to the respondent No. 4, this act was deliberate. A statement is also made in the affidavit-in-reply that petitioner has also committed forgery in respect of registered Will executed by Yamunabai. She states further that her report was not false, frivolous and vexations. Respondent No. 4 finally submits that petitioner is not entitled to get compensation and the petition is, therefore, liable to be dismissed.

(12.) THE petitioner has argued that without application of mind and without any justification the respondent No. 3 arrested him and illegally detained him in police custody. He points out from remand report (Exhibit D) dated 29-4-2001 that the Investigating Officer did not even ask for police custody remand. On the contrary, M. C. remand was asked for. The petitioner also brought to our notice the report {exhibit C) submitted by the Investigating Officer on 16-6-2001 filed under section 169 of the Criminal Procedure Code for discharge of the petitioner. He also diverted our attention to the report submitted for 'b' summary by the Investigating Officer (Exhibit F). According to the petitioner, these documents would clearly support his case of unjustified arrest and illegal detention. He further submits that the State is responsible for giving compensation to him for the illegal acts committed by the respondent no. 3 on the basis of doctrine of vicarious liability. In support of his submissions, he mainly relied upon the case of (Jpginder Kumar v. State of U. P. and others)1, 1994 Cri. L. J. 1981 and (D. K. Basu v. State of West Bengal), 1997 (2)Bom. C. R. (S. C.)666 : 1997 Cri. L. J. 743.

(13.) THE learned A. P. P. , Shri. K. G. , Patil submits that the first information report lodged by respondent No. 4 disclosed the commission of cognizable offence and, therefore, the respondent No. 3 was justified in arresting the petitioner. He submits that

no illegality was committed by respondent No. 3 in arresting the petitioner. The petitioner was arrested at 9. 35 p. m. on 28-4-2001 and immediately on the next day he was produced before the Judicial magistrate, First Class at 3. 00 p. m. and was released on bail. Therefore, the petitioner is not entitled to compensation on the basis of doctrine of vicarious liability. He also submits that respondent No. 3 acted in good faith while arresting the petitioner/he raised defence under section 159 of the Bombay police Act, 1951.

(14.) THE learned Advocate Shri. S. G. Shinde, for respondent No. 4 submitted that no illegality has been committed by respondent No. 4. The complaint lodged by respondent No. 4 very much disclosed commission of cognizable offence and, therefore, there was nothing wrong in the arrest of the petitioner,

(15.) WE gave anxious consideration to the rival submissions made at the bar. It is material to note that the petitioner is a old man of 76 years. The petitioner is in active practice of law. He-practices law in the High Court. Prima fade the house property was originally owned and possessed by Rajarampant, the father of the petitioner. The petitioner acquired title to the portion of the house property on the basis of registered Will executed by his real mother. It is seen from the copy of the Will (Exhibit G) that Yamunabai executed Will on 12-5-1975. This document of Will (Exhibit G) would clearly support the say of the petitioner with regard to his title to the portion of the house property.

(16.) IT is clearly mentioned in the report submitted under section 169 of the criminal Procedure Code that the registered Will dated 12-5-1975 is a genuine document. It also reveals that the officer from the Department of City survey committed an inadvertent mistake in showing the name of Madhukar as son of Rajaram Pole instead of Vitthalrao Pole. It is also stated in the report submitted under section 169 of the Criminal Procedure Code that on the basis of the inadvertent mistake committed by the concerned officer from City survey Office. Madhukar has not at all taken any undue advantage and has not cheated the Government or any other person. It is also clearly mentioned in the report under section 169 of the Criminal Procedure Code that the entry in the P. R. Card in respect of incorrect name of Madhukar is not at all delierate. It is reiterated in the report under section 169 of the Criminal Procedure Code that it was slip of hand. It is also pointed out that Madhukar submitted application for -mutation after death of Yamunabai and he had shown his name as Madhukar s/o Vitthalrao Pole.

(17.) IN fact petitioner has not committed any kind of forgery so far as registered Will dated 12-5-1975. He has also not committed any forgery in respect of P. R. card. It is clearly seen on the basis of material placed on record that the respondent No. 4 tried to take advantage of slip of hand and lodged a report at the City Chowk Police Station without there being any foundation. The respondent No. 3 could have verified from the record from City Survey office as to who is the owner of the house property in dispute. It is also material to note that Shrikrishnarao, the step brother of the petitioner, who died in February 2000, did not at all challenge the Will executed by Rajarampant in favour of Yamunabai and the registered Will dated 12-5-1975 executed by his step mother Yamunabai during his lifetime. The respondent No. 4 was aware that her father did not challenge the Will executed by Yamunabai II.

(18.) ON examination of the documents placed on record, and after having digested the material facts of the case, we are not at all inclined to accept the explanation of the

respondent No. 3 in the matter of arrest and detention of the petitioner in jail. The petitioner is practising Advocate. He is a senior citizen. There was no possibility of petitioner being absconded. The justification for arrest and detention for seizure of so called forged documents is nothing but a lame excuse put forth by the respondent No. 3 in order to justify his high handed action. The respondent No. 3 could have summoned the petitioner under section 91 of the Criminal Procedure Code for purpose of production of so called forged document. He did not at all apply his mind as to whether really arrest and detention of the petitioner was necessary. From the very report lodged by respondent No. 4 one could easily know in whose name the house property stands.

(19.) IN the case in hand, the respondent No. 3, without any justification, arrested the petitioner at odd hours of night in order to prevent him from securing a bail and detained him in custody throughout the night. When easy and legitimate course was open for the respondent No. 3, he preferred unjustified arrest and illegal detention of the petitioner simply on the ground that the first information report lodged by respondent No. 4 disclosed the commission of cognizable offence. The respondent No. 3 cannot take shelter under the umbrella of good faith in order to justify his high handed and illegal action of arrest and detention of the petitioner. Good faith is defined by section 52 of the Indian Penal Code. Good faith requires care, caution and prudence, the action of resporident No. 3 does not reflect either care or prudence. Therefore, section 159 of the Bombay Police Act, 1951 cannot be pressed into service.

(20.) IN the case of Joginder Kumar, the Supreme Court has observed in para 24 of the judgment that no arrest can be made because it is lawful for the police Officer to do so. The existence of the power to arrest is one thing and the justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock up of a person can cause incalculable harm to the reputaionand self esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. The supreme Court went on to observe that it would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. A person is not liable to be arrested merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified and except in heinous offences, an arrest must be avoided if a Police Officer issues notices to person to attend the Station House and not leave station without permission would do.

(21.) WE would also like to make reference to the case of (M. C. Abraham and another v. State of Maharashtra and others)3, 2003 Bom. C. R. (Cri.) (S. C.)650 : 2002 (9) SCALE 769. The Supreme Court dealt with the question of powers of investigating Officer with regard to arrest. Section 41 of the Criminal Procedure Code gives power to a Police Officer to arrest an offender without an order from a Magistrate or without a warrant. Section 41 of the Criminal procedure Code gives discretion to the Police Officer in the matter of arrest. However, the Supreme Court has observed that Police Officer is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. It is further observed that in appropriate cases, after some investigation, the Investigating Officer may make up his mind as to whether it is necessary to arrest the accused person.

Since the power to arrest is a discretionary, a Police Officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. The Supreme Court went on to observe that since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. The power, therefore, has to be exercised with caution and circumspection.

(22.) IF the observations made by the Apex Court are taken into consideration, we are of the clear opinion that the respondent No. . 3, without there being any justification for immediate arrest, clearly indulged in an illegal act of arrest and detention of the petitioner, which has caused incalculable harm to his reputation and self esteem. The respondent No. 3 has failed to justify the arrest of the petitioner. No doubt the respondent No. 3 has power to do so. The guidelines of the Supreme Court given in Joginder Kumar's case unfortunately fell on the deaf ears of respondent No. 3. The respondent No. 3 has arrested the petitioner in a routine manner on mere allegations of commission of a cognizable offence. The respondent No. 3, in this particular case, has lost sight of the very concept of personal liberty and the constitutional protection of the rights of the citizen. The arrest and detention of the petitioner was contrary to the guidelines given by the Supreme Court.

(23.) THERE is nothing on record to show that the respondent No. 3 has verified as to genuineness and bona fides of the complaint and a reasonable belief as to the petitioner's complicity in the crime and need of immediate arrest. He has not bothered slightly in depriving the personal liberty of the petitioner. The respondent No. 3 has not at all pointed out a reasonable justification in effecting the arrest of the petitioner at the odd hours of night. There was no need to effect arrest in the night time. The respondent No. 3 had oblique motive in doing so. Because of arrest at the odd hours of night, the petitioner could not obtain bail. It is also to be noted that first information report does not disclose heinous offence.

(24.) IN the case of D. K. Basu (referred supra), the Supreme Court has ob-served that' infringement of fundamental right of a citizen cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in civil action but by way of compensation under the public law jurisdiction for wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compul-sion of judicial consciences. The Supreme Court has also observed that it is now well accepted proposition that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suit-able remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer.

(25.) WHILE dilating upon the question of assessment of compensation, the supreme Court has given a caution. It is said that the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as award-ing appropriate punishment for the offence

(irrespective of compensation) must be left to the Criminal Courts in which the offender is prosecuted, which the state, in law, is duty bound to do. The Supreme Court has further said that the quantum of compensation will, of course, depend upon the peculiar facts of each case and no straitjacket formula can be evolved in that behalf.

(26.) A reference with profit can be made to the case of (Rudul Sah v. State of bihar}\ A. I. R. 1983 S. C. 1086. The Supreme Court has observed that the administrative sclerosis leading to flagrant infringement of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right of compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. Respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's right. The case demonstrates consequences of illegal detention for over 14 years after acquittal. The Supreme Court ordered the State of Bihar to pay to the petitioner in that case Rs. 30. 000/- as an interim measure in addition to the sum of Rs. 5000/- already paid.

(27.) IN the case of (Bhim Singh, M. L. A. v. State of Jammu and Kashmir)5, a. I. R. 1986 S. C. 494, the Supreme Court awarded compensation of Rs. 50. 000/- to the petitioner whose arrest was mischievous and malicious. The Supreme court observed that the constitutional and legal rights, if invaded, the mischief or malice and invasion may not be washed away by his being set free. In appropriate cases, the Court has jurisdiction to compensate the victim by awarding suitable monetary compensation.

(28.) HAVING examined the case of the petitioner, in the light of the pronouncements of the Supreme Court referred above, we are of the clear opinion that the arrest and detention of the petitioner was unjustified. The arrest and detention of the petitioner was mischievous and malicious. The fundamental right of the petitioner has been abrogated by illegal arrest and detention. Therefore, the petitioner is entitled to monetary compensation. In the matter of liability of the State for the torts committed by its employees, it is now the settled law that the State is liable for the tortious acts committed by its employees in the course of their employment. Viewing the case from that angle, there is no difficulty in holding that the State is liable for the tortious act committed by its servant within the scope of his employment. A senior citizen of 76 years of age, a practicising lawyer has been arrested and detained without there being any justification. The law should be used as a positive and effective instrument to meet the demand of the individual to have a better life, a fuller life, meaningful life and a complete life. Right to life includes dignified life. To promote that demand is the purpose of law. The petitioner has made out very strong case for grant of compensation. Taking into consideration the incalculable harm caused to the reputation of the petitioner, we are inclined to grant monetary compensation to the petitioner.

(29.) A direction with regard to submission of 'b' summary with prosecution cannot be granted because, the matter for grant of 'b' summary is pending before the Judicial Magistrate. The Judicial Magistrate, First Class is the competent authority in this behalf. We do not want to usurp his powers. Therefore, we are not inclined to issue any direction in this behalf.

(30.) THIS takes us to consider the case of respondent No. 4. The petitioner has also claimed compensation from respondent No. 4 for having filed a false criminal complaint

against him. In order to substantiate his argument, he heavily relied upon the report submitted by the Investigating Officer under section 169 of the Criminal Procedure Code and the opinion expressed by the investigating Officer therein. The Investigating Officer has stated in the report under section 169 of the Criminal Procedure Code that the complaint filed by respondent No. 4 is false. The prayer of the petitioner for compensation is liable to be rejected. The writ cannot be issued against respondent No. 4. There is one more difficulty in accepting the opinion expressed by the Investigating Officer in the report submitted under section 169 of the Criminal Procedure Code. The Judicial Magistrate, First Class, before whom the proceeding of 'b' summary is pending, can very well grant 'b' summary with prosecution or refuse to grant 'b' summary with prosecution. The petitioner, therefore, can very well initiate a proper proceeding against respondent No. 4 for purpose of recovery of compensation after conclusion of the proceeding for grant of 'b' summary.

(31.) IN the result, the criminal writ petition is partly allowed. We direct the respondent No. I/state to pay compensation of Rs. 25. 000/- (Rupees twenty five thousand) to the petitioner within a period of four weeks. We clarify that respondent No. 1 can, after due enquiry, initiate an appropriate action against respondent No. 3 for recovery of monetary loss caused to the State and do recovery from him amount of compensation paid to the petitioner. Rule made absolute accordingly. Criminal writ petition partly allowed.
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Cross Citation: 2011 CRI. L. J. (NOC) 398 (P. & H.)

PUNJAB & HARYANA HIGH COURT

Coram : Alok Singh, J.

Suresh Sehgal ….Vs.. State of Punjab.

CRM-M No. 8223 of 2011 - Decided On 05/04/2011

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Criminal P. C. (2 of 1974) - S. 438 Anticipatory bail - Serious allegations by petitioner against ACP for threatening him to falsely implicate him in case of cheating - Story set up by police and complainant does not inspiring confidence – Held, Bail granted to Petitioner and investigation transeferred to crime Branch.

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JUDGEMENT

ALOK SINGH, J.:- This is an application seeking anticipatory bail in FIR No.52 dated 24.2.2010, under Sections 406,420,120 of Indian Penal Code, registered at Police Station Division No.4, District Jalandhar.

2. As per the prosecution story, the demised property i.e. House No.517 R, Model Town Jalandhar belongs to Amrik Singh and Avtar Singh, who are residing abroad. Neena

alongwith property dealer Charanjit Singh assured the complainant Didar Singh that she is the owner and has authority to sell the demised property in question and believing Neena and property dealer Charanjit Singh, he (complainant) has agreed to purchase the property for 1,95,70,000/- ; a written agreement was executed by Neena as seller in favour of complainanta€™s wife Darshan Kaur and his son Kaljinder Pal Singh; the wife and son of the complainant had paid a€40,00,000 «-*/- to the alleged vendor Neena and it was agreed that sale deed would be executed on or before 25.4.2008. Again a€50,00,000 «-S/- were paid to the seller Neena under the receipt executed on the back of the agreement and time to execute the sale deed was further extended till 30.5.2008; thereafter Neena refused to execute the sale deed and on inquiry complainant found that Neena has cheated him, his wife and son by showing herself as owner of the property while it was found by the complainant that Neena was neither the owner nor had any authority to sell the demised property.

3. Learned counsel for the petitioner has vehemently argued that after one year of the registration of the FIR, the petitioner was called by the Additional Commissioner of Police, Satinder Pal Singh, in his office and demanded a€30 5 lacs from the petitioner; when the petitioner asked him the reason, he told that he is investigating the alleged complaint of Neena Singla against the petitioner in relation to Kothi No.517-R, Model Town, Jalandhar; when the petitioner told him that he is unable to arrange the illegal demand made by him then the said ACP Satinder Pal Singh threatened the petitioner that he will falsely implicate the petitioner in the false FIR under Section 420 IPC etc and put him behind the bars; on hearing this, immediately the petitioner made a complaint dated 10.01.2011 to Hon'blethe Chief Justice of Punjab and Haryana High Court, Chandigarh with a copy to the Chief Minister of Punjab, Chandigarh, the Director General of Police, Punjab, Chandigarh and the Chairman, Human Rights Commission, Punjab, Chandigarh, under the Speed Post; Hon'ble the Acting Chief Justice did not take the cognizance of the complaint made by the petitioner on the ground that no action is possible on the administrative side; however, the Punjab State Human Rights Commission took cognizance of the complaint, which was registered as Complaint No.561/8/2011; since serious allegations have been levelled against a senior Commission took cognizance of the matter and called for the report in the matter from Home Department through Commissioner of Police, Jalandhar; after the Punjab State Human Rights Commission issued notice in the complaint made by the petitioner against ACP Satinder Pal Singh, he immediately instructed the concerned SHO and the Incharge, Anti Fraud Cell to arrest the petitioner; the Incharge, Anti Fraud Cell thereafter picked up Shiv Bahadur, servant of Shivender Sehgal @ Shiv Sehgal and got recorded his statement under threat and later took him to the Magistrate and got recorded his statement under Section 164 of the Code of Criminal Procedure after tutoring him. The statement of Shiv Bahadur was got recorded by the Police before the JMIC on 14.02.2011.

4. Learned counsel for the petitioner further contends that one Avtar Singh son of Hari Singh and Amrik Singh son of Mukhtiar Singh resident of Talwandi Road, Zira, District Ferozepur, executed a General Power of Attorney in favour of one Shiv Bahadur son of Janki Dass, resident of Plot No.80, Partap Bagh, Jalandhar, servant of Shiv Sehgal son of Virender Sehgal with regard to House No.517-R, Model Town Jalandhar, area 37 marlas 41 square feet. In the General Power of Attorney executed by Avtar Singh and Amrik Singh in favour of the said Shiv Bahadur, Shiv Bahadur has been given all powers with regard to sell, mortgage, Hibba, exchange in any manner; Shiv Bahadur son of Janki Dass further executed a Special Power of Attorney dated 20.11.2007 in favour of one Naresh Singh son of Dubans Singh and Ajit Singh son of Kanshi Ram, resident of Makhdhumpura, Jalandhar,

again both of them other servants of Shiv Sehgal son of Virender Sehgal; not only this, the attesting witness of the Sub Power of Attorney executed in favour of the Naresh Singh and Ajit Singh is Kuldip, who is Driver of Shiv Sehgal. A bare perusal of Sub Power of Attorney executed in favour of Naresh Singh and Ajit Singh would further make it clear that no complete address of Naresh Singh and Ajit Singh has been given in the said attorney.

5. Learned counsel for the petitioner has further stated that although Shiv Bahadur has delegated his power in favour of Naresh Singh and Ajit Singh by executing Sub Power of Attorney but still he on the basis of the General Power of Attorney executed by Avtar Singh and Amrik Singh entered into an agreement to sell the property situated at House No.517-R, Model Town, Jalandhar with Neena Singla wife of Pawan Singla on 1st March, 2008 for a€*-S 1,53,00,0007- and received a sum of a€20,00,000 *4/- as earnest money after the execution of agreement to sell in favour of Neena Singla; this fact is proved from the legal notice served by Shiv Bahadur through his counsel to Neena Singla; since there was some dispute between Shiv Bahadur and Neena Singla with regard to execution of the sale deed or the payment made in pursuance to agreement to sell, Neena Singla submitted a complaint to the Senior Superintendent of Police, Jalandhar on 24.12.2009 against Shiv Bahadur. In the said complaint Neena Singla also levelled some wild allegations against the petitioner stating that the payment of lacs was made in the house of the petitioner to his servant Shiv Bahadur despite the fact that Shiv Bahadur is not at all servant of the petitioner but is servant of Shiv Sehgal son of Virender Sehgal; when the complaint was received in the office of Senior Superintendent of Police, Jalandhar, one Mr. Iqbal Signh Kahlon, Inspector came to the house of the petitioner along with the complaint and supplied him a copy of the complaint made by Neena Singla to the S.S.P., Jalandhar; the petitioner immediately submitted an application dated 8.2.2010 to the Inspector, Anti Fraud Cell explaining his position, alleging that he is neither a party to the agreement nor Shiv Bahadur son of Janki Dass is his servant and he is unnecessarily dragged in the complaint, which is to harm his reputation as the petitioner is Ex-Mayor of Municipal Corporation, Jalandhar.

6. Learned counsel for the petitioner has further stated that when Avtar Singh and Amrik Singh came to know about the misuse of power of attorney by Shiv Bahadur, Avatar Singh and Amrik Singh, the owner of House No.517-R, Model Town, Jalandhar, cancelled the General Power of Attorney executed in favour of Shiv Bahadur stating that they have lost faith in him as they have reasons to believe that said Shiv Bahadur son of Janki Dass would misuse the General Power of Attorney executed by them; after cancelling the General Power of Attorney in favour of Shiv Bahadur on 30.12.2009, Avtar Singh and Amrik Singh executed a General Power of Attorney in favour of Sumit Sehgal son of the petitioner-Suresh Sehgal, resident of EK 123, Shivrajgarh Jalandhar; it requires to mention here that in the said Power of Attorney executed by Avtar Singh and Amrik Singh, no power of alienation or transfer the property in any manner has been given to Sumit Sehgal son of the petitioner but the power to know about the alleged agreement to sell dated 27.11.2009 in favour of Ajay Puri executed by Shiv Bahadur, Avtar Singh and Amrik Singh informed Sumit Sehgal son of the petitioner, who was appointed as General Power of Attorney by Avtar Singh and Amrik Singh to look after the property and to defend litigation; Sumit Sehgal the son of the petitioner through his advocate, replied the legal notice served by Ajay Puri and it was alleged that Shiv Bahadur was not having any authority to execute the agreement to sell and the same was fabricated documents.

7. It is further contended by the learned counsel for the petitioner that a bare perusal of the present FIR No.52, reveals that only allegation alleged in the said FIR are against Neena Singla who on the basis of agreement to sell in her favour has further agreed to sell the property in favour of Didar Singh son of Shankar Singh and therefore, Neena Singla and one property dealer Charanjit Singh has cheated Didar Singh son of Shankar Singh; police has falsely implicated the petitioner on the direction of ACP Satinder Pal Singh, as he was annoyed with the petitioner because the petitioner refused to pay a sum of a€30 «-£ lacs as demanded by the ACP Satinder Pal Singh.

8. Mr. T.S. Salana, Deputy Advocate General, Punjab, on the instruction of Inspector Gurbinder Iqbal Singh, states that in fact Neena has lodged a report with the police stating that petitioner-Suresh Sehgal has executed an agreement to sell in her favour showing himself owner of the demised property and has received £€20,00,000 <-$/- as a token money. On the complaint of Neena, police has found that Suresh Sehgal present petitioner has obtained thumb impressions of Shiv Bahadur servant on the blank papers and has prepared forged documents in favour of Neena.

9. Mr. Sandeep Arora, learned counsel for the complainant has stated that an agreement to sell was executed in favour of Neena by the petitioner and Neena in turn has executed agreement to sell in favour of complainants wife and son. Therefore, Neena accused has been cheated by the present petitioner/accused.

10. Story set up by police as well as Neena that petitioner has executed the agreement to sell in favour of Neena on the face of it seems to be incorrect and concocted on the following grounds :-

(A) Shiv Bahadur got issued one legal notice to Neena Singla through Advocate Gopal Thakur, Chamber No. 181 District Courts Compound, Jalandhar on 25.1.2009 (Annexure P-9 to the petition) stating Neena Singla has failed to honour agreement to sell between them, therefore, earnest money of a€20 <-* lakhs paid by Neena Singla to Shiv Bahadur stands forfeited and agreement stands cancelled.

(B) Complaint made by Neena Singla to S.S.P. Jalandhar dated 24.12.2009 reads that she had entered into agreement to sell with Shiv Bahadur and a€20 <-S Lakhs as earnest money was paid in the house of Suresh Sehgal.

(C) Shiv Bahadur has executed one special power of attorney on 20.11.2007 in favour of Naresh Singh and Ajit Singh while Kuldip signed the power of attorney as witness. According to petitioner Shiv Bahadur, Naresh Singh, Ajit Singh and Kuldip Singh are servants of Shiv Sehgal.

(D) Shiv Bahadur again executed agreement to sell on 27.11.2009 in favour of Ajay Puri. Ajay Puri has issued notice to Shiv Bahadur, Ajit Singh and Amrik Singh, owners of the property which was duly replied.

(E) If Shiv Bahadur is executing sub power of attorney, another agreement to sell and got issued legal notice through Advocate and has never been servant of present petitioner, prima facie, it seems that agreement, if any, in favour of Neena Singla was executed by Shiv Bahadur and not by present petitioner.

11. Since serious allegations are made by the petitioner against ACP Satinder Pal Singh and story set up by the police and complainant at this stage does not inspire confidence, therefore, it would be just and proper and in the interest of justice that investigation must be carried out by a team of the Crime Branch of the Punjab Police consisting of three members of the Crime Branch headed by the officer not below the rank of Superintendent of Police. D.G.P., Punjab is expected to look into this.

12. However, at this stage custodial interrogation of the petitioner seems to be totally unjustified keeping in mind the ratio of the judgment in a€oeSiddharam Satlingappa Mhetre versus State of Maharastra and others, 2011 (1) RCR (Criminal) 126, wherein the Hon'ble Apex Court has observed that irrational and indiscriminate arrest must be avoided.

13. This Court hopes and trust that the story set up by all the parties as recorded hereinbefore shall be investigated by the Crime Branch, Punjab Police. This Court further trust and hopes that before coming to any conclusion Crime Branch shall also make necessary inquiries from the owners of properties who are residing abroad.

14. Considering totality of the facts and circumstances of the case, I direct that in the event of arrest of the petitioner, he shall be released on bail on furnishing his personal bond and one surety of a€20,000 to the satisfaction of the present Investigating Officer. It is clarified that observation/discussion hereinabove are solely for the purpose of deciding present petition.

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Cross Citation: 2005 (2) Crimes 299 (HC)

Chhattisgarh High Court

Hon'ble Judge(s) : V.K.Shrivastava, J
Mohd.Amin Memon..Vs..State of Chhattisgarh
Misc.Cr.Case 2150 Of 2004, Nov 03,2004

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Cr - P.C. S. 438 – IPC SS 452, 323, 294 and 506 – Applicant earlier lodged a complaint against police officials and to take revenge police wanted to arrest applicant – Fit case for protection of anticipatory bail under S. 438 of Cr. P.C. – Anticipatory bail granted.

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JUDGEMENT

(1.) Heard.

(2.) The accused/applicant No. 1 - Mohd. Amin Memon has preferred this bail application under Section 438 of the Cr. P.C., apprehending arrest in Crime No. 198/2004 registered at Police Station: Darn, Dist, Korba, for commission of the offence punishable under Sections 452, 323, 294 and 506 read with Section 34 of the I.P.C. for releasing him on anticipatory bail.

(3.) It is alleged that on 18/8/2004 Mohd. Amin Memon and Abdul Ajij Memon entered the house of complainant Hanif Khan, abused and assaulted him. Applicants contention is

that he has lodged a complaint against Police officials and the same has been registered by the Court, therefore, the Police officials have got this fake case prepared and to take revenge they want to arrest the applicant.

(4.) Taking into account all the facts and material available on record, I am of the opinion that this is a fit case where protection under Section 438 of the Cr. P.C should be extended to the applicant. Accordingly, the petition is allowed and it is directed that in the event of arrest, if the applicant No. 1 - Mond. Amin Memon, abiding with the conditions as laid down in Section 438 of the Cr. P.C., furnishes a personal bond of Rs.20,000.00 (Rs. Twenty thousand) with two solvent sureties of the like sum to the satisfaction of the authority arresting, he be released on anticipatory bail for a period of two months from today. In the meanwhile, applicant shall be entitled to file application for grant of regular bail in concerned Court and the concerned Court shall decide the same on its own merit without being influenced with the observations made herein. Certified Copy as per rules Application allowed.

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[Note:- Also see **2010 ALL MR (Cri.) 2775** – Sec. 467, 326 etc of I.P.C. through punishable with life but not with death therefore bail can be granted by Magistrate**.]**

Cross Citation: 1997 CRI. L. J. 3124, AIR 1997 SC 2575,

SUPREME COURT OF INDIA

(FULL BENCH)

Hon'ble Judge(s) : A. M. AHMADI C.J.I., J. S. VERMA AND B. N. KIRPAL, JJ.

Chandraswami …Versus..Central Bureau of Investigation

Criminal Appeal No. 2068 of 1996 (arising out of S.L.P. (Cri) No. 3337 of 1996), D/- 7 -11 - 1996.

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Criminal P.C. S. 437 – Bail – Grant of - If the case is not covered by cls (i) and (ii) of S. 437(1) of Cr. P.C. i.e. the offences are not punishable in alternative with death and the accused is not previously convicted for seven years imprisonment or two times for 3 years or more - Held- the accused is entitled to get bail – Therefore ordinarily a person suspected to having committed an offence u.s. 420, 120(B) of I.P.C. would be entitled to bail.

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Cases Referred : Chronological Paras (1996) 6 SCC 354 : 1996 SCC (Cri) 1338 6

Judgement

JUDGMENT :- Leave granted.

2. A complaint dated 25-8-1987 was received from one Shri Lakhu Bhai Pathak of U.K. whereupon a case under Section 120-B read with Section 420, I.P.C. was registered against the appellants.

3. In brief, the allegations of the aforesaid complainant were that during the year 1983, the appellants came in contact with the complainant Lakhu Bhai pathak and led him to believe that they wielded sufficient influence in India to secure for him lucrative contracts in India. It was further alleged that in the month of December, 1983, the appellants induced him to pay an amount of US$ one lakh for procuring a contract for him. This amount was alleged to have been paid to appellant No. 1, Chandra-swami, by two cheques, one for US$ 27,000, dated 29-12-1983 and another for US$ 73,000, dated 30-12-1983. Both the cheques were stated to have been handed over to appellant No. 1 on January 4, 1984 in New York.

4. Both the appellants denied the aforesaid allegations as being false and baseless. However on the aforesaid complaint having been lodged, the appellants were arrested on 13-2-1988 but were ordered to be released on bail, vide order dated 17-2-1988 of the learned Addl. Chief Metropolitan Magistrate, New Delhi. While passing the order, some conditions were imposed including one that the appellants would not leave the country without prior permission of the Court and they would join the investigation as and when required.

5. On an application being filed, the High Court of Delhi, vide order dated 4-8-1988, allowed the appellants to go abroad on certain conditions. Thereafter, the appellants went abroad on a number of occasions after securing permission from the Delhi High Court. The last such permission was granted under order dated 4-9-1995.

6. Pursuant to the order passed by this Court on 28-11-1995 in a Public Interest Litigation, being Writ Petition No. 640 of 1995 (Anukul Chandra Pradhan v. U.O.I.), which was confirmed by order dated 2-4-1996, (reported in 1996(6) SCC 354), the appellants have been restrained from going abroad. In reply to the aforesaid writ petition, the respondent stated that the investigation in the first information report lodged by Lakhu Bhai Pathak was still pending. Thereafter, on 12-4-1996, the respondent filed a charge-sheet in the Court of the Chief Metropolitan Magistrate (C.M.M.), Delhi, against the two appellants. The C.M.M., Delhi, vide order dated 2-5-1996, took cognizance of the offence and issued non-bailable warrants against both the appellants. Consequent thereto, the appellants were arrested in Madras on 2-5-1996 and have been in custody since then. The appellants, on 3-5-1996, filed an application for cancellation of the non-bailable warrants and also moved another application for grant of bail. Both these applications were dismissed by the C.M.M. on 4-5-1996. He also passed an order cancelling the bail granted earlier to the appellants on 17-2-1988.

7. The orders dated 2-5-1996 and 4-5-1996 were challenged by appellant No. 1 under Section 482, Cr. P.C. before the High Court, but without success. By order dated 8-5-1996, the prayer for bail was rejected by the High Court of Delhi. The three main grounds for rejecting bail were; (i) new material had come to light; (ii) the C.B.I.

apprehended that the appellants may tamper with the evidence; and (iii) the Supreme Court had restrained the appellants from going abroad in view of the apprehension expressed by the C.B.I.

8. Charges were then framed by the C.M.M., Delhi, against the appellants on 21-5-1996. Thereupon, another application for bail, being Criminal Misc. (main) No. 1267/1996, was filed in the High Court of Delhi but the same was dismissed on 24-5-1996. The trial of the appellants then commenced on 3-6-1996.

9. Applications for bail were again filed by appellant No. 1 before the Additional Chief Metropolitan Magistrate and Special Judge, Delhi but were dismissed on 6-6-1996 and 7-6-1996 respectively.

10. On 5th, 7th and 8th July, 1996, the complainant Lakhu Bhai Pathak was examined and partly cross-examined. On the basis of his statement, the C.M.M. Delhi, vide his order dated 9-7-1996, added the former Prime Minister of India Shri P.V. Narasimha Rao as an accused to the criminal conspiracy and he was summoned for the offence under Section 120(B) read with Section 420, I.P.C. The summons were returnable on 24-7-1996. The dates which were earlier fixed for recording of evidence in the trial were cancelled.

11. On 21-9-1996, charges were ordered to be framed against the newly added accused but no further evidence has since been recorded. Remaining cross-examination alone remains in the testimony of Lakhu Bhai Pathak.

12. In the meantime, after summons were issued by the C.M.M., Delhi, to Narasimha Rao, the appellants moved yet another application for bail before the C.M.M. Delhi. The said application too was dismissed on 10-7-1996. Another application for bail was filed by the appellants before the C.M.M. Delhi, but the same was dismissed on 3-8-1996. Thereupon a petition under Section 482, Cr. P.C., being Criminal Misc. (main) No. 2068/1996, was filed in the High Court of Delhi challenging the said order dated 3-8-1996. The main contention which was raised in the High Court was that the prosecution evidence had started on 23-6-1996 and as the trial of the appellants had not concluded within a period of 60 days from the first date for taking the evidence, they were entitled to be released on bail under Section 437(6) of Cr. P.C.

13. The High Court by the impugned judgment dated 17-9-1996, reiterated its earlier order dated 8-5-1996, whereby it had held that bail could not be granted to the appellants as there was an apprehension that they may, if released on bail, tamper with the evidence or influence the witnesses. The High Court rejected the contention of the counsel for the appellants that the provisions of Section 437(6), Cr. P.C. gave a mandate to the Court that in case of non-compliance of the provisions of the said Section, it had no option but to release the appellants on bail observing that there was strong apprehension that the appellants may tamper with the evidence and influence the witnesses, if they were admitted to bail.

14. It was contended by the learned counsel on behalf of the appellants, challenging the aforesaid decision dated 17-9-1996 of the Delhi High Court, that the provisions of Section 437(6), Cr. P.C. were clearly applicable in the present case and that the appellants should be released on bail. It was further contended that, taking all the facts and

circumstances of the case into consideration, this was a fit case where the bail should not have been refused.

15. Mr. K.N. Bhatt, learned Additional Solicitor General submitted that there was an apprehension that if the appellants were released on bail, they might try to influence the witnesses or tamper with the evidence.

16. We propose to examine the plea for grant of bail by looking at the totality of the facts and circumstances of the case at this stage, without going into the question of interpretation or applicability of Section 437(6), Cr. P.C. So also, we do not propose to examine if the cancellation of the bail granted to the appellants earlier in point of time was justified.

17. The complaint relates to an offence alleged to have been committed by the appellants nearly 16 years ago. Not much progress has taken place in the conduct of the proceedings but the examination-in-chief and a part of the cross-examination of the complainant, the main witness, has been completed. The appellants have been in custody since 2-5-1996. The only reason put forth by the trial Court, as well as the High Court, for not releasing the appellants on bail is that there is an apprehension that they are likely to influence the witnesses or tamper with the evidence. The main witness in the present case is the complainant himself, who has been zealously pursuing this case since 1987. It is his perseverance throughout these long years that has made it possible for the case to reach the stage at which it presently stands. His commitment to see the prosecution reach its logical end is strong and he is not likely to be influenced by the accused. In spite of our query at the hearing, the learned Additional Solicitor General was unable to point out any evidence which could now be tampered or influenced by the accused. We are, therefore, not satisfied that if the appellants are released on bail, they would be in a position to influence the witnesses, the main witness being the complainant himself, or tamper with the evidence.

18. Section 437(1) provides that when any person accused of, or suspected of, the Commission of any nonbailable offence is brought before a Court, he may be released on bail unless his case falls in Clauses (i) or (ii) thereof. The present case is not covered by the said two clauses. Therefore, ordinarily, a person who is suspected of having committed an offence under Section 120-B read with Section 420, I.P.C. would be entitled to bail; of course the paramount consideration would always be to ensure that the enlargement of such persons on bail will not jeopardise the prosecution case. Any such likelihood is not shown by the learned Additional Solicitor General. Moreover, the learned counsel for the C.B.I. had admitted before the High Court that there was nothing to indicate any attempt of tampering by the accused in India or abroad during the long period available to them earlier. There is no reasonable basis for such an apprehension now at this stage and in the existing circumstances.

19. It was pointed out from the High Court's order dated 8-5-1996, that the statements of W.E.Millar and Kishore Kamdar revealed that the appellants had indulged in similar activity of cheating a number of persons and therefore the apprehension was not misplaced. We fail to see how that is a factor supporting the apprehension of tampering in this case.

20. Looking at the nature of the offence which is alleged to have been committed, and the facts and circumstances now in existence, we are of the view that the appellants should be released on bail in this case, subject to the imposition of the necessary conditions. We make it clear that this order is subject to the requirement of the appellants remaining in custody by virtue of any order made in connection with any other crime by the competent Court or authority. This is so, because of several other cases pending in Courts against the appellants, and some other crimes alleged to have been committed by them.

21. Accordingly, without expressing any opinion on the merits of the case, we direct that both the appellants be released on bail, unless required to be detained by any order made in any other case/crime, on their furnishing bail bonds for a sum of Rs. one lakh each with one surety in like amount each. But this order is subject to the appellants strictly adhering to the following conditions:

(1) The appellants will not leave the country;

(2) The appellants shall not make any attempt to contact any of the prosecution witnesses, directly or through any other person, or in any other way try to tamper with the evidence or influence any witness in this case or any other case against them or any other crime under investigation by any government agency.

(3) If the appellants desire to go out of Delhi, they shall give prior information to C.B.I. about their programme, including the places and addresses where they can be contacted during that period;

(4) The appellants shall cooperate in the early completion of the trial and shall attend the hearing unless exempted;

(5) The appellants shall intimate the place of their residence and shall not change the same without prior intimation to the respondent of their intention to shift elsewhere;

(6) The appellants will appear before the concerned officer of the C.B.I. or any other Government agency whenever required in connection with any crime or matter under investigation.

22. The judgment of the High Court is set aside and this appeal is disposed of in the aforesaid terms.

Order accordingly.

Cross Citation: 2005-MhLR-4-111 , 2005-Cri.L.J.-0-2984

HIGH COURT OF BOMBAY

(Division Bench)

Hon'ble Judge(s) : R.M.S.Khandeparkar, P.V.Kakade,JJ

Sanjay Narhar Malshe …Vs..State of Maharashtra

Criminal Writ Petition 672 of 2005 Of Mar 29,2005

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Bail – Power of Magistrate to grant bail in session triable cases – offence under S.C. & S. T. Act – Held, Magistrate has power to grant bail to accused even if the offence is triable by Court of session.

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JUDGEMENT

(1.) HEARD. Rule. By consent the rule is made returnable forthwith.

(2.) A question of law, important and interesting which is sought to be raised in this petition relates to the powers of the Judicial Magistrate in respect of the grant or refusal of the bail to accused persons in cases which are exclusively triable either by the Sessions Courts or Special Courts established under a special statute.

(3.) INITIALLY the writ petition was filed challenging the F. I. R. being C. R. No. 3014 of 2005 register at the Jail Road Police Station, Solapur. However, considering the fact that charge-sheet in the matter has already been filed by the Investigating Agency, reserving his right to dispute about the insufficiency of the materials to frame the charge against him, the petitioner has restricted the challenge to the extent of the point which is sought to be raised as noted above.

(4.) FEW facts relevant for the decision are that the services of one Rajendra patil, who was the employee of the petitioner's company came to be terminated on 20-11-2002. The petitioner on or about 26-8-2004 lodged a complaint with the commissioner of Police, Solapur against Shri Jawahar Chavan, rajendra Patil and some others that he was being pressurised for re-employment of said Rajendra Patil and further that he was also being threatened in that regard. The police authorities arrested some people including Jawahar

chavan, Rajendra Patil pursuant to the said complaint. The complaint also came to be filed on 4-2-2005 against Zopadpatti Sanghatana, Solapur, by the company of the petitioner. Meanwhile, a complaint came to be filed on 26-8-2004 against the petitioner accusing the petitioner having used abusive language against one Smt. Nanda Bansode as well as the complainant chandrakant Raut on 25-8-2004. Thereupon the petitioner moved for an anticipatory bail, and by an order dated 18-2-2005, the same was rejected by the learned Sessions Judge, Solapur. The petitioner thereupon filed an anticipatory bail application being Criminal Application No. 1417 of 2005 in this Court and the same was disposed of by an order dated 4-3-2005 while reserving the right of the petitioner to challenge the F. I. R. Consequently the present petition has been filed. In the course of the hearing of the petition it was revealed that the charge-sheet has already been filed. Thereupon by reserving the right to raise necessary objection before the concerned court about insufficiency of the materials to frame the charge, the learned advocate for the petitioner has restricted the challenge in the petition to the extent of the petitioner's right to secure the bail even in the course of committal proceedings.

(5.) IT is the submission of the learned Advocate for the petitioner that though the provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)Act, 1989, hereinafter called as "the said Act" under which the charge-sheet has been filed, specifically provide under section 18 thereof that the provision of section 438 of the Code is not applicable to the cases arising under the said Act, yet there is no bar under section 209 of the Criminal procedure Code or under any other provision of law including under the said act for grant of bail to the person accused of offences punishable under section 3 of the said Act while the matter is being committed to the Special Court. Referring to the decision of the Apex Court in (Gangula Ashok and another v. State ofa. P.), reported in 2000 (5) Bom. C. R. (S. C.)265 : 2000 (2) S. C. C. 504 wherein it has been ruled that a Special Court under the said Act is not empowered to take cognizance directly of the offence committed under the said Act but it has to be only after committal of the case by the Magistrate in exercise of powers under section 209 of the Code, it is submitted by the learned advocate that it is necessary for the Magistrate to commit the proceedings to special Court in order to enable to Special Court to take cognizance of the said proceedings arising from the charge-sheet filed by the police in relation to the offence in question. It is further submitted that in the interregnum period there is absolutely no justification for detention of the petitioner, nor it has been the case of the Investigating Agency that such detention is necessary. Besides, there is no statutory provision debarring the Magistrate to refuse bail in the course of the committal proceedings. However, considering the normal practice followed by the Magistrate in committal proceedings, it is necessary for this Court to give direction to the Court of Magistrate to exercise their powers in relation to the grant of bail even in such cases including the one of the petitioner. Reliance is also placed in that regard in the decision of kerala High Court in (Shanu v. State of Kerala), reported in 2001 (1) Crimes 292 as well as Allahabad High Court in the case of (Ram Bharoshi and others v. State of U. P. and others), reported in 2004 (3) Crimes 651. Drawing attention to section 437 of the Criminal Procedure Code the learned Advocate for the petitioner has further submitted that there is no bar for release of the accused person on bail by the Magistrate unless the person is accused of commission of the offence punishable with death or life imprisonment. The learned Advocate for the petitioner has also submitted that whenever the legislature has though it fit to impose such bar on exercise of the powers of the Magistrate to grant the bail, invariably a specific provision is made in that regard in the statute. For example, attention is drawn to section 36-A of the Narcotic Drugs and Psychotropic Substance Act 1985, hereinafter called as "the N. D. P. S Act".

(6.) THE learned A. P. P. while fairly conceding that the provision of section 437 of the Code does not bar the Magistrate to grant such bail, submitted that the question of grant or refusal of bail would depend upon the facts of each case and the Magistrate has to exercise his discretion in that regard judiciously depending upon the facts of each case, and therefore, submitted that, there cannot be any blanket direction as such for grant of such bail in each and every case.

(7.) UNDOUBTEDLY section 18 of the said Act provides that nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any persons on an accusation of having committed an offence under the said Act. Undoubtedly, therefore, the question of grant of anticipatory bail in case of person accused of commission of offence under the said Act does not arise at all. However, as rightly submitted by the learned Advocate for the petitioner that the said Act nowhere debars the Magistrate from exercising the powers under section 437 of the Code whenever facts of the case demand such an exercise of powers of the Magistrate under the provision of the Code.

(8.) SECTION 437 of the Code deals with the subject of availability of bail in cases of non bailable offences. It specifically provides that when any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a Police Station or appears or is brought before a Court other that the High Court or court of Sessions, then such person may be released on bail, unless there appears reasonable ground for believing that such person is guilty of an offence punishable with death or imprisonment for life and or/such person had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions for a non-bailable and cognizable offence. At the same time the first proviso to the said section provides that if the accused person happens to be of the age of less than 16 years or a women or is sick or infirm, then such a person can be released on bail. Even in some cases where person is accused of the commission of the offence punishable with death or imprisonment for life can also be released on bail if the Court is satisfied that it is just and proper to grant bail for any special reason. The third proviso to sub-section (1) of section 437 provides that the mere fact that an accused person may be required for being identified by the witnesses during the investigation shall not be sufficient ground for refusal of bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such conditions as may be imposed by the Court. Obviously, apart from the cases wherein the person is accused of commission of the offence punishable with death or imprisonment for life, the Court of Magistrate has wide power in the matter of grant of refusal of the bail to the accused person, of course, such power is to be exercised judiciously and the same should be apparent from the order passed by the Magistrate. Nevertheless the fact remains that there is no total prohibition against grant of bail merely because a person is accused of commission of offence of serious nature. Besides, if we peruse section 209 of the Code which deals with the committal proceedings, it is apparent that even in the course of the committal proceedings there is no bar imposed upon the power of Magistrate in the matter of grant or refusal of bail. Clause (b) of section 209 clearly provides that while dealing with the accused persons appearing and brought before the Magistrate having committed the matter as the same is triable exclusively by the Court of Sessions, while the Magistrate is enjoined to commit the proceedings to the court of Sessions or the Special Court constituted under any special statute, the accused may be remanded to the custody until such committal proceedings are complete, subject to the provisions of the code relating to the bail. In other words

while the Magistrate is empowered to remand the accused to the custody until the conclusion of the committal proceedings, that is to say, till the proceedings are placed before the Court of Sessions or the Special Court, as the case may be, the powers of the Magistrate either to grant the bail if asked for or to refuse the same are not restricted in any manner. On the contrary provision of section 209 make it very clear that the Magistrate while dealing with the committal proceedings is fully empowered either to grant or refuse the bail depending upon the facts of the case, albeit he has to exercise the discretion judiciously in that regard as rightly submitted by the learned A. P. P.

(9.) THE learned Advocate for the petitioner is also justified in contending that whenever the legislature has thought it fit to provide any embargo over the power of the Magistrate in the matter of grant of bail to the accused person, the legislature has made necessary provision in that regard and one such example is section 36-A in the N. D. P. S. Act. Section 36-A (l) (b) of N. D. P. S act clearly provides that notwithstanding anything contained in the Code of criminal Procedure where a person accused of or suspected of the commission of offence under the N. D. P. S. Act is forwarded to a Magistrate under subsection (2) or sub-section (2-A)of section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the remand of such person to such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate provided that in cases which are triable by the Special Magistrate where such Magistrate considers when such person is forwarded to him as aforesaid, or upon or at any time before the expiry of the period of detention authorised by him, that the remand of such person to the custody is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction. This apparently discloses that the Magistrate in case of the persons accused of commission of the offence under N. D. P. S Act and in cases which are triable by the sessions Court even if he considers the remand of such person to the custody to be unnecessary, he cannot grant the bail, but he will have to direct the person to be forwarded to the Sessions Court having jurisdiction. That is not the case in relation to a person accused of commission of offence under the said Act. There is no provision in the said Act in pan materia to section 36-A of the N. D. P. S Act. The said Act also does not provide any embargo over the powers of the Magistrate to grant bail. Considering the same merely because the offence under the said Act is exclusively triable by the Special Court in terms of the provision of section 14 of the said Act, it cannot be said that the magistrate will have no power to grant the bail. In our considered opinion, therefore, taking into consideration all the provisions of the said Act as well as the provisions of the Code of Criminal Procedure, it is apparent that the Magistrate has power to grant the bail even at the time of committal proceedings, if the facts of the case do not justify remanding of such person to the custody. The exclusive jurisdiction of the Special Court to try the offence that by itself could not be criteria to decide about the absence of the powers to the Magistrate to grant bail in case of offence under the said Act. Unless the special statue which gives exclusive jurisdiction to the Special Court for the trial of the offences thereunder makes a specific provisions like in the nature of section 36-A of the N. D. P. S. Act or on similar lines, specifically excluding the powers of the Magistrate to grant the bail to the person accused of commission of such offence, there cannot be any restriction on the powers of the magistrate to grant the bail, merely because the person is accused of the offence punishable under the said Act, unless, of course, the offence is punishable with death or life imprisonment.

(10.) WE are fortified in the above view by the decision of the Kerala High court and the Allahabad High Court which are relied upon by the learned advocate for the petitioner. In fact the decision of the Kerala High Court is directly in relation to the offence under the said Act. In the case of Shanu (supra) the learned Single Judge of the Kerala High Court after taking note of the provision of the said Act as well as section 437 of Code held that "it is clear that the J. F. C. M. 's Court has got jurisdiction to grant bail to the persons accused of the offence punishable under any of the sub-clauses (i)to (xv) of sub-section (1) of section 3 of the Act. " While delivering the said decision the learned Single Judge after taking note of section 437 of Criminal procedure Code has observed that "the Magistrate is competent to release an accused, either appeared or brought before him, if the offence alleged is not punishable with death or imprisonment for life. " Similarly in ram Baharshi's case (supra) the learned Single Judge of Allahabad High court held that "it is abundantly clear that there is no prohibition on a magistrate to grant bail in Sessions triable case, unless it is punishable with death or imprisonment for life, and it is absolutely necessary that the magistrate give up the erroneous practice of refusing to consider or grant bails in such cases where there is no prohibition under the Code of Criminal Procedure. " while delivering the said judgment it was observed thus -

"13. There are a number of offences in the Penal Code which are not punishable with death or imprisonment for life, but they are triable by the court of Sessions, where the Magistrates invariably refuse bail, because they entertain a wrong notion that they are disentitled to grant bails in such cases, even if the case is one where bail ought to have been granted on merits, this approach is also in the teeth of Division bench decision of this Court, Vijay Kumar and others v. State of U. P. and others. 14. The result of this unhealthy practice is that a person against whom an F. I. R. is lodged relating to any Sessions triable offence, which on a plain reading appears to be a case of false or malicious prosection, uncorroborated by any independent material, the accused is left at the mercy of the police, in whose favour the Magistrate has virtually abdicated his jurisdiction. An accused may have to remain in jail for some time before his bail application is heard and granted by the Sessions court, after the Magistrate's routine, rejection of his prayer for bail even in those minor Sessions triable offences where there may be no need for taking an accused in custody for the purpose of investigation, or where palpably he appears to have been implicated falsely, and there are no other attendant circumstances disentitling the accused from an order of bail. A sting in jail can be a source of great humiliation for a maliciously prosecuted accused who enjoys some social status. We are in respectful agreement with the view expressed by the learned Single judges of the Kerala High Court as well as Allahabad High Court in the above referred judgments.

(11.) LIBERTY to the petitioner to raise the point regarding insufficiency of the materials to frame the charge before the concerned Court, as it is too premature for this Court to express any opinion in that regard, and the issue in that regard can be very well raised before the concerned Court after committal of the proceedings. We make it clear that we have not expressed any opinion on this point.

(12.) FOR the reasons stated above, therefore, the petition partly succeeds. Meanwhile the Magistrate while committing the proceedings consequent to the filing of the charge-sheet is expected to exercise his discretion judiciously in relation to power to grant or refuse the bail to the petitioner in case an application for bail is filed by the petitioner and to pass an appropriate order in that regard in accordance with the provisions of law

bearing in mind the observations made herein above on the point of jurisdiction of the Magistrate to entertain and decide such bail application.

(13.) IN view of the filing of the charge-sheet the petitioner has to appear before the concerned Magistrate within ten days whereupon the Magistrate will have to pass an appropriate order as stated above. Meanwhile the interim relief granted to the petitioner to continue till the appropriate order is passed by the Magistrate.

(14.) RULE is made absolute in above terms with no order as to costs. Petition partly succeeds.

Cross Citation: 2010-AD(CR)-4-466 , 2010-ALLMR(CRI)-0-2775

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : J.H.BHATIA, J.

Ambarish Rangshahi Patnigere..Vs.. State of Maharashtra, Through Sr. P.I., CBD Belapur Police Station, Navi Mumbai
CRIMINAL WRIT PETITION NO. 2785 OF 2009 with CRIMINAL APPLICATION NO. 425 OF 2010

CRIMINAL WRIT PETITION NO. 2785 OF 2009 Of, Jul 22,2010

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A) Cr. P.C. S. 437(1) – Penal code S.S. 467, 409 – The offences are punishable with life or for 10 years imprisonment – Magistrate has powers to grant bail to the accused – Restriction under S. 437 (1) is in respect of offences which are punishable with alternative sentence of death or life imprisonment. In case under Sec. 326 of I.P.C. also the Magistrate has power to grant bail.
B) P.C.R. – Request for Police custody – Order of rejecting Police custody – Once application for P.C.R. is rejected – Police cannot repeat and make a application again for Police custody.

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JUDGEMENT

(1.) Rule. Rule made returnable forthwith. Heard Counsel for the parties.

(2.) To state in brief, Writ Petition No.2785 of 2009 is filed by the five accused persons in Crime No.I-73/2009, registered with CBD Belapur police Station, Navi Mumbai on 17.5.2009. The petitioners are the senior officers of Municipal Corporation of Navi Mumbai.

Petitioner No.1 was the Deputy Municipal Commissioner, petitioner No.2 was the Assistant Municipal Commissioner, petitioner No.3 was the Office Superintendent/Ward Officer and then Assistant Municipal Commissioner, petitioner No.4 was working as Senior Accountant and the petitioner No.5 was the Deputy Accountant and then Assistant Account Officer. On 16.5.2009, Suresh Ramu Patil, Assistant Commissioner of Navi Mumbai Municipal Corporation filed a report with the Senior Inspector of Police, CBD Belapur Police Statioon, Belapur, Navi Mumbai. That report revealed that for the purpose of removal of encroachment and for transportation of he goods removed after encroachment, the Municipal Corporation required supply of labourers, instruments, machinery and vehicles. For this purpose, Municipal Corporation had called tenders. H.B. Bhise and Co.. of which H.B.Bhise was the proprietor, had submitted tender which was accepted. On 12.5.2009, a meeting of all the concerned officials and the Assistant Commissioners was called by the Deputy Commissioner for the purpose of removal of encroachment and unauthorised construction, to stop new encroachment and for carrying out immediate works during the rainy season. During the meeting, some officers made a grievance that men and machinery and vehicles were not made available by the contractor H.B.Bhise and, therefore, the work of removal of encroachment, unauthorised construction, etc. could not be carried out effectively. It was also pointed out by some of the officers that the contractor was required to submit one copy of the challan showing the work done by him and the bill for that work to the concerned ward officer and one copy in the office for passing the bills, so that the concerned officers of the different areas could verify the correctness of the bill. In view of the complaint that the contractor was not following the procedure and used to was submit the bills and challans directly in the office to get them passed, the Deputy Commissioner became suspicious and, therefore, he called the record for the period from 1.4.2007 to 31.3.2008. Several officers pointed out that either the bills and the challans did not bear their signatures or when they were signed by the officers, there were over-writings and forgery in respect of number of labourers, vehicles and machinery supplied. It appears that in some cases, the signatures of the concerned officers of the different areas were not obtained and in some cases after obtaining their signatures, changes wee made in the contents of bills and challans by over-writing for the benefit of the contractor. The said contractor was working for the Navi Mumbai Municipal Corporation since 27.2.2003. On audit of the record for the financial year 2007-08, it was revealed that the bills, worth Rs.53,68575/- submitted by the contractor H.B.Bhise, were passed and payment was made. However, as per the entries taken in the note books pertaining the work of removal of encroachment the actual work done was worth Rs.17,51,916/-. It did not include the amount of work done for Airoli area. That amount appears to be Rs.6,82,610/-. Excluding that amount and the actual work done as per the record, excess payment of Rs. 26,31,796/- was made to the contractor H.B.Bhise for one financial year. In the report lodged by the police, it was stated that this was the excess payment for one year and as the said contractor was working since February 2003, there was possibility of much more excess payment and defalcations. On the basis of that report, the offence was registered as Crime No.I-173/2009 for the offences punishable under Section 420, 465, 467, 468, 471 IPC against H.B.Bhise, the proprietor of H.B.Bhise and Co.

(3.) During investigation, it was revealed that excess payment to the tune of Rs.1,38,03,008/- was made and several persons including staff members of the Municipal Corporation were involved in commission of the said offence and helped the said contractor H.B.Bhise. As per the remand report dated 9.9.2009 submitted by CBD Belapur Police Station before the J.M.F.C. Vashi, Navi Mumbai, besides H.B.Bhise, 7 other persons were already arrested and remanded to Judicial Custody. On 8.9.2009, at 16.30 hrs., 5

more persons, who are the petitioners before the Court, came to be arrested for the said offence. In the remand report, it was submitted that these accused persons were also involved in commission of offence, as some of them were in charge of the concerned areas, the Assistant Municipal Commissioner and some were accountants and the offences are committed by H.B.Bhise in collusion with and active assistance of these petitioners. However, as per the remand report immediately after the arrest each of these five persons, complained of different medical problems and were required to be taken to the Municipal Corporation Hospital at Vashi where they were immediately admitted in the Intensive Care Unit. In the remand report, it was stated that in view of their admission in ICU in the Hospital, they could not be produced before the Court. Therefore, in absence of those accused persons, the learned Magistrate was requested to grant their judicial custody, but at the same time, the Investigating Officer clearly stated that this application for remand was without prejudice to his right to make an application for police custody remand as and when these accused persons would be found medically fit. In view of this, on 9.9.2009, the learned Magistrate granted Judicial Custody remand of these petitioners till 11.9.2009.

(4.) When these petitioners were indoor patients in ICU in the Hospital, on 10.9.2009 an application for bail was moved on their behalf by their Advocate. It appears that the application was moved at 2.30 p.m. and the learned Magistrate directed the learned APP to file reply immediately. On that bail application, at 4 p.m., the learned Magistrate endorsed that despite giving directions to the concerned Court duty constable, he was absent till 4 p.m. and that when the matter was called, nobody was present nor affidavit was filed. After that endorsement, the mater was placed on the next day i.e. 11.9.2009. On 11.9.2009 at 11.25 a.m. the Magistrate endorsed on the bail application - "I.O. absent Case diary not produced till 11.25 a.m. At 11.35 a.m., the learned Magistrate endorsed and directed I.O. to remain present with case diary immediately. It appears from the record that the learned APP had submitted his strong objection to the bail application contending that because of the medical reasons, immediately after arrest, the accused persons were required to be admitted in the Hospital. Magisterial custody remand was sought having reserved a right to seek police custody. The period of 15 days after arrest was not over during which police custody could be sought by police under Sec. 167. Defalcation of huge public money was committed and the accused persons, as public servants, had committed serious offences which included offence under Sec. 467 IPC which is punishable for imprisonment for life and therefore the Magistrate could not grant bail.

(5.) The learned Magistrate passed the order on the application granting bail. That order reveals that he had started dictation of the order at 11.40 a.m. and completed at 4.30 p.m. He also noted that at 4.30 p.m., the Investigating Officer filed an application for grant of police custody remand on several grounds. However, by that time, the dictation of the order on bail application was completed and though the learned APP and I.O. were present during dictation, I.O. had not moved application for police custody remand nor he had stated that he was moving an application for police custody remand. On the remand report dated 11.9.2009,submitted at about 4.30 p.m., the learned Magistrate passed the brief order rejecting the application. The main ground for rejection of the request for police custody was that charge-sheet was already filed and in view of the authority of the Bombay High Cout in Mohammed Ahmed Yasin Mansuri vs. State of Maharashtra 1994 (1) Mh.L.J.688, once charge-sheet is filed and cognizance of the offence is taken, only custody which could be granted is Magisterial custody even in respect of the accused who is

arrested during investigation after taking cognizance of the case. The said order does not reveal any other reason for refusal of the police custody. The said order rejecting the application for police custody remand was challenged in Revision Application No.178/2009. That Revision Application was partly allowed by the learned Additional Sessions Judge, Thane by the impugned judgment and order dated 9.10.2005. The learned Additional Sessions Judge observed that while the order granting bail is an interlocutory order and cannot be challenged by filing Revision Application, the order refusing to grant police custody is not an interlocutory order and it can be challenged. The learned Additional Sessions Judge set aside the order passed by the Magistrate refusing to grant police custody and directed the learned magistrate to fix the matter on12.10.2009 for passing proper order in connection with police custody of the accused for the purpose of further investigation. The said order in the Revision Application setting aside the order of the Magistrate refusing Police Custody has been challenged by the accused/petitioners in the present Petition. The said order is also challenged by the Intervenor in the Criminal Application No.425/2010. The intervener, was a Corporator and Leader of the Opposition during the relevant period. He also claims to be whistle-blower. He has challenged the order passed by the Additional Sessions Judge refusing to set aside the order granting bail to the accused persons.

(6.) Before going to the facts and the arguments advanced by the learned Counsel for the parties raising several grounds for and against the grant of bail and refusal of police custody, it may be noted that the learned Magistrate had rejected the request for police custody on the sole ground that in view of the Judgment and authority of this High Court in Mohammed Yasin Mansuri (supra), the police custody remand could not be granted even in respect of the accused who would be arrested for the first time after the charge-sheet was filed and cognizance of the case was taken. The said Judgment of the Division Bench of this Court was over-ruled by the Supreme court in State through CBI vs. Dawood Ibrahim Kasker and Ors. (2000) 10 SCC 438. The Supreme Cort after having considered the similar arguments as advanced on behalf of of the present petitioners and the provisions of sections 167, 173(8) and 309 Cr.P.C. observed thus in paras 10 and 11 :-

"10. In keeping with the provisions of Section 173 (8) and the above-quoted observations, it has now to be seen whether Section 309(2) of the Code stands in the way of a Court, which has taken cognizance of an offence, to authorized the detention of a person, who is subsequently brought before it by the police under arrest during further investigation, in police custody in exercise of its power under Section 167 of the Code. Section 309 relates to the power of the Court to postpone the commencement of or adjournment of any inquiry or trial and sub-section (2) thereof reads as follows : "309. (2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody: Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time."

"11. There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody under Section 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody. Since, however, even after

cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation. If Section 309(2) is to be interpreted - as has been interpreted by the Bombay High Court in Mansuri - to mean that after the Court takes cognizance of an offence it cannot exercise its power of detention in police custody under Section 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. we are, therefore, of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation. So far as the accused in the first category is concerned he can be remanded to judicial custody only in view of Section 309(2), but he who comes under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which had taken cognizance of the offence may exercise its power to detain him in police custody, subject to the fulfillment of the requirements and the limitation of Section 167."

(7.) From the above observations of the Supreme Court, it is clear that Their Lordships specifically considered the interpretation put by this Court in Mohd. Yasin Mansuri and overruled the same. From the above observations, it is clear that words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation. Their Lordships made it clear that the accused who would be arrested during further investigation after filing of the charge sheet and taking cognizance of the case would be governed by Section 167 Cr.P.C. so long as further investigation continues subject to limits and requirements of sec. 167. In view of this legal position, the order passed by the Magistrate refusing police custody on the sole ground was clearly wrong and could not be sustained. The manner in which the learned Magistrate dealt with the bail application by making different endorsements thereon minute to minute as noted earlier, it appears that the Magistrate was in great haste and hurry to grant the bail to the accused persons and he did not give sufficient and reasonable time to the prosecution to oppose that application and to bring the correct legal position before the Court. The learned Magistrate had almost completed dictation of the order on bail application by 4.30 p.m. and at about 4.35 p.m., he rejected the application moved by the Investigating Officer for police custody by passing a short order referring to the authority in Mohd. Yasin Mansuri. Had the learned Magistrate given sufficient and reasonable time to the prosecution, the learned Assistant Public Prosecutor could point out to the Magistrate that the said authority of the Bombay High Court was overruled long back in the year 2000 by the Supreme Court. However, because of the haste shown by the learned Magistrate, he rejected the application for police custody remand on the basis of the overruled authority of this Court.

(8.) The learned Counsel for the petitioners vehemently contended that the order granting or refusing bail or police custody remand is an interlocutory order and therefore such an order is not subject to revisional jurisdiction under Section 397 Cr.P.C. Section 397(2) provides that powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other

proceeding. The question before this Court is whether the order granting bail is or is not interlocutory order and whether the superior Courts can interfere if the bail order is passed without jurisdiction or if it is passed without application of mind by the concerned Magistrate and without considering the gravity of the matter. Similarly a question also arises whether the refusal to grant police custody remand is interlocutory order and is not subject to revisional jurisdiction of the superior Courts. The learned Counsel for the petitioners vehemently contended that in a catena of judgments, the Supreme Court held that the order granting bail is an interlocutory order and is not subject to revisional jurisdiction. What is interlocutory order within the meaning of Section 397 Cr. P.C. was the subject matter for consideration before the Supreme Court in number of cases beginning with Madhu Limaye vs. State of Maharahtra AIR 1978 SC 47, V.C. Shukla, V.C. Shukla vs. State (1980) SCC 695, Usmanbhai Dawoodbhai Memon v. State of Gujarat, 1988 (2) SCC 271, In Usmanbhai, the Supreme Court considered the earlier Judgments and observed thus in para 24 :-

"24.... The expression 'interlocutory order' has been used in Section 19(12) in contradistinction to what is known as final order and denotes an order of purely interim or temporary nature. The essential test to distinguish one from the other has been discussed and formulated in several decisions of the Judicial Committee of the Privy Council, Federal Court and this Court. One of the tests generally accepted by the English Courts and the federal Court is to see if the order is decided in one way, it may terminate the proceedings but if decided in another way, then the proceedings would continue. In V.C. Shukla v. State, Fazal Ali, J. in delivering the majority judgment reviewed the entire case law on the subject and deduced therefrom the following two principles, namely, (i) that a final order has to be interpreted in contradistinction to an interlocutory order; and (ii) that the test for determining the finality of an order is whether the judgment or order finally disposed of the rights of the parties. It was observed that these principles apply to civil as well as to criminal cases. In criminal proceedings, the word 'judgment' is intended to indicate the final order in a trial terminating in the conviction or acquittal of the accused. Applying these tests, it was held that an order framing a charge against an accused was not a final order but an interlocutory order within the meaning of section 11(1) of the Special Courts Act, 1979 and therefore not appealable. It cannot be doubted that the grant or refusal of a bail application is essentially an interlocutory order. There is no finality to such an order for an application for bail can always be renewed from time to time...."

(9.) Thus, in Usmanbhai, it was held that the grant or refusal of bail application is essentially an interlocutory order as there is no finality to such an order for an application for bail can always be renewed from time to time. The Supreme Court dealt with only the question whether the grant of bail was or was not interlocutory order. In State represented by Inspector of Police vs. N.M.T. Joy Immaculate 2004 (5) SCC 729, Police custody for one day was granted by the Magistrate and it was held to be interlocutory order and it was held that revision against such an order is not maintainable. However, the question whether refusal of the police custody is final or interlocutory order was not subject matter for consideration. That point came before this Court in R. Shakuntala vs. Roshanlal Agarwal and othrs 1985 Cri. L.J. 68 wherein the learned Single Judge of this Court considered the observations in Amar Nath v. State of Haryana AIR 1977 SC 2185, Madhu Limaye and other Judgments. The learned Judge observed thus in para 9 :-

"9.... In this connection the Supreme Court had occasion to deal with Amar Nath's case AIR 1977 SC 2185 : (1977 Cri L.J. 1891). The Supreme Court observed in that connection as follows :-

"It is neither advisable, nor possible to make a catalogue of orders to determine which kinds of orders would be merely, purely or simply interlocutory and which kinds of orders would be final, and then to prepare an exhaustive list of those types of orders which will fall in between the two It will be seen that having regard to this view taken by the Supreme Court, in fact in Madhu Limaye's case AIR 1978 SC 47: (1978 Cri L.J. 165), the larger Bench of the Supreme Court has expressed an opinion that the broad statement of law contained in Amar Nath's case needed certain modification. However, the Supreme Court reaffirmed the decision in Amar Nath's case and held that the order releasing some of the accused on perusal of the police report and subsequently summoning them was not an interlocutory order but was a final order. To my mind, reading the two cases together Amar Nath's case and Madhu Limaye's case, no doubt is left about the legal position, namely, that an order rejecting the Department's application for remand of the accused to judicial custody is a final order and not an interlocutory order."

The learned Judge of this Court in R. Shakuntala, finally came to conclusion that an order rejecting application for remand of the accused to judicial custody is a final order and not an interlocutory order. This will be applicable with equal force to the refusal of request for police custody also. As such, the order passed by the Magistrate rejecting request for police custody cannot be treated as interlocutory order because the police cannot repeat and make applications again and again for police custody after the application for police custody had been rejected once and particularly in view of the limitation under Sec. 167 Cr.P.C. that the police custody may be granted only during first 15 days after the arrest or detention and not thereafter. If such application for police custody is rejected, that order becomes final and the Investigating Officer is permanently deprived of seeking police custody of that accused for the purpose o further investigation, discovery, etc. even though the offence may be very serious.

(10.) Mr.Bhat, learned Counsel for the intervener contended that if the Magistrate has granted bail in the serious offences without looking to the gravity of the offences and without giving proper opportunity to the prosecution to present its viewpoint and if it results in the miscarriage of justice, the superior courts can always interfere and can cancel the bail by virtue of powers under Section 439(2) Cr.P.C. The learned counsel for the intervener placed reliance on several authorities in this respect.

(11.) In Puran vs. Rambilas and Anr. 2001 (6) SCC 338, the Supreme Court observed thus in para 10 :-

"10. Mr. Lalit next submitted that once bail has been granted it should not be cancelled unless there is evidence that the conditions of bail are being infringed. In support of this submission he relies upon the authority in the case of Dolat Ram v. State of Haryana. In this case it has been held that rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different basis. It has been held that very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. It has been held that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt

to evade the due course of justice or abuse of the concession granted to the accused in any manner. It is, however, to be noted that this Court has clarified that these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society. Therefore, an arbitrary and wrong exercise of discretion by the trial court has to be corrected."

(12.) In Pandit Dnyanu Khot vs. The State of Maharashtra, JT 2002 (6) SC 115, the Supreme Court again reiterated the observations made in Puran vs. Rambilas and observed thus in paras 8 and 9 :-

"8. In our view, it appears that the High Court has committed basic error in not referring to the provisions of section 439(2) Cr.P.C. which specifically empower the High Court or the court of sessions to cancel such bail. Section 439(2) reads as under : "439. Special powers of High Court or court of session regarding bail: (2) A High Court or court of session may direct that any person who had been released on bail under this chapter be arrested and commit him to custody."

"9. Proviso to section 167 itself clarifies that every person released on bail under section 167(2) shall be deemed to be so released under chapter XXXIII. Therefore, if a person is illegally or erroneously released on bail under section 167(2), his bail can be cancelled by passing appropriate order under section 439(2) Cr.P.C. This Court in Puran v. Rambilas and Another [JT 2001 (5) SC 226], has also clarified that the concept of setting aside unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation."

(13.) The same principle was reiterated by the Supreme Court in Subodh Kumar Yadav v. State of Bihar and Anr. AIR 2010 SC 802. Their Lordships observed thus in para 9 :-

"9. Learned counsel for the appellant contended that cancellation of bail can be only with reference to conduct subsequent to release on bail and the supervening circumstances. According to him an application for cancellation will not be maintainable with reference to what transpired prior to the grant of bail. He relied upon the following observations in State of U.P.vs. Amarmani Tripathi [(2005) 8 SCC 21]: (2005 AIR SCW 4763, Para 18), in support of the said contention :- "The decisions in Dolat Ram v. State of Haryana [1995 (1) SCC 349]: (2004 AIR SCW 4970) and Samarendranath Bhattacharjee v. State of West Bengal [2004 (11) SCC 165] relate to applications or cancellation of bail and not appeals against orders granting bail. In an application for cancellation, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But in an appeal against grant of bail, all aspects that were relevant under Section 439 read with section 437, continue to be relevant. We, however, agree that while considering and deciding the appeals against grant of bail, where the accused has been at large for a considerable time, the post-bail conduct and supervening circumstances will also have to be taken note of. But they are not the only factors to be considered as in the case of applications for cancellation of bail." A careful reading of the said observations shows that while considering the factors relevant for consideration of bail already granted vis-a-vis the

factors relevant for rejection of bail, this Court pointed out that for cancellation of bail, conduct subsequent to release on bail and supervening circumstances will be relevant. The said observations were not intended to restrict the power of a superior court to cancel bail in appropriate cases on other grounds. In fact it is now well settled that if a superior court finds that the court granting bail had acted on irrelevant material or if there was non-application of mind or failure to take note of any statutory bar to grant bail, or if there was manifest impropriety as for example failure to hear the public prosecutor/complainant where required, an order for cancellation fo bail can in fact be made. (See Gajanand Agarwal vs. State of Orissa [2006 (9) SCALE 378] : (2006 AIR SCW 4753) and Rizwan Akbar Hussain Syyed v. Mehmood Hussain [2007 (10) SCC 368): (2007 AIR SCW 3654)."

(14.) In view of the above authorities of the Supreme Court, it is now settled position of law that even though the grant of bail may be interlocutory order not subject to revisional jurisdiction under sec.397, still the superior Courts by virtue of the powers under Sec. 439(2) Cr. P.C. can cancel the bail in appropriate cases, if the superior Courts find that the bail was granted acting upon irrelevant material or there was non-application of mind or failure to take note of statutory bar or grant bail, or if there was manifest impropriety as for example failure to hear the public prosecutor or complainant.

(15.) In Subodhkumar Yadav (supra), facts and the circumstances under which the bail was granted by the Magistrate were almost similar to the present case. After having considered the facts of that case, the Supreme Court observed thus in para 11 :-

"11.....The undue haste exhibited by the learned Magistrate as well as his decision to hear the bail application on the same day without hearing the learned counsel for the complainant, compelled the learned Sessions Judge to draw adverse inferences against the learned Magistrate. On the facts and in the circumstances of the case, this Court is of the opinion that the learned Sessions Judge was justified in drawing adverse inferences against the learned Magistrate and holding that the order granting bail was passed by the learned Judicial Magistrate for considerations other than judicial...."

In the present case also, the learned Magistrate showed a great haste in hearing bail application and passing the order without giving reasonable time and opportunity to the investigating officer and the Public Prosecutor to move application for police custody remand and also to oppose the bail application . As indicated above, if the reasonable opportunity would have been given, the learned Magistrate would have been saved of passing the order rejecting application for police custody on the basis of overruled authority of this Court. The haste shows that the Magistrate was bent upon hearing bail application immediately and i passing order for bail. This amounted to impropriety.

(16.) The facts of this case are already noted above and it shows that a serious offences of forgery, misappropriation, etc. were committed and huge amount of more than Rs.1,38,00,000/- was paid in excess to the contractor H.B.Bhise. It could not have been possible if the concerned officers would have been careful in verifying the record and taking due caution which was expected from them in such matters. The investigation papers revealed that the contractor had given registration number of vehicls, allegedly used for the purpose of transportation of the goods and material after demolition of the unauthorised structures and removal of the encroachment and those registration numbers were of two wheelers like scooters and bikes. Thus a huge fraud was played against the Corporation. Not only this, it was revealed that the proper procedure was not followed in

presentation of bills because one copy of the bills was not given to the concerned ward officer and the bills were directly submitted before the senior officers who passed the bills without any scrutiny and verification by the concerned ward officers. Some of the bills revealed that even though they were signed by the ward officers, later on, by overwriting the contents of the same were changed in respect of number of workers, machinery and vehicles used and thus forgery was played and on the basis of forged documents, huge excess payments were made to the contractor. This was a loss to the public money because afterall the Municipal Corporation was to make payment from the taxes collected from the general public. In view of the manner in which these offences were committed, the investigating officer wanted police custody of these petitioners for proper investigation which could go to the root of the case. That opportunity was refused by the learned Magistrate and he hastily granted bail to them.

(17.) It may be noted here that the learned Counsel for intervener contended that the Magistrate did not have jurisdiction to grant bail because the offences under Sections 467 and 409 IPC, carry punishment which may be life imprisonment. According to the learned Counsel, if the offence is punishable with sentence of death or life imprisonment, the Magistrate cannot grant bail under Section 437(1) Cr. P.C. unless there are special grounds mentioned therein. He relied upon certain authorities in this respect including Prahlad Sigh Bhati vs. NCT, Delhi and Anr. JT 2001 (4) SCC 116. In that case, offence was under Section 302 which is punishable with death sentence or life imprisonment and is exclusively triable by Court of Sessions. The offence under Section 409 is punishable with imprisonment for life or imprisonment for 10 years and fine. Similarly, the office under Section 467 is also punishable with imprisonment for life or imprisonment for 10 years and fine. Even though the maximum sentence which may be awarded is life imprisonment, as per Part I of Schedule annexed to Cr.P.C., both these offences are triable by a Magistrate of First Class. It appears that there are several offences including under sec.326 in the Indian Penal Code wherein sentence, which may be awarded, is imprisonment for life or imprisonment for lesser terms and such offences are triable by Magistrate of the First Class. If the Magistrate is empowered t try the case and pass judgment and order of conviction or acquittal, it is difficult to understand why he cannot pass order granting bail, which is interlocutory in nature, in such cases. In fact, the restriction under Sec. 437(1) Cr. P.C. is in respect of those offences which are punishable with alternative sentence of death or life imprisonment. If the offence is punishable with life imprisonment or any other lesser sentence and is triable by Magistrate, it cannot be said that Magistrate does not have jurisdiction to consider the bail application. In taking this view, I am supported by the old Judgment of Nagpur Judicial Commissioner's Court in Tularam and Ors. vs. Emperor 27 Cri.L.J. 1926 page 1063 and also by the Judgment of the Kerala High Court in Satyan Vs. State 1981 Cr.L.J. 1313. In Satyan, the Kerala High Court considered several earlier Judgments and observed thus in paras 7 and 8 :-

"7. According to the learned Magistrate Section 437(1) does not empower him to release a person on bail if there are reasonable grounds for believing that he has committed an offence punishable with death or an offence punishable with imprisonment for life. In other words the learned Magistrate has interpreted the expression "offence punishable with death or imprisonment for life" in Section 437(1) to include all offences where the punishment extends to imprisonment for life. This reasoning, no doubt, is seen adopted in an old Rangoon Case H.M. Boudville v. Emperor, AIR 1925 Rang 129 : (1925) 26 Cri L.J. 427 while interpreting the phrase "an offence punishable with death or transportation for life" in Section 497 Cr. P.C. 1898. But that case was dissented from in Mahammed Eusoof

v. Emperor, AIR 1926 Rang 51: (1926) 27 Cri L.J. 401). The Rangoon High Court held that the prohibition against granting bail is confined to cases where the sentence is either death or alternative transportation for life. In other words, what the Court held was that the phrase "death or transportation for life" in Section 497 of the old Code did not extend to offences punishable with transportation for life only, it will be interesting to note the following passage from the above judgement : "It is difficult to see what principle, other than pure empiricism should distinguish offences punishable with transportation for life from offences punishable with long terms of imprisonment; why, for instance, the detenu accused of lurking house trespass with a view to commit theft, for which the punishment is fourteen years imprisonment, should be specially favoured as against the individual who has dishonestly received stolen property, knowing that it was obtained by dacoity, for which the punishment happens to be transportation for life ? It cannot seriously be argued that the comparatively slight difference in decree of possible punishment will render it morally less likely that the person arrested will put in an appearance in the one case rather than the other. On the other hand the degree of difference is so great as between transportation for life and death as to be immeasurable. A prudent Legislature will, therefore, withdraw from the discretion of the Magistracy cases in which, if guilt is probable, even a man of the greatest fortitude may be willing to pay a material price, however, exorbitant, for life."

The above decision has been followed by the Nagpur High Court in the case reported in Tularam v. Emperor, AIR 1927 Nag 53 : (1926) 27 Cr. L.J. 1063).

"8. The reasoning applies with equal force in interpreting the phrase "offence punishable with death or imprisonment for life" So long as an offence under section 326 is triable by a Magistrate of the First Class there is no reason why it should be viewed differently in the matter of granting bail from an offence under Section 420 I.P.C. for which the punishment extends imprisonment for 7 years or any other non-bailable offence for which the punishment is a term of imprisonment."

It would be illogical and incomprehensible to say that the magistrate who can hold the trial and pass judgment of acquittal or conviction for the offences punishable with sentence of life imprisonment or lesser term of imprisonment, for example in offences under S. 326, 409, 467, etc., cannot consider the application for bail in such offences. In fact, it appears that the restriction under Sec. 437(1) (a) is applicable only to those cases which are punishable with death sentence or life imprisonment as alternative sentence. It may be noted that in Prahlad Sigh Bhati (supra), in para 6, the Supreme Court held that even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a Court of session, yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Session for the purposes of getting the relief of bail. This may be applicable to many cases, wherein the sentence, which may be awarded, is not even life imprisonment, but the offence is exclusively triable by court of Sessions for example offences punishable under Sections 306, 308, 314,315, 316,399, 400 and 450. Taking into consideration the legal position, I do not find any substance in the contention of Mr.Bhatt, learned Counsel for the intervener that merely because the offence is under Sec. 409 and 467 IPC, Magistrate did not have jurisdiction to hear and grant the bail.

(18.) Even though I find that the learned Magistrate had jurisdiction to consider the bail application and to grant bail,still taking into consideration seriousness and gravity of the

matter, it was highly improper on the part of the learned Magistrate to show such haste in considering the application immediately and making endorsements on the bail application minute to minute and refusing reasonable opportunity to the investigating agency to oppose that application, I find that the order passed by the Magistrate granting bail was without application of mind to the facts of the case. By granting bail and refusing police custody of the accused, who were not in police custody even for a day, the learned Magistrate practically prohibited the investigating agency from making proper investigation to the case which, in fact, required in-depth investigation and which could not be possible without the police custody. Therefore, while the order refusing the police custody could be challenged under revision jurisdiction under sec. 397, the order granting bail could be cancelled by the superior courts, including the Sessions Court, by virtue of the powers under sec. 439(2) Cr.P.C.

(19.) The learned Counsel for the petitioners contended that during pendency of the present petition, the petitioners had offered to present themselves before the police for giving their specimen handwritings and signatures and that as per order of this Court they had also made available to police and their specimen handwritings and signatures were obtained by the police and therefore in view of this changed circumstances, now the police custody should not be granted nor bail order passed by the Magistrate should be cancelled. I am not impressed with this contention. The investigation in such a serious offence including huge amount of the Municipal Corporation, which is public money, could not be completed merely by obtaining specimen signatures or handwritings of the accused/petitioners. The investigation would require in-depth interrogation, which could reveal several facts which may not be within the knowledge of the investigating agency without such interrogation,

(20.) For the aforesaid reasons - (a) the Writ Petition filed by the petitioners is hereby dismissed. Rule discharged. (b) Criminal Application No.425/2010 filed by the intervener is allowed and the bail granted by the Magistrate is also hereby set aside. (c) The petitioners/accused shall remain present before the Judicial Magistrate, First Class, Vashi, Navi Mumbai, on 2.8.2010 and on that day, request for police custody made by the investigating officer shall be considered. The magistrate shall pass appropriate order after hearing both parties. (d) It is made clear that in case police custody is granted, after expiry of the police custody remand, the accused/petitioners shall be at liberty to move fresh application for bail and that will be disposed of in accordance with law after hearing both parties. Rule made absolute in the Criminal Application No.425/2010.

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Cross citation : 2011 CRI. L. J. 2065

BOMBAY HIGH COURT

Coram : 1 V. M. KANADE, J. (Single Bench)

Criminal Application No. 1397 of 2009, D/- 25 -3 -2009.
Krushna Guruswami Naidu v. The State of Maharashtra.

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Criminal P.C. (2 of 1974), S.439 - BAIL - COURT OF SESSIONS - CUSTODIAL REMAND - Bail - Application for - Is maintainable even if filed during period of police remand granted by Magistrate - Sessions Court cannot reject application for bail on that ground - Bail application should be entertained and considered on merits even if there is order of police remand.

The Apex Court in the case of Niranjan Singh and another v. Prabhakar Rajaram Kharote and others reported in (1980) 2 Supreme Court Cases 559 : (AIR 1980 SC 785) has observed as under :

"7. When is a person in custody, within the meaning of Section 439 Cr.PC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor prece-dential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblins and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained

him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

The Constitutional Bench of the Apex Court in the case of Shri Gurbaksh Singh Sibbia and others v. State of Punjab reported in (1980) 2 Supreme Court Cases 565 : (AIR 1980 SC 1632) In paragraph 22, it is observed that;

"These sections with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for."

It is expected from the Sessions Court that if such an application is filed under section 439, even if there is an order of remand, it should be entertained and considered on merits and in accordance with law.

AIR 1980 SC 785; AIR 1980 SC 1632, Rel. on. (Para 12)

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Cases Referred : Chronological Paras
AIR 1980 SC 1632 (Rel. on) 12
AIR 1980 SC 785 (Rel. on) 12

S. R. Chitnis, Sr. Counsel i/b. Smt. V. R. Raje, for Applicant; Shri S. R. Shinde, APP, for State.

Judgement

ORDER :- This is an application for bail.

2. The Applicant is a practicing advocate, practicing in the Court at Chittoor, Andhra Pradesh. The Applicant was arrested in connection with an offence, which is registered with Loni-Kalbhor Police Station dated 13th March, 2009 for the offence punishable under sections 363 and 364A r/w. 34 of the Indian Penal Code. In the said complaint, the Complainant alleged that his son was abducted by some unknown persons and he was taken to Bangalore.

3. The prosecution case is that the present Applicant had taken the abducted son of the Complainant to the Court premises in Bangalore for the purpose of holding settlement talks and at that time, he was arrested on the spot by the police.

4. The learned Senior Counsel for the Applicant submits that the prosecution case so far as the present Applicant is concerned, is incorrect and he was arrested from the street and no arrest panchnama has been prepared and he was, thereafter produced before the Court and, thereafter remanded to the police custody. He submitted that no panchnama was made and, therefore, the allegation of the prosecution that the Applicant was involved in the abduction is incorrect.

5. An affidavit has been filed by the daughter of the Applicant in which she stated that the Applicant's family members were not informed of the arrest of their father on 16.3.2009.

6. The learned APP for the State was asked to get the panchnama. He clearly made a statement that no panchnama has been made when the Applicant was arrested.
7. The Applicant is in police custody since last 10 days. It is submitted that on the basis of the statement of one of the co-accused, the present allegation has been made against the Applicant and there is no material on record to show that the Applicant is involved in the offences of abduction.
8. Perusal of the remand application filed by the Bangalore Police indicates that the Applicant has been arrested at the Post Office Road at 6.30 p.m. on 16.3.2009 whereas the remand application has been filed in the Pune Court shows that the Applicant was arrested in the Court premises while settlement was in progress. Admittedly, no arrest panchnama has been made at the time of arrest of the Applicant. The arrest form shows that the signatures of two witnesses were obtained. There is still discrepancy in the statement made in the remand application in the Bangalore Court and also the remand application filed in the Pune Court about the place of arrest. So far as the signatures of two witnesses are concerned on the arrest form, it is strange that the said witnesses are from the Pune and the arrest was made at Bangalore. It is strange that the signatures on the arrest form were obtained at Pune from Pune witnesses. The Applicant is practicing advocate in Chitoor, Andhra Pradesh since last 30 years and he was public prosecutor in the said Court. In my view, continued detention of the Applicant, therefore, under these circumstances, is not necessary since there is no material been found against him. The only material is the statement of the co-accused, who stated that the Applicant was holding settlement talks between the parties in the Bangalore Court. The Applicant deserves to be released on bail.
9. The Applicant be released on bail in a sum of Rs.20,000/- with one or two sureties in the like amount. The Applicant, initially furnish cash bail and within two weeks, shall furnish the sureties as directed by this Court. The Applicant shall co-operate with the police. The Applicant shall report to the concerned police station, as and when called.
10. The learned Magistrate, Pune shall act on the authenticated copy of the order and fax of the Applicant's advocate and that the same may be acted upon.
11. The learned Counsel for the Applicant has also canvassed one other submission that the Applicant has filed this application directly in this Court because his experience of the past is that when the application is filed under section 439 of the Criminal Procedure Code in the Sessions Court after an accused is remanded to police custody, such application is not entertained by the Sessions Court on misconception that such an application for bail is not maintainable. The learned Senior Counsel for the Applicant further submitted that, therefore, the Applicant has no other option but to file this application for bail under section 439 of the Criminal Procedure Code in this Court directly. It is submitted that though the Applicant was practicing advocate and public prosecutor in the Chitoor Court, Andhra Pradesh for last 30 years, he was illegally detained in this matter. He submitted that, therefore, it has been clarified that such applications which are filed after police remand is granted by the Magistrate are maintainable in the Sessions Court under section 439.
12. In my view, this question is no longer res-integra and the Apex Court in several cases has held that the power of the Sessions Court and the High Court will not be restricted or limited in any manner as is evident from provisions of section 439 of the Criminal Procedure Code and, therefore, even if police remand has been granted by the Magistrate Court, during this period also an application under section 439 is maintainable in the Sessions Court. The Apex Court in the case of Niranjan Singh and another v. Prabhakar Rajaram Kharote and others reported in (1980) 2 Supreme Court Cases 559 : (AIR 1980 SC 785) has observed as under :

"7. When is a person in custody, within the meaning of Section 439 Cr.PC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor prece-dential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblins and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court."

It is, therefore, evident that the Sessions Court cannot reject such applications which are filed on the ground that they are not maintainable. It is quite another thing for the Court to consider the said application and to see that such an application should be entertained or not. Whether bail is granted or not at this stage. But the Sessions Court certainly cannot say that the said application is not maintainable. The Constitutional Bench of the Apex Court in the case of Shri Gurbaksh Singh Sibbia and others v. State of Punjab reported in (1980) 2 Supreme Court Cases 565 : (AIR 1980 SC 1632) has made certain observation in respect of power of Court under section 439. Though the Constitutional Bench of the Supreme Court was considering the power of the Court under section 438 to grant anticipatory bail, the said observation has been made only after taking into consideration the observation that those powers are also relevant. In paragraph 22, it is observed that;

"These sections with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for."

It is expected from the Sessions Court that if such an application is filed under section 439, even if there is an order of remand, it should be entertained and considered on merits and in accordance with law.

Application is, accordingly, disposed of.

Order accordingly.

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Cross Citation: 2010 (3) SCC (Cri) 469, 2010-TLPRE-0-452 , 2010-JT-6-656

SUPREME COURT OF INDIA

Hon'ble Judge(s) : ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.

Pravinbhai Kashirambhai Patel ….. Vs….. State of Gujarat

SPECIAL LEAVE PETITION (CRL.) NO.1923 OF 2010 Of Jul 08,2010

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Cr. P.C. – S. 438 – Anticipatory Bail – Case of Complainant doughtful -Different versions given in different complaints – I.P.C. - Section 395, 397, 467, 468 and 471 – Grant of anticipatory bail to accused justified.

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JUDGEMENT

(1.) In connection with an incident which is said to have occurred on 11th September, 2008 at about 11.00 a.m. and continued even thereafter, a complaint was made at about 5.30 p.m. to the Police Inspector, Anand Police Station, by one Patel Bipin Dahyabhai and three others. In the said complaint it was alleged that on the said date at 11.00 a.m. the Respondent No.2 and his associates together with a mob of about 20 persons carrying sticks, scythes and arms, illegally entered into Nidhwad Survey No.66, which the complainant contended belonging to him and his family members, and threatened to dispossess them by force from the said land and even held out threats to kill the complainant and his family members if they resisted.

(2.) From the contents of the complaint itself it is clear that immediately after the said incident the petitioner tried to lodge a complaint with the Police Inspector of Anand Police Station, but such complaint was not registered and within half an hour thereafter the mob came back and assaulted the complainant and his associates with sticks and scythes and caused serious injuries to the petitioner herein and some of his other associates who had to be taken to the Anand Suvidha Hospital for treatment. In the written complaint it was mentioned that besides causing serious injuries to the complainant and his group, the Respondent No.2 and his associates caused damage to the vehicles belonging to the petitioner. Since the complaint was not registered, the petitioner and his associates were said to have gone to the Office of the D.S.P., where they were informed that the said Officer was not available and, ultimately, the written complaint was made, in which another incident allegedly involving the snatching and theft of cash and ornaments from one Manishbhai Patel and certain other car accessories, was also included.

(3.) After the said written complaint had been made, a First Information Report was also recorded at the instance of the petitioner herein by the P.S.O., Sanand District, Ahmedabad (Rural), on 11th September, 2008, at 10.15 p.m. at V.S. Hospital, where the complainant had been referred for treatment. In the First Information Report it was stated by the petitioner that when the mob of 30 to 40 persons rushed towards the informant and his brother and nephew, the Respondent No.2 and his son, Lalitbhai Babubhai Patel, were standing on the road beside their car and with the help of signs they are alleged to have directed the attackers to assault the petitioner and his family members. According to the Respondent Nos.2 and 3, there is yet another version of the incident contained in a letter addressed by the petitioner and others to the Director General of Police, Gujarat, wherein it was shown that the Respondent Nos.2 and 3 were present at Village Nighrad at the time of the alleged offence and after having directed as to how the entire operation was to be carried out, they left the place. The Respondent Nos.2 and 3 thereafter applied for anticipatory bail and the same was allowed by the Additional Sessions Judge, Fast Track Court No.1, Ahmedabad (Rural), Mirzapur, by his order dated 11th November, 2009. While granting the prayer of the Respondent Nos.2 and 3 for grant of anticipatory bail, the learned trial court imposed various conditions to ensure that the investigation was not

compromised in any way or that the Respondent Nos.2 and 3 cooperated with the investigation.

(4.) The said order allowing the prayer of the Respondent Nos.2 and 3 for grant of anticipatory bail was thereafter challenged by the petitioner herein before the High Court. The High Court, upon considering the material available and after considering the various decisions of this Court laying down the parameters for grant of anticipatory bail, dismissed the petitioner's application under sections 439(2) and 482 of the Criminal Procedure Code for setting aside the order dated 11th November, 2009, passed by the learned Additional Sessions Judge and to cancel the anticipatory bail granted to the Respondent Nos.2 and 3 herein.

(5.) This Special Leave Petition has been filed by the complainant being dissatisfied with the aforesaid order of the High Court upholding the order of the trial court granting anticipatory bail to the Respondent Nos.2 and 3 in connection with the F.I.R. dated 11th September, 2008.

(6.) Extensive submissions were made by Mr. Yatin N. Ojha, learned Senior Advocate, appearing for the petitioner, in support of his contentions that not only had the trial court erred in granting anticipatory bail to the Respondent Nos.2 and 3, but that the High Court had also erred in confirming the order of the learned Additional Sessions Judge. Mr. Ojha submitted that in the facts and circumstances of the case, the anticipatory bail granted to the Respondent Nos.2 and 3, in connection with the complaint filed by the petitioner, was liable to be set aside. Mr. Ojha urged that when such serious charges in respect of offences alleged to have been committed under Sections 395, 397, 467, 468 and 471 I.P.C. had been made against the Respondent Nos.2 and 3 and their associates, the learned Additional Sessions Judge, having regard to the gravity of the offence, ought not to have allowed the prayer of the Respondent Nos.2 and 3 for grant of anticipatory bail.

(7.) In support of his aforesaid submissions, Mr. Ojha firstly referred to the decision of this Court in Puran vs. Rambilas and Anr. [(2001) 6 SCC 338], in which the grounds for cancellation of bail under Section 439(2) Cr.P.C. fell for consideration and it was held that an order granting bail, by ignoring material and evidence on record and without giving reasons, would be perverse and contrary to principles of law and such an order would itself provide a ground for moving an application for cancellation of bail. It was further observed that such ground for cancellation of bail would be different from the ground that the accused had misconducted himself or that some new facts called for cancellation of bail.

(8.) Mr. Ojha then referred to the decision of this Court in Superintendent of Police, CBI and Ors. vs. Tapan Kumar Singh [(2003) 6 SCC 175] in support of his submissions that there was no compulsion that all facts and details relating to the offence are to be included in the F.I.R. This Court observed that the information given must disclose the commission of a cognizable offence and must provide a basis for the Police Officer to suspect the commission of such an offence. Mr. Ojha submitted that in the instant case certain information was provided in the F.I.R. which was subsequently supplemented by addition of other charges upon further investigation into the complaint.

(9.) Mr. Ojha submitted that the said view was subsequently reiterated by this Court in various cases and as recently as in the case of Animireddy Venkata Ramana and Ors. vs.

Public Prosecutor, High Court of Andhra Pradesh [(2008) 5 SCC 368], wherein it was reiterated that since in the F.I.R. the accused persons have been named and overt acts on their part have also been mentioned, it was not necessary that each and every detail of the incident was to be stated. It was further observed that a First Information Report is not meant to be encyclopaedic.

(10.) Mr. Ojha submitted that the grant of anticipatory bail to the Respondent Nos.2 and 3 was in violation of the principles laid down by this Court in State rep. by the C.B.I. vs. Anil Sharma [(1997) 7 SCC 187], in which the factors to be considered in exercise of the discretionary power were considered. The said case involved a member of the Legislative Assembly of the State of Himachal Pradesh, who was also a Minister of the Himachal Pradesh State Government for three years and was the son of a former Union Minister. It was held that in appropriate cases anticipatory bail should not be granted to persons holding high positions and/or wielding considerable influence and that the investigating agencies would be better placed to elicit more useful information and material during custodial interrogation and that the High Court had erred in ignoring the apprehension expressed by C.B.I. that considering the high office held by the applicant and wide influence that he could wield, the C.B.I. would be subjected to a great handicap in the interrogation process in case of grant of pre-arrest bail. Reference was also made to the decision of this Court in Anil Kumar Tulsiyani vs. State of U.P. and Anr. [(2006) 9 SCC 425], wherein it was indicated that among the relevant considerations for grant of bail in respect of non-bailable offences, was the gravity and the nature of the offence. Mr. Ojha urged that the decision in the said case was clearly attracted to the facts of the instant case, having regard to the gravity of the offences complained of against the Respondent Nos.2 and 3.

(11.) Mr. Ojha submitted that whether the Respondent Nos.2 and 3 have abused the privilege of anticipatory bail or not was not the only consideration for exercise of power under Section 439(2) Cr.P.C., what was equally important was the correctness of the manner in which the respondents had been admitted to bail by the trial court. Mr. Ojha urged that having regard to the gravity of the offences alleged, both the Additional Sessions Judge as well as the High Court had erred in granting anticipatory bail to the Respondent Nos.2 and 3 and the said orders were liable to be set aside.

(12.) Appearing for the State of Gujarat, Ms. Hemantika Wahi supported the case of the petitioner and contended that notwithstanding the fact that the investigation had been completed, custodial interrogation of Respondent Nos.2 and 3 was still required in order to elicit further evidence in connection with the case.

(13.) On behalf of the Respondent Nos.2 and 3 it was submitted that it is only after considering the various materials available on record in respect of the purported incident the prayer of the said respondents for grant of anticipatory bail was allowed. Mr. Jaideep Gupta, learned Senior Advocate appearing with Mr. Mukul Rohtagi, learned Senior Advocate, who had commenced the submissions on behalf of the said respondents , urged that except for the statement made on behalf of the State of Gujarat that custodial interrogation of the Respondent Nos.2 and 3 was necessary in connection with the investigation into the complaint made by the petitioner, no other case has been made out for cancellation of such bail.

(14.) The decisions cited by Mr. Ojha in support of his contentions, lay down the principles, which are normally required to be followed while granting regular bail or anticipatory bail, but the same have to be applied according to the facts and circumstances of each case. Except for indicating the broad outlines for grant of bail and/or anticipatory bail, no strait-jacket formula can be prescribed for universal application, as each case for grant of bail has to be considered on its own merits and in the facts and nuances of each case. In fact, the principles laid down by this Court in State of U.P. vs. Amarmani Tripathi [(2005) 8 SCC 21], broadly covers the matters to be considered in an application for grant of bail, but even then the same may not fully cover the fact situation of each case. 14. In the instant case, on account of the different versions noticed in the three different complaints made in respect of the incident of 11th September, 2008, and having regard to the fact that allegations with regard to offences under Sections 395, 397, 467, 468 and 471 I.P.C. were sought to be added at a later stage of investigation, no case has been made out for allowing the petitioner's application under Section 439(2) read with Section 482 Cr.P.C.

(15.) Accordingly, while dismissing the Special Leave Petition, filed by Pravinbhai Kashirambhai Patel, we also make it clear that any observation made in this order shall be deemed to have been made only for the purposes of disposing of the Special Leave Petition and not for any other purpose.

(16.) The Special Leave Petition is dismissed accordingly.

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Note :- See also – 2007 ALL MR (Cri.) 674 (Bom) – Bail granted in Rape case sec. 376 I.P.C.- as accused relied on love letters**.**

Cross Citation: 2005 Cri. L. J. 1416, 2005-Crimes(SC)-1-283 , 2005-AIR(SC)-0-790

SUPREME COURT OF INDIA

Hon'ble Judge(s) : N.SANTOSH HEGDE, S.B.SINHA, JJ.

M.P.Lohia ...Vs.. State of West Bengal

Criminal Appeal 219 Of 2005 Feb 02,2005

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A] Cr. P.C. – Section 438 – Anticipatory Bail – I.P.C. – 304 – B, 406, 498 – A, 34 – Accused and Complainant relying on documentary evidence – Bail should be granted - Wife Committing Suicide – Allegation of demand of dowry made by her parents – Accused taking defence that she was suffering mental illness- Both sides relying on documentary evidence – Held - accused relying on documentary evidence genuineness of that document can be decided by the trial court- however in such case the accused are entitled to be released on anticipatory bail.

B] Media Trial – Supreme Court condemned the act of publishing and holding of media trials of the matters which is subjudice before Court.

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JUDGEMENT

(1.) Heard learned counsel for the parties.

(2.) Leave granted.

(3.) The appellants in these appeals have been charged for offences punishable under Sections 304B, 306 and 498A read with Section 34 of the IPC. Their applications for the grant of anticipatory bail have been re- jected by the courts below. Daughter of the complainant Chandni (since deceased) was married to the appellant in the third appeal before us. Their marriage took place on 18th February, 2002. The appellants live in Ludhiana whereas the complainant and his family are residents of Calcutta. Chandni committed suicide on 28th of October, 2003 at her parents house in Calcutta. It is the case of the appellants herein that the deceased was a schizophrenic psychotic patient with cyclic depression and was under medical treatment. Though she was living in the matrimonial home often went to Calcutta to reside with her parents and she was also being treated by doctors there for the above mentioned ailments.

(4.) While the complaint against the appellants is that they were not satisfied with the dowry given at the time of wedding and were harassing the deceased continuously, consequent to which she developed depression and even though the parents of the deceased tried to assure the appellants that they would try to meet their demand of the dowry, the deceased was being treated cruelly at her matrimonial home and her husband had no love and affection to her because of which she developed depression.

(5.) It has also come on record that the deceased had tried to commit suicide at the residence of her parents sometime in July, 2002 i.e. about a year earlier than the actual date of her death.

(6.) On behalf of the prosecution as well as on behalf of the defence, large number of documents have been produced to show that the appellants were demanding dowry because of which the deceased was depressed and ultimately committed suicide. Per contra the documents from the side of the defence show that the relationship between the husband, wife and the in-laws were cordial and it was only illness of the deceased that was the cause of her premature death.

(7.) One thing is obvious that there has been an attempt on the part of both the sides to create documents either to establish the criminal case against the appellants or on the part of the appellants to create evidence to defend themselves from such criminal charges. Correctness or genuineness of this document can only be gone into in a full- fledged trial and it will not be safe to place reliance on any one of these documents at this stage.

Therefore, we would venture not to comment on the genuineness of these documents at this stage. Suffice it to say that this is a matter to be considered at the trial.

(8.) In this background the only question for our consideration at this stage is whether the appellants be granted anticipatory bail or not.

(9.) As stated above, any expression of opinion on the merits of the case except to the extent of finding out prima facie whether the appellants are entitled for anticipatory bail or not, would likely to effect the trial. Therefore, taking into consideration the entire material available on record without expressing any opinion on the same, we think it appropriate that the appellants should be released on bail in the event of their arrest on their furnishing a bail bond of Rs. 1,00,0007- (Rupees one lac) each and one surety for the like sum by each appellants to the satisfaction of the court or the arresting authority as the case may be. We direct that the appellants shall abide by the condiiions statutorily imposed under Section 438(2) of the Code of Criminal Procedure and further direct that in the event of the investigating agency requiring the presence of the appellants for the purpose of investigation they be given one week's notice and they shall appear before such investigating agency and their presence at such investigation shall not exceed two days at a time but such interrogation shall not be a custodial interrogation. They shall be entitled to have their counsel present at the time of such interrogation.

(10.) Having gone through the records, we find one disturbing factor which we feel is necessary to comment upon in the interest of justice. The death of Chandni took place on 28th February, 2002 and the complaint in this regard was registered and the investigation was in progress. The application for grant of anticipatory bail was disposed of by the High Court of Calcutta on 13.2.2004 and special leave petition was pending before this Court. Even then an article has appeared in a magazine called 'Saga' titled "Doomed by Dowry" written by one Kakoli Poddar based on her interview of the family of the deceased. Giving version of the tragedy and extensively quoting the father of the deceased as to his version of the case. The facts narrated therein are all materials that may be used in the forthcoming trial in this case and we have no hesitation that this type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who were responsible for the said article against indulging in such trial by media when the issue is subjudiced. However, to prevent any further issue being raised in this regard, we treat this matter as closed and hope that the other concerned in journalism would take note of this displeasure expressed by us for interfering with the administration of justice.

(11.) For the reasons stated above, these appeals succeed and the same are allowed.

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Cross Citation: 2009-ALL MR(CRI)-0-3289, Mar 03,2009

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : A. B. CHAUDHARI, J.

SURESH KRISHANRAO POL .....Vs.... STATE OF MAHARASHTRA

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Cr. P.C. – Section 438 – Anticipatory Bail – Murder Case – I.P.C. 302, 34 – Role played by accused is factor to be considered - There is no allegations against petitioner that he hit the deceased with dangerous weapons – Anticipatory bail granted.

==========

JUDGEMENT

(1.) HEARD learned counsel for rival parties.

(2.) THIS is an application for grant of anticipatory bail for the offence punishable under Section 302 read with Section 34 of indian Penal Code registered by Dattapur police Station, District Amravati, vide Crime no. 65 of 2008.

(3.) I have perused the case dairy. The First Information Report shows that only namdeo Nandardhane and Purushottam were named. It appears that thereafter some more statements were recorded. Insofar as the present applicant is concerned, there is no allegation that the present application hit the deceased by any dangerous weapon. Allegation is against Purushottam and Namdeo nandardhane about the actual assault. In view of this, the applicant deserves to be released on anticipatory bail.

(4.) THIS Court had, upon perusal of the document (Ex. 14) in Mis. Cri. Appln. No. 700/08 placed by P. S. O. Dattapur, addressed to District Government Pleader, amravati, called the explanation of the concerned P. S. O. vide order 3-2-2009, as to under what provisions and on what basis he gave no objection for releasing the applicant on bail in the case of murder. The learned a. P. P. invited my attention to para 6 of his reply which affirms that such no objection was given by the concerned P. S. O. on the ground that nothing was recovered from Namdeo. In the F. I. R. itself the name of Namdeo is mentioned as assailant of the accused by stick and his name has also been taken by other

witnesses. Merely because no recovery was made from Namdeo Nandardhane, the police officer has no authority to give no objection for releasing on bail in the case of murder. Hence, I make the following order.

(5.) THE applicant be released on anticipatory bail in Crime No. 65/08 for the offence punishable under Section 302 read with Section 34 of Indian Penal Code registered at Police Station Dattapur, district amravati, on furnishing PR Band in the sum of Rs. 20,000/- with one solvent surety in like amount. The applicant to attend police station dattapur every day for 15 days between 11 a. m. and 2 p. m. He is directed to co-operate with the investigating machinery. Liberty to prosecution to move this Court for cancellation of bail, if exigency arises. District Superintendent of Police amravati (Rural) i directed to examine the role of investigating officer who has given no objection for releasing Namdeo on bail in writing to the District Government Pleader, amravati, in the case of murder and, if necessary, to proceed against him departmentally. Hamadast granted.

(6.) IN view of the above order, criminal Application No. 505/09 stands disposed of as infructuous.

Application allowed.

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Cross Citation :2013 ALL MR (Cri) 1317

THE HIGH COURT OF JUDICATURE AT BOMBAY

R. C. CHAVAN, J.

Pradeep Shivaji Shinare ..Vs. The State of Maharashtra

Application No.l844of20l2
withApplicationNo.621 of2012.
11thDecember,2012.

S.R. CHITNIS, Senior Counsel i/b Nittn Shejpal for the applicant , Ms.P.P. Shinde , APP, for the State.

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Cri.P.C.(1973),**S.439-Bail-Offenceofmurder--Investigation was complete and charge-sheet** had **already been filed - Trial was not likely to take off – Applicant entitle to bail - Application allowed with conditions. (Para 2)**

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JUDGE MENT :- This is an application for bail by one Pradeep Shivaji Shinare who has been named in the FIR as one of the five persons who participated in the assault on victim Ravindra , who died as a result of the injuries sustained by him. The FIR by the victim's brother Arvind shows that he and some other family members were eye-witnesses in the incident . The dispute was initially with Bharat . On 11-5-2012, at about 6:00 p.m., the applicant and four others were hiding behind a bush. Bharat was armed with

a sword. He hit Ravindra on the face with the sword. Ravindra fell down. Jaywant assaulted Ravindra on right leg by a sickle. Tanaji and Santosh hit Ravindra by iron rods on chest and head. Bharat again gave a blow by the sword on the backside of Ravindra's head. The applicant hit on the head, neck and chest with wooden handle of a spade. The victim was pronounced dead on being taken to hospital. The notes of post-mortem examination show 16 injuries. Out of them, 15 injuries are either contused lacerated wounds, bruises, swelling or graze injuries, none of which has resulted in any fracture. The 16th injury is a contused lacerated wound in the occipital region of the size 8 cm x 1 cm bone deep resulting in compound fracture of the occipital bone. There was no internal injury on the thoracic region. The cause of death was head injury, polytrauma, haemorrhage and shock.

2 The learned counsel for theapplicant submits that though the applicant has been named in the FIR, the role attributed to the applicant is of assaulting the victim by the wooden handle of a spade on the victim's head, leg and chest. The learned counsel points out that apart from Bharat, who allegedly hit the victim by sword on the head, Tanaji and Santosh Shinare are also alleged to have hit the victim on the head with iron rods. Yet, there was only one head injury observed in the notes of postmortem examination. He, therefore, submits that there may be a possibility of an exaggeration by the first informant's side in order to involve all members of the Shinars family. The learned counsel for the first informant and the learned APP submit that since the applicant was a part of an unlawful assembly which had indulged in causing multiple injuries to the victim, leading to the victim's death, it would not be permissible, at this stage, to find out exactly what role was played by the applicant in order to consider whether he could be admitted to bail or not. The learned counsel for the first informant and the learned APP submit that all the participants in the assault would have to be treated similarly, since they had formed an unlawful assembly. This aspect would undoubtedly be considered by the trial Judge at the trial. Considering the nature of the injuries observed by the autopsy surgeon on the victim and the assault as described in the FIR, as also considering the fact that investigation is complete and charge-sheet has already been filed and the trial is not likely to take off, the applicant be released on bail in Sessions Case No.98 of 2012 arising out of C.R. No.I-21 of 2012 of Neral Police Station, District Raigad on his furnishing P.R. Bond in the sum of ?25,000/-with one or more solvent sureties in the sum aggregating to ?25,000/-on the condition that the applicant shall stay out of Raigad District till the trial is over and shall enter Raigad

District only for attending the trial. He shall scrupulously keep himself away from all the prosecution witnesses. The application accordingly stands disposed of.

3. In view of the above, the intervention application also stands disposed of.

Ordered accordingly.

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Cross Citation :2002-ALLMR(CRI)-0-573

BOMBAY HIGH COURT

Hon'ble Judge(s) : J.A.PATIL, J.

Decided on 22nd December, 2000

Rohidas Gangaram Jadhav ….Vs….. State Of Maharashtra

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Cr. P.C. – 437 – I.P.C. 302 Murder Trial – Two set of evidences inconsistent with each other – one incriminating the accused, while the other indicating his absence at relevant time on the spot – Accused deserves to be granted bail.

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JUDGEMENT

Heard Shri. Amin Solkar, Advocate for the Applicant-accused and Shri. Konde-Deshmukh, APP for the Respondent State. 2. The Applicant was arrested on 24th April, 2000 on the charge that he and one Nisha, with whom he had illicit connections, set the deceased Nalini on fire, after pouring kerosene on her. The deceased sustained 99 percent burn injuries and she succumbed to the said injuries on the same day. However, before, that, she made two statements-one before the police and the other before a Municipal Councillor. Both the statements are in writing and they bear the thumb impressions of the deceased. In both the statements the deceased stated that the Applicant, on account of illicit relations with the co-accused Nisha had asked her to leave the house. According to her, then there was a quarrel between the two and in that quarrel, Nisha poured kerosene on her person, whereas the Applicant set her on fire. The dying declarations bear endorsements of the Medical Officer, Kalyan, to the effect that the patient was conscious to give statement. Although, both the statements must have been recorded one after the other, the Medical Officer's endorsement bear the same timing, i. e. , 1. 00 p. m. The dying declaration recorded by the Municipal Councilor Rekha Gajabe contain typed questions, against which hand-written answers, purported to have been given by the deceased are written. The police have recorded the statement of Damyanti the minor daughter, aged five years, the deceased and the Applicant. The same was recorded, five days, after the incident. Damyanti has stated that it was the Applicant, who poured kerosene on her mother and set her on fire. She does not refer to the presence of Nisha. Relying upon these statements, Shri. Konde-Deshmukh, APP submitted before me that there is a prima facie case of murder against the Applicant and, therefore, he does not deserve to be released on bail. Shri. Solkar drew my attention to the statements of neighbouring witnesses, namely, Salochana Konkar, Chandrakant Konkar, Jaywant

Sambare, and Vijayabai Kardak, which show that at the relevant time, they heard a noise of shouting and, therefore, they rushed to the house of the Applicant. But at that time, the door was found closed from inside and finally it was required to be broken open. Chandrakant Konkar has stated that at the relevant time he and the Applicant had gone to the market for buying vegetables and at that time, Jaywant Sambare came there and informed the Applicant that the deceased had sustained burn injuries. It is only thereafter that the Applicant came to the house and it was found that the deceased was lying on the floor with burns on her person. 3. It thus prima facie appears that there is inconsistency in the two sets of evidence - one incriminating the Applicant, while the other indicating his absence at the relevant time on the spot. In view of this position, I think that the Applicant deserves to be granted bail. 4. In the result, the Application is allowed. The Applicant-Accused be released on P. R. bond of Rs. 10,000/- with one/two solvent sureties to make up the said amount. Bail in trial Court. 5. Authenticated copy allowed. Certified copy expedited.

..Application allowed**....**

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Cross Citation : [2008(4) B Cr C 716 (SC)]

SUPREME COURT OF INDIA

Hon'ble Judge(s) : S.B. SINHA AND CYRIAC JOSEPH, JJ.

SAMIULLAHA ..... Vs ..... SUPERINTENDENT, NARCOTIC CENTRAL BUREAU

Criminal Appeal No. 1748 of 2008, decided on 7th November, 2008.

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Criminal Procedure Code, 1973, Section 439 (2)-Constitution of India, Article 21—When two views are possible in respect of commission of crime, , justifying or not justifying the grant of bail, then the view which leans in favour of accused must be favoured.

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Case law : Referred, discussed and overruled
Ouseph alias Thankachan v. State of Kerala,(2004) 4 SCC 446
E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau,2008) 5 SCC 161
NoorAga v. State of Punjab & Anr.,2008 (9) SCALE 681
State of Mauritius v. Khoyrattya2006 UKPC 13 : [2006] 2 WLR 1330
Delhi Administration) v. Sanjay Gandhi, 1978 (2) SCC 411.

Advocates appeared:- For the Appellant: Sushil Kumar Jain, Puneet Jain, Ms. Archana Tiwari, Ashwin V. Kothamath and Ms. Pratibha Jain, Advocates.

For the Respondent : B.B. Singh, Kumar Rajesh Singh, Ms. N. Gupta * and B.V. Balaram Das, Advocates.

JUDGMENT

S.B. Sinha, J. :- 1. Leave granted.

2. Whether an order of bail granted in favour of the appellant herein could have been directed to be cancelled on the basis of a report of analysis of the articles recovered from him containing 'heroin' is the core question involved herein.

3. Before, however, we advert to the said question, we may notice the factual matrix involved in the matter.

On or about 14.08.2004, the luggage of two persons, viz., Abdul Munaf and Zahid Hussain, who were traveling in a bus were searched and allegedly contraband weighing 2 kgs. was recovered. A purported statement was made by the said accused persons that the said contraband (heroin) was meant to be delivered to the appellant. Nothing was recovered from him. Apart from the said statements of the said accused persons, no other material is available on , ecord to sustain a charge against him. On the basis of the said statement the "appellant was arrested on 15.08.2004. Allegedly, a statement was made by him in terms of Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"). Appellant contends that he was tortured and the statement was obtained forcibly from him on some blank documents. He later on retracted there from. Indisputably, the seized articles were sent for chemical examination to the Government Opium and Alkaloid Works, Neemuch. A report was sent to the investigating officer on 23.09.2004 stating that the sample did not contain any contraband substance. Appellant thereafter filed an application for discharge. The prosecution moved the court for sending the substance allegedly recovered from the co-accused persons for its examination by the Central Revenue Control Laboratory, New Delhi. It was rejected by the court opining that there was no provision in the Act for sending the sample to another laboratory. The court, however, did not pass an order of discharge in favour of the appellant but released him on bail, stating:

> Accordingly as mentioned above, there is no ground that by accepting the application of the complainant and order be passed for sending the second sample for examination to another laboratory. If the investigating officer so desires, then in accordance with the ruling expounded as above, he is free to send the second sample to any of the laboratories for its examination at his own level. On the basis of the abovementioned observations, the application of the complainant is rejected."

4. The prosecution, however, sent another sample to the Central Revenue Conrol Laboratory, New Delhi. A report dated 5.01.2005 was sent opining that the sample inder reference was tested positive for Diacetyl-morphine (Heroin), which according to the said report was found to be 2.6% of the sample tested.

5. Thereafter, an application for cancellation of bail was filed on 4.02.2005. By an order dated 15.03.2005, the bail granted to the appellant was cancelled relying on or on the basis of the second report obtained by the respondent from the Central Revenue Control Laboratory, New Delhi stating:

> "While receiving guidance from the abovementioned citations, I arrive at the conclusion that under the present facts, the second sample which was sent for examination and according to its receipt the seized substance was heroine, and on the basis of which charges have been levelled against the accused persons, and the prosecution has right to send second sample for chemical examination, and as such there are charges of serious nature against the accused persons in which there provisions (sic) to award punishment of imprisonment of the term of at least ten years and fine of rupees one lakh, as well as under Section 37 of the Act, in case of recovery of psychotropic substances in the quantity of commerce & trade, bail cannot be granted until the court does not arrive at the conclusion to the effect fhat the accused is not guilty of such an offence, and in case of granting him bail such an offence will not be committed by him during the course of his remaining free on bail."

6. A revision application filed there against by the appellant before the b - jh Court, which was marked as S.B. Criminal Revision Petition No. 277 3?2005, was dismissed by reason of the impugned judgment.

7. Appellant is, thus, before us.

8. Mr. Sushil Kumar Jain, learned counsel appearing on behalf of the ippellant, would contend that in the peculiar facts and circumstances of this case there was no justification at all for cancellation of bail which had already >een granted to the appellant.

The learned counsel would contend that a bail granted must be cancelled >nly if the requirements contained in Sub-section (2) of Section 439 of the -ode of Criminal Procedure are fulfilled.

In any event, as the Central Revenue Control Laboratory, New Delhi is tot a designated chemical examiner as defined in the Narcotic Drugs and 'sychotropic Substances Rules, 1985 (for short "the Rules"), reliance hereupon could not have been placed particularly when the laboratory which omes within the definition of the term "Chemical Examiner" had opined otherwise.

The learned counsel would contend that unlike the provisions of Section (3) of the Prevention of Food Adulteration Act, 1954, no provision exists in the Act for sending one sample to one laboratory and the second to another laboratory.

The learned counsel would further contend that the miniscule percentage of heroin which has been found, i.e., 2.6%, would not come within the purview of commercial quantity.

9. Mr. B.B. Singh, learned counsel appearing on behalf of the respondent, on the other hand, submitted that as Section 37 of the Act contains a special provision providing that (i) no court shall grant bail without hearing the public prosecutor; (ii) the court is of the opinion that there is reasonable ground to believe that the accused is not likely to commit the said offence, no order of bail could have been passed in derogation of the provisions thereof. It was furthermore submitted that having regard to the fact that the appellant himself had confessed his guilt by making a statement in terms of Section 67 of

the Act, a judgment of conviction could be based thereupon. Even a retracted confession, according to the counsel, can form basis for recording a judgment of conviction.

10. The Act although is a self-contained code, application of the provisions of the Code of Criminal Procedure, 1973, however, either expressly or by necessary implication, have nol; been excluded. There exists a distinction between an appeal from an order granting bail and an order directing cancellation of bail. While entertaining an application for cancellation of bail, it must be found that the accused had misused the liberty granted to him as a result whereof :

(a) he has attempted to tamper with evidence;

(b) he has attempted to influence the witnesses;

(c) there is a possibility of the accused to abscond and> therefore, there is a possibility that the accused may not be available for trial,

11. It is true that the general principles of grant of bail are not applicable in a case involving the Act. The power of the court in that behalf is limited. Section 37 of the Act reads as under:

"37. Offences to be cognizable and non-bailable

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973.(2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence arid that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of subsection (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

12. However, a distinction even is made as regards grant of bail in relation to a commercial quantity and a small quantity. Commercial quantity has been defined in Section 2(viia) of the Act to mean "any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette[7]'.

13. We will advert to the question of the definition of "Chemical Examiner" a little later. The question, however, as to whether the contraband found came within the purview of the commercial quantity within the meaning of Section 2(viia) or not is one of the factors which should be taken into consideration by the courts in the matter of grant or refusal to grant bail. Even, according to the Central Revenue Control Laboratory, New Delhi, only 2.6% of the sample sent was found to be containing heroin. Small quantity in terms of the notification issued under Sections 2(viia) and 2(xxiiia) is as under:

S.No	Name of Narcotic Drug or Psychotropic Substance (International Non-proprietary Name (INN))	Chemical Name	Small Quantity	Commercial Quantity
77.	Morphine	Morphine	5 gms.	250 gms.

The quantity, thus, alleged to have been recovered from the co-accused persons could be said to be intermediate quantity and, thus, the rigours of the provisions of Section 37 of the Act relating to grant of bail may not be justified.

In Ouseph alias Thankachan v. State of Kerala[1], this Court held:

"8. The question to be considered by us is whether the psychotropic substance was in a small quantity and if so, whether it was intended for personal consumption. The words 'small quantity' have been specified by the Central Government by the notification dated 23-7-1996. Learned Counsel for the State has brought to our notice that as per the said notification small quantity has been specified as 1 gram. If so, the quantity recovered from the appellant is far below the limit of small quantity specified in the notification issued by the Central Government. It is admitted that each ampoule contained only 2 nil and each ml contains only 3 mg. This means the total quantity found in the possession of the appellant was only 66 mg. This is less than l/10th of the limit of small quantity specified under the notification.

11. On account of the aforesaid fact situation, we are inclined to believe that the small quantity of buprenorphine (Tidigesic) was in the possession of the appellant for his personal consumption and, therefore, the offence committed by him would fall under Section 27 of the NDPS Act." See also E.Micheal Raj v. Intelligence Officer, Narcotic Control Bureau[2].

14. The Central Government in exercise of its power conferred upon i under Section 9 read with Section 76 of the Act made the Rules. "Chemical Examiner" has been defined in Rule 2(c) of the Rules to mean "the Chemical Examiner or Deputy Chief Chemist or Shift Chemist or Assistant Chemical Examiner, Government Opium & Alkaloid Works, Neemuch or, as the case may be, Ghazipur".

15. It is not necessary for us to consider the matter in depth as to whether the aforementioned definition is exhaustive but then we are concerned with a question involving cancellation of an order of bail. The authorised laborator) at Neemuch categorically found that the seized substance did not contair any contraband. For the purpose of grant of bail, the court cannot be said tc have committed any illegality in relying thereupon. There exists a difference of Opinion insofar as the Central Revenue Control Laboratory, New Delhi, has since opined that the sample contained 2.6% here on. The effect of said contradictory report must be gone into only at trial. A person's liberty is protected in terms of Article 21 of the Constitution of India. When two views are possible, the view which leans in favour of an accused must be favoured.

16. It is not the stage where the court is required to take into consideration the submission of Mr. B.B. Singh that a judgment Oi conviction is possible to be recorded on the basis of a confessional statement made by an accused. It may be so but the question is that when the prosecution itself had failed to show that the seized, substance contained any narcotic substance or psychotropic substance, the question of reliance on the confession of the accused does not arise; at least at this stage.

In Noor Aga v. State of Punjab & Anr.,[3], this Court held: .

"92. We may, at the outset notice that a fundamental error has been committed by the High Court in placing explicit reliance upon Section 108 of the Customs Act.

93. It refers to leading of evidence, production of document or any other thing in an enquiry in connection of smuggling of goods. Every proceeding in terms of Sub-section (4) of Section 108 would be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. The enquiry contemplated under Section 108 is for the purpose of 1962 Act and not for the purpose of convicting an accused under any other statute including the provisions of the Act.

98. It was pointed out that the power of a Police Officer as crime detection and custom officer as author, ties not Police Officers but then the court took notice of the general image of police in absence of legislative power to enforce other law enforcing agencies for the said purpose in the following terms:

23. It is also to be noticed that the Sea Customs Act itself refer to police officer in contradistinction to the Customs Office: Section 180 empowers a police officer to seize articles liable t confiscation under the Act, on suspicion that they had been] stolen. Section 184 provides that the officer adjudging confiscation shall take and hold possession of the thing confiscated apd every officer of police, on request of such office] shall assist him in taking and holding such possession. This leaves no room for doubt that a Customs Officer is not an office: of the Police. 24. Section 171-A of the Act empowers the Custom; Officer to summon any person to give evidence or to produce i document or any other thing in any enquiry which he be making in connection with the smuggling of any goods.

100. When, however, the custom officers exercise their power undei the Act, it is not exercising its power as an officer to check smuggling of goods; it acts for the purpose of detection of crime and bringing an accused to book."

But, as indicated hereinbefore, the said question need not be gone into at this stage.

17. We may, however, incidentally refer to a recent decision of the Privy Council in State of Mauritius v. Khoyratty[4] wherein a similar provision curtailing the power of court to grant bail was held by the Supreme Court of Mauritius to be ultra vires of the doctrine of separate of power. A constitutional amendment by simple majority was carried out. Even that constitutional amendment was held to be unconstitutional. The Privy Council in the aforementioned case upheld the said decision stating:

"In A v Secretary of State for the Home Department [2005] 2 AC 68 Lord Bingham gave the leading judgement. He stated at para 42: "...crt is also of course true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatize judicial decision-making as in some way undemocratic."

While not conclusive of the issue presently before the Board, these decisions give important colour to the words of section 1 of the Constitution, viz that Mauritius shall be a democratic state.

14. There is another aspect to take into account. The Supreme Court observed that decisions on bail are intrinsically within the domain of the judiciary. At the very least that means that historically decisions on bail were regarded as judicial. The importance of the historical perspective was emphasized in the Australian jurisprudence cited in Anderson. This factor too gives colour to the words of section 1."

18. Furthermore, for the purpose of cancellation of bail, the statutory requirements must be satisfied. Appellant has failed to do so. We may notice that in State Delhi Administration) v. Sanjay Gandhi,[5] this Court held:

13. Rejection of bail when bail is applied for is thing; cancellation of bail already granted is quite another. It is easier to reject a be application in a non-bailable case than to cancel a bail granted i such a case. Cancellation of bail necessarily involves the review of decision already made and can by and large be permitted only if, b reason of supervening circumstances, it would be no longe conducive to a fair trial to allow the accused to retain his freedom during the trial. The fact that prosecution witnesses have turned hostile cannot by itself justify the inference that the accused has woi them over. A brother, a sister or a parent who has seen the commission of crime, may resile in the Court from a statemen recorded during the course of investigation. That happen! instinctively, out of natural love and affection, not out of persuasior by the accused. The witness has a stake in the innocence of the accused and tries therefore to save him from the guilt. Likewise, are employee may, out of a sense of gratitude, oblige the employer by uttering an untruth without pressure pr persuasion. In other words, the objective fact that witnesses have turned hostile must be shown to bear a causal connection with the subjective involvement therein of the respondent. Without such proof, a bail once granted cannot be cancelled on the off chance or on the supposition that

witnesses have been won over by the accused. Inconsirtent testimony can no more be ascribed by itself to the influence of the accused than consistent testimony, by itself, can be ascribed to the pressure of the prosecution. Therefore, Mr. Mulla is right that one has to countenance a reasonable possibility that the employees of Maruti like the approver Yadav might have, of their own volition, attempted to protect the respondent from involvement in criminal charges. Their willingness now to oblige the respondent would depend upon how much the respondent has obliged them in the past. It is therefore necessary for the prosecution to show some act or conduct on, the part of the respondent from which a reasonable inference may arise that the witnesses have gone back on their statements as a result of an intervention by or on behalf of the respondent."

19. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The order dated 15.03.2005 cancelling the bail is set aside and the revision application filed in the High Court' stands allowed. The appeal is allowed.

Appeal allowed

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Cross Citation :2003-ALLMR(CRI)(JOUR)-0-59 , 2003-Cri.L.J.-0-736

HIGH COURT OF HIMACHAL PRADESH

Hon'ble Judge(s) : M.R.VERMA,J

Jeet Ram ... Versus... **State of Himachal Pradesh**

Crl.M.P.(M) 1183 Of 2002, Sep 24,2002

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(B) Bail – Murder Case – I.P.C. 302 – Mere gravity of offence and severity of punishment is no ground for rejection of bail - The nature of evidence, part played by the accused and the likely hood of the accused absconding has to be taken in to account – the allegations against accused are that they hold the deceased and other accused pelted stones – It does not mean that accused have common intention of murder - Accused entitled to get bail.

In Kuldip Singh v. State of Punjab, 1994 (3) Rec Cri R 137 : (1994 Cri L.J. 2201) (SC) where one of the accused inflicted the injury on the head of the injured with sharp edged weapon and the second accused gave Lathi' blow on his shoulder causing simple injury allegedly with the common intention of accused in an attempt to commit the murder of the injured, the Hon'ble Supreme Court held that the injury on the head of the injured was serious one and proved to be grievous, therefore, the offence under Section 307, I.P.C. is made out against Kuldip Singh who caused such injury but in so far as the other co-accused is concerned, he inflicted only one blow on the shoulder with the Lathi' causing swelling, therefore, it could not be said that he shared

the common intention along with the Kuldip Singh in attempt to commit the murder of the injured.

(C) There is no allegation that if released on bail the accused are likely to abscond with a view to evade the trial – Accused entitled to get bail.

(D) Plea that accused if released may be assaulted by complainant party not tenable-BailGranted.

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JUDGEMENT

(1.) Since all these petitions arise out of the same F.I.R. No. 97 of 2002 dated 19-7-2002 under Sections 302, 147, 148, 149, 201, I.P.C. registered at Police Station, Tieog, therefore, these are being disposed of by this common order.

(2.) The case of the prosecution against the accused petitioners (hereafter referred to as the accused persons') is that on 19-7-2002 at about 6.30 p.m. at Bag, Ramesh Heta (since deceased and hereafter referred to as the deceased') was caught hold by the accused persons and their co-accused Savitri and Bimla pelted stones at him. In the meanwhile, Bhupender, another co-accused named in the F.I.R., inflicted a Draft' blow to the deceased on the back portion of his neck while proclaiming that he would be done to death there and then. After inflicting the injury with the aforesaid blow to the deceased, said Bhupender while carrying the Draft' bolted away and the accused persons and co-accused Savitri and Bimla also ran towards their house. As a consequence of the Draft' blow the deceased fell down. The occurrence was witnessed by Mohan Lal and in the meanwhile Sher Singh also came on the spot. When the injured was being removed to the Civil Hospital, Theog, he succumbed to the injuries on the way. Mohan Lal lodged the F.I.R. at Police Station, Theog. During the course of investigation, the weapon of offence and blood-stained clothes of Bhupender, co-accused, had been recovered and taken in possession by the police. Injuries were noticed on the person of Bhupender, co-accused, when he was got medically examined on 23-7-2002. On post-mortem examination of the dead body of Ramesh, a single injury was found on the left side of his neck and the cause of his death, as per the medical opinion, is ante mortem injury over the neck causing severing of a major vein and puncturing of left lung causing hemorrhagic shock and death. It has further been found during the investigation that the relations between the families of accused Kewal Ram and that of the father of the deceased are inimical because of some land dispute and accused Kewal Ram and Jeet Ram are facing social boycott. At the material time said Bhupender was blocking a path used by villagers which runs through the land belonging to accused Kewal Ram. Moti Ram father of the deceased, objected. However, said Bhupender asserted that he would not allow anybody to enter in his land. In the meanwhile, the deceased also came there and started removing the stones fixed by Bhupender for blocking the path. It enraged Bhupender who rushed towards his house and returned to the spot accompanied by the accused persons and the said co-accused and thereafter the occurrence took place, as already stated hereinabove.

(3.) The accused persons are presently lodged in judicial lock up. Their co-accused, namely, Savitri and Bimla, had already been released on bail. The accused persons have

claimed bail on the grounds that it was with oblique motive that all the members of the family of accused Kewal Ram had been implicated in the case without any basis and particularly no common object or common intention to murder Ramesh on the part of the accused persons can be inferred from the contents of the F.I.R. and the allegations against them that they caught hold of deceased are totally false.

(4.) I have heard the learned Counsel for the accused persons and the learned Law Officer for the respondent/State and have also gone through the records.

(5.) It was contended by the learned Counsel for the accused that the prosecution version that the deceased was caught hold by three bail petitioners and two of their co-accused pelted stones at him is unbelievable and as per the material on record particularly the First Information Report it cannot be said that the accused had either the common intention or common object to kill the deceased. None of them is alleged to have inflicted any injury on the person of the deceased and even according to the prosecution they were not armed with any weapon which clearly negatives the prosecution allegation that the accused, along with their co-accused, acted in furtherance of common object of killing Ramesh. It was further contended by the learned Sessions Judge, while dealing with the bail applications of the accused persons, has also observed that there is reasonable force in the contention raised for the accused that the question regarding application of Section 149 of the Indian Penal Code is debatable. It was further contended that the learned Sessions Judge denied the bail to the accused persons mainly for the reason that the possibility of retributory action by or at the instance of the complainant party could not be ruled out at this stage if the accused persons are enlarged on bail. However, such an apprehension is no reason for curtailing the liberty of the accused who in the facts and circumstances of the case are entitled to be released on bail.

(6.) On the other hand, the learned law Officer has contended that there is evidence on record to prima facie show that the accused persons and their co-accused had the common object to kill the deceased and it was in furtherance of such common object that Bhupender caused fatal injury to the deceased, therefore, the accused are involved in the commission of grave offences for which severe punishment is provided in law, therefore, they should not be released on bail. It was further contended that the atmosphere in the village and in adjoining areas is surcharged and, if released on bail, the lives of the accused may be in danger at the hands of the people of the area and their release may create law and order situation. Therefore, they are not entitled to be released on bail.

(7.) As is the case of the prosecution, the only role attributed to the accused persons is that they caught hold of the deceased and their co-accused Savitri and Bimla pelted stones at him and thereafter Bhupender gave him the fatal blow with a Draft'. Prima facie it is difficult to believe that when a person is caught hold of by three persons two other persons are pelting stones at him, then such person and those persons who have caught hold of him will not sustain any injury. Therefore, the version regarding pelting of stones and holding of the deceased is prima facie clouded by suspicion as none of the accused persons who are alleged to have caught hold of the deceased while co-accused Savitri and Bimla were pelting stones at the deceased did not receive any injury whatsoever and no injury caused by the pelting of stones was found on the person of the deceased. Mere catching hold of the deceased by the accused persons may not necessarily lead to the conclusion that they have the common object of killing the deceased as the applicability of Section 149, IPC, in the facts of the case, is a debatable question.

(8.) In Thakar Singh v. State of Punjab, 1969 Cur L.J. 810 (relied upon by the learned Counsel for the accused persons to substantiate his contention) wherein the case of the prosecution was that accused Niranjan Singh caught hold of the deceased and fell him down and accused Thakar Singh throttled his neck, the Punjab and Haryana High Court held as under :

..... It is not a case in which it can be legitimately contended on behalf of the prosecution that there was any pre-planned common intention on the part of both Niranjan Singh and his father Thakar Singh in throttling the deceased. There could be no such intention on the part of Niranjan Singh even in executing his act of catching hold of the boy by the arms and throwing him down on the ground. The act of throttling by Thakar Singh followed per se and was independent of the act of throwing the boy down by Niranjan Singh. Thus, there is no community of intention in the act performed by Niranjan Singh and that executed by Thakar Singh. The two are distinct ones and one has nothing to do with the other. No intention on the part of Niranjan Singh from his act could be inferred in common with the intention of throttling by Thakar Singh, which followed later on. It is not a case in which it could be held that throwing down was committed by Niranjan Singh in furtherance of the common intention of throttling by Thakar Singh. Thus, the applicability of Section 34 of the Indian Penal Code is uncalled for. Niranjan Singh appellant could not be held vicariously liable by virtue of that Section. This is additional ground of his being entitled to acquittal."

(9.) In Jaspal Singh v. State of Haryana, 1986 (2) Recent CR 582 (2) wherein one of the accused caught hold of the deceased while armed with a stick but did not cause any injury to the deceased whereas his co-accused caused injuries to the deceased which resulted in his death, the Punjab and Haryana High Court granted bail to the accused who had only caught hold of the deceased while on the following premise :

Though the motive was with the petitioner and he caught hold of the deceased while armed with a stick, he did not cause any injury to the deceased. Rather his co-accused did cause injuries to the deceased which resulted in his death. In this situation, applicability of Section 34 Indian Penal Code is a moot point. It would thus be apt that the petitioner gets the concession of bail."

(10.) In Kuldip Singh v. State of Punjab, 1994 (3) Rec Cri R 137 : (1994 Cri L.J. 2201) (SC) where one of the accused inflicted the injury on the head of the injured with sharp edged weapon and the second accused gave Lathi' blow on his shoulder causing simple injury allegedly with the common intention of accused in an attempt to commit the murder of the injured, the Hon'ble Supreme Court held that the injury on the head of the injured was serious one and proved to be grievous, therefore, the offence under Section 307, I.P.C. is made out against Kuldip Singh who caused such injury but in so far as the other co-accused is concerned, he inflicted only one blow on the shoulder with the Lathi' causing swelling, therefore, it could not be said that he shared the common intention along with the Kuldip Singh in attempt to commit the murder of the injured.

(11.) Keeping in view the above position in law and the role attributed to the accused persons and the facts and circumstances of the case, bail cannot be denied to the accused persons on the sole ground that they are involved in the commission of an offence under Section 302, I.P.C. by virtue of being members of the alleged unlawful assembly.

(12.) There is no doubt that offence punishable under Section 302, I.P.C. is a grave offence for which the extreme penalty of death has been provided in law. However, the mere gravity of the offence and the severity of punishment is no ground for rejection of bail, while deciding the question of grant or refusal of the bail, other factors such as the nature of evidence, the part played by the accused in the commission of the offence and the likelihood of the accused absconding or tampering with prosecution evidence has also to be taken into account.

(13.) There is no allegation that if released on bail, the accused are likely to abscond with a view to evade the trial. Further there is no material on record to show that in the event of bail, the accused are likely to tamper with the prosecution evidence which consist of such persons who are admittedly at logger's head with the accused persons.

(14.) The contention that if released on bail the accused persons may be assaulted or any other criminal offence may be committed against their person by the complainant party is no reason for curtailing the liberty of the accused persons. It is the duty of the State to protect the life and property of its citizens. No law authorizeo the detention in custody of a person whose life is in danger. The contention, therefore, is simply unsustainable.

(15.) In view of the above discussion, there is no legal impediment or lawful reason to deny bail to the accused persons.

(16.) As a result, these petitions are allowed and the accused persons are ordered to be released on bail on their furnishing a personal bond each in the sum of Rs. 25,000.00 with one surety each in the like amount to the satisfaction of the learned Sub-Divisional Judicial Magistrate, Theog. The bail, however, is subject to the conditions that the accused persons shall not in any manner tamper with the prosecution evidence, shall not indulge in the commission of such acts as are alleged to have been committed by them and shall not deliberately and intentionally act in a manner which may tend to delay the investigation and trial of the case. Copy dasti, as prayed for..

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[See also 2001 ALL MR (Cri.) 1696 For Transit Bail]

Cross Citation :1999 CRI. L. J. 1084

ORISSA HIGH COURT

Coram : P. K. MISRA, J

Debasis Mohapatra ….Vs…. State of Orissa

Criminal Misc. Case No. 2505 of 1998, D/- 25 -6 -1998.

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Criminal P.C. (2 of 1974), S.436 – Transit BAIL - Rejection by Magistrate by simply stating that alleged offence had been committed beyond his jurisdiction – Illegal - The Magistrate has ample jurisdiction to consider the question of bail

- Such bail, if granted, must be for a temporary period to enable the accused person to appear before the proper Court within a fixed period and it would not be open to Magistrate to reject bail application straightaway.

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Judgement

ORDER :-

1. After this bail application was heard and orders were reserved, the counsel for the petitioner mentioned the matter and the matter was listed under the heading "To be Mentioned". The counsel for the petitioner submitted that the bail application had become infructuous as the petitioner had been taken into custody by police from Gujarat and produced before the concerned Magistrate at Rajkot city. The aforesaid submission of the counsel for the petitioner is correct and the bail application is liable to be disposed of as infructuous. However, in view of the question of law involved in the matter, it is appropriate to decide the question of law raised in the petition.

2. It is alleged that the petitioner had committed an offence under S. 408, Indian Penal Code. The case was registered as Malaviya P. S. case No. 149/98 in the State of Gujarat. It is alleged that the said offence had been committed by the petitioner while he was serving in a private Company in Rajkot city. It is further alleged that police officials of Malaviya P. S. arrested the petitioner with the assistance of local police at Patkura and the petitioner was produced in the Court of the S. D. J. M., Kendrapara. The bail application of the petitioner was rejected by the S. D. J. M., Kendrapara. Thereafter, the petitioner filed bail application before the Additional Sessions Judge, Kendrapara, which was rejected on the ground that the alleged offence had been committed in Gujarat and, therefore, the Additional Sessions Judge at Kendrapara had no jurisdiction to release the petitioner on bail. Subsequently, a fresh application for bail was filed by the petitioner before the very same Additional Sessions Judge, Kendrapara, who again rejected the bail application stating that the earlier bail application had been rejected. Thereafter the petitioner filed the present bail application in this Court.

3. After the matter was heard and orders were reserved, the counsel for the petitioner was required to produce a copy of the earlier order passed by the Additional Sessions Judge. On perusal of the earlier order, it is found that the bail application was rejected only on the ground that the alleged offence had been committed in Gujarat and as such the Additional Sessions Judge, Kendrapara, had no jurisdiction. This observation of the Additional Sessions Judge, Kendrapara, cannot be considered to be correct. Even though the alleged offence was committed outside the State, the petitioner was arrested in Orissa and was produced before the Magistrate at Kendrapara. It seems that the petitioner was not arrested pursuant to any warrant issued by any Court beyond the jurisdiction of Orissa. In such a case, the warrant itself would have shown the nature of allegations as well as the substance of the materials, so that the application for bail, if any, by the arrested person can be dealt with by the Magistrate before whom the accused is produced. In such cases if the concerned Magistrate is prima facie satisfied that bail should be granted, the normal procedure is to grant bail for an interim period calling upon the accused to appear before the proper Court as indicated in the warrant itself. If accused would have been arrested pursuant to such warrant and Magistrate could have dealt with the matter in such manner, there cannot be any logic in stating that where an accused

person is arrested by the police, even without warrant, the Magistrate or the higher Court will have no jurisdiction to deal with the accused person merely because the offence was alleged to have been committed beyond the jurisdiction of the Court. In such cases also the Magistrate has ample jurisdiction to consider the question of bail. Of course, such bail, if granted, must be for a temporary period to enable the accused person to appear before the proper Court within a fixed period and it would not be open to the Magistrate to reject the bail application by simply stating that the alleged offence had been committed beyond the jurisdiction of the Magistrate. In the present case, the Additional Sessions Judge should have considered the matter from that angle. However, as already indicated, the application itself has become infructuous, as the petitioner during the pendency of the bail application in this Court had been taken into custody and produced before the proper Court in Gujarat.

4. Subject to aforesaid observation, the Criminal Misc. Case is disposed of as infructuous.

Order accordingly.

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2006 CRI. L. J. 4332

MADRAS HIGH COURT

Coram : 1 K. N. BASHA, J. (Single Bench)

Cri. O. P. No. 6542 of 2006, D/- 15 -3 -2006.

Regupathi v. Govindan and Anr.

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A) Criminal P.C. (2 of 1974), S.438, S.71, S.482 - INHERENT POWERS - ANTICIPATORY BAIL - Dishonour Of Cheque - Anticipatory bail - Grant of - Issuance of non-bailable warrant directly by Magistrate without first issuing bailable warrant is illegal - Court in exercise of power under S. 482 granted anticipatory bail.

B) Criminal P.C. (2 of 1974), S.71- Bail by police when warrant is issued by Court - The police officer, to whom the warrant had been forwarded for execution is given a discretion, from the person sought to be arrested, to take security under Section 71, Cr. P. C.

(Paras 8, 9)

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Cases Referred : Chronological Paras

2004 Mad LJ (Cri) 421 6

(1994) 2 Mad LW (Cri) 764 6

A. Balaguru, for Petitioner; V. Madhavan, Govt. Advocate (Crl. Side), for Respondents.

Judgement

ORDER :- The petitioner has come forward with this petition, praying to grant anticipatory bail for him on the ground that he is facing trial in C. C. No. 324 of 2004 on the file of the Court of Judicial Magistrate, Kallakuruchi, for the offence under S. 138 of the Negotiable Instruments Act wherein a Non-Bailable Warrant is issued against him.

2. Heard both sides.

3. Mr. A. Balaguru, the learned counsel for the petitioner submitted that the petitioner was not able to appear before the trial Court on 15-7-2005, though he was regularly appearing for all the dates of hearing, as a result of which, the learned Magistrate has issued a Non-Bailable Warrant against the petitioner.

4. The offence under Section 138 of the Negotiable Instruments Act is a bailable one, since the same is punishable with imprisonment for a maximum period of two years. But, unfortunately, the learned Magistrate has issued non-bailable warrant without a preceding bailable warrant where the offence is bailable, is not in accordance with the scheme of the Criminal Procedure Code and hence illegal. Therefore, while exercising the power conferred under Sec. 87, Cr. P. C. and issuing a warrant, in a case of bailable offence, the Magistrate shall always issue at the first instance a bailable warrant (including the endorsement provided under S. 71, Cr. P. C.). If the person does not appear before the Court even after execution of bailable warrant, and only then the Magistrate may issue a non-bailable warrant.

5. Section 71 of the Code of Criminal Procedure reads as follows :

"Power to direct security to be taken :

(1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state-

(a) the number of sureties;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound;

(c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court."

6. The decision of a learned single Judge of this Court is brought to my notice reported in 1994-2-LW (Cri) 764 in J. K. S. Manickam v. The Inspector of Police, Kumarapalayam, Salem District and another. The learned single Judge of this Court held that Section 138 of the Negotiable Instruments Act is bailable offence and the anticipatory bail petition is not maintainable. But the learned Judge has observed that the power under S. 71 of the Cr. P. C. may be exercised by the Magistrate as well as by the police officers concerned and thereby indicating that the execution of the non-bailable warrant by arresting the concerned persons is not necessary. The learned Judge made the following observation in the above cited decision :

" ..... it is rather crystal clear that the police officer, to whom the warrant had been forwarded for execution is given a discretion, from the person sought to be arrested, to take security under Section 71, Cr. P. C."

Another decision of this Court reported in **2004 MLJ (Cri) 421 in R. Sarathkumar v. The Inspector of Police,** C-9 Police Station, Neelankarai, Chennai is also brought to my notice. The learned Judge in that decision has also considered the earlier decision of this Court, extracted supra, and held that though the offence under S. 138 is a bailable one,

the Court is empowered to grant anticipatory bail to a person, against whom NBW was issued by the Magistrate. This Court has held, in that decision, as follows :
"Therefore this Court, exercising the power under S. 482 read with 438, Cr. P. C. has the power to grant anticipatory bail, since non-bailable warrant has been issued by the Magistrate for a bailable offence."
7. The learned Judge has also held in the decision, as cited supra, that,
"Non-bailable warrant issued without a preceding bailable warrant where the offence is bailable is not in accordance with the scheme of the Criminal Procedure Code and hence illegal. Therefore, while exercising the power conferred under S. 87, Cr. P.C. and issuing a warrant, in a case of bailable offence, the Magistrate shall always issue at the first instance a bailable warrant (including the endorsement provided under S. 71, Cr. P.C.). If the person does not appear before the Court even after execution of bailable warrant, then, and only then the Magistrate may issue a non-bailable warrant. Therefore, in all cases under S. 138 of the Negotiable Instruments Act, though it is possible or there is no legal infirmity for the Magistrate to issue a non-bailable warrant for the reasons to be recorded in writing, yet, considering the bailable nature of the offence under S. 138 of the Negotiable Instruments Act the Magistrate shall always issue "bailable warrant" at the first instance. For the above reasons there appears no reason or no circumstances warranting the issue of non-bailable warrant in this case."
8. The above said proposition laid down by this Court is squarely applicable to the instance case, wherein the learned Magistrate, instead of following the procedure contemplated under S. 71 of the Cr. P.C., has, straightway issued NBW against the petitioner, who is facing trial only under S. 138 of the Negotiable Instruments Act, as a result of which, this Court is having power to grant anticipatory bail to the petitioner, by invoking S. 482 of the Cr. P.C. also.
9. Considering the facts and circumstances of the case, I am inclined to release the petitioner on anticipatory bail in the event of his arrest on his executing a bond for a sum of Rs. 10,000/- (Rupees Ten Thousand only) together with two sureties each for a like sum to the satisfaction of the Judicial Magistrate, Kallakurichi.
The petitioner shall surrender before the Court referred to above, for executing the bond and furnishing sureties within two weeks from the date of receipt of a copy of this order, failing which, this order shall stand cancelled.
Order accordingly.
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LAWS(KAR)-2000-4-39=ILR(Kar)-2000-0-4000

HIGH COURT OF KARNATAKA

Coram :- S.R.Venkatesha Murthy J.

Decided on April 04, 2000
CRIMINAL PETITION 999 of 2000

M.B.Ponnappa VS. State Of Karnataka

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Cri. P.C. Section 436 or 437- Bail to accused against WHOM warrant of arrest is issued by the Court - WHEN an accused, against whom a warrant of arrest has been issued, appears before the court where the offences are neither punishable with death nor imprisonment for life nor otherwise of a grave nature, the magistrate should examine granting interim bail till such time as objections, if any, are filed by the prosecution and thereafter decide on the merits of the bail application

WHEN an accused, against whom a warrant of arrest has been issued, appears before the court which has issued the warrant of arrest, he could be dealt with under Section 436 or 437 of the code as the case may be. An inflexible notion seems to have developed that such an accused person has to be remanded to judicial custody till such time as the objection of the prosecutor is heard on the bail application, resulting in hardship to accused, who are as a matter routine, would be otherwise entitled to bail. Denial of bail is not to be used as punishment to an accused who would otherwise be eligible for bail where the offences are neither punishable with death nor imprisonment for life nor otherwise of a grave nature, the magistrate should examine granting interim bail till such time as objections, if any, are filed by the prosecution and thereafter decide on the merits of the bail application

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JUDGEMENT

1. GOVERNMENT pleader is directed to take notice.
2. HEARD the counsel for the petitioner and the government pleader for the state.

The petitioner who is an accused in cc No. 130 of 1995 on the file of J. M. F. C. , Madikeri for offences under sections 189, 332 and 506 (1) of the IPC was released on bail on 20-2-1995 at the investigation stage with conditions. Later conditions of bail were relaxed and the petitioner was directed to appear before court on being summoned. On a final report being filed, summons were issued to the accused. The accused petitioner claims that on account of mental illness, he could not appear before court, being treated in different hospitals at mysore, Bangalore, udupi and the nimhans, Bangalore and in kerala. Meanwhile, the sureties being unable to trace and produce the accused, paid the penalty imposed on them by the court. The case was transferred to the long pending case register, with no immediate prospect of apprehension of the petitioner. A non-bailable warrant for

arrest of the petitioner, as per rules, is pending with the police. The petitioner's apprehension is that when he appears before the court to face trial of the offence alleged, he would be taken to judicial custody resulting in aggravation of his illness. The petitioner's prayer is that the order dated 20-1-2000 for his arrest on transfer of the case to long pending case register be set aside and to enquire into his mental condition.

Normally an accused person who is shown to be an evader from Justice would not be entitled to indulgence of bail, unless he is able to demonstrate that he is really not an absconder and there are circum stances in mitigation of his absence from court. This is, essentially a question of fact to be found by the magistrate on a bail application being moved by the accused declared to be an absconder. In the instant case, petitioner has pleaded that he could not respond to the summons to the court on- account of his mental illness described as 'maniac depression this circumstance could be pleaded before trial court to persuade it to treat the petitioner with the indulgence of not being remanded to judicial custody pending consideration of an application for bail.

3. WHEN an accused, against whom a warrant of arrest has been issued, appears before the court which has issued the warrant of arrest, he could be dealt with under Section 436 or 437 of the code as the case may be. An inflexible notion seems to have developed that such an accused person has to be remanded to judicial custody till such time as the objection of the prosecutor is heard on the bail application, resulting in hardship to accused, who are as a matter routine, would be otherwise entitled to bail. Denial of bail is not to be used as punishment to an accused who would otherwise be eligible for bail. In these days jails filled with undertrials beyond all decent levels of confinement, the power of remand should be judiciously exercised by the magistrate, so that an accused who is willing to offer bail to the satisfaction of the court, is not pushed into the jail needlessly. It would be indeed necessary, where the offences are neither punishable with death nor imprisonment for life nor otherwise of a grave nature, the magistrate should examine granting interim bail till such time as objections, if any, are filed by the prosecution and thereafter decide on the merits of the bail application. This approach would not only be humane but also would help in avoiding infliction of needless misery on accused who would ultimately be entitled to bail. These considerations should inform the court in their approach to bail matters, so that an eminently avoidable remand to judicial custody pending consideration of a bail application, is prevented. Offences of such nature as are alleged to be committed in this case are not unusual and when the accused submits to the court's jurisdiction and seeks bail, it is a matter for court to impose such conditions as are sufficient to ensure presence at the trial.

In the instant case, the petitioner's alleged illness would have to be taken into consideration by the magistrate, while passing orders on the application for bail and the magistrate may consider granting interim bail till the disposal of his application for bail, on the basis of the observations made herein. In terms stated above, the petition is allowed.

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Cross Citation :1998 DCR 249, ILR 1997 KAR 2560

KARNATAKA HIGH COURT

Hon'ble Judge(s) : V M Kumar,J

K. Pandarinathan ….VS…. V. Raju And Another

on 8/7/1997

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Summons Case – N. I. Act – Sec. 138 – When accused appears pursuant to the Summons issued by court there is no need for him to move bail application and furnish personal bond – Impugned order asking accused to furnish security for his enlargement is illegal – Order quashed.

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JUDGEMENT

ORDER

1. The petitioner challenges Annexure D endorsement issued by the 2nd respondent. A complaint was made by the 1st respondent with respect to an offence committed by the petitioner, punishable under Section 138 of the Negotiable Instruments Act. Annexure C is the summons issued to the petitioner to appear before the 2nd respondent on 2-5-1997. The petitioner alleges that he appeared on 2-5-1997, but the Presiding Officer was on leave. Thereafter, the matter stood adjourned to 30-5-1997. On that day, the accused was present along with his counsel. It is seen that on that day the impugned order was passed by the 2nd respondent in the following manner :

"Accused present. No bail petition filed, hence the accused is remanded to J.C. Call on 13-6-97.

Sd/-

II A.C.M.M.

Bail petition filed, the accused is released on executing P.B., and S.B., of Rs. 10,000/-. Surety not furnished, hence the accused is remanded to J.C. till 13-6-97.

Sd/-

11 A.C.M.M."

2. It is this endorsement that is challenged by the petitioner in these proceedings.

3. It is urged by the petitioner that the copy of the complaint was not furnished to him along with the summons. Normally, as provided under Sub-section (3) of Section 204 of the Cr.P.C., in a proceeding instituted upon a complaint made in writing, every summons or warrant issued under Sub-section (1) shall be accompanied by a copy of such complaint. It means, there is a means for the accused to know what is the complaint arraigned against him what are the charges he is to face and whether it is a bailable or non-bailable offence alleged etc., etc. This is also necessary because he should decide as to whether the summons is issued in a warrant case or summons case and to know the necessity to avail bail. As can be seen from the Code, S. 2(w), Cr.P.C., defines "summons case" and S. 2(x) defines "warrant case". In a warrant case, the punishment involved is imprisonment for a term exceeding two years. The allegation made in the complaint as could be seen from the Lawyer Notice Annexures A and B is that the offence involves of an offence wherein the punishment of less than two years and therefore it is a summons case. Normally a warrant could not have been issued to the petitioner at the first instance in a given case. If that be the position, to secure the presence of the accused, there was no need to issue Annexure D order calling upon the petitioner to get himself enlarged on bail. That is totally unwarranted. In a summons case, if the accused appears in pursuance to the summons issued by the Court, and is present in the Court, there is no need for him to move a bail application or furnish personal Bond for his subsequent appearance. Such procedure is not contemplated under law.

4. Mr. N. K. Ramesh, learned Government Pleader appearing on behalf of respondent No. 2, submitted that Section 88 of the Cr.P.C. empowers the Magistrate to call upon the accused to furnish bond, security or bail for his release. Section 88 reads as follows :

"Sec. 88. Power to take bond for appearance : When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such Officer may require such person to execute a bond, with or without sureties for his appearance in such Court, or any other Court to which the case may be transferred for trial."

1. A careful reading of Section 88 would disclose that it does not apply to the situation as in hand. The section indicates that if a person is present in a Court in connection with a case or otherwise and the Officer presiding the Court is entitled to issue summons or warrant to secure his presence, then he may direct that person to execute a bond for his presence in his Court on a later date or to secure his presence in some other Court notwithstanding the fact that his presence in the Court at the relevant time is not in connection with that case for which he is being bound over. That is to say, if a person required to be arrested or detailed in connection with some other case either before him or elsewhere is present in his Court, then the Presiding Officer in whose Court he is present, has power to issue warrant calling him to execute bond for his appearance in future. It is not that

situation that is present here and Sec. 88 can, therefore, have no application. In this case the presence of the accused is secured in pursuance to the summons issued by the Court in the very case he is asked to appear. As long as the warrant has not been issued to the accused and when the accused was present along with his counsel in response to the summons, there was no need for the 2nd respondent to have passed Annexure D endorsement calling upon the accused to furnish security for his enlargement. Annexure D endorsement issued by the 2nd respondent is illegal and liable to be quashed. I, therefore, quash Annexure D endorsement and dispose of the writ petition. Whatever amount that is deposited by the petitioner in terms of the impugned order will be ordered to be returned to him.

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Index Note :- Change in circumstances for Second or successive bail application :-

Second or successive application is maintainable if there is change in fact situation or in law or where earlier finding has become obsolete.

2005 Cr.L.J 944(SC) FB.

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Cross Citation :2000 (I) RCR (Cri) 399,1999-TLMPH-0-106 , 1999-MPL.J.-2-663

HIGH COURT OF MADHYA PRADESH
Hon'ble Judge(s) : R.S. Garg, J.

Mohan Raikwar .....V/s…. State of M.P.

M. Cri. Case 2286 of 1999 Of Apr 19,1999

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A] Cases triable by the Magistrate- Factor to be taken in to consideration while dealing with the bail application - Cases in which 7 years or more punishment is provided are triable by Magistrate First Class who has the jurisdiction to award the maximum sentence of 3 years- This factor has to be taken in to consideration while dealing with the bail application - The Magistrate or the Sessions Judge, while considering the application for

grant of bail are also required to see whether the offence is triable by First Class Magistrate or by the Court of Session- They should not forget that many of the cases in which 7 years or more punishment is provided are triable by Magistrate First Class who has the jurisdiction to award the maximum sentence of 3 years. At this stage the court considering the bail application must not forget that if the accused is ultimately convicted he cannot be awarded a sentence of more than 3 years.

B] Cr. P.C. SS. 437, 439 – Change in circumstance- Delay is change in circumstances - Second bail application not to be dismissed on the ground that previous application was rejected on merits – Each days delay and detention of accused should be taken as relevant consideration while considering the second application –The court considering the application must again look into the facts, the nature of the allegation, character of the evidence collected and should also see whether the allegations made are making out a prima facie case against the accused or the allegations even on their face entitle the accused to bail. There may be cases where on the first occasion considering the totality of the circumstances the Judge may reject the bail but after filing of the Challan or after discharge of the complainant from the hospital or after recovery of certain articles or after collection of certain other evidence the accused may be in a position to persuade the Judge to admit him to bail. It is not possible for this Court to give a myriad example but the court while applying its wisdom to the facts of the case must not forget that it has a discretion to grant bail and unless very strong evidence is produced before the Court, the personal liberty of the accused should not be interfered by unnecessarily keeping him in jail. ' A Judge while deciding the application should not derive a sadistic pleasure in keeping the person in jail and he should not reject the application just for nothing. In a case like present the rejection of the application, on the ground that the earlier application was rejected after considering the merits, was not only contrary to the provisions of law but shows non-application of mind.

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JUDGEMENT

(1.) ARGUMENTS heard.

(2.) CASE Diary of Crime No. 117/99 registered at Police Station, Seoni, for the offences punishable under Sections 323, 294, 506 -II of the Indian Penal Code, read with Section 3/4 of the Dowry Prohibition Act, perused.

(3.) THE prayer shows that barring Section 506-11 of the Indian Penal Code, all other offences are bailable. It is unfortunate that for an offence punishable under Sections 323, 294, 506-II of the Indian Penal Code, and Section 3/4 of the Dowry Prohibition Act, the accused has to remain in jail, in absence of an order of bail, from 13-3-1999. The petitioner had moved this application for grant of bail as his application for release has been rejected by the learned Trial Judge and, thereafter, the application was rejected by the learned First Additional Sessions Judge on 17-3-1999. The repeat prayer has been rejected by the learned Additional Sessions Judge on 13-4-1999 simply on the ground that the earlier application was rejected on merits and there were no changed circumstances. The attention of the learned Judicial Magistrate and the Additional Sessions Judge are drawn to Section 503 of the Indian Penal Code, which defines Criminal Intimidation as under :

"whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation. The explanation provides that a threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section. "

(4.) FROM a perusal of the definition it would appear that the threat must be with intent to cause alarm to that person or to cause that person to do any act or omit to do any act. Section 506 is in two parts. It reads as under :" whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. "

(5.) THIS part of Section 506 is commonly known as 506-A. The second part of Section 506 which is commonly described as 506-B provides that :

"if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to 7 years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. "

(6.) THE ingredients required to be stated in the first information report and to be proved during the course of the trial are that the accused threatened some persons with injury to his person, reputation or property, or to the person, reputation or property to another in whom that person is interested or threat was to cause death or grievous hurt etc. The intimidation must be extended with intention to cause alarm to that person. The first information report in the present case says that the complainant had contracted marriage of his daughter with Mohan Raikwar. The marriage was to be performed on 12-3-1999 but abruptly the said Mohan Raikwar made a demand of gold chain which the complainant was unable to meet. The complaint further reads that the 'barat' which was taking food and had not finished when the said Mohan Raikwar caused some injury to Satish, brother of the bride and at that point of time the said Mohan Raikwar refused to take the bride with him. On being asked not to do so the accused started abusing and caused an intimidation to kill. There was a written report lodged on 12-3-1999 itself at about 9 P. M. From the case diary it appears that the police came to the spot and compelled the accused to take the bride with him. On 12-3-1999 and 14-3-1999 the prosecution agency recorded the statement of some witnesses. On the report the accused was arrested on 13-3-1999. What is to be seen from the first information report is whether the complainant was in fact alarmed or the threat was an empty threat or was one to persuade the father-in-law of the accused to give something in dowry. From the first information report it no- where appears that the accused was armed with any weapon lethal or ordinary or he had done some act which stunned the complainant or other persons or caused an alarm in the mind of the complainant that if he was not to meet the demand of dowry he was to suffer grievous injury or the accused was likely to kill him. In absence of this material allegation for the purpose of this bail petition it can straightaway be said that the offence under Section 506-II of the Indian Penal Code, is not made out. The police in our country may register any offence against any person less realising that whether the offence is 'prima facie' made or not, because they have been trained to do so, but it is expected of a Magistrate and specially of an Additional Sessions Judge who has at least 10 or more years experience as a Judge that in what case bail should and should not be granted. It is high time to remind the Judges of the Lower Judiciary that they are required to exercise the powers which they possess and not to refuse to exercise the powers, vested in them, just for one reason or the other.

(7.) THE learned Judge hearing the second petition does not lose his jurisdiction to grant bail. The changed circumstances do not mean some extra ordinary changes. Each day's confinement, each day's delay and each day's detention of the petitioner should be taken as a relevant consideration while considering the second application. I fail to understand that why without applying the mind to the facts of the case the Magistrate and the Additional Sessions Judge rejected the bail application. When a bail application is under consideration the Judge deciding the application is not only required to read the allegations made against the accused, but is also required to see whether prima facie the offence with which the accused is charged are made out or not. At one side a Judge rejects the application without reading the facts observing that it was likely to prejudice the case of the accused or the prosecution and while considering the second application he rejects the same observing that the first application was rejected on merits.

(8.) THE Magistrate or the Sessions Judge, while considering the application for grant of bail are also required to see whether the offence is triable by Magistrate First Class or by the Court of Session. They should not forget that many of the cases in which 7 years or more punishment is provided are triable by Magistrate First Class who has the jurisdiction

to award the maximum sentence of 3 years. At this stage the court considering the bail application must not forget that if the accused is ultimately convicted he cannot be awarded a sentence of more than 3 years. The court considering the application must again look into the facts, the nature of the allegation, character of the evidence collected and should also see whether the allegations made are making out a prima facie case against the accused or the allegations even on their face entitle the accused to bail. There may be cases where on the first occasion considering the totality of the circumstances the Judge may reject the bail but after filing of the Challan or after discharge of the complainant from the hospital or after recovery of certain articles or after collection of certain other evidence the accused may be in a position to persuade the Judge to admit him to bail. It is not possible for this Court to give a myriad example but the court while applying its wisdom to the facts of the case must not forget that it has a discretion to grant bail and unless very strong evidence is produced before the Court, the personal liberty of the accused should not be interfered by unnecessarily keeping him in jail. ' A Judge while deciding the application should not derive a sadistic pleasure in keeping the person in jail and he should not reject the application just for nothing. In a case like present the rejection of the application, on the ground that the earlier application was rejected after considering the merits, was not only contrary to the provisions of law but shows non-application of mind.

(9.) THE application deserves to and is accordingly allowed. Petitioner Mohan Raikwar be released immediately on his furnishing personal bond in the sum of Rs. 5,000/- (Rs. Five Thousand, only) with one surety in the like amount, to the satisfaction of C. J. M. Seoni for his appearance before the trial Court as and when ordered.

(10.) LET a copy of this order be sent to the learned Magistrate before whom the matter is pending for trial and to the Additional Sessions Judge who had rejected the repeat application filed by the accused for understanding the letter of law in its true perspective. C. C. as per rules.
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Cross Citation :2005-ALLMR(CRI)(JOUR)-0-12 , 2004-Cri.L.J.4576

HIGH COURT OF MADHYA PRADESH

Hon'ble Judge(s) : A.K.GOHIL,J

Yuvraj Gaud ….V/s….State of Madhya Pradesh

Misc.Cri 1387 Of 2004, May 14,2004

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Cr. P.C. Sec. 438 – I.P.C. 420, 467, 468, 471, 120 (B) –Bail should not be withheld as a punishement – The requirement of bail is to secure the attendance of the prisoner at trial - Anticipatory Bail –Accused entitled to be granted with anticipatory bail.

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JUDGEMENT

(1.) Applicant is seeking anticipatory bail under S. 438 of the Code of Criminal Procedure, 1973, in a private complaint case No. 40/2003, pending in the Court of Judicial Magistrate First Class, Vijaypur, district Sheopure, for the offences under Ss. 420, 467, 468, 471 and 120-B of Indian Penal Code. Earlier M.Cr.C. No. 2795/03 was disposed of with a direction to the applicant to appear before the trial Court and to furnish bail, as he was summoned through bailable warrant.

(2.) The submission of the learned counsel for the applicant is that the offence un- under S. 467, I.P.C. though is triable by Magistrate First Class but is a non-cognizable and non-bailable offence and punishment of imprisonment of life or imprisonment of ten years and fine has been prescribed, therefore, the Magistrate First Class is not having jurisdiction to grant the bail in cases where sentence of imprisonment for life has been prescribed for a particular offence and if the applicant will appear even after issue of bailable warrant, he shall be arrested and shall be committed to prison. Additional Sessions Judge, Sabalgarh has already rejected his anticipatory bail application.

(3.) It is further contended that the applicant is a Patwari and respondent No. 2- complainant has filed a private complaint against this applicant along with two others on the ground that the land bearing Survey No. 104, admeasuring 5 bighas and 14 biswas, situated at Patwari Halka No. 20, village Barakalan, Tehsil Vijaypur, District Sheopure has been recorded as a Government land reserved for Government pond. Every year Government is auctioning this land and from 1997 complainant is taking the land in auction and cultivating but in the meantime the applicant and Naib Tehsildar in connivance have granted Patta over this land to Adjuddibai w/o Ramratan. The Naib Tehsildar was not having any right to allot the Patta of the said land, as he was functioning as In-charge Tehsildar on that day. He has allotted this land with the connivance of the applicant who is Patwari and the applicant has not supplied copy of the Patta or the allotment letter or the entries made in the revenue record to respondent No. 2, therefore, they have committed offence of cheating and dishonestly inducing delivery of property causing wrongful loss to the State and it is a case of forgery of valuable security for the purpose of cheating.

(4.) Learned Judicial Magistrate has registered a private complaint and firstly directed issuance of bailable warrant and thereafter directed to issue warrant of arrest against the applicant. It was further submitted that this Court has already granted anticipatory bail to Yashendra Singh Chouhan, who is the Naib Tehsildar and Smt. Ajuddi Bai, who is the allottee of the land. It is further contended that prima facie no offence under Sections 420, 467, 468 and 471 with 120-B, I.P.C. for cheating or dishonestly inducing the delivery of property or causing wrongful loss to the complainant or regarding forgery of valuable security or will or forgery for the purpose of cheating or criminal conspiracy is made out against the applicant. He has not granted any Patta. If he has made some entries in the revenue record, they have been made on the basis of the order passed by Naib Tehsildar. It is the Government land and complainant is not having any interest and is also not having any locus standi to file the criminal complaint, as no offence is committed against the complainant.

(5.) Miss Sudha Shrivastava, learned panel lawyer, appearing for the respondent State opposed this application on the ground that this is second application for anticipatory bail, therefore, it is not maintainable and liable to be dismissed.

(6.) Copy of the criminal complaint has been produced on record. In the complaint, allegation of criminal conspiracy in granting Patta has been levied against the applicant and it has been stated that the Naib Tehsildar with the connivance of the applicant has granted Patta in favour of Ajuddibai and applicant made entries in the revenue record and has not supplied copy of the said record to the complainant.

(7.) The legislative mandate of S. 438, Cr. P.C. for grant of anticipatory bail for a person, who is apprehending his arrest, has already been mentioned in the section itself. In proper cases on judicial scrutiny and after exercising judicial discretion the Court may grant anticipatory bail and impose appropriate conditions as laid down under S. 438 of the Code of Criminal Procedure.

(8.) Though at the stage of pre-arrest and pre-trial bail the matter may be of judicial discretion but in view of the decision in the case of Gudikanti Narasimhulu v. Public Prosecutor, High Court of A.P. (AIR 1978 SC 429), the Court is required to consider the nature of charge, nature of prima facie evidence and material collected during investigation or enquiry and punishment to which the party may be liable if convicted. Nature of charge is vital factor and evidence is pertinent. The Court may also consider whether the course of justice would be thwafted by him who seeks the benignant jurisdiction of the Court to be freed for the time being. The legal principle and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the complainant or otherwise polluting the process of justice. Though it is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad and criminal record, particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, criminological history may also be considered and the criminal record of applicant is, therefore, not an exercise in irrelevance. The deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice, to the individual involved and society affected. The Judge is also required to consider that mechanical detention should be demoted and public justice is to be promoted. The period already spent in prison is to be kept in mind and the bail is not to be withheld as a punishment, but the requirements as to bail are to secure the attendance of the prisoner at trial.

(9.) As regards the objection raised by learned Panel Lawyer for the State that second application for grant of anticipatory bail is not maintainable under the law, in fact this contention has already been negatived by the Supreme Court in the case of Baboo Singh (1978 Cri L.J. 651) : (AIR 1978 SC 527) and Division Bench of this High Court in the case of Imratlal Vishwakarma v. State of M.P., reported in 1996 JL.J. 642. This Court after considering the various decisions has held that the second application for anticipatory bail under S. 438, Cr. P.C. is maintainable. The second application filed under S. 438, Cr. P.C. has to be decided on its merits even if earlier application was als dismissed on merits. No such fetters can be put or applied on the second petition that it can only be considered when it was withdrawn, or was rejected having been not pressed. It shall, however, be open for the Court to reject it even summarily on the ground that the said second petition is nothing but a repetition of the earlier petition and no new ground has been disclosed in the second petition. It was considered that in Babusingh's case (supra), the Supreme Court was considering a second application after one such application was earlier rejected. It was then ruled that an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, and further development. It was also

held that the Court is not barred from its second consideration at a later stage and that an interim direction is not a conclusive adjudication and that an updated reconsideration is not overturning an earlier negation. Second application was entertained. It was considered that in view of the aforesaid dictum the second application for grant of anticipatory bail under S. 438 was maintainable and it was held that the earlier rejection is not conclusive. The Court may consider the second bail application on account of subsequent events and developments.

(10.) In the case of Gurbaksh Singh Sibbia v. State of Punjab, reported in AIR 1980 SC 1632. Constitution Bench of the Apex Court has considered the distinction between the ordinary order of bail and order of anticipatory bail. The Apex Court has held that a blanket order of anticipatory bail should not generally be passed. A belief can be said to be founded on reasonable ground only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. It is necessary that specific events and facts must be disclosed by the applicant in order to enable to Court to Judge the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section. The Court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective and the power should not be exercised in a vacuum. The order should be limited to a short period until after filing of the F.I.R. In respect of the matter covered by the order and necessary conditions should be satisfied. The applicant must show that he has reason to believe that he may be arrested for a non-bailable offence. Supreme Court has clearly observed that anticipatory bail is a device to scure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely. The Court must apply its own mind to the question and decide whether a case has been made out for granting such relief or not.

(11.) From the aforesaid discussion and in view of the aforesaid decisions of the Apex Court as well as of the Division Bench of this High Court, it is clear that second application under S. 438, Cr. P.C. is not barred and is tenable but the same has to be considered on the parameters laid down by the Apex Court as well as by the Division Bench of this Court.

(12.) Thus, considering the totality of the facts and circumstances of the case that the applicant was summoned initially through bailable warrant in a private complaint case and subsequently by a warrant of arrest and that the applicant is a Government servant and looking to the allegations in the private complaint and considering the aforesaid discussions without commenting on the merits of the case of this stage of pre-arrest bail, this application for grant of anticipatory bail under S. 438, Cr. P.C. is allowed on the following conditions : "

(i) that, the applicant shall appear before the Magistrate First Class, before whom the private complaint is pending, within a period of fifteen days and shall furnish bail for the amount as may be fixed by the Magistrate;

(ii) that, the applicant shall regularly appear before the Magistrate and co-operate in the quick disposal of the private complaint;

(iii) that, the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so

as to dissuade him from disclosing such facts to the Court or to any police officer on enquiry.

Petition allowed

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Cross Citation : 2008-CRIMES-4-327 , 2008-ILR(Ker)-3-604

HIGH COURT OF KERALA

Hon'ble Judge(s) : R.Basant, J

Sreekumar ….V/s….State of Kerala

Crl.M.C. 3056 of 2008 Of, Aug 13,2008

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Bail – Remand of accused to custody when he appears before court – Held - when a Court issues summons and not a warrant in a non – baillable case – then the accused should be released on bail when he appears before the Court - he should not be committed to custody.

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JUDGEMENT

(1.) IS a court which has chosen to exercise its discretion under Sec. 204 Cr. P. C. to issue a summons and not a warrant to an accused facing allegations of commission of a non-bailable warrant offence justified or correct in remanding such an accused to custody when he appears in court despite the fact that he is willing to offer bail? This question is thrown up for consideration in this Crl. M. C.

(2.) THE petitioner, along with the co-accused, faces allegations in a crime registered alleging offences punishable, inter alia, under Sec. 326 read with Sec. 149 ipc and Sec. 27 of the Arms Act. According to the petitioner, he is a cancer patient undergoing treatment from 2003. The police were not too convinced about the involvement of the petitioner or the need to arrest the petitioner. Considering the circumstances of the petitioner, the police, it is submitted, have filed a final report without formally arresting the petitioner and releasing him on bail. Final report has been filed. Cognisance has been taken. The learned Judicial Magistrate of the First class-I, Punalur, has issued a summons to the petitioner under Sec. 204 Cr. P. C. The petitioner is to appear before the learned Magistrate on 26-8-2008. He has now come to this Court with this petition seeking directions under Sec. 482 Cr. P. C.

(3.) WHAT is the nature of directions that the petitioner wants? The learned counsel for the petitioner submits that there is a practice in that court that notwithstanding the fact

that only a summons has been issued under Sec. 204 cr. P. C. accused persons appearing in response to such summons will be remanded to custody for the short reason that the police have shown them as absconding. Apprehending the same treatment at the hands of the learned Magistrate, the petitioner has now come before this Court.

(4.) I find it difficult to accept that such practice can be in vogue in any court. I extract Sec. 204 (1) Cr. P. C. below:

"204. Issue of process.- (1) If in the opinion of a Magistrate taking cognisance of an offence there is sufficient ground for proceeding, and the case appears to be- (a) a summons-case, he shall issue his summons for the attendance of the accused, or (b) a warrant-case, he may issue a warrant, or. if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction. " (emphasis supplied)

When a court issues summons and not a warrant under Sec. 204 Cr. P. C. in a non-bailable warrant offence, I must assume that the learned Magistrate must have advisedly exercised the discretion under Sec. 204 Cr. P. C. to issue a summons and not a warrant. If a warrant were issued against him, the petitioner would certainly have been entitled, in the light of the dictum in Bharat Chaudhary and another v. State of Bihar (A. I. R. 2003 S. C. 4662), to move the Superior Courts for anticipatory bail. Having chosen to exercise the discretion under sec. 204 Cr. P. C. in favour of the petitioner and having issued only a summons to the accused, it appears to me to be heartless, insensitive and harsh for any court to remand an accused person who has come to court on the invitation extended to him by the court by issuing a summons. That procedure is shockingly unreasonable and should not be pursued by any court. Having exercised the discretion under Sec. 204 Cr. P. C. to issue only a summons and having led the accused by such conduct to believe that he can safely appear before court on invitation, it would be impermissible for any court thereafter to turn turtle and remand the accused to custody. Issue of summons by exercise of the discretion under Sec. 204 Cr. P. C. does firmly and eloquently convey that the accused person on appearance shall not be detained unnecessarily if he is willing and prepared to offer bail. The courts will have to be careful at the stage of exercising the discretion under Sec. 204 Cr. P. C. and cannot take parties by surprise when they appear before court in response to an innocuous summons issued by the court. This must be so whether the offence is triable by a Magistrate or not and whether the offence is bailable or not.

(5.) I have no reason to assume that such a practice is in vogue. No user friendly and humane court can afford to ignore the tragic plight of an accused person who receives a summons from the court, goes in search of the court and gets remanded to custody when he appears in court even though he is willing to offer bail. Such a person must certainly be granted bail when he appears and offers bail.

(6.) I do not, in these circumstances, want to issue any further directions under Sec. 482 Cr. P. C. as I do not assume or apprehend that the learned Magistrate would remand the petitioner to custody if he appears in response to the summons issued by the court and offers bail.

(7.) THIS Crl. M. C. is dismissed with the above observations.

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Cross Citation :2005-SCC-7-226 , 2006-AIR(SCW)-0-4723

SUPREME COURT OF INDIA

Hon'ble Judge(s) : B.P.SINGH, S.H.KAPADIA,JJ

KAMAL.JIT SINGH ….V/s…..STATE OF PUNJAB

Criminal Appeal 807 Of 2005, Jul 11,2005

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Bail – Parity – Co-accused with similar allegations have been granted anticipatory bail – Held- the appellant entititled to be granted anticipatory bail.

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JUDGEMENT

(1.) Leave granted.

(2.) Heard the counsel for the parties. In the facts and circumstances of the case we are of the view that it is an appropriate case in which the application of the appellant for grant of anticipatory bail ought to have been allowed, particularly when on similar allegations the remaining two accused have been granted the benefit of anticipatory bail. In these circumstances the appeal is allowed and the appellant is directed to be released on bail in the event of arrest or surrender on his furnishing bail bonds to the satisfaction of the arresting officer or the Court, as the case may be, subject to the conditions laid down in Section 438 Cr. PC.

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Cross Citation :2010-ALL MR(CRI) -0-2524

HIGH COURT BOMBAY

Hon'ble Judge(s) : V. M. KANADE, J.

Ashik Rameshchandra Shah ….V/s…. State of Maharashtra

Criminal Application No.5307 of 2009 Of Dec 04,2009

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Cr. P.C. & 438 – Anticipatory Bail – Interim Bail – Presence of accused – Held, the order directing accused to remain present can not be passed without granting interim bail to the accused.

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JUDGEMENT

(1.) Heard the learned Senior Counsel appearing on behalf of the applicants and the learned APP appearing on behalf of the State.

(2.) On 24/11/2009, Sessions Court directed the applicants to remain present before the Court on 27/11/2009. However, oral prayer made by the applicants for protection from arrest till 27/11/2009 was rejected. On 25/11/2009, application for anticipatory bail was rejected in view of application for withdrawal of the anticipatory bail application filed by the applicants vide Exhibit-8. Applicants, therefore, apprehending arrest by the police were constrained to file this application in this Court.

(3.) An interesting question, therefore, which has been raised before this Court is whether power of the Sessions Court in Maharashtra to direct the applicant - accused to remain present can be exercised without taking into consideration the application for interim protection and the manner, method and circumstances in which the said power has to be exercised. Before taking into consideration the facts of the present case, therefore, it would be relevant to take into consideration the Maharashtra Amendment. In 1993, the State Government was pleased to amend section 438 of the Code of Criminal Procedure which is a Central Act and the provisions viz. sub-sections (3) and (4) were inserted. The amended section 438 of the Criminal Procedure Code reads as under :-

"438. Direction for grant of bail to person apprehending arrest.- (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail, and that Court may after taking into consideration, inter alia, the following factors :-

(i) the nature and gravity or seriousness of the accusation as apprehended by the applicant;

(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court, previously undergone imprisonment for a term in respect of any cognizable offence;

(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested; and

(iv) the possibility of the applicant, if granted anticipatory bail, fleeing from justice, either reject the application forthwith or issue an interim order for the grant of anticipatory bail; Provided that, where the High Court, or as the case may be, the Court of Session has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer

in charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court, or as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1) the Court shall indicate therein the date on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit; and if the Court passes any order granting anticipatory bail, such order shall include, inter alia, the following conditions, namely:- (i) that the applicant shall make himself available for interrogation by a police officer as and when required; (ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the Court or to any police officer; (iii) that the applicant shall not leave India without the previous permission of the Court; and (iv) such other conditions as may be imposed under sub-section (3) of section 437 as if the bail was granted under that section.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice, being not less than seven days' notice, together with a copy of such order to be served on the Public Prosecutor and the Commissioner of Police, or as the case may be, the concerned Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(5) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm modify or cancel the interim order made under sub-section (1)."

The distinguishing feature, therefore, so far as State of Maharashtra is concerned is that if an application is made by the Public Prosecutor to the Court seeking an order for securing presence of the applicant then the Court can pass an order after taking into consideration the fact that such presence is necessary in the interest of justice. The question which falls for consideration is : whether, provisions of sub-sections (3) and (4) of section 438 have to be read together ? In other words, whether it is open for the Court to direct the accused to remain present if such a request is made by the Public Prosecutor and refuse interim order to the accused.

(4.) Shri. Adhik Shirodkar, the learned Senior Counsel appearing on behalf of applicants submitted that it is a well settled position in law that power which has to be exercised by the Sessions Courts and by the High Courts is concurrent power and that by virtue of practice which has been prevalent and by virtue of various judgments of various High Courts and Supreme Court, it has now been laid down that the applicant accused has to first approach the Sessions Court and, thereafter, he can approach the High Court and if such an application is made in the High Court, the said application has to be treated as fresh application. He submitted that in exceptional circumstances, the applicant may

choose to apply directly to High Court under certain exceptional circumstances, otherwise the normal rule is to first approach the Sessions Court. In support of the said submission, he invited my attention to the judgments of various Courts which I shall refer to at the latter stage. He submitted that, therefore, as a result of the law laid down by the various courts including this court, applicant has no other option buy to approach the Sessions Court. He submitted that, however while exercising power under subsection (4) of section 438 (inserted by Maharashtra Amendment Act 24 of 1993 w.e.f. 28-7-1993) giving direction to the accused to remain present in Court, the Court has to consider the question of granting interim relief so as to protect him when he appears before the court, otherwise in view of various judgments of this Court and the Apex Court, it is open for the Investigating Officer to arrest the accused without warrant in cases where offence is a cogn

(5.) The learned APP appearing on behalf of the State, on the other hand, submitted that the Sessions Court had a discretion to consider the application made by the Public Prosecutor for the purpose of securing presence of the applicant. She submitted that the said provision has been incorporated in order to ensure that the accused is available for interrogation and that he does not abscond and, therefore, by virtue of such order, his presence is secured so that after securing his presence, the court can take into consideration whether the applicant is entitled to get an order of anticipatory bail or not. She submitted that if such an order is not passed the process of investigation would be hampered and valuable time would be lost during which time the applicant may get a chance to tamper with the evidence or to remain away throughout the process of investigation. She submitted that the power to consider the application for interim protection and the power to consider the application of the prosecution securing presence of the accused are two different aspects and, therefore, they are not dependent on each other.

(6.) After having heard the learned Senior Counsel appearing on behalf of applicants and the learned APP appearing on behalf of the State and after taking into consideration various judgments on which reliance is placed by the learned Senior Counsel appearing on behalf of applicants and from the conspectus of cases which have been cited before this Court, I am of the view that section 438 lays down the manner and method and circumstances under which order of pre-arrest can be passed or not passed. In that sense it is a self-contained Code and a scheme in itself and these provisions, therefore, have to be read as a whole and it cannot be said that provisions of sub-sections (3) and (4) of section 438 are mutually exclusive and operate in different ways. The Apex Court in Gurubaksh Singh Sibbia (supra) has observed in paragraphs 7, 26, 19, 16, 17, 42 and 43 as under :-

"(7) The facility which Section 438 affords is generally referred to as 'anticipatory bail', an expression which was used by the Law Commission in its 41st Report. Neither the section nor its marginal note so describes it but, the expression 'anticipatory bail' is convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's Law Lexicon is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to

take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is a inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is is.sued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word of action". A direction under Section 438 is intended to confer conditional immunity from his 'touch' or confinement."

"(26) We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on he scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not,

"19. A great deal has been said by the High Court on the fifth proposition framed by it, according to which, inter alia, the power under Section 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender under section 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and, therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith. It is true that the functions of the judiciary and the police are in a sense complementary and not overlapping. As observed by the Privy Council in King-Emperor Vs. Khwaja Nazir Ahmed [1943-44)71 IA 203 : AIR 1945 PC 18 : 46 Cri.L.J. 413]. Just as it is essential that every one accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry .....The functions of the judiciary and the police are complementary, not overlapping, and the combination of the individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function,... But these remarks, may it be remembered, were made by the Privy Council while rejecting the view of the Lahore High Court that it had inherent jurisdiction under the old Section 561-A, Criminal Procedure Code, to quash all proceedings taken by the police in pursuance of two first information reports made to them. An order quashing such proceedings puts an end to the proceedings with the inevitable result that all investigation into the accusation comes to a halt. Therefore, it was held that the court cannot, in the exercise of its inherent powers, virtually direct that the police shall not investigate into the charges contained in the FIR.

We are concerned here with a situation of an altogether different kind. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued under Section 438(1) are those recommended in sub-section (2)(i) and (ii) which require the applicant to cooperate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in the principle stated by this Court in State of U.P. Vs. Deoman Upadhyaya [(1961)1 SCR, 14, 26 : AIR 1960 1125 : 1960 Cri.L.J. 1504] to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody : submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under section 167(2) of the Code is made out by the investigating agency."

"16. A close look at some of the rules in the eight-point code formulated by the High Court will show how difficult it is to apply them in practice. The seventh proposition says : The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised."

"17. How can the court, even if it had a third eye, assess the blatantness of corruption at the stage of anticipatory bail ? And will it be correct to say that blatantness of the accusations will suffice for rejecting the bail, if the applicant's conduct is painted in colours too lurid to be true ? The eighth proposition rule framed by the application at the threshold or grant interim protection and thereafter consider whether in the interest of justice it is necessary to secure presence of the accused on the application being made by the prosecution.

(8.) So far as words 'interest of justice' used in sub-section (4) of section 438 are concerned, the said term obviously means the interest not only of the prosecution but also of the accused of seeking fair and proper administration of criminal justice and giving a fair opportunity to the applicant - accused of securing substantive right which accrues in his favour by virtue of section 438. Provisions of sections 438(1), (3) and (4), therefore have to be read together and they cannot be read in isolation.

(9.) It would be profitable to reproduce the observations made by the three learned Single Judges of this Court with regard to power of the court to be exercised under section 438. In State of Maharashtra Vs. Kachrusingh Santaramsingh Rajput and Anr. [1994(3)

Bom.C.R. 348] learned Single Judge had an occasion to consider this aspect and the learned Single Judge has observed in paras 7, 8, 9 and 10 as under :-

"7.It was thought for some time that if a person who approached the Court for anticipatory bail loses his cause, he could not be arrested or he should not be arrested or he should be arrested immediately. Proviso to sub-section (1) now removes the doubt on that point by providing that where the High Court or the Court of Sessions, as the case may be has not passed any interim order under that sub-section, or, has rejected outright the application for grant of anticipatory bail, it would be open to the officer-in-charge of a Police Station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application i.e. the application preferred by the person seeking anticipatory bail. It is, thus, clear that the person approaching the Court for anticipatory bail under section 438(1) is not given any absolute protection as such, by the section till he has secured some protection from the Court, either in the form of anticipatory bail or, in the form of an interim order of protection or, interim order for bail."

"8. As sub-section (1) of section 438 itself contemplated an order for interim anticipatory bail, a provision had to be made immediately about the grant of such interim relief. The sub-section (2) of section 438, therefore, considers that eventuality and provides that where the High Court or the Sessions Court, as the case may be, considers it expedient to issue an interim order to grant anticipatory bail, the Court shall comply with the requirements which are indicated in that sub-section, namely :- (I) Indicate in the order, the date on which application for grant of anticipatory bail shall be finally heard for passing an order thereon. (II) At the time of passing orders for interim anticipatory bail, such order shall include, inter alia, the four conditions indicated in the said section, namely :- (i) That the applicant shall make himself available for interrogation by a Police Officer as and when required; (ii) That the applicant shall not directly or indirectly make any inducement, threat or promise to any other person acquainted with the facts of the accusations against him so as to dissuade him from disclosing such facts to be Court or to any officer. (iii) That the applicant shall not, leave India without the previous permission of the Court; and (iv) Such other conditions as may be imposed under sub-section (3) of section 437 as if the bail was granted under that section. The provisions of this sub-section (2) of section 438 of the Code of Criminal Procedure, therefore, make it clear that the object of grant of anticipatory bail or, a protection, during the pendency of a petition for such anticipatory bail should not, in any event, stall the investigation, stall the interrogation of the accused, or impliedly or otherwise give liberty to the accused to be away from the due process of law. A duty is cast on the Court, now explicitly, that the Court shall ensure, whenever it extends any sort of protection to the accused approaching it for protection, that he shall not dodge the legal process and he shall cooperate with the Investigating Officer in the matter of investigation of the offence."

"9. An eventuality might arise that the Public Prosecutor appearing on behalf of the State before a particular Court, was not able to say anything in the matter of grant of interim bail for want of instructions or adequate instructions. He might ask from the Court some accommodation, some time to enable him to put before the Court the reasons for which the State wanted to resist an application made for anticipatory bail. In such an eventuality, ordinarily, the Court shall not leave the applicant-accused without extending the protection of the Court to him, may it be temporary. Where the Court decides to grant such an interim protection to a particular a the State would not arrest a particular accused for a day or two and that the say would be put in before the Court as early as possible, within a

day or two. In such an eventuality, the Court may not pass any order for anticipatory bail or for grant of interim protection. The provisions contained in sub-sections (2) and (3) do not make it obligatory on the Court to pass necessarily an order for interim bail or for an interim protection, even in cases where the State undertakes not to arrest the particular person for a day or two, or till they are able to put up their case before the Court."

"10. It is this point which strikes at the root of the submission, which was advanced on behalf of the respondents before us. If at all in the circumstances as indicated in the preceding paragraph the Court refrains from passing any interim order, would it man that the Court would not require, if so prayed for in appropriate cases, the petitioner to remain present in the Court at the time of final hearing ? The answer has got to be in the negative. Sub-section (4), in that respect, stands on its own. It provides that the presence of an applicant seeking an anticipatory bail, shall be obligatory at the time of final hearing of the application and passing of the final order by the Court, "if on an application made to it by the Public Prosecutor the Court considers such presence necessary in the interest of justice". Thus, the presence of the accused may be directed by the Court on an application of the Public Prosecutor and only if the Court considers such presence necessary in the interest of justice. Again, sub-section (4) did not put limitation on the power of the Court to direct suo-motu in the interest of justice, a particular accused to remain present in the Court at the time of final hearing of the application. It is not necessary to read subsection (4) of section 438 as rigidly as that. It is a power to be exercised by the Court in the interest of justice. The justice does not always lie in protecting the person who is an accused. The justice also lies in ensuring, in appropriate cases where the State exercises its power of investigation strictly according to law, in not creating hindrance in the exercise of the lawful powers of the State. We do not think that sub-section (4) of section 438 prescribes or imposes any limitation on the power of the Court, to direct the accused to remain present in the Court at the time of final hearing, whenever it thinks such presence necessary in the interest of justice."

"14. Mr. Loya was right, to some extent, in contending that the very purpose of introducing section 438 in the Code of Criminal Procedure and of substituting the said section in the new form was to strike a balance between the rights of the State to investigate through police into the offences according to the established procedure of law and the individual liberties of a person against whom accusation of serious crimes were made. Neither the old section 438 nor the section newly substituted in its place, started with a non-obstante clause. Both the sections do not provide that the provisions contained therein are, over and above, the common law as incorporated in Chapter XII of the Code of Criminal Procedure, which defines the powers of the police to investigate into the offences. True it is that, at a criminal trial, there is a presumption of innocence in favour of an accused person, but all the same there is no presumption of law that every activity of an individual is innocent or, that if the accusations are made as per law against the person, the police are to start with a presumption that the accusations are false and no offence has taken place. Again, it is not the intention of the law to protect a person who had indulged in criminal activity or, who is alleged to have committed a crime. The provisions contained in old section 438 or the section now substituted in its place, are not intended to protect any person who is accused of a serious offence. Indeed, the provisions are incorporated in the Statute-Book for protecting a person who has, in fact, not committed any crime or, who has not been indulging in any criminal activity and yet on account of some extraneous reasons, he is being implicated in a false accusation. It may be that, in a given case, the investigation is not honest or is not subjected to process of

law for reasons which are not good at law, or in a manner, which is not warranted by law. It is only in these last mentioned contingency that the individual liberty must be fully protected according to law. Mere apprehension of an arrest by a person does not, by itself, afford that person has right to claim a protection under the provisions contained in section 438 of the Code of Criminal Procedure. Just as section 157(1) of the Code casts an obligation on the police to (a), proceed to the spot (b) investigate the facts and circumstances of the case and (c) if necessary, to take measures for recovery before an offender can be arrested and subjects the police to comply with the provisions contained in sections 158, 167 and 168 of the Code, section 438 casts a duty on the courts, not to protect a person who is alleged to have committed a crime or who is alleged to be indulging in criminal activity or who is keeping himself away from the legal process if there are good reasons to suppose that he has been doing so, section 438, old or substituted virtually operates as an injunction against the police restraining them to arrest an offender as required by Section 157(1) of the Code of Criminal Procedure and to release him on bail, if arrested on the terms and conditions imposed on the alleged offender by the Court. While issuing an injunction, the Courts have got to be extraordinarily cautious, particularly in view of the deteriorating law and order situation day by day, in exercising the powers which are conferred upon them under section 438 of the Code of Criminal Procedure. The powers under section 438 of the Code are to be exercised "in the interest of justice" and not otherwise. At the cost of repetition, it may be stated that justice does not always lie in protecting a person who has committed a crime or who has been indulging in criminal activity or who has been keeping himself away from legal process. Committing a serious offence or indulging in serious criminal activity dodging the legal process is a wrong against not only an individual but against the society at large and it is high time that the Court should bear that consideration in mind while exercising the power contained in section 438 of the Code of Criminal Procedure. The provisions contained in Chapter XII of the Code of Criminal Procedure, and in particular, the powers to arrest a person under section 157(1) of the Code are as much part of normal criminal law as are the provisions contained in section 438 of the Code. Therefore, the provision contained in section 438 of the Code are required to be implemented subject to the powers of the police conferred upon them under Chapter XII of the Code of Criminal Procedure. The balance between liberty of an individual and the rights arising out of the legal and constitutional duties of the police to investigate into the offence is to be struck by the Courts in accordance with the aforesaid considerations and in a manner which is conducive to the cause of justice."

While deciding Criminal Application No.569 of 2001 in Vijaya Ramesh Ramdasi Vs. State of Maharashtra the learned Single Judge (Coram : N. V. Dabholkar, J. [as he then was]) vide order dated 20/3/2001 observed in paras 7 and 8 as under :-

"7. On going through the text, certainly there is no reference to interim anticipatory bail in sub-section (4). However, it is difficult to agree with the proposition of learned APP that sub-section (4) should be read independently and without any reference to sub-sections (3) and (5), between which the said provision is sandwiched. In this context, reference to proviso, incorporated in sub-section (1) is a must. This proviso is conspicuously absent in the substantive section 438(1) of the Code. The proviso reads as follows : "Provided that, where the High Court or. as the case may be. the Court of Session, has not passed any interim order under this subsection or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application."

Thus, on reading proviso to sub-section (1), it is evident that mere pendency of application for anticipatory bail is not a bar to effect arrest of the applicant on the basis of allegation for which he apprehends arrest. The Investigating Officer will be required to stay away, only if the applicant has succeeded in securing the interim anticipatory bail. As can be seen by comparison of section 438(1) and (2), as it stood before the substitution by State amendment and Section 438(1) and (2) as introduced by the State Amendment, it can be seen that notion of interim anticipatory bail is totally absent in the original section, which seems to have been officially introduced by the express, statutory provisions by the State amendment. Sub-section (2) as incorporated by State amendment expressly introduces the provision of grant of interim anticipatory bail, while maintaining the same conditions, those can be imposed upon the applicant by the Court, which were available for final grant of. anticipatory bail in the Central Legislation. Thus, the contention of Shri. Patil that Section 438 of the Code as introduced by the State amendment should be read as a scheme within itself has substance. The scheme makes a provision for considering certain factors for grant of anticipatory bail by the Court; as embodied in sub-section (1). In case, the Court is not pleased to grant interim anticipatory bail, it is open for the Investigating Officer to effect arrest on the allegations for which the arrest is apprehended. Pendency of application for anticipatory bail is no impediment in effecting such an arrest and even on rejection of application for anticipatory bail, the investigating officer is at liberty to effect immediate arrest of the applicant without requiring a warrant for the purpose." "8. While considering, whether the grant of interim anticipatory bail is sine-qua-non for the Court to order personal presence of the applicant on the date fixed for final hearing, practical effect of the scheme as a whole must be taken into consideration. In case the applicant is not granted interim anticipatory protection and still the Court directs the applicant to remain present in the Court on the date fixed for final hearing, by virtue of proviso to sub-section (1), it is open for the Investigating Officer to effect arrest of the applicant. The direction under sub-section (4), if considered as an independent and irrespective of interim protection, will prove to be a mouse trap and not a protection of personal liberty of the citizen. Being under the Court directions the applicant would be obliged to proceed towards the Court and Investigating Officer can wait at the entrance gate of the Court premises. The proposition of learned APP that subsection (4) is an independent power and can be exercised without granting interim protection is, therefore, unacceptable, being against the spirit of provision of anticipatory bail, which is believed to be for the purpose of protection of personal liberty guaranteed by the Constitution of India. It must, therefore, be said that the Court entertaining the application for anticipatory bail shall be in a position to insist for personal presence of the applicant, although in the interest of justice on the date fixed for final hearing or on any other date fixed for hearing, provided the applicant is granted protection by interim anticipatory bail. In case sub-sections (3), (4) and (5) are not to be read together in this fashion, by virtue of proviso to subsection (1) the Court itself shall be indulging into frustrating the petitions."

applicant is granted protection by interim anticipatory bail. In case sub-sections (3), (4) and (10.) I am, therefore, fortified in my view by virtue of the observations made by the aforesaid three learned Single Judges of this Court on this aspect. Therefore, I am of the view that the learned Sessions Judge clearly erred in directing the applicants to remain present in court without granting any interim protection in this case.

(11.) I am informed that the said provision is being used by the prosecution for the purpose of arresting the accused and the courts, very often, after passing an order under sub-section (4) of section 438 do not grant any interim protection. In my view, it would be

appropriate, therefore, to take into consideration the scheme of section 438 that if an application is preferred by the prosecution for the purpose of securing presence of the accused, the courts, if they want to pass favourable order granting the application in such cases it would be appropriate if some reasons are assigned as to why it feels that presence of the accused is necessary and ordinarily should grant interim protection to the accused so that the prosecution on the pretext of securing presence of the accused does not arrest the accused and make his application infructuous.

(12.) So far as the merits of the present case are concerned, in my view, applicants have made out a case for grant of anticipatory bail. One Rameshchandra Shah and Haresh Kapadia who are father and father-in-law of applicant No. 1 respectively had made representations to the complainant that certain land belonging to Rayon Mills was available for sale and that they could assist the complainants to secure that land and, for that purpose, they had asked the complainants to deposit an amount of Rs. 1 crore each in the Bank of Maharashtra and Sangli Bank and thereupon asked them to pay their fees to the tune of Rs.1.25 crores. This agreement took place sometime in 2007 and, after depositing the amount of Rs. 1 crore each in Maharasthra Bank and Sangli Bank, an amount of Rs.1.25 crores was deposited in the account of applicant No.3. According to the complainants, thereafter, no further steps, as required under the said agreement, were taken and, therefore, a notice was sent by the complainants to the applicants herein, asking them to refund the said amount of Rs.1.25 crores and the said notice was to be treated as notice of winding up under the provisions of Companies Act. The reply was given by the applicants herein denying the allegations which were made by the complainants. It was denied that the said amount of Rs.1.25 crores was deposited in their account. It was further denied that there was any meeting held between the applicants and two other gentlemen viz. Rameshchandra Shah and Haresh Kapadia and the Complainants' Directors. A civil suit has been filed by the complainants in this Court for recovery of the said amount. Under the facts and circumstances of this case, therefore, there is some substance in the submissions made by the learned Senior Counsel appearing on behalf of applicants that the entire exercise of filing a complaint after 26 months, essentially, is an arm-twisting technique employed by the complainants to secure an amount of Rs.1.25 crores from the present applicants who had no concern of whatsoever with the said agreement between Rameshchandra Shah and Haresh Kapadia and the complainants. It is an admitted position that Rameshchandra Shah, father of applicant No.1 has expired and though no application was filed by Haresh Kapadia for anticipatory bail, no steps have been taken by the police to arrest him. Applicant No.2 is a wife of applicant No.l and she, according to the learned Senior Counsel appearing on behalf of applicants, is not concerned with day-to-day management of the Company.

(13.) In my view, therefore, taking into consideration the aforesaid facts and circumstances, in any event, custodial interrogation of applicants is not necessary. Prima facie case, therefore, is made out by applicants for grant of anticipatory bail. Application also appears to have been filed against the present applicants to pressurise them to pay the said amount of Rs.1.25 crores which was paid to Haresh Kapadia father-in-law of applicant No.l and Rameshchandra Shah who is a father of applicant No.l and who had expired in the meantime.

(14.) In the result, the following order is passed :- ORDER In the event of the arrest of the applicants in connection with the offence punishable under sections 420 and 120-B of the Indian Penal Code which is registered with Tardeo Police Station vide MECR No.05 of 2009, they shall be released on bail in the sum of Rs. 10,000/- each with one or two

sureties each in the like amount. Initially, in the event of arrest, applicant Nos. 1 and 2 shall furnish cash bail of Rs. 10,000/ - each and within two weeks thereafter, they shall furnish sureties of the said amount. Applicant No.l shall report to Tardeo Police Station for a period of one week from 7th December, 2009 and, thereafter, as and when called. It is clarified that the applicant No. 1 shall be called between 11.00 A.M. and 5.00 P.M., after giving him 24 hours notice. Application for anticipatory bail is disposed of. Parties to act on the copy of this order duly authenticated by the registry.

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Cross Citation :2007-ALLMR(CRI)(JOUR)-0-24 , 2006-GLR-3-2529

HIGH COURT OF GUJARAT

Hon'ble Judge(s) : K.S.Jhaveri,J

Hasmukhlal Kalidas Choksi …… V/s….. State of Gujarat
Special Civil Application 3462 Of 2006, Sep 12,2006

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Bail – Condition – Imposition of – Held- Condition can only be imposed in non-bailable offences having punishment more than 7 years – But for other non-bailable offences conditions could not be imposed.

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JUDGEMENT

(1.) These are applications praying for deletion of conditions stipulated in the respective orders of bail granted to them by this Court in various orders.
(2.) The prosecution case, in short, can be summarised as under:

(3.) The applicants herein have constructed different residential buildings and allotted and sold to different persons. In the earthquake occurred on 26th January 2006 those buildings collapsed on account of which many persons sustained injuries and many of them succumbed to injuries. In view of this complaints were filed against criminal complaints were filed against the applicants. The applicants had filed bail applications and they were released on bail on the terms and conditions stipulated in the said order. The conditions stipulated in the order dated 29th June 2001 passed in Criminal Misc. Application No.3641 of 2001 are as under:

"29. In the facts and circumstances of the case, all these applications are allowed, the petitioners involved in respective offences are ordered to be released on bail on furnishing solvent surety and P.R. in a sum of Rs.50,000/- (Rs. Fifty thousand only) each on following conditions: (a) The petitioners shall not leave Ahmedabad City and Ahmedabad Rural District till completion and conclusion of the entire investigation and till

the submission of final charge-sheet against all the accused persons, and till the apprehension and arrest of all the accused persons involved in the respective cases, without the express permission of the learned City Sessions Judge Ahmedabad / concerned court. (b) The petitioners shall not approach, contact, induce or threaten the witnesses connected with the offence in question. (c) The petitioners shall file an affidavit before the learned Sessions Judge concerned, at Ahmedabad showing the place of their residence after their release on bail which would contain details about full address and telephone numbers, if any. (d) The petitioners shall personally remain present on every 1st working day of the month according to British Calendar before the learned City Sessions Judge, Ahmedabad / concerned court between 2 pm and 5 pm and mark their presence there. The learned Sessions Judge shall make appropriate arrangements for obtaining their signatures on his appearance. (e) The petitioners shall not leave Gujarat State without prior permission of the learned City Sessions Judge, Ahmedabad/ concerned court. (f) The petitioners shall not leave the revenue district of the place of residence stated by them in their affidavit without the permission of the learned City Sessions Judge, Ahmedabad / concerned court. (g) Petitioners shall deposit their passport, if any, before the concerned police station before their release on bail. In case a petitioner does not hold any passport, then in that case, he shall file an affidavit before the learned City Sessions Judge, Ahmedabad / concerned court disclosing such a fact. (h) The learned City Sessions Judge, Ahmedabad /concerned Judge, shall write Yadi to the Passport Office, Ahmedabad with respect to the aforesaid conditions imposed upon the petitioners restricting their movement and that he has not been permitted to visit abroad, for their information and action. (i) Each petitioner before his release on bail as aforesaid, shall deposit a sum of Rs.50,000/-(Rs. Fifty thousand only) before the learned City Sessions Judge, Ahmedabad / concerned court for the due performance of the aforesaid conditions by the petitioner/s concerned. The learned Sessions Judge will be at liberty to place the said amount in FDR in the name of the officer of his Court at the instance of the petitioner. (j) If any one or more condition are reported to have been breached by the petitioner/s the learned City Sessions Judge, Ahmedabad/concerned court shall be at liberty to issue non-bailable warrant against the petitioner / s. (k) Bail bonds shall be executed before the learned City Sessions Judge, Ahmedabad I concerned court."

Similar conditions have been imposed in respect of other applicants also. The applicants have therefore prayed for deletion of such conditions on the grounds stated hereinafter.

(4.) Mr. Raju, learned Advocate for the applicants submitted that when the original complaints were filed some of the sections of IPC mentioned therein were non-bailable offences. He further submitted that after the chargesheet has been filed in each case and charges were framed, the offences mentioned therein are bailable offences. He, therefore, submitted that under the circumstances the conditions which are imposed are required to be deleted in view of various decisions of different High Courts and the recommendation, of Law Commission. A. Mr. Raju, after referring to section 437 of CrPC, further submitted that Power to impose conditions is only in case of non-bailable offence and that too where it is punishable more than seven years. Under the provisions of Cr.P.C only in non-bailable offences conditions of bail can be imposed on an accused while being released on bail.

(5.) Mr. A.Y. Kogje, learned APP submitted that section 439(1) of Criminal Procedure Code stipulates that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose

any condition which it considers necessary for the purposes mentioned in that sub-section. He therefore submitted that the conditions are not required to be deleted.

(6.) It is an undisputed fact that chargesheets have been filed in all these matters. The concerned Court has also framed charges under sections 304A, 336, 338 and 418 of the Indian Penal Code and under the provisions of Gujarat Ownership of Flat Act, 1973. The punishment for offences under the said Act is imprisonment for one year, which is a bailable offence. The rest of the offences are also bailable offence i.e. under sections 304A, 336, 338 and 418 of IPC. Therefore, since now all the offences are bailable, no conditions can be imposed while releasing the accused on bail.

(7.) At this stage it would be profitable to look into the law laid down by different High Courts under the aforesaid subject.

(8.) Mr. S.V. Raju, learned Advocate appearing for the applicants has relied upon various decisions of the High Courts as under:

A. In the case of ANWAR HUSSAIN V/S. STATE OF ORISSA, REPORTED IN 1995 CRI.L.J.. 863, in para 5 it is stated as under:

"5. Chapter XXXIII consists of Section 436 to 450. Sections 436 and 437 provides for the granting of bail to accused persons before trial and conviction. For the purposes bail offences are classified into two category i.e. (i) bailable and (ii) non-bailable. Section 436 provides for granting bail in bailable cases and section 437 in non-bailable cases. A person accused of bailable offence is entitled to be released on bail pending his trial. In case of such offences, a police officer has no discretion to refuse bail if the accused is prepared to furnish surety. The Magistrate gets jurisdiction to grant bail during the course of investigation when the accused is produced before him. In bailable offence there is no question of discretion for granting ball. The only choice for the court is as to taking a simple recognizance of the principal offender or demanding security with surety. Persons contemplated by this section cannot be taken into custody unless they are unable or unwilling to offer bail or to execute personal bond. The Court has no discretion, when granting bail under this section, even to impose any condition except the demanding of security with sureties."

B. In the case of REX V/S.GENDA SINGH, REPORTED IN AIR (37) 1950 ALLAHABAD 525 it is held asunder: "I am, therefore, of opinion that in bailable cases no condition can be imposed. The order granting bail can just fix the amount for which the accused is to furnish the bond, the number of the sureties to be furnished and the amount for which each of the sureties is to furnish the bond. I, therefore, reject this application."

C. In the case of AZEEZ V/S. STATE OF KERALA, REPORTED IN 1984(2) CRIMES 413, the Kerala High Court observed as under: "3. The petitioner, being a person accused of only bailable offence, has a right to be enlarged on bail. There is no discretion with the Court enabling it to grant or refuse bail. The Court is required to grant bail in such a case, though the court is at liberty to modulate the terms as to bail. This certainly does not mean that the court can impose a condition which is not a term as to bail. The condition that a person accused of bailable offence has to surrender his passport in court is not a term as to bail and therefore cannot be imposed by a magistrate under section 436 of the Code. The condition imposed is illegal and has to be set aside."

D. In the case of HANUMANTHE GOWDA and ANR V/S. STATE OF KARNATAKA it is held as under: "The wordings of the three sections make it clear that under Section 436 of the Code of Criminal Procedure, there is no discretion left to the Court to impose a condition while releasing a person on bail when he is accused of a bailable offence. I am in respectful agreement with the judgements cited above of the Madras High Court. I, therefore, hold that the conditions imposed by the learned Magistrate while granting bail to the petitioners are without jurisdiction and they are accordingly set aside except releasing the petitioners on bail on their executing a personal bond for Rs. 10000/ - each with one surety for like sum for their appearance."

E. I n the case of KANUBHAI CHHAGANLAL BRAHMBHATT V/S. STATE OF GUJARAT AND OTHERS, REPORTED IN 13 GLR 748 it is held that the whole question of producing the accused before a Magistrate would only arise if the accused was not prepared to give bail before the police officer after his arrest and even when he is produced before the Magistrate and he is prepared to give bail, the Magistrate has no option but to release him on bail so far as bailable offence is concerned.

F. In the case of DISTRICT MAGISTRATE OF VIZAGAPATANAM, REPORTED IN AIR (36) 1949 MADRAS 77, it is held as under: "4. In bailable offences it is well settled that there is no question of discretion in granting bail as the words of the section are imperative. The only choice for the Court is as between taking a simple recognizance of the principal offender or demanding security with surety. Ordinarily the word "bail" applies to the second kind of security according to the practice and procedure of the Courts. The Criminal Court has no discretion in a bailable offences while granting bail under section 496, Criminal P.C. to impose any condition except the demanding of security with sureties. The reference is accepted and the order of the Magistrate passed on 14th August 1947, granting bail to the accused is modified by deleting from the order the conditions mentioned above.

G. In the case of In RE KOTA APPALAKONDA, REPORTED IN AIR (29) 1942 MADRAS 740 it is held that where a person is charged with bailable offences only, the Magistrate has no discretion in granting bail and hence the imposing of a condition e.g. not to enter on the disputed land, in a bail order leads to the infringement of the provisions of section 496 in case the condition be not fulfilled. Such is not one authorized by law.

(9.) It is also relevant to quote certain paragraph as stated in the Thirty-Sixth Report on Sections 497, 498 and 499 of Cr.PC - grant of bail with conditions (December 1967):

"6. The amendment suggested by the State Government seeks to replace section 497(1) as follows :- "(1) When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer incharge of a police station, or appears or is brought before a court, he may be released on bail which may be subject to such conditions as may appear necessary in a particular case if the offence is one punishable with imprisonment, extending to seven years or more or is one falling under Chapters VI, XVI and XVII of the Indian Penal Code including abetment, conspiracy or attempt to commit any such offence, but shall not be so released if there appear reasonable grounds for believing:- (i) that he is likely to tamper with the evidence or (ii) that he has been guilty of an offence punishable with death or imprisonment for life; Provided that the court may direct that any person under the age of 16 years or any woman or any sick or infirm person accused of such an offence be released on bail.

Explanation: In granting a conditional bail the Court may impost conditions like requiring the person to reside in a particular locality or to report to the police or any other specified authority".

15. In bailable cases, i.e. those governed by section 496, the court cannot, it seems, impose conditions, as the accused has a right to bail (Nor can a police officer impose conditions requiring attendance before the police. This does not, of course, affect the High Court's power to cancel bail in case of abuse. "This jurisdiction springs from the over-riding inherent powers of the High Court and can be invoked in exceptional cases only when the High Court is satisfied that the ends of justice will be defeated unless the accused is committed to custody."

(10.) From the above settled law it is clear that when a person is charged with Bailable offences and when he is released on bail, the court has no discretion in granting bail and no condition can be imposed. On the facts of the case it is clear that after filing of the chargesheet, all the offences are bailable offences. On the facts of the case, it is clear that the alleged offences are bailable and therefore the conditions imposed by this Court earlier require to be deleted in view of change of circumstances.

(11.) Now since the offences are bailable offences, I do not find any substance in the contention raised by Mr. Kogje that these are not malicious proceedings and therefore the petition cannot be entertained. When the chargesheet has been filed, and if the offences are bailable, no conditions can be imposed. Mr. Kogje is unable to dispute this position.

(12.) Power to impose conditions is only in case of non-bailable offence and that too where it is punishable more than seven years. Under the provisions of Cr.P.C only in non-bailable offences conditions of bail can be imposed on an accused while being released on bail. Considering the provisions of section 437 of CrPC the conditions imposed are required to be deleted.

(13.) In view of the above facts and circumstances of the case, these applications are partly allowed and the conditions Nos.29(1), 29(c) 29(6), 29(f), 29(g), 29(i) imposed in the order dated 29.6.2001 are hereby deleted and the aforesaid order dated 29.6.2001 is modified accordingly. The applicants are at liberty to encash the fixed deposit made by them in pursuance of the aforesaid order at any time. Rule is made absolute accordingly.

(14.) In the premises aforesaid these applications are allowed. The conditions Nos. 29[a], 29[c], 29[e], 29[f], 29[g], 29[h] and 29 [i] imposed in the order dated 29.6.2001 passed in Criminal Misc. Application No.3641/2001, 3642/2001 condition Nos.1, 4, 5, 6, 7, 8 and 9 imposed in the order dated 11.7.2001 passed in Criminal Misc. Application No.4678/2001, condition Nos.29[a], 29[c], 29[f], 29[g], 29[h] and 29[i] imposed in the order dated 29.6.2001 passed in criminal Misc. Application No.4117 of 2001 are hereby ordered to be deleted. The amounts deposited by the applicants shall be returned to them. If the amounts are kept in Fixed Deposit the same may be encashed. Rule is made absolute accordingly.

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Cross Citation : 2011 CRI. L. J. (NOC) 364 (A.P.)

ANDHRA PRADESH HIGH COURT

Hon'ble Judge(s) : R. KANTHA RAO ,J

Guddanti Narasimha Rao ….Vs…. State of Andhra Pradesh And Another.

Criminal Petition No. 9099 of 2010 - Decided On 17/09/2010

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Cr. P.C. 209 – Commitment of case under Attrocities Act to sessions Court– Court insisting accused to obtain bail is improprer. It is not a requirement u/s 209 of Cr. P.C. – Magistrate can commit the case by taking personal bond from him to appear before special court ensuring his attendance before said court till conclusion of trial.

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JUDGEMENT

ORDER: - This Criminal Petition is filed under Section 482 Cr.P.C. seeking to issue a direction to the Additional Judicial Magistrate of First Class, Chirala, Prakasham District not to insist the petitioner to obtain bail at the time of committing P.R.C.No.26 of 2010 to the Court of Sessions.

2. I have heard the learned counsel appearing for the petitioner and the learned Public Prosecutor representing the State.

3. On a report lodged by the second respondent-complainant the police registered a case under Section 506 IPC and Section 3(1)(x) of the SC and ST (POA) Act, investigated into and filed a final report stating that the case is false. Subsequently, in protest the second respondent filed a petition and the learned Magistrate after recording sworn statement of the second respondent, took cognizance of the case against the petitioner under Section 3(1)(x) of SC and ST (POA) Act, 1989.

4. Since the offence is triable by the Special Court for the trial of offences under prevention of atrocities Act, it has to be committed by the magistrate to the said Court. It is submitted by the learned counsel representing the petitioner that at the time of committing the case, the learned Magistrate is insisting upon the petitioner to obtain order of bail from the Special Court, or any other competent court as the case may be, and therefore, the petitioner filed the present criminal petition to issue the required direction to the learned Magistrate.

5. It can be understood from Section 209 Cr.P.C. that when the Court directly issues summons to the accused to secure his attendance and in obedience thereto, the accused attends before the magistrate, the magistrate while committing case to the Court of Session can bind him over to the Sessions Court on his executing a bond, as provided under Section 441 Cr.P.C. Obtaining bail is not a requirement as per Section 209 Cr.P.C. Further, there is no provision under prevention of atrocities act for granting anticipatory bail.

6. From the language of Section 209 Cr.P.C., it does not appear that at the time of committing the case to the Court of Session, he must be on bail by the Sessions Court.

7. Section 209 Cr.P.C. lays down that when it appears to the Magistrate that the offence is exclusively triable by Court of Session, he shall a) commit, after complying with the provisions of Section 207 or 208, as the case may be, the case to the Court of Session, and subject to the provisions of this code relating to bail, remand the accused to custody until such commitment has been made; b) subject to the provisions of this Code, relating to bail, remand the accused to custody during; and until the conclusion of, the trial;

8. The expression subject to the provisions of this code relating to bail can only be understood to mean subject to the provisions in Chapter 33 of the Code.

9. When the accused appeared before the Court on receiving summons from the Court issued after registering the PRC, and undertakes himself to appear before the Magistrate during the committed proceeding and also to appear before the Court of Session/Special Court and the accused not being arrested and released on bail earlier in connection with said case, need not be driven to obtain bail from the Court of Sessions/Special Court. Section 441(3) Cr.P.C. lays down, if the case so requires the bond shall also bind the person released on bail to appear when called upon the High Court or Court of Session or other court to answer the charge.

10. There is no requirement in law that in each and every case triable by the Court of Session the accused shall be arrested and released on bail. When only summons were issued to the accused to secure his attendance after the charge sheet is filed in a case triable by Court of Session the accused shall not be compelled to approach the Sessions Court/Special Court and to obtain bail. In every case triable by Court of Session unless the accused is arrested and is in judicial custody,, the question of his obtaining bail from the Sessions Court does not enough while committing the case it is enough on the part of the committing Magistrate to bind over the accused with or without sureties undertaking to appear before the Sessions Court till the conclusion of the trial.

11. Therefore, this Court agrees with the submission made by the learned counsel appearing for the petitioner and the learned Magistrate is hereby directed not to insist the petitioner to obtain bail from the Court concerned for the purpose of commitment of P.R.C. to the Special Court or Court of Sessions and the Magistrate can commit the case by obtaining personal bond from him to appear before the Special Court ensuring his attendance before the said Court till the conclusion of the trial.

12. The criminal petition is accordingly allowed. Petition allowed-

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Cross Citation :1963 (1) Cri. L. J. 451 (1), AIR 1963 MANIPUR 12

MANIPUR HIGH COURT

Coram : T. N. R. TIRUMALPAD, J.

"Gaibidingpao Kabui ….V/s…..Union Territory of Manipur**"**

Criminal Misc. Appln. No. 55 of 1961, D/- 15 -2 -1962.

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Cri. P.c. S. 167 and 109 – Procedure for remand of accused – Duty of Magistrate – It is duty of Magistrate to safeguard liberty of a citizen – Court should not behave as an agent of the Executive to help the police in detaining persons in custody at the wish of the police – When the person detained informs the Magistrate that he was not told of the reasons for his arrest then it should be seen that such a person is informed of the grounds of his arrest – There is no provision u.s. 109 of Cri. P.c. to detain a person in jail.

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R.K. Manisena Singh, for Petitioner, N. Ibotombi Singh, Govt. Advocate, for Opposite Parties.

Judgement

ORDER :- This is an application for the issue of a writ of habeas corpus for releasing the petitioner Gaibidingpao Kabui from Jail custody.

2. This petitioner and two others, Kadonglung and Namei were arrested on 12-8-1961 near Tamenglong by the Army and they were produced before Shri K. Lamphel Singh, Magistrate 1st Class at Imphal on 17-8-1961 with a letter from the O/C Imphal Police Station. In the said letter, it was mentioned that they were Naga Hostiles of the area and were arrested by the Army, that the O/C Tamenglong and Nungba Police Stations have been asked to submit N. F. I. R. under Sec. 109, Cri. P. C. for prosecution and that they may be remanded to Jail for a period of 15 days, during which the N. F. I. R. will be submitted. The Magistrate thereupon remanded them to Jail custody till 30-8-1961.

3. On 24-8-1961, the petitioner Gaibidingpao Kabul sent a petition to the Magistrate from jail stating that he was a cultivator and innocent of any offence and that a Police Report may be immediately called for and he may be released. This petition was sent for a Police report by 30-8-1961. The O/C I. P. S. endorsed a report on the said petition on 30-8-1961 that the village from where the petitioner was arrested was within the jurisdiction of Nungbu Police Station and so the O/C Nungba Police Station may be directed to submit the necessary prosecution report. The petitioner and the two others were produced before the Magistrate with this report and the Magistrate again remanded them to custody till 13-9-1961 and in doing so he passed an order in the following words :

"Ask O/C concerned to submit an offence report".

On 13-9-1961, they were again produced before the Magistrate and he passed an order that no offence report has yet been submitted, nor any report for further remand, that there has been serious objection from the side of the arrested persons and that the O/C Imphal Police Station will be directed to submit a report by the next remand date at any rate and that the arrested persons will be remanded till 27-9-1961 and he directed that a copy of the order should be sent to the Additional Superintendent of Police for necessary action. On 27-9-1961, they were again produced before the Magistrate without any offence report and the Magistrate again remanded them till 11-10-1961 saying that the I/O will be asked to submit the offence report early.

After this further remand, a letter was received by the Court from the S. I. of the Imphal Police Station stating that the O/C Tamenglong and Nungba Police Stations have been asked to submit offence report against the arrested persons and that report had also been submitted to the Court praying for directing the Police Stations concerned to submit necessary reports.

On this letter, an endorsement had been made by the O/C, Imphal Police Station stating that it was beyond the competence of the Imphal Police Station to submit a prosecution report in the case as the place of occurrence was beyond Imphal Police Station and that therefore the Police Stations concerned may be directed to submit the necessary prosecution report. Thus, the O/C Imphal Police Station was throwing the burden on the Court for getting the necessary offence report from the Tamenglong and Nungba Police Stations concerned. On receipt of this letter, the Magistrate wrote on the order sheet that he has received the report for further remand. Thus, the three arrested persons continued in Jail custody without any offence report from the Police and without the Court knowing why they were being remanded. It is surprising that the Magistrate should have continued to remand the arrested persons to police custody in this fashion.

4. It was at this stage that the petitioner Gaibidingpao Kabui filed the present application for the issue of a writ of habeas corpus before this Court on 22-9-1961 in which he pointed out that his arrest itself was done mala fide without any F. I. R. or any other information and without his being informed of the grounds for his arrest and detention in Jail. It was pointed out that the arrest was illegal and in contravention of the provisions of the Cri. P. C., that his detention was against the provision of section 167, Cri. P. C., that the remand orders were being passed by the Magistrate without any jurisdiction and without recording any reason and that such detention was against the fundamental rights of the petitioner.

5. When this matter came up for hearing of the bail application on 29-9-1961, I directed the petitioner to be released on bail immediately, as there was no reason for his detention. When the writ application for habeas corpus came for hearing, the Government Advocate wanted time to file counter, but he admitted that as the petitioner was being proceeded against only under section 109, Cri. P. C. there was no provision for detention in Jail and so on 15-12-1961, I directed the petitioner to be released. I also directed the two persons Kadonglung and Namei to be released from Jail. But final orders were not passed as I was awaiting the explanation of the Magistrate for having continued to remand the arrested persons to Jail custody continuously even without any request from the Police.

6. A counter statement has been filed for the Government in which it is stated that the petitioner and the other two persons were arrested by the Military in exercise of the power under Sec. 4(c) of the Armed Forces (Assam and Manipur) Special Powers Act, 1958, that they were produced before the Magistrate by the O/C Imphal Police Station with a report that the O/C Tamenglong Police Station in whose jurisdiction the petitioner was arrested would submit prosecution report for proceeding under Sec. 109, Cri. P. C., that in respect of the petitioner, the said prosecution report was duly submitted on 28-8-1961 before the A. D. M., Manipur instead of before this Magistrate, that the said case has been registered under N. F. I. R. 1/61 and it stands transferred to the Court of Shri B. Ahamad, Magistrate First Class for disposal, and that as far as the report regarding the

other two persons were concerned, vigorous search is being made to see if any report has since been submitted.

7. I am afraid that the counter statement filed for the respondent does not disclose anything which would in any way support the procedure adopted by this Magistrate against the petitioners and the other two persons. It is stated that the arrest of the three persons was made by the military under section 4(c) of the Armed Forces (Assam and Manipur) Special Powers Act, 1958 (hereinafter to be referred to as the Act). Such arrest can be made under Sec. 4(c) by the Army of a person who has either committed a cognizable offence or against whom a reasonable suspicion existed that he has committed or is about to commit a cognizable offence. As soon as such arrest is made, the Army have to make over the arrested person, under Sec. 5 of the said Act, to the O/C of the nearest Police Station together with a report of the circumstances occasioned in the arrest.

In this case, the army made over the petitioner to the O/C, Imphal Police Station and I am sure that they must have submitted the report of the circumstances occasioned in the arrest as required under Sec. 5. That report has not been produced. Hence we are unable to know the circumstances which led to their arrest. We do not know therefore whether the petitioner and the two others were reported to have committed a cognizable offence or whether a reasonable suspicion existed that they have committed or were about to commit a cognizable offence. The report of the O/C Imphal Police Station to the Court was that the 3 persons were Naga Hostiles and that the O/C Tamenglong and Nungba Police Stations have been asked to submit N. F. I. R. under section 109, Cri. P. C. for prosecution. This report did not show what cognizable offence the 3 persons had committed or what reasonable suspicion existed that they have committed or were about to commit a cognizable offence.

8. If we compare section 4(c) of the Act with Sec. 54(1) First and Sec. 151, Cri P. C. it will be seen that the provision for the arrest under Sec. 4(c) of the said Act is similar to the provision under Sec. 54(1) First and Sec. 151, Cri. P. C. Under section 54(1) First Cri. P. C., there must be reasonable complaint or credible information or reasonable suspicion that the person has been concerned in any cognizable offence. Under Sec. 151, Cri. P. C. the arrest is to prevent the commission of a cognizable offence. In both those cases, there has to be investigation and the arrested person has to be produced before a Magistrate under Sec. 167, Cri P. C. if his detention is desired pending the investigation. In such a case, ordinarily action under section 109, Cri. P. C. is not contemplated, if we read Sec. 55, Cri. P. C. and Sec. 109, Cri. P. C. together, it will be seen that vagabonds, habitual robbers etc. could be arrested under section 55, Cri. P. C. and they can be proceeded against under Sec. 109, Cri. P. C. The provision for arrest under Sec. 55 by the Police is quite different from the provision for the arrest under Sec. 54(1) First and Sec. 151, Cri. P. C. It is only if the arrest is made under Sec. 55 that the question of proceeding against the arrested person under section 109, Cri. P. C. would arise. But the provision for arrest by the Army under Sec. 4(c) of the Act is not similar to the provision for the arrest under Sec. 55, Cri. P. C.

9. When a person is arrested under Sec. 4(c) of the Act and handed over to the Police or when a person is arrested by the Police under Sec. 54(1) First or under Sec. 151, Cri. P. C, he has to be produced before a Magistrate under Sec. 167, Cri. P. C., with a copy of the entries in the diary relating to the case and the Magistrate must proceed under

section 167 and decide whether he should be remanded or not pending Police investigation.

In our present case, no diary relating to the case was submitted at all, except the report which I have already referred to. It was the duty of the Police Officer to have produced in Court the report given under Sec. 5 of the Act by the Military. That was not done, evidently, because no further Police investigation regarding the commission of any cognizable offence was contemplated, but only action under Sec. 109, Cri. P. C. Thus this is a case where the Police treated the arrest as one under Sec. 55, Cri. P. C. In such a case when the arrested person is produced before the Magistrate under Secs. 61 and 167, Cri. P. C., no question of his detention in Jail would arise at all. There is no provision under Sec. 109, Cri. P. C. to detain a person in Jail pending proceedings under the said section. If a person is produced before a Magistrate for action under Sec. 109, Cri. P. C., what the Magistrate may do is to make an order under Sec. 112, Cri. P. C., setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the manner, character and class of sureties, if any, required. Thus, it is clear that this Magistrate had no authority under Sec. 167, Cri. P. C. to order the detention of the 3 persons produced before him.

10. What the Magistrate did in this case was much worse. In the first Police Report of the Police dated 17-8-1961, the Magistrate was not given any information which would permit him to initiate proceeding under Sec. 109, Cri. P. C. All that the O/C Imphal Police Station stated was that the O/C Tamenglong and Nungba Police Stations have been asked to submit N. F. I. R. under Sec. 109, Cri. P. C. It was not the fault of the arrested persons that the O/C of Tamenglong and Nungba Police Stations could not submit a N. F. I. R. under section 109, Cri. P. C. when they were produced before the Magistrate. The O/C Implal Police Station had no right to request the Magistrate to remand the arrested persons to Jail custody pending the receipt of the N. F. I. R. from the O/C Tamenglong and Nungba Police Stations.

I have already pointed out that even if the said N. F. I. R. had been received in time, the Magistrate cannot order the detention of the arrested persons under section 167, Cri. P. C., but that he can proceed only under Sec. 109, Cri. P. C., and direct the arrested persons to give surety pending further enquiry into the matter under Sec. 117, Cri. P. C.

11. The petitioner before me, pointed out to this Magistrate that he has not been informed as to the cause of his arrest and that a report should be called for from the Police and he should be released. It is a pity that this Magistrate and the O/C Imphal Police Station were ignorant of the fundamental right of a citizen as provided in Article 22 of the Constitution. It provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.

12. When, therefore the petitioner informed this Magistrate that he has not been told of the reasons for his arrest, the Magistrate should not have simply ordered his continued detention, but he should have seen to it that the petitioner was informed of the grounds of his arrest. If the Magistrate had himself looked into the matter, he would have seen for himself that no grounds for the arrest had been disclosed to him and that he had no authority to order detention.

It is indeed surprising that this Magistrate went on ordering the continued detention of the petitioner and the other two arrested persons fortnight after fortnight, when no report had been received from the Police stating the grounds for the arrest. It would look as if this Magistrate did not know that citizens had certain fundamental rights guaranteeing them freedom, which, it is the duty of Courts to safeguard. He behaved as if he was merely an agent of the Executive to help the Police in detaining persons in custody, as long as the Police wanted. It is high time that this Magistrate learnt that as a Court he cannot behave in this fashion.

13. The explanation of this Magistrate it that he was only a link Magistrate to the S. D. M., Tamenglong as per order of the District Magistrate and that remand reports had to be obtained from Tamenglong and Nungba Police Stations which was not convenient and so remands had to be considered and granted in anticipation of such reports and so the arrested persons continued to be remanded till 11-10-1961. The explanation only betrays that for this Magistrate, the convenience of the Police is of greater concern than the freedom of the citizen or the provisions of the Criminal Procedure Code.

When dealing with section 167, Cri. P. C. the Magistrate cannot look to the convenience of the Police to submit remand reports. The Court is dealing with the liberty of a citizen which is guaranteed under the constitution and it has to act according to the strict letter of the Law. If the Police do not transmit to the Court a copy of the entries in the diary relating to the case, to satisfy the Magistrate that investigation could not be completed within 24 hours and that there are grounds for believing that the accusation or information is well-founded, the Magistrate has no jurisdiction to direct the detention of the arrested person. It is a travesty of justice to order detention in anticipation of a remand report. It is seen in this case, that on many occasions no Police Officer was present and no remand report received and still the Magistrate went on ordering further remands of the arrested persons.

14. I am not able to understand what the District Magistrate meant by link Magistrates in his Order No. 5(J)-DM/61 dated Imphal, the 29th July, 1961. There is no provision for appointment of link Magistrates under the Criminal Procedure Code. It can at best only mean that one Magistrate has been given concurrent jurisdiction along with another Magistrate who may not be readily available. Even the so-called link Magistrate has to act under Section 167, Cri. P. C. and abide by the strict provisions of the said section.

15. There is no doubt in my mind that the detention of the petitioner and the other two arrested persons in this case was totally against law and they have to be directed to be released from Jail. I have already ordered their release pending final orders in this application and the said release order is hereby made absolute.

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Cross Citation :2004-ALLMR(CRI)-0-646 , 2004 (1) Crimes 202

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : S.B. Deshmukh, J.

Mohammad Asgar ....V/s....**State of Maharashtra**

Criminal Application 3355 of 2003 Of Dec 12,2003

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Criminal P.C. – Section 439 – Murder – No direct evidence of offence – Admission on the part of applicant before police regarding commission of offence could hardly a ground to deny a bail, even in murder case – Accused granted bail – If the accused belong to other state proper condition be imposed to secure his presence at the trial.

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(1.) HEARD learned Counsel Mr. Bhangde, as well as Mr. Sonare, learned A. P. P. for the respondent/state.

(2.) THE applicant had filed application below Exh. 3 in Sessions Trial No. 372/2003 pending in the Court of learned 4th Additional Sessions Judge of Nagpur for release on bail. The application filed by the applicant came to be rejected by order dated 20th September, 2003 by the learned 4th Additional Sessions Judge, Nagpur for release on bail. The application filed by applicant came to be rejected by the order dated 29th September, 2003 by the learned 4th Additional Sessions Judge at Nagpur and, therefore, the present application is filed by the original accused in S. T. No. 372/2003.

(3.) THE prosecution case in short is that, the deceased Khurshida Begum, was wife of the present applicant and was being ill-treated by the present applicant on account of demand of Splendor Motor Bike and Colour TV. The prosecution claims that prior to the date of incident for about 7-8 days she was not keeping well. According to the prosecution story the deceased Khurshida Begum is murdered by the present applicant. However, admittedly, there is no direct evidence so as to implicate the present applicant in the alleged murder of Khurshida Begum.

(4.) THE application filed on behalf of the present applicant, came to be rejected by the learned 4th Addl. Sessions Judge by a cryptic order. The learned 4th Addl. Sessions Judge in para No. 3 of the order observed that "no doubt it seems from the Post Mortem Report that the doctor has reserved opinion regarding the cause of death. However, admittedly the applicant himself had lodged report of incident with police, in presence of the two independent persons and admitted the guilt. " It seems that the alleged admission of guilt by the applicant weighed with the learned Addl. Sessions Judge while rejecting the application for bail. I am afraid that the admission on the part of the applicant regarding commission of the offence can be a ground to reject the application, especially in the absence of any other incriminating evidence regarding culpability of the applicant in the alleged offence. However, I have seen the reply and heard the learned A. P. P. Mr. Sonare who states that the applicant hails from Jharkhand State and in case of release he may not be available for trial of the Sessions Court, pending in the Court of learned 4th Addl. Sessions Judge, Nagpur. The learned Counsel for the applicant states that other accused are released and some of them are also co-accused in this case along with the present applicant and are residing with the applicant at Tajbagh, Nagpur. The learned Counsel states that the applicant may be released on imposition of some conditions regarding attending the Police Station. According to the learned Counsel the applicant undertakes to remain present as and when the learned Additional Sessions Judge has directed for the trial.

(5.) IN this view of the matter, and considering the fact that applicant hails from Jharkhand State, subject to conditions the applicant needs to be released on bail.

(6.) THE applicant is, therefore, directed to be released on bail, on executing P. R. Bond of Rs. 10,000/- and one surety in the like amount. The applicant is, however, directed to attend Police Station, Sakkardara, Nagpur, once in a week i. e. , on every Sunday in-between 9. 00 a. m. to 1. 00 p. m. , till conclusion of the trial.

(7.) THE applicant is permitted to furnish bail in the Court of the learned 4th Additional Sessions Judge, Nagpur

(8.) THE criminal application is disposed of accordingly.

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Cross Citation :1998-Cri.L.J.-0-2656

HIGH COURT OF JAMMU AND KASHMIR

Hon'ble Judge(s) : G.D.SHARMA,J

B.A. 93 Of 1997 Dec 26,1997

M.K.Jalali ….V/s….State of JAMMU and KASHMIR

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Bail – charges against accused having assets disproportionate to their known source of Income – Prevention of corruption Act section 5 (2) (e). The accused have statutory right to render explaination before the trial court – The apprehension that the accused will flee away if enlarged on bail cannot viewed with seriousness as they have deep root in the society and social status – The petitioner required to be admitted to bail.

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JUDGEMENT

(1.) ORDER :- The petitioner M.K. Jalali is a Superintending Engineer, in the Irrigation and Flood Control Department. The petitioner Bindraban Sawhney is an Inspector in Motor Vehicles Deptt. Cases under Section 5(2)(e) of the Prevention of Corruption Act 2006 have been registered against them under FIR No. 103/97 and 61/97 respectively. They are stated to have been taken into custody on 22-12-1997.

(2.) Through the medium of these petitions they have sought their release on bail by pleading that they have been co-operating with the investigating agency right from the date of the alleged raids and the investigating agency has not yet concluded that the property recovered from their possession is disproportionate to their known source of income. That they are respectable citizens and there is no likelihood of jumping the bail or misusing the concession of bail in any manner. The petitioner Bindraban Sawhney in addition has alleged that he is a diabetic patent and is entitled to bail because of ill-health. He has placed on record the medical prescriptions showing his sickness.

(3.) These petitions have been opposed by the prosecution by filing the objections wherein it is pleased that the Vigilance Organisation had preliminary clues for their possessing assets dis- proportionate to their known sources of income and on this basis secret enquiries were initiated. The raids were conducted in the premises occupied by them. Documents and articles have been seized and investigating agency requires some time for questioning the petitioners accused and interrogating them in order to know about their disproportionate assets possessed by them either on their own names or in 'benami' nature. These are economic offences against the society in general and the State in particular and deserve no leniency from the Court. The grant of bail will adversely effect the investigation. From the investigation it has to be ascertained whether the offence under Section 409, RPC is made out or not.

(4.) Regarding petitioner Bindraban Sawhney, it is stated that he is being provided medical aid and that the pass-books and cheque books recovered from his possession require verification.

(5.) Heard the arguments.

(6.) The learned counsel appearing for the petitions have contended that it is not the mere acquisition of property that constitutes an offence under Section 5(2)(e) of the Prevention of Corruption Act 2006, but it is the failure to satisfactorily account for such possession that makes the possession objectionable as offending the law. An accused person has a statutory right to account for during the investigation as well as during the trial and can be held guilty in case it is not satisfactorily accounted for. In support of these contentions learned counsel have cited the case of of M. Krishna Reddy v. State Dy. Supdt. of Police, Hyderabad, AIR 1993 SC 313 : (1993 Cri L.J. 308) and State of Maharashtra v. Ishwar Piraji Kalpatri, AIR 1996 SC 722 : (1996 Cri L.J. 1127). It is further pleaded by them that offence is not punishable with death sentence or imprisonment for life but the maximum penalty on conviction provided under law is seven years as well as fine and in this view of the matter, there is no legal embargo for the grant of bail. Rather the petitioners while remaining on bail will be in a better position to account for their alleged dis-proportionate assets before the Investigating agency as according to the showing of the investigating agency itself the investigation is at its initial stage. The petitioners are not habitual offenders but Government servants about whom there can be no possibility of jumping over the bail.

(7.) These arguments have been controverter by the learned Sr. AAG by pleading that the alleged offences against the petitioners are against the society in general because these are economic offences perpetuated against the State exchequer and the assets which have been found to be dis-proportionate could not be satisfactorily explained by them. Referring of the case of M.K. Jalali (B.A. No. 93/97), the learned Sr. AAG has contended that he was asked to co-operate with the investigation on 19th, 20th and 21st of Dec. 1997 but he was not sincerely co-operating and giving evasive replies which compelled the investigating agency to take him into custody on 22nd of Dec. 1997. That on search being conducted in the premises occupied by him an amount of Rs. 19,86,150/- was recovered in cash from his possession. That different pass books enumerated in the seizure-memos (list whereof is given at page 12 with the objections) show that the amounts are debited in the names of various persons and lying in different Banks. These pass books were found from the custody of the accused and still he has to account for. These seizure-memos also contained some FDRs and further investigation is also required

to be done as to the amount covered by them. Item No. 29 in the said seizure-memos pertained to the registration of a house situate in Trikuta Nagar and further enquiries are required to be made. Besides that, he has some immovable properties in the cities of Delhi and Srinagar and he has to be further investigated. The accused is a man of status having heavy purse with him who can tamper with the prosecution evidence as the persons whose pass-books have been seized from his possession are under the spell of influence and this Court in the case of Mazhar Ali Shah v. State, 1982 KL.J. 62 : (1982 Cri L.J. 1223), has laid down eight grounds which in his case weigh in favour of the prosecution and in that view of the matter the accused should be denied bail. Again in the case of Kunj Lal v. State, 1984 KL.J. 133 High Court declined the anticipatory bail on the plea that not fit case had been made out by the accused for that purpose. It has been further contended that these offences are against the society and required to be reviewed in the light of the law laid down in the case of N. Sasikala v. Enforcement Officer 1997 Cri L.J. 2127 where basing upon the ratio of case reported as AIR 1987 SC 1321 : (1987 Cri L.J. 1061), the bail was rejected. The ratio was that "the Community or the State is not a persona non-grata whose cause may be treated with disdain. The entire Community is aggrieved if the economic offenders who run the economy of the State are not brought to book."

(8.) Regarding application of Bindraban (B.A. No. 95/97) it has been admitted by the learned Sr. AAG that huge amount has not been recovered from his possession in the form of cash but nine pass-books and different banks deposits have been recovered from his possession. They are being looked into. These accounts are in the names of his kiths and kins and his retention of the account is required to be properly investigated. The withdrawals and deposits in the Banks also require verifications. Some deposits are made in the Post Office which also require verification.

(9.) Considering the respective contentions of the learned counsel for the parties it can be said that further detention of the petitioner-accused in the police custody is not required, who have been already with the investigating agency for the purpose of investigation since as the seized memos were effected on that date. Their further presence in the investigation has been admitted by the prosecution for 19th, 120th and 21st of Dec. 1997. The apprehension of the prosecution is that they will tamper with the prosecution evidence because the witnesses of the pass books are either their relations or under their influence and control. This argument has an element of future contingency which may happen or not. In case an accused person tampers with the prosecution evidence and he trial Court is satisfied on this aspect, the concession of bail can be withdrawn at any time. This argument is not relevant at this stage.

(10.) In the case of Ishwar Piraji Kalpatri (supra) the law laid down by the Apex Court in Veeraswami's case 1991 (3) SC 655 has been reiterated where it has been held that there is no provision in law or otherwise which makes it obligatory of an opportunity of being heard to be given to a person against whom the report is to be lodged. Rather, the law laid down is that the delinquent officer under Section 5(2)(e) of the Act has the right to satisfactorily explain about his assets and resources before the Court when the trial commences and not at an earlier stage. The burden of proof placed on the accused is an evidential burden though not a persuvasive burden. The Courts take into consideration the following questions for granting or refusing the bail which have been reiterated by this court in Mazhar Ali's case (supra) and the grounds are -

(a) the nature of the charge; (b) the nature of the accusation; (c) the nature of evidence in support of the accusation; (d) the severity of the punishment to which the accused may be subjected; (e) the danger of the accused abusing the concession of bail by way of absconding or tampering with the evidence.; (f) health, age and sex of the accused; (g) the social position er status of the accused and complainant party; and last but not the least (h) whether the grant of bail would thwart the course of justice.

(11.) The nature of the charge against the petitioners-accused is of having assets disproportionate to their known incomes and they have a statutory right to render explanation before the trial Court. The offence accused of is punishable with a maximum punishment for seven years with fine and minimum punishment of one year and with fine. The danger that the petitioners-accused will flee away in case enlarged on bail cannot viewed with seriousness as they have deep root in the society and social status.

(12.) Similar is the position to say that an admission to bail they would thwart the course of justice. In view of these facts and the circumstances no discussion is required on the subject as grant of bail is a rule and rejection an exception. Taking stock in all these facts and the circumstances the petitioners require to be admitted to bail.

(13.) Regarding the plea taken with regard to the registration of FIR against the petitioner M.K. Jalali in Kashmir it can be said that this offence can also be tried in Jammu. This controversy if raised will be solved by the trial Court after looking into the provisions of Sections 181, 182, Cr.P.C. and other relevant provisions and it cannot be said that this Court has no jurisdiction to entertain the petition.

(14.) In view of what has been stated above, the petitions are, therefore, accepted and the petitioners-accused are admitted to bail on their furnishing bail bonds and personal bonds in the sums of Rs. 50,000/- each of the satisfaction of the Registrar (Judl.) with two sureties. The petitioners-accused shall co-perate with the investigation of the case as and when required, they will not tamper with the prosecution evidence in any manner and not leave the territory of the State of J. and K. without the prior permission of the trial Court. Petition allowed.

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Cross Citation :2000 Cri. L. J. 4660, 2000-AIR(SCW)-0-3349

SUPREME COURT OF INDIA

Hon'ble Judge(s) : K.T.THOMAS,M.B.SHAH,JJ

ABDUL HAMIT ANSARI ....Vs....State of Maharashtra

Criminal Appeal 295 Of 2000,

SPECIAL LEAVE PETITION (CRIMINAL) 3923 Of 1999 Mar 16,2000

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Cr. P.C. Sec. 438 - Anticipatory Bail – Murder case – IPC 302, 149 – Accused name not in F.I.R. – The appellant was included amongs others as a result of further investigation – He is not named in F.I.R. – The appeallant be directed to be released on bail if he surrender before Police.

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JUDGEMENT

(1.) Leave granted.

(2.) We know that this is a case under Section 302 of the Indian Penal Code read with Section 149. Though the police was not able to trace out the culprits at the first stage of the investigation, pursuant to the petition filed by the widow of the deceased further investigation was conducted and the names of the present appellants are also now included among the suspected persons. We came across the antecedents of the deceased which appellants described as 'dreaded'. Nontheless, we are not inclined to give a pre-arrest bail order to the appellants. At the same time considering all the pros and cons of this matter we are of the view that some relief must be granted to the appellants in view of the peculiar facts and circumstances of the case. We, therefore, dispose of this appeal with the following directions :

(1) If appellants would surrender before the police within 2 weeks from today, we direct the Investigating Officer to complete the interrogation of the appellant concerned as expeditiously as possible. On completion of interrogation and recovery of material object, if any, such appellant shall be released on bail on his executing a bond in a sum of Rs. 5,000.00 with two solvent sureties each to the satisfaction of the Investigating Officer.

2. Appellants shall abide by the condition, inter alia, that no threat shall be exerted on any of the witnesses nor any evidence be tampered with. We also make it clear that if any of the appellants misuses the bail we permit the Investigating Officer or even the aggrieved person to move the Sessions Court or the High Court under Section 439(2) of the Code of Criminal Procedure for cancellation of the bail. With these observations, this appeal is disposed of.Order accordingly.

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Cross Citation :2010-JT-6-498 , 2010-TLPRE-0-407

SUPREME COURT OF INDIA

Hon'ble Judge(s) : V.S. Sirpurkar AND Cyriac Joseph, JJ.

Vijeta Gajra Vs State of NCT Of Delhi
CRIMINAL APPEAL NOS. 1182-1184 OF 2010
Arising out of SLP (Crl) 6091-6093 of 2009 Jul 08,2010

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Bail - Sec. 482 of Cri. P.C. and Art. 226 of the Constitution of India - Penal code (1860), Ss. 498-A, 406 – F.I.R. against petitioner who is not relative of husband – S. 498-A does not get attracted – Allegations against petitioner – about not returning jwellery which belonged to the complainant Held, The

allegations are extremely wild and disgusting – In such cases interests of accused required to be protected – The petitioner accused would not be required to attend the proceedings unless specifically directed by the court to do so and that too in the case of extreme necessity – Similarly no step shall be taken against her – She shall be granted bail by the court trying the case – The Trial Court shall be careful while considering the framing of charge – The appellant shall not be tried for offence u.s. 498 – A of I.P.C.

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JUDGEMENT

(1.) Leave granted.

(2.) The appellant herein challenges the order passed by the High Court whereby the petition filed by her was dismissed. The said petition was filed under Article 226 of the Constitution of India read with Section 482 of the Criminal Procedure Code for quashing the FIR No. 138/08 dated 07.08.2008 for offences under Section 498A and 406, Indian Penal Code in the Chitranjan Park Police Station.

(3.) This FIR was lodged by one Gunjan Sujanani, wife of one Rohit Sujanani. It is a long document wherein the complainant Gunjan Sujanani stated about her marriage with Rohit on 08.07.2003 and he being a resident of Nigeria. It was claimed that before the marriage, Rohit had introduced Gunjan to one Mr. Sham and Mrs. Lavina Daswani as his foster parents and also said that he had two foster sisters, namely, Vijeta Daswani (Vijeta Gajra-the appellant herein) who is a resident of Indore, Madhya Pradesh and the other being one Ms. Ritika Daswani, who resided with her mother in London. There are allegations made about the demand of dowry against the husband as also Mrs. Lavina Daswani. The demand included diamond neckless for Vijeta Daswani/Gajra. There was reference to subsequent behaviour of troubling the complainant on account of the dowry demands. The First Information Report also made some allegations regarding the relations of her husband Rohit Sujanani with Mrs. Lavina Daswani and Vijeta Daswani/Gajra, the present appellant. It was then contended that in December, 2003, when the complainant had gone to Sierra Leone, Vijeta Dasawani/Gajra took away her diamond encrusted heavy gold pendant and chain and earring set on the pretext that she wanted to wear them once and she would keep them at a safe place in her father's house. The complainant also stated that she did not return these ornaments. Further, it was stated that in May, 2004, Mr. Rohit Sujanani and Mrs. Lavina Daswani insisted that the complainant should keep her jewellery in London and claimed that she was slapped by her husband on her refusal. It was further claimed that in November, 2004, the present appellant, Vijeta Gajra got married during which the complainant had to beg for her ornaments for attending the marriage. There was a reference in the FIR to the misbehaviour on the part of Mrs. Lavina Daswani towards her and again the name of the present appellant figured therein. At this time, the complainant claimed that she was pregnant for the first time and yet she was given physical and mental ill treatment because of which she had a mis-carriage. There is a reference to the sexual behaviour of her husband with reference to a pornographic website. It was claimed that the complainant delivered a baby on 08.03.2007. Then there is reference to the appellant visiting and staying with the complainant's parents for three days and the allegation that her husband was having sexual relations with Vijeta Gajra, the

appellant herein and Mrs.Lavina Daswani. There was a reference that during her stay the appellant was wearing the diamond encrusted pendant and gold chain and earring set which she had taken (practically stolen) in Sierra Leone.

(4.) In the last part of this lengthy FIR, there was a reference to the demand of two crores of rupees having been made by Vijeta and her mother over the phone to the complainant as a cost of peace and marital happiness. There was a reference to a telephonic conversation with Mrs. Lavina Daswani in this regard. There was a further reference to an ugly scene on account of arguments. However, there was also a reference to the presence of the brother of the complainant on account of which further ugly scenes were avoided. It was complained that, thereafter, the complainant and her parents tried to contact Rohit Sujanani and the Daswanis who were avoiding them and not returning jewellery which was with Vijeta Gajra, Lavina Daswani and Rohit Sujanani.

(5.) This complaint dated 15.04.2008 seems to have been registered as an FIR. It seems that on the basis of this FIR, the appellant was sent a summons under Section 160, Cr. P.C. and she moved the Court of Additional Sessions Judge, New Delhi under Section 438 Cr.P.C. for grant of anticipatory bail. In that application, she had made a reference to the summons asking her to appear on 05.06.2008. It was claimed in the application that the complainant's husband Rohit Sujanani was an employee of appellant's father who has business in Sierra Leone and that he was employed on contract basis for the period of three years in 1994. It was claimed in that application that the appellant had met the complainant last in 2007. It was also stated that the allegations made in the FIR were concocted, false and baseless and she had no connection whatsoever with the family of the complainant or her parents. She complained that her own marriage was being tried to be destroyed by wild allegations. There was a reference made in this application by the appellant for quashing the summons arising out of the complaint dated 15.04.2008 and also to a Criminal Miscellaneous Petition No. 2153 of 2008. The High Court had passed the order disposing it of since the State's Counsel had agreed to provide copy of the complaint and had further stated that in the event the FIR was registered, the applicant would be informed of this fact and no coercive action would be taken against her till then. In her application there was a statement that she did not even belong to the family of the complainant, her husband or any of their relatives and that all the allegations were palpably false. It was then stated that the writ petition was filed which came to be disposed of by the High Court. It seems that the complainant sought the direction to implead herself in the writ petition-cum-Section 482 Cr.P.C application filed by the appellant.

(6.) Following are the prayers in the said writ petition under Article 226 of the Constitution of India read with Section 482, Cr.P.C.:

(a) Quash the FIR NO. 138/2008 dated 07.08.2008 under Sections 498A/406, IPC at Police Station Chitranjan Park registered against the petitioner; b) Direct the police not to take any coercive action against the petitioner in respect of the above said complaint: c) Pass such other and further orders which may be deemed fit and proper in the facts and circumstances of the case."

It is on this backdrop that we have to see as to whether it would be expedient to continue the criminal prosecution against the appellant.

(7.) Shri U.U. Lalit, Learned Senior Counsel, appearing on behalf of the appellant argued that in U. Suvetha v. State By Inspector of Police and Anr. [(2009) 6 SCC 757], it was specifically held that in order to be covered under Section 498A, IPC one has to be a 'relative' of the husband by blood, marriage or adoption. He pointed out that the present appellant was not in any manner a 'relative' as referred to in Section 498A, IPC and, therefore, there is no question of any allegation against her in respect of the ill-treatment of the complainant. The Court in this case examined the ingredients of Section 498A, IPC and noting the specific language of the Section and the Explanation thereof came to the conclusion that the word 'relative' would not include a paramour or concubine or so. Relying on the dictionary meaning of the word 'relative' and further relying on R. Ramanatha Aiyar's Advance Law Lexicon, Volume 4, 3rd Edition, the Court went on to hold that Section 498A, IPC being a penal provision would deserve strict construction and unless a contextual meaning is required to be given to the statute, the said statute has to be construed strictly. On that behalf the Court relied on the judgment in T. Ashok Pai v. CIT [(2007) 7 SCC 162]. A reference was made to the decision in Shivcharan Lal Verma and Anr. v. State of M.P. [(2007) 15 SCC 369]. After quoting from various decisions of this Court, it was held that reference to the word 'relative' in Section 498A, IPC would be limited only to the blood relations or the relations by marriage.

(8.) Relying heavily on this, Shri Lalit contended that there is no question of any trial of the appellant for the offence under Section 498A, IPC. The argument is undoubtedly correct, though opposed by the Learned Counsel appearing for the State. We are of the opinion that there will be no question of her prosecution under Section 498A, IPC. Learned Senior Counsel appearing on behalf of the complainant, Shri Soli J. Sorabjee, also did not seriously dispute this proposition. Therefore, we hold that the FIR insofar as it concerned Section 498A, IPC, would be of no consequence and the appellant shall not be tried for the offence under Section 498A, IPC.

(9.) That leaves us with the allegation under Section 406, IPC for the offence of criminal breach of trust as there are allegations in respect of the jewellery. We desist from saying anything at this juncture. We also desist from going into the correctness or otherwise of these allegations as they will have to be proved by evidence. Shri Lalit pointed out that on the face of it the allegations are wild and baseless as the appellant herself comes from a wealthy background and is a married lady having settled down in Indore and is also mother of a child. He pointed that the FIR is calculated to destroy her marital life with the wildest possible allegations and, therefore, we should quash the entire FIR as not being bona fide and actuated by malice.

(10.) There can be no doubt that the allegations made are extremely wild and disgusting. However, how far those allegations can be used to meet the requirements for the offence under Section 406, IPC is a moot question. For obvious reasons, we will not go into that exercise. Whatever the form in which the allegations under Section 406, IPC are made, the fact of the matter is that there is an FIR and the Court concerned has taken cognizance thereof. Under these circumstances, we would only protect the interest of the appellant by directing that she would not be required to attend the proceedings unless specifically directed by the Court to do so and that too in the case of extreme necessity. Similarly, no coercive step shall be taken against her. She shall be granted bail by the Court trying the case if it decides to try the offence by framing the charge. We expect the Court to be careful while considering the framing of charge.

(11.) We, therefore, hold that the appellant shall not be tried for offence under Section 498A, IPC. However, we desist from quashing the FIR altogether in view of the allegations made under Section 406, IPC with the protection that we have granted to the appellant. With these observations, the appeals are disposed of.

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Cross Citation :1991 Cr. L.J. 950, 1990-ILR(Del)-2-203 , 1992-CCR-1-708

HIGH COURT OF DELHI

Hon'ble Judge(s) : R.N.PYNE, P.N.NAG,JJ
Satish Kumar Sharma ….V/S…Delhi Administration
Criminal 265 Of 1990 Nov 11,1990

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Article 226 of constitution of India – Even if the offence is committed outside the jurisdiction of the High Court – The High Court can grant anticipatory bail even by using provisions of Article 226 of the constitution of India.

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JUDGEMENT

(1.) To be heard today with the consent of both the parties.

(2.) The petitioner Captain Satish Kumar Shanna, a resident of Delhi is a member of the Parliament and owes allegiance to Indian National Congress. He actively campaigned in Amethi Parmentary Constituency for Sh. Rajiv Gandhi, for mer Prime Minister of India, during the Parliamentary Elections held in November, 1989 and Sh. Rajiv Gandhi won this, Parliamentary seat by a margin of more than 2,00,000 votes.

(3.) Shri SanJay Singh, who was earlier a sitting Congress (1) M.L.A., defected from the party and joined the Janta Dal. On the ticket of Jaata Dal he fought from Amethi Assembly Constituency but lost to the Congress candidate, viz., Harcharan Singh Yadav by a big margin, with the result, he became very inimical to the petitioner.

(4.) On 23-11-1989 at about 3.00 P.M. some unfortunate violent incident took place between Janfa Dal and the Congress workers and it appears there was a cross firing in which Shri Sanjay Singh received bullet injuries. F.I.Rs. were lodged by both the parties and cross cases were registered with the police station Munshi Ganj U/S 147, 148. 149 and 307 Indian Penal Code being case Crime No. 182 of 1989 and 182-A of 1989.

(5.) F.I.R. Crime No. 182 of 1989 was registered at the instance of Shri Ashish Shukla at about 345 n.m. on 22-11-1989 at P.S. Munshi Ganj in which allegation was that Shri

Sanjay Singh fired with his rule as a result of which persons, namely- Manoj Kumar, Satya Narayan Yadav, Sitla Prasad etc. were injured.

(6.) F.I.R. Crime No. 182-A of 1989 was registered at aboat 6.45 A.M. on 23-11-1989 at the instance of Shri Jai Parkash Singh H.C. 24 according to which Shri Sanjay Singh sustained injuries. However, the assailants were unknown. In both the F.I.Rs. the name of the petitioner was not mentioned.

(7.) After investigation, first a charge sheet was filed in Court of CJM Sultanpur on 16-2-1990 in case Crime No. 182-A of 1989 U/S 147, 148, 149, 307, 302, 504 Indian Penal Code which was followed by two supplementary charge sheets dated 6-4-1990 and 7-5-1990. la all these three charge sheets the petitioner was not chargesheeted although it is stated in the return that the name of the petitioner was mentioned therein as an accused person against whom the investigations were pending. In these charge sheets there were 19 accused persons court whom 15 have already been enlarged on bail by the Sessions Judge, Sultanpur.

(8.) According to the petitioner, there is absolutely no case against him. In fact, no complicity in the crime was alleged against him from November, 1989 1st week of February, 1990. After Shri Sanjay Singh who returned from London after his treatment on 1st February. 1990 at his behest, pressure and undue influence the case against the petitioner was cooked up by the police and C.I.D of U.P. It has been alleged that Sanjay Singh is the brother's son-in-law of Shri V. P. Singh, the present Prime Minister of India and is very close of him; and, as such he is exercising tremendous influence on the Government of U.P. including CID and Police of U.P. as a result thereof he has been able to fabricate a false case against the petitioner after his return from England. As already mentioned, Shri Sanjay Singh is doing so out of political vendetta as he considers the petitioner responsible for his defeat in his Assembly constituency in Amethi. In fact he is determined to humiliate the petitioner by getting him arrested and paraded in the streets.

(9.) According to the petitioner, there is no evidence to connect him with the commission of the crime nor was his name mentioned in the FIR. That is why no charge sheet U/S 173 Criminal Procedure Code . could be submitted in the Court by the police till 21-5-1990 although three charge sheets in the. case were already submitted in the Court by fie police. This case was fabricated at the instance of Shri Sanjay Singh and police investigating Team added section 120-B Indian Penal Code . in the charge sheet already filed before the C.J.M., Sultanpur on the basis of evidence already recorded. No challan could be put up against the petitioner without any fresh evidence. Section 173 is a very important step as it requires investigation to be completed without unnecessary delay and in this case the petitioner has been. charge sheeted after six months.

(10.) After 7th May, 1990 when the last charge sheet was filed in Court and the petitioner, at that stage, as well was yet to be chellaned, the respondents, under undue pressure from Shri Sanjay Singh got non-bailable warrant issued on 14-5-1990 from Chief Judicial Magistrate, Sultanpur against the petitioner which was endorsed to the Commissioner of Police, Delhi for execution. After the said warrant of arrest was brought to Delhi and again endorsed in favour of various Delhi Police Functionaries like Additional Commissioner of Police, Deputy Commissioner of Police, Assistant Commissioner of Police and finally to Inspector of Police of P.S. Mehrauli who was authorised to execute the warrant and consequently to effect the arrest of the petitioner in Delhi within the

jurisdiction of Delhi High Court. Since the petitioner was about to be arrested and deprived of his liberty he was constrained to file the present dvil writ petition under Article 226 of the Constitution for restraining' the respondents from arresting the petitioner in case Crime No. 182-A/89 P.S. Munshi Ganj,Distt. Sultanpur, U.P. In this writ petition the petitioner has also prayed for quashing the proceedings in Case Crime No. 182-A/89 and the Warrant of arrest issued by C.J.M. Sultanpur against him. During the course of arguments, however, Mr. Bhardwaj learned counsel for the petitioner, did not press for quashing of proceedings and the impugned warrant although the arguments were addressed by him that there was no legal justification for the magistrate for issuing of such impugned warrant. However, he confined himself only to the prayer of restraining the respondents from arresting the petitioner and for enlarging him on the anticipatory bail.

(11.) The petitioner has also brought to our notice that he has also challenged the charge sheed and connected proceedings submitted before the Magistrate in the High Court of Judicature at Allahabad-Lucknow Bench-and a notice has been ordered to be; issued by that Court. Further proceedings have also been stayed. Certified copy of the order dated 25-6-1990 has been placed on record.

(12.) Respondents 2 and 3 have denied that the case has been fabricated out of political vendetta and under undue influence of Shri Sanjay Singh. They have also raised preliminary objections about the maintainability of the writ petition. The respondents have raised preliminary obfections that this court has no territorial jurisdiction to entertain the civil writ petition under Article 226 of the Constitution of India; that the petitioner has an alternate remedy under the Criminal Procedure Code : and parallel proceedings have been initiated in the Lucknow Bench of Allahabad High Court. The writ petition therefore is not maintainable.

(13.) At the very outset Mr. Yogeshwar Prasad, learned counsel for respondents 2 and 3 vehemently submitted that this court has no territorial jurisdiction to entertain this petition as. according to him the cognizable oftence is alleged to have been committed in the State of Uttar Pradesh and such an offence can ordinarily be enquired into by the court in whose jurisdiction the offence has been committed. The jurisdiction with regard) to the grant of anticipatory bail, therefore, can only be exercised by the court in the State of Uttar Pradesh having jurisdiction in the matter.

(14.) As similar question arose before this court in Pritam Singh vs. State of Punjab (19-(1981) DLT 300)(1) where a cognizable offence was alleged to have been committed in the State of Punjab whereas the anticipatory bail was applied for before the Delhi High Court as the accused had reasonable apprehension of arrest in Delhi. In that context this Court observed that there is nothing in Section 438 which restricts the jurisdiction of the High Court or the Court of session. One need not mix up the jurisdiction relating to cognizance of an offence with that of granting of bails. Bails are against arrest and detention. Therefore, an appropriate court within whose jurisdiction the arrest takes place or is apprehended or is contemplated will also have jurisdiction to grant bail to the person concerned. If the court of session or the High Court has the jurisdiction to grant interim bail, then the power to grant full anticipatory bail will emanate from the same jurisdiction. Concurrent jurisdiction in courts situated in different States is not outside the scope of the Cr. P. C. It is not possible to divide the jurisdiction under Section 438 Criminal Procedure Code . into an ad interim and complete, but it permissible if it is so expedient or desirable, for any of the courts competent to take cognizance of and to try an offence and the courts

competent to grant bails or grant anticipatory bail for a specified period only, and hereby this Court rejected the contention of the State of Punjab with regard to jurisdiction of the High Court of Delhi for the grant of anticipatory bail in respect of cognizable offence alleged to have been committed in the State of Punjab. Consequently, the petition for anticipatory bail was allowed finally and not as an interim measure.

(15.) In B. R. Sinha and others vs. The State (1982 Cri. L.J.61(2) the Division Bench of the Calcutta High Court also expressed the same view and observed that the High Court has jurisdiction to entertain an application for anticipatory bail of a petitioner who resides within the jurisdiction of High Court, though he apprehends arrest in connection with a case which has been started outside the jurisdiction of such Court.

(16.) This question also came up for consideration before the Karnataka High Court in Dr. L. R. Naidu vs. State of Karnataka (1984 01. L.J. 757)(3) wherein the Karnataka High Court expressed similar views that Section 438 provides relief to person apprehending arrest. A beneficial provision like Section 438, is required to be considered in favour of the citizen. There is nothing in the provisions of Section 438, suggesting that it is only the High Court or the Sessions Court, within whose jurisdiction, the case against the person apprehending arrest is registered that can grant bail. Therefore, the person apprehending arrest can seek bail in the High Court or the Sessions Court within whose jurisdiction, he ordinarily resides even though the offence in respect of which arrest is apprehended and case has been started was committed outside the jurisdiction of that Court (in another State).

(17.) A Division Bench of the Bombay High Court in N.K. Nayar and others vs. State of Maharashtra and others (1985 Cri. L.J. 1887)(4) again held that the provisions for the grant of anticipatory bail are contained in Section 438 of the Criminal Procedure Code . An application for such type of bail can be made to the High Court or to the Court of Sessions whenever a person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. Thus the real cause for making an application under Section 438 is the contemplated arrest of a person. If this arrest is likely to be effected within the jurisdiction of this Court, the concerned person should have the remedy of applying to that Court for anticipatory bail.

(18.) However, in Syed Zafrul Hassan and another vs. State (1986 Cri. L.J. 605x5) the Full Bench of Patna High Court has struck a dissenting note and held that Section 438 of the Code does not permit the grant of anticipatory bail by any High Court or any Court of Session within the country where the accused may choose to apprehend arrest. Such a power vests only in the Court of Session or the High Court having jurisdiction over the locale of the commission of the offence of which the person is accused. Question of residence of accused is irrelevant in such a case. This judgment, in fact, was heavily relied upon by Mr. Yogeshwar Prasad, learned counsel for respondents 2 and 3 and it was contended that this court has no jurisdiction to grant anticipatory bail to the petitioner and the reasoning adopted by him was the same as was adopted in that case for the proposition that the jurisdiction can be cxercised only. by the High Court or Court of Sessions where the offence is alleged to have been committed.

(19.) In the light of what is discussed above, the consensus view of various High Courts that emerges is that the High Court or Court of Sessions within whose territorial jurisdiction the person has a reasonable apprehension that he would be arrested shall have

concurrent jurisdiction to grant anticipatory bail. We agree and endorse this consensus view and more particularly the view expressed by our High Court in Pritam Singh's case (supra). With respect, we find ourselves unable to agree with the views expressed by the Patna High Court.

(20.) In order to determine whether or not the High Court or the Court of Sessions within whose territorial jurisdiction a person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, it is necessary to reproduce Section 4? 8(1) as under :-

"438(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit. direct that in the event of such arrest, he shall be released on bail."

(21.) A bare perusal of the Section reveals that no restrictions for grant of anticipatory bail have been imposed in Section 438(1) for exercise of jurisdiction by that High Court or Court of Sessions within whose territorial jurisdiction a person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. On the other hand. such High Court or Court of Sessions has been conferred jurisdiction to exercise such power. It is no doubt true that the High Court or the Court of Sessions within whose territorial jurisdiction the offence has been committed and within whose jurisdiction the offence ordinarily be enquired into and tried by a Court shall also have the jurisdiction to grant anticipa tory bail. But this does not take away the jurisdiction of the High Court or Court of Sessions to grant anticipatory bail where a person has reason to believe that he would be arrested in connection with non-bailable offence. Section 438(1) is wide enough to confer jurisdiction not only to the High Court or the Court of Sessions within whose territorial jurisdiction the offence has been committed and is to be enquired into and tried but also the High Court or the Court of Sessions where a person has reason to believe that he may be arrested in connection with the commission of non-bailable offence. By taking away the jurisdiction from the High Court or the Court of Sessions for the grant of anticipatory bail within its territorial jurisdiction in respect of a person who may be arrested in connection with non-bailable offence would be reading certain words in the section which are not to be found therein. At the cost of repetition no restriction whatsoever has been placed for exercise of power by the High Court or the Court of Sessions for the grant of anticipatory bail within whose territorial jurisdiction if a person has reason to believe that he may he arrested in connection with non-bailable offence. The purpose for which this beneficial provision of anticipatory bail was introduced in the Code of Criminal Procedure, 1973 has been referred to by the Supreme Court in para 8 of Gurbaksh Singh Sibbia vs. State of Punjab AR 1880 S.C. 1632(6) Para 8 of that judgement is reproduced below :-

"No one can accuse the police of possessing a healing touch nor indeed does anyone have misgivings in regard to constraints consequent upon confinement in police custody. But, society has come to accept and acquiesce in all that follows upon a police arrest with a certain amount of sang-froid, in so far as the ordinary rule of criminal investigation is concerned. It is the normal day-to-day business of the police to investigate into charges brought before them, and, broadly and generally. they have nothing to gain, not favours at any rate. by subjecting ordinary criminals to needless harassment. But the crimes, the criminals and even the complainants can occasionally possess extraordinary

features. When the even flow of life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism. The powerful processes of criminal law can then be perverted for achieving extraneous ends. Attendant upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of a respectable person in hand-cutts, apparently on way to a court of justice."

Further, in para 26 of that judgment the Supreme Court has further held that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the preunuption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provision constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. These observations have been made in the context that earlier the view taken was that the power of granting anticipatory bail was somewhat extraordinary in character and in exceptional cases it should be granted. Having regard to the object and the purpose for which this beneficent provision was enacted by way of amendment in 1973 in the Code of Criminal Procedure and more particularly no restriction whatsoever has been imposed by the legislature in Section 438 which takes away the jurisdiction of the High Court or Court of Sessions within whose jurisdiction a person has reason to believe that he may be arrested in connection with non-bailable offence and in the light of the observations of the Supreme Court in this context, we have no hesitation to hold that Section 438(1) confers concurrent jurisdiction in the High Court and the Court of Sessions to enlarge a person on anticipatory bail within whose jurisdiction a person has reason to believe that he may be arrested on an accusation of having committed non-bailable offence.

(22.) Viewed from different angle, under Article 226 of the Constitution the High Court has been given still wider powers. Under Article 226(2) it has been provided that the power conferred byclause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such persons is not within those territories. In the present case, the facts are undisputed that on the basis of a non-bailable warrant for the arrest of the petitioner issued by C.J.M. Sultanpur the petitioner is sought to be arrested in Delhi by execution of the said warrants by the Commissioner of Police, Delhi to whom the warrant was endorsed by the C.J.M. Sultanpur. In other words, the petitioner is sought to be deprived of his personal liberty and threatened to be arrested in Delhi within the jurisdiction of High Court of Delhi and through the police officers of Delhi to whom the warrant has been endorsed, although the offence is alleged to have been committed in the State of Uttar Pradesh. Therefore, it cannot be disputed that since there is a threat of deprivation of liberty of the petitioner in the State of Delhi in connection with an offence alleged to have been committed in the State of Uttar Pradesh, the cause of action in part certainly arises in Delhi. Therefore, this Court has jurisdiction in the matter irrespective of the seat of the Government or the High Court within whose jurisdiction the offence is alleged to have

been committed. Therefore, in the light of the discussion above, we have no doubt in mind that since the petitioner has reason to believe that he may be arrested on an accusation of having committed a non-bailabte offence in Delhi, this Court has certainly the jurisdiction to enlarge the petitioner on anticipatory bail under Section 438 of the Code of Criminal Procedure as well as under Article 226 of the Constitution.

(23.) In the case of S.M.D. Kiran Pasha vs. Government of Andhra Pradesh and others, (1990) 1 S.C.C. 328(7), Supreme Court has clearly held that for protection of fundamental right of personal liberty guaranteed under Artcile 21 of the Constitution of India from its threatened and imminent violation writ petition under Article 226 is maintainable.

(24.) The next preliminary objection raised on behalf of respondents 2 and 3 was that the petitioner should have availed of alternate remedies under Criminal Procedure Code . and he should be directed to avail of those remedies and this petition should be thrown out on this ground alone. Thfs submission of Mr. Yogeshwar Prasad is wholly devoid of any force. When there is imimnent/ urgent threat of deprivation of personal liberty of a citizen, he cannot be asked to avail of the alternate remedies in such a situation as in this process he may actually be arrested and therefore, such remedy will, therefore, neither be adequate nor efficacious.

(25.) It was again straneously urged that the petitioner has started parallel proceedings in the Lucknow Bench of the Allahabad High Court wherein he has sought the quashment of the proceedings of the charge sheet and trial under Section 482 of the Code of Criminal Procedure as according to the petitioner no case has been made out against him under Section 147, 148, 149, 307 Indian Penal Code . As already stated, the prayer made in this writ petition for quashing of the proceedings has neither been pressed nor argued on merits and in fact have been dropped by counsel for the petitioner. Counsel for respondents 2 and 3 has also not addressed this Court on merits. In the face of this there is no question of starting any parallel or of pending proceedings before the Lucknow Bench of Allahabad High Court. In such a situation, there is no question of any parallel proceedings. This contention, therefore, must also fail.

(26.) What should be the consideration for the grant of anticipatory bail which has again been the subject-matter in Gurubaksh Singh Sibbia's case (supra). In that case, in substance, it has been observed that grant of anticipatory bail should be left to the discretion of the High Court or the Court of Sessions as no fixed principles can be laid down for the grant of such bail as two cases are never similar and the Cr. P.C. cannot provide for all the eventualities where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment the court, the primary inquiry is whether a recognizance or bond would effect that end. For the purpose of grant of bail the accused petitioner must have reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. The belief must be reasonable and not vague or fanciful or imaginative. Normally, in the matters of bail, the grant of bail is a rule and refusal is an exception. In regard to anticipatory bail the Supreme Court has further observed :

"In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object

being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail, he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as ait inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numberous to enumerate, the combined effect of which must weight with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail."

(27.) In the present case, it may be noted that the petitioner had reason to believe that he was going to be arrested on an accusation of having committed a non-bailable offence; that the warrant had been issued by C.J.M. Sultanpur and endorsed to the Commissioner of Police. Delhi for execution of the warrant and Police Station Mehrauli was about to execute the warrant and thereby arrest the petitioner; that the investigation in this case was already over even at the time when the warrant was issued on 14-5-1990 and the charge-sheet has already been submitted in the court of C.J.M. Sultanpur on 21-5-1990. Already 3 charge-sheets on 16-2-1990, 6-4-1990 and 7-5-1990 have been presented before C.J.M. Sultanpur and in these charge sheets, the petitioner has not been challaned. These three charge sheets have been filed against 19 accused. All of them have already been enlargd on bail by the Court of Sessions Judge, Sultanpur, and the High Court of 'Judicature at Allahabad, Lucknow Bench. There is no question now of any interference in the investigation of police. The petitioner's name does not find place in the F.I.R. The petitioner is an M.P. and has deep roots in the society and there is no likelihood of being absconding or tampering with the witnesses who are all residents of U.P. In case he is released on bail it can safely be said that he will appear in court as and when required and he will not jump out the bail. He is a respectable man of the Society and is not a pre-convict.

(28.) The offence alleged against the petitioner appears to be of conspiracy under Section 120B read with other offences which is not so heinous a crime. Furthermore, it is settled low that the challan has to be put before magistrate/court of sessions, without unnecessary delay. In the present case the challan has been put up against the petitioner after six months, more particularly after the presentation of three charge sheets in respect of other 19 accused persons, more particularly when the evidence has already been collected and there is no further evidence available with the prosecution for implicating the petitioner in the commission of the crime at such a belated stage.

(29.) So, having regard to the antecedents, character of the petitioner, nature of offence and overall background and all other surrounding circumstances. We are of the firm view that the petitioner deserves to be enlarged on anticipatory bail.

(30.) What conditions should be imposed on the petitioner, including the personal bond and sureties ? In this connection the case of Hussainara Khatoon and others Vs. Home

Secretary. State of Bihar, Patna (AIR 1979 SC 1360) (8) may be referred to. In that case it has been held that even under the law as it stands today the courts must abandon the antiquated concept under which pretrial release is ordered only against bail with sureties. That concept is outdated and experience has shown. that it has done more harm than good. The new insight into the subject of pretrial release which has been developed in socially advanced countries and particularly the United States should now inform the decisions of our Courts in regard to pretrial release. If the Court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is not likely to abscond it can safely release the accused on his personal bond.

(31.) In the present case the undisputed facts, as already mentioned, are that the petitioner is an M.P. and enjoys respectable status and presumes to be in good financial condition. There is nothing against his reputation, character and monetry condition. The very fact that he is a Member of (Parliament shows that he is a respectable member of the community who would watch for his reliability and that he has deep roots in. the community which would deter him from fleeing from the process of the court. In these circumstances, the ends of justice would be fully met if the petitioner is released on the personal bond of Rs. 10,000 in the event of his arrest.

(32.) The next question that may arise is as to whether the petitioner should be granted anticipatory bail for a limited period till he approaches the magistrate of Uttar Pradesh who has also jurisdiction in the matter. In this connection we may again refer to Gurbaksh Singh's case (supra) wherein the Supreme Court has laid down that the normal rule should be not to limit the operation of the order in relation to a period of time for the grant of anticipatory bail. In the prevent case, the investigation is complete, charge-sheets have been presented before the court and only trial has to be held. The grant of bail is only ensure that the petitioner attends the trial regularly and. therefore, there is no question of interference in the investifiation. Furthermore, this Court has taken the view with which we are respectfully in agreement that the concurrent Jurisdiction has been conferred on courts under Criminal Procedure Code . The appropriate court within whose jurisdiction the petitioner apprehends arrest will also have jurisdiction to the grant of bail to the person concerned. Concurrent jurisdiction is courts situated in different States is not outside the scope of the Code of Criminal Procedure. It is not possible to divide the jurisdiction under Section 438 Criminal Procedure Code into an ad interim and complete. Therefore, even this Court has got concurrent jurisdiction to grant bail in respect of the offences which arc to be tried in the Slate of Uttar Pradesh. Normally, we wouH have granted antlcipatory bail for some period and asked the petitioner to apply for permanent bail before competent court of jurisdiction in Uttar Pradesh. But, since in this case the investigation is already over and, in fact, charge-sheets have also been filed before the competent court and there is apprehension in the mind of the petitioner that in the peculiar facts and circumstances of the case that in Uttar Pradesh where the offence would be enquired into and tried, there is likelihood of the petitioner being humiliated in the eyes of people. In such circumtances and situation it would be appropriate and expedient in the interest of justice to grant him anticipatory bail till the conclusion of the trial.

(33.) We, therefore, allow this petition and enlarge the petitioner on anticipatory bail in the criminal case being Crime No. 182A/89 pending in the Court of C.J.M., District Sultanpur, U.P., and further direct that in the event of his arrest, the petitioner shall be released on his furnishing a personal bond fur a sum of Rs. 10,000 to the person/officer

effecting his arrest for the petitioner's appearance before the concerned court. After the personal bond is furnished by the petitioner, as directed, the same shall be sent thereafter to the Court of C.J.M., District, Sultanpur U.P.

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Cross Citation :2006-DLT-134-390, 2006-AD(Del)-7-589

HIGH COURT OF DELHI

Hon'ble Judge(s) : S.N.AGGARWAL, J
K. Jayram ….V/s…State
BAIL APPLN 3008,3009 Of 2006 Aug 30,2006

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Anticipatory Bail – I.P.C. 406, 409, 420. 467, 468, 471, 120 B – Petitioner Director of the company – Complainant company signed MOU – Contract with petitioner – Failure to fulfil promise – Security deposit of complainant not returned – Held, Dispute is purely of civil nature – The tendency in the business circles to convert purely civil disputes in to criminal cases highly deprecated by Supureme Court – Co-accused already granted bail – Petitioners also entitled to be released on Anticipatory Bail.

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JUDGEMENT

(1.) (ORAL) Exemption granted subject to just exceptions. Bail Appln.No.3008-09/2006 and Crl.M.A.No.8780/2006 Notice. Mr. Sunil Sharma, APP for the State, accepts notice of this application on behalf of the respondent. Mr. Lalit Kumar, Advocate is also present on behalf of the complainant.

(2.) This bail application is opposed by the learned APP for the State. He has opposed this bail application on the ground that the amount of alleged cheating involved in this case is quite huge and that other CandF Agents appointed by the petitioners have also filed similar complaints against him in the State of Gujrat, Kerala and West Bengal.

(3.) The facts relevant for the decision of this bail application are as follows:- The petitioners are accused of offences under Section 120B/406/409/420/467/468/471 IPC in case registered against them vide FIR No.736/2005 with Police Station Punjabi Bagh. The Petitioner No.1 is the Chairman of a company called India Household and Health Care Ltd. (hereinafter referred as IHHL) which was doing the business of importing the health care and household goods of South Korean company named LG House Hold and Health Care Ltd. (hereinafter referred as M/s LGHHL) into India. The Petitioner No.2 is the wife of the Petitioner No.1 and a Director of the above named company called IHHL which has been accused by the complainant for cheating and defrauding.

(4.) The complainant M/s Akshatha Services Pvt. Ltd. was appointed as Clearing and Forwarding Agent (CandF Agent) by the IHHL when the IHHL was at the advance stage of discussion to acquire exclusive marketing rights for Indian territory for the Fast Moving Consumer Products (FMCG) with the above named South Korean company LGHHL. An agreement dated 01.06.2004 between IHHL and the complainant company is Annexure A-1 at Page 18 of the paper book.

(5.) On 01.11.2003, the LGHHL had entered into a Memorandum of Understanding (MOU), annexed as Annexure A-2 at page 58 of the paper book. As per the terms of the MOU, the LGHHL had appointed IHHL as its sole representative, importer and licensee for the import, promotion, sale and marketing of the whole range of Fast Moving Consumer Goods of LGHHL. The said MOU contemplated the achievement of sale of products of LGHHL by IHHL worth 4.5 million USD in two years and had an automatic renewal clause based on the performance. The LGHHL had acted upon the MOU and exported its products to India from their factories in Korea, Vietnam. All the products were emblazoned with LG logo along with the name of IHHL printed as sole licensee.

(6.) In order to promote the business, IHHL had appointed several Clearing and Forwarding Agents. The complainant on whose complaint the present FIR was registered against the petitioners and others is one of such CandF Agents. In continuation of the MOU, the LGHHL had executed a License Agreement with the IHHL on 08.05.2004 crystallizing the rights and liabilities of the parties. A copy of the said License Agreement is at pages 67 to 90 of the paper book.

(7.) It is contended that pursuant to the aforementioned MOU and the License Agreement, the IHHL had invested huge amount to the tune of Rs.500 Crores on promotion, advertisement, creation of the network of distributors and established 23 warehouses across the India, 4 Regional Headquarters, one Corporate Office, appointed 23 major CandF Agents and also created other nation wise infrastructure. It is further contended that under the MOU, the IHHL had given a purchase commitment of 2 million USD for the year 2004-05 and 2.5 million USD for the year 2005-06. However the IHHL had achieved the entire target of 4.5 million USD in just 7-8 months and had purchased products worth 4.5 million USD from LGHHL by August, 2004 The contention of the counsel for the petitioner is that the achievement of the target by the IHHL in such a short time had unearthed the potential of the Indian Market and it has polluted the minds of the officials of LGHHL and on that count LGHHL allegedly started to distant itself from IHHL since September, 2004 onwards. the LGHHL had instructed the IHHL to put on hold the business on the pretext that a serious internal dispute regarding the use of LG logo had arisen in the company and further instructed to put on hold the business until the confusion pertaining to the use of LG logo was resolved within the LG Company. The LGHHL thereafter terminated all business relations with IHHL through a legal notice dated 05.02.2005 sent to IHHL. In the aforesaid notice the stand taken by LGHHL was that the documents viz. the MOU dated 01.11.2003 and the License Agreement dated 08.05.2004 are null and void as the same were executed on behalf of LGHHL by working level officers who were junior in rank to the Management. The counsel for petitioner has contended that the LGHHL official who had signed the contract with IHHL had also signed the contract with many other countries also. He has referred to page 118-A to 118-I of the paper book (Annexure-A-6-A) to show the copy of one such Agreement.

(8.) The learned counsel for the petitioners has argued that the petitioners and the Management of IHHL had done all that was possible to sort out the problem but on account of unilateral termination of the contract of IHHL by LGHHL, the IHHL ran into huge losses on account of unexpected and unforeseen situation created by LGHHL. It is submitted that the IHHL has filed an arbitration agreement before the Supreme Court and the dispute arising out of unilateral termination of its contract by LGHHL is presently pending in the Supreme Court where a prayer has been made for referring the same to the panel of arbitrators. The counsel has further contended that the LGHHL has colluded with the complainant in order to defeat and circumvent the claim of the IHHL for the unfortunate and most arbitrary termination of the contractual relationship with IHHL by the LGHHL. The FIR in question registered against the petitioners is alleged to be the outcome of that collusion between LGHHL and the complainant company. The counsel for the complainant has contended that the complainant company was induced by IHHL to make a security deposit of Rs. 1.5 crores on the pretext that the complainant was going to be appointed as CandF Agent for LG Company. This contention is denied by the learned counsel for the petitioners. At this stage, the learned APP for the State has contended that the goods supplied by M/s IHHL to the complainant company were of sub-standard quality and the complainant had asked IHHL to take it back and to return the security deposit of the complainant. It is submitted that neither the goods were taken back by IHHL nor the security amount of the complainant was refunded to it.

(9.) The learned counsel for the petitioners has also argued that Vijay R. Singh, Managing Director of IHHL was arrested and he was admitted to regular bail by the Court of Shri O.P. Gupta, ASJ, Rohini, Delhi. In the bail order of petitioners' co-accused Vijay R. Singh, it is mentioned that the dispute between the parties seems to be of civil nature. It is also mentioned in the bail order pertaining to Vijay R. Singh that the genuineness of the documents by and between LGHHL and IHHL is not in dispute, rather the I.O. confirms having verified the same. The bail order in relation to petitioners' co-accused Vijay R. Singh is at pages 152-153 of the paper book. The learned counsel for the petitioners has urged that the petitioners are also entitled to be admitted to bail applying the principle of parity as their co-accused Vijay R. Singh has already been admitted to bail by the Sessions Court.

(10) The learned counsel for the petitioners has also argued that Vijay R. Singh, Managing Director of IHHL was arrested and he was admitted to regular bail by the Court of Shri O.P. Gupta, ASJ, Rohini, Delhi. In the bail order of petitioners' co-accused Vijay R. Singh, it is mentioned that the dispute between the parties seems to be of civil nature. It is also mentioned in the bail order pertaining to Vijay R. Singh that the genuineness of the documents by and between LGHHL and IHHL is not in dispute, rather the I.O. confirms having verified the same. The bail order in relation to petitioners' co-accused Vijay R. Singh is at pages 152-153 of the paper book. The learned counsel for the petitioners has urged that the petitioners are also entitled to be admitted to bail applying the principle of parity as their co-accused Vijay R. Singh has already been admitted to bail by the Sessions Court.

(11.) The learned APP for the State has disputed the parity claimed by the petitioners. He has submitted that the petitioners' co-accused Vijay R. Singh was granted bail by the Sessions Court after he remained in custody for 45 days. According to him since the petitioners are asking for anticipatory bail, they cannot claim parity with their co-accused Vijay R. Singh. The learned APP has also contended that the custodial presence of the

petitioners is required for making recovery of account books and other related documents of the company M/s IHHL from them. He has also submitted that the petitioners' co-accused Vijay R. Singh has stated in his disclosure statement that the petitioner No.1 alone can tell where security deposit of the complainant worth Rs.1.5 crores has gone and for that purpose also the custodial presence of the petitioner No.1 is required. The learned APP has further submitted that the petitioner No.1 despite orders of the Court in his first anticipatory bail application has not co- operated in the investigation. He has said that except for once the petitioner No.1 did not appear before the I.O. for his interrogation. This submission of the learned APP implies that the petitioner No.1 had attended the inquiry into the case before the I.O. at least on one occasion. The contention of the learned APP that custodial presence of petitioner No.1 is required for making recovery of the account books and other related documents of IHHL does not hold any water. I am of the view that if the I.O. could not recover the account books of IHHL from the Managing Director of the said company though he remained in police custody for five days, how could recovery of account books be made from the petitioner No.1.

(12.) In G. Sagar Suri v. State of UP, 2000 (2) SCC 636, the Supreme Court has observed as under:

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence, criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. for the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

(13.) In M/s. Indian Oil Corporation v. M/s. NEPC India Ltd. and Ors. (Criminal Appeal No. 834/2002 decided on 20.7.2006), the Supreme Court has observed that there is a growing tendency in the business circles to convert purely civil disputes into criminal cases on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interest of lenders/creditors.

(14.) The ratio of law laid down by the Supreme Court in the aforementioned two judgments squarely applies to the facts of the present case. In this case also, it prima-facie appears that the complainant company has filed the FIR in question against the petitioners to convert a business dispute of purely civil nature into a criminal case. I am further of the view that in case the petitioners have done any criminal wrong for which FIR in question is registered against them, they can be punished as per law after the trial against them is over. Both the petitioners seeking their anticipatory bail in the present case have roots in the society. There is no apprehension of their absconding the trial. In my view, the petitioners cannot be denied bail particularly when their co-accused Vijay R. Singh has already been admitted to bail.

(15.) In view of the above and having regard to all the facts and circumstances of the case, the petitioners are admitted to anticipatory bail on their executing bail bonds in the sum of Rs.5 lacs each with two sureties each in the like amount to the satisfaction of the concerned Arresting Officer and subject to the further condition that they shall not leave the country without prior permission of the Court. The petitioners are directed that they shall join the investigation as and when called by the I.O. Order dasti to both sides.

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Cross Citation :2001-Cr L. J. -0-3739, 2001-Crimes-3-409

HIGH COURT OF ORISSA

Coram : M.PAPANNA,J
Prof.D.N.Rao ....**V/s.... State**
Cri Misc. Case 3412 Of 2001, Jul 06,2001

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Cr. P. C. 438 – Anticipatory Bail – Delay in lodging in F.I.R. Sections 295, 354, 500, 506, 509, 34 of IPC – Documents shows that the victim tried to falsely implicate the accused – FIR lodged after a delay of 1 year – Charges made are not free from doubt Accused entitles to be granted anticipatory bail.

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JUDGEMENT

(1.) This is an application for an anticipatory bail moved by the petitioners before this Court for invoking its jurisdiction under S. 438 of the Code of Criminal Procedure.

(2.) Facts of the case relevant for the purpose of its adjudication are delineated concisely hereunder.

(3.) At Bhubaneswar there is an Institute known as Xavier Institute of Management (in short, 'the Institute'). It is Center for Development Research and Training (in short, the 'CENDERET'). One Miss. Bharati Ray (in short, 'the victim') happens to be a Senior Programme Manager of the Institute. Petitioner No. 1, D N. Rao (in short, 'Mr. Rao') acts as a coordinator of the Institute. Petitioner No. 2 Mrs. Swapna Harison is his Secretary whereas petitioner No. 3, Dr. Latha Rabinderan is the Professor of the said Institute. The victim alleges a series of incidents of sexual harassment and misbehavior meted out to her by Mr. Rao. He addresses her always openly as well as in official discussions as "you are just like use and throw pen, rotten apple and rotten fish". He, in a discussion, accused her once, saying that when she was proceeding on leave she was spending time with Director and keeping illicit relationship. On many occasions he directed her to stay in the office beyond office hours and also come to office on holidays. On protest, he directed her to go to distant places like Koraput or Malkangiri even if there was no need to go there (sic) particularly when other male colleagues in the office are sitting idle. After publication of news regarding sexual harassment caused by him to other lady employees of the Institute in newspapers like 'Adhikar' and 'Pratishruti', he passed indecent and filthy remarks like

you bloody idiot hand in glove with this publication". He has also sent a number of times, some letters containing a lot of sexually coloured languages and then wiped out immediately. He has appealed her a number f times for his lust for sex. And for having failed in his attempts, he officially puts her to a number of difficulties. Whenever, he comes to her single room at Cenderet Building he always sits close to her in spite of her objections. He has touched her body a number of times on pretext of seeing her necklace or how she wears her saree. He talks always regarding sex and sexual objects of lady members, thereby creating a lot of embarrassment for her. On protest he becomes violent and with grudge tries to put her to a lot of difficulties during official transaction. He threatened to evaluate her performance and C.C.R. as poor and transfer her to Koraput or Keonjhar. Sometimes he has threatened her to remove from service with the help of Director of the Institute. Though she reported to the previous Director regarding the aforesaid misdeeds of Mr. Rao but in vain. At last she intimated the said Director about her trauma and harassment through her lawyer but of no use. Though on 26-6-2000 he wrote her a letter stating that he would take care of her case for further action but at the same time he had sent another envelope containing nude picture of a lady super-imposing her official photo with it. In the said envelope the Director has written in his own hand as "Ms. Bharati Ray, CENDERET" at the back of the seminude picture. The Director (GYANERATHINAM) has written in his own hand as "to his daughter from Gautam Budha". The said Director was removed from the post of Director by the Governing Body of the Institute and in his place the present Director has joined. So at last out of fear of suspension and removal from service she brought a writ in O.J.C. No. 6555 of 2000 before this Court to issue direction to the State Government to provide her protection from being sexually harassed by the petitioners and to cause enquiry into her allegations and take appropriate action against the perpetrators. It is alleged by her that during dependency of the writ application petitioner no. 3 at the direction of Mr. Rao pressurised her to withdraw the same. She also threatened her with dire consequences if she does not agree to her suggestions. Similarly, petitioner No. 2 pressurised her to withdraw her case from the High Court. She has also threatened her to beat with chappels unless she agrees o her suggestions. It is also alleged that Mr. Rao is always giving threats to her life and properties for which she is passing her days with apprehension and fear. The victim further alleges that on 25-1-2001 Mr. Rao scolded her through intercom phone saying " you are a prostitute. How long you will survive I will see. Your days are numbered". On her information with the aforesaid allegations Chandrasekharpur P.S. Case No. 64 of 2001 under Ss. 294/354/500/506/509/34, IPC was registered and investigation of the caseis now in progress for which the petitioners are apprehending their arrest by the police. Hence, the application for anticipatory bail is made by them with a prayer to admit them to bail in the event of their arrest by the police.

(4.) In this case the petitioners are represented through their counsel, Shri Ashok Kumar Mohanty. Learned Advocate Shri N.C. Panigrahi is appearing for the victim and the Additional Standing Counsel is representing the State. The petitioners' counsel submits that the allegations made against the petitioners are false and frivolous. According to him, the allegations as reflected in the FIR do not constitute the offences in the Indian penal code. It also contended by him that the victim claims for her promotion and as she was not found suitable for promotion she is making various allegations falsely in the colour of sexual harassment against the petitioners. The learned counsel for the victim, on the other hand, vehemently opposes to grant anticipatory bail to the petitioners on the facts and in the circumstances of the case. He relies on a series of decisions of this court as well as the Hon'ble Apex Court in Support of his contentions. The learned Additional Standing Counsel

appearing for the State has rendered assistance to this Court supplying the case diary during the course of hearing on the matter.

(5.) Provision of S. 438, Cr. P.C. which empowers the High Court or the Court of Session to grant anticipatory bail to a person apprehending arrest is quoted below :

"(1) When any person has reason to believe that he may be arrested on an accusation or having committed a non-bailable offences, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail xxx xxx xxx"

(6.) The above provision of law as contemplated under S. 438, Cr. P.C. is very clear. It says that an applicant seeks for anticipatory bail when he apprehends his arrest on the accusation that he has committed a non-bailable offence. It gives a very wide discretion to the High Court as well as the Court of Session to exercise while dealing with anticipatory bail. The discretion has to be exercised very cautiously and judiciously but with not whims and caprice. Therefore, in exceptional cases only, this extraordinary power conferred by S. 438, Cr. P.C. has to be invoked. Thus, the Court has to bear in mind a basic principle while allowing or rejecting a prayer for anticipatory bail. The principle is, every individual has a right to his personal liberty. When It is curtailed or in jeopardy he has a remedy under S. 438, Cr. P.C. Such an individual is entitled to the benefit of presumption of innocence, since on the date of making application for anticipatory bail he is not convicted for the offence in respect of which he seeks bail. In the background of the facts of the case, keeping in mind, the aforesaid basic principle, hearing at length the submissions of the learned counsel appearing for the parties, I am called upon to adjudicate the application for anticipatory bail.

(7.) I have gone through the FIR lodged by the victim alleging that the petitioners in furtherance of their common intention have subjected her to sexual harassment and misbehaviour for which she brought a writ in OJC No. 6555 of 2000 before this Court, who while deciding the said writ application came to hold that there is no complaints committee legally constituted by the Institute in terms of the guidelines issued by the Apex Court in AIR 1997 SC 3011 : (1997 Lab IC 2890) (Vishaka v. State of Rajasthan) and therefore, the opp. parties were directed to constitute such a committee in terms of the said guidelines. The committee has to look into the allegations of sexual harassment and to find out whether such allegations constitute sexual harassment or not? When the committee examines the victim's allegations she can adduce evidence before the committee to substantiate the same. After the committee submits enquiry report in terms of the guidelines issued by the Apex Court holding that allegation made by the victim are found to be correct, then only action should be taken against the offenders.

(8.) In this case the petitioners are represented through their counsel, Shri Ashok Kumar Mohanty. Learned Advocate Shri N.C. Panigrahi is appearing for the victim and the Additional Standing Counsel is representing the State. The petitioners' counsel submits that the allegations made against the petitioners are false and frivolous. According to him, the allegations as reflected in the FIR do not constitute the offences in the Indian penal code. It also contended by him that the victim claims for her promotion and as she was not found suitable for promotion she is making various allegations falsely in the colour of sexual harassment against the petitioners. The learned counsel for the victim, on the other hand, vehemently opposes to grant anticipatory bail to the petitioners on the facts and in

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(12.) Shri N. C. Panigrahi, learned counsel appearing for the victim has referred to AIR 1999 SC 625 : (1999 Lab IC 918) (Apparel Export Promotion Council v. A. K. Chopra), wherein the Apex Court has ruled that High Court should not normally interfere with either the factual findings regarding guilt or with penalty or punishment imposed by departmental authorities. In the reported case the delinquent, a superior officer wasfound guilty of molesting and of having tried to physically assault a subordinate female employee. On such findings, the departmental authorities awarded him punishment of

dismissal from service. The Delhi High Court interfered with the said order of punishment of dismissal on the ground that since delinquent had not "actually molested" and had "not managed" to make physical contact with her, the punishment of removal from service was not Justified. But the Apex Court reversed the order of the Delhi High Court. The Apex Court has found that conduct of delinquent, a superior officer, was wholly against moral sanctions, decency and was offensive to female subordinate's modesty. It is held, for mere want of actual assault or tough by delinquent, his conduct does not cease to be outrageous and it amounts to sexual harassment. Shri Panigrahi, being fortified with this ruling contends that in the case at hand Mr. Rao has actually molested the victim with whom he made physical contact and misbehaved with her in different manner for which his conduct amounts to sexual harassment which is nothing but outrageous.

(13.) Shri N.C. Panigrahi, while vehemently opposing to grant bail to the petitioners also relied on the decisions in Gurucharan Singh v. State of Punjab and Sanjay Malhotra v. State of Punjab, both reported in 2000 Cr L.J. at pages 4480 and 4481 (Punjab and Haryana High Court) and also Tarachand v. State of Himachal Pradesh reported in 2000 Cri L.J. 3764 (Himachal Pradesh High Court) in support of his contention.

(14.) I have carefully gone through the above rulings where facts of the reported cases are found quite distinguishable from the facts of the present case. In AIR 1999 SC 625 : (1999 Lab IC 918) (supra) the respondent was placed under suspension. He was charge-sheeted. But he denied the allegations made against him. He asserted that the said allegations are imaginary, and motivated. In the Departmental proceeding drawn against him, the Disciplinary Authority appointed an Enquiry Officer to conduct an enquiry into the charges framed against him. During enquiry, oral and documentary evidence was adduced on behalf of both the sides. The Enquiry Officer basing on the documentary and oral evidence and the circumstances of the case held him guilty. Basing on his findings, the Disciplinary Authority imposed a penalty of removing him from service with immediate effect. However, in the present case a Complaints' Committee was constituted on 23-9-1999. The Committee was consisted of seven members out of whom, five were ladies and it was headed by a woman. Admittedly, one of the women members of the Committee enquired into the allegations of the victim and submitted a report stating that the allegations made against Mr. Rao are not genuine. The victim filed a writ petition in OJC No. 6555 of 2000 before this Court which held that though the above Committee was constituted but it neither includes an N,G,O. nor a body familiar with the issue of sexual harassment in terms of the guidelines issued by the Apex Court. Moreover, the Committee as a whole did not enquire into the allegations of the victim and instead a woman member of the Committee who is also an employee in the Institute and subordinate to Mr. Rao enquired into the allegations and submitted the report. This Court did not accept the said report. It issued directions to the Institute for reconstituting the Complaints Committee by including either an NGO or other body familiar with the issue of sexual harassment of the victim to examine the allegations and submit a report. The Institute was also directed to amend the Rules and Regulation relating to conduct and discipline of the employees and to provide for appropriate penalty in such a Rule against the offender in terms of the guidelines issued by the Apex Court within a period of three months from the date of communication of the order. This Court also instructed the Institute to take action against the offender in terms of Clauses IV and V the Guidelines issued by the Apex Court, if the Complaints Committee finds the allegations made by the victim to be correct. Admittedly, the Complaints Committee was reconstituted as per the guidelines issued by the Apex Court but during enquiry into the allegations of the victim, she did not adduce evidence on

her behalf and instead she challenged the Complaints Committeeon the ground that Mrs. Swapna Harisan and Mrs. Latha Ravindran should not have been included in the Committee as its members as they are the supporters of Mr.Rao and as such she would be highly prejudiced if the Committee is allowed to enquire into her allegations. That apart, she disputed inclusion of one Dr P. Jasodhara as thirdparty member of the Committee as she is neither an NGO nor a body familiar with the Issue of sexual harassment. But the complaints committee headed by Mrs. Geeta Devi constituted on 20-1-2000 as per the direction of this Court enquired into the allegations of the victim as reflected in the writ application and lawyers notice. The victim's oral evidence could not be recorded as she refused to adduce her oral evidence on the above ground. Statement of Ex-Director of the Institute and statement of Mr. Rao were recorded. The Committee after making analysis of victim's various allegations as reflected in her complaint petition submitted its report on 13-3-2001 stating that her allegations are nothing but irrational allegations having no grain of truth. The Committee has opined that the allegations are totally false and fabricated. They are false, malicious and motivated to defame Mr. Rao. The Committee intimated her about the result of the enquiry with a warning that she should not make false allegations in future or else appropriate action shall be taken against her. Therefore the victim had no alternative except lodging an FIR in question as contended by Mr. Panigrahi.

(15.) In the case of Vishaka v. State of Rajasthan (supra) (AIR 1997 SC 3011), the Apex Court has provided remedial measure to safeguard the interest of female employees at their work place against sexual harassment caused by the superior officers in the office. In the present case the Complaints Committee constituted in terms of the guidelines of the Apex Court has submitted its report after enquiring into the allegations of the victim holding that the allegations made by her are not correct and genuine. But now the bone of contention is if the allegations made by the victim constitute specific offences under the Indian Penal Code.

(16.) Shri N. C. Panigrahi also contends that the conduct of the petitioners amounts to offences punishable under Ss. 294, 354, 500, 506, 509 and 34 of the Indian Penal Code. Though the attention of the previous Director of the Institute was drawn to the illegal and objectionable conduct of the petitioners he did not initiate appropriate action in accordance with law by making a complaint with the appropriate authority for which she was obliged to set the Criminal law into motion by lodging the FIR in question before the Police authority. Referring to 1996 Cri Law Journal 381 : (AIR 1996 SC 309) (Mrs. Rupan Deol Bajaj v. Kanwar Pal Singh Gill) he has contended that in the criminal proceeding initiated on her FIR prima facie case is made out under Ss. 294, 354, 500, 506, 509 and 34, IPC against the petitioners. According to him ingredients of all the aforesaid offences are present in the instant case and as such the petitioners are not entitled to anticipatory bail. In his opinion, it is a clear case of outraging the modesty of women. In the reported case of Kanwarpal Singh Gill, the Apex Court held that apart from the offence under S. 354, IPC an offence under S. 509, IPC has been made out on the allegation contained in the FIR as the words used by gesture made by Mr. Gill was intended to insult the modesty of Mrs. Bajaj. Their Lordships have observed that Mr. Gill is a top-most official of the State Police indecently behaved with Mrs. Bajaj, a Senior Lady I.A.S. Officer in the presence of gentry and in spite of her raising objection continued with his such behaviour. According to their lordships, offence relating to modesty of women is not a trivial offence.

(17.) In the reported case of 2000 Cri L.J. 4480 and 2000 Cri L.J. 4481 (supra) Punjab and Haryana High Court refused to exercise jurisdiction of the Court u/S. 438, Cr.P.C. in

granting anticipatory bail to the petitioner because in the former case the petitioners tried to cheat the persons who belong to the weaker section of the society and matters are yet to be investigated whereas in the latter case there was serious allegation of bigamy and cruelty made against the petitioner. On the other hand, in the case of Mrs. Rupan Deol Bajaj v. Kanwar Pal Singh Gill reported in 1996 Cri L.J. 381 : (AIR 1996 SC 309) (SC) Mr. Gill not only behaved indecently and repeatedly with Mrs. Bajaj in spite of her protection in presence of other dignitaries but also he slapped her on the posterior in the full presence of ladies and gents. Here, undoubtedly intention or knowledge of the offender is the main ingredient of any offence and the same is to be proved like other ingredients for convincing a person. At the same time. intention being state of mind has to be proved by direct evidence or it may have to be inferred from the attending circumstances of a given case. In the instant case, it is to be seen whether Mr. Rao intended to outrage her modesty orknew it to be likely that he would thereby outrage her modesty. In the present case, the victim was no doubt at liberty to start a criminal proceedings also by the by against wrong doers. Immediately after the occurrence had she actually suffered humiliation because of the alleged sexual harassment and misbehaviour caused to her by Mr. Rao and others. For getting Mr. Rao punished by the disciplinary authority she brought a writ application, but of no use. The complaints Committee looked into her allegations of sexual harassment and reached a conclusion that she is making a false and fabricated allegations against the petitioners. Her allegations as reflected in the FIR are not free from modification, exaggeration and embellishment, for which the petitioners are entitled to the benefit of presumption of innocence and moreover, on the date of making application for anticipatory bail they were not convicted for the offence in respect of which they seek bail. In fact in the writ application in OJC No. 6555/2000 she has referred to letter dated 8-3-1999 on "International Women's Day" addressed by her lady colleagues of the Institute to the Director indicating how they were subjected to sexual harassment by Mr. Rao by not giving them promotion. In their representation to the Director dated 8-3-1999 they have alleged that Mr. Rao made sexual coloured statement against them by commenting always that unmarried women staff are more competent than the married women staff. This does not actually amount to sexual harassment.

(18.) In the writ application it is mentioned that Mr. Rao unnecessarily and without any basis accused the victim in front of others that she is hand in glove with the publication of sexual harassment caused by him towards lady employees of the Institute when it was published in News-papers "Adhikar" and "Pratisruti". But in the FIR in question the victim has added the words such as "you bloody idiot" to "hand in glove with this publication". In the writ application, the allegation that he has appealed her a number of times for satisfying his lust for sex is not there but the same finds place in the FIR. Similarly, in the writ application the allegation that he has touched her body a number of times on the pretext of seeing her necklace or how she wears her saree, is not there but it is there in the FIR. In the writ application it is mentioned that in a meeting on 5-6-2000 Mr. Rao made remarks against the victim that while she was staying on leave, she was frequently coming and passing time with the Director whereas in the FIR she has mentioned the said remarks with addition of the words "keeping illicit relationship". In the writ application, she has mentioned that Mr. Rao refers to the petitioner and her lady colleagues such as "rotten apple", "rotten fish" and "use and throw pen" and the same is also mentioned in the FIR in an exaggerated manner as if specifically directed against her.

(19.) I have kept in view the scope of power of the Court under S. 438, Cr. P.C. coupled with the legislative intention behind such provision while adjudicating this application

under S. 438, Cr. P.C. In the Constitution Bench decision of the Apex Court In the case of Gurbaksh Singh Sibia v. State of Punjab, AIR 1980 SC 1632 : 1980 Cri L.J. 1125 and subsequent three Judge Bench decision in the case of Poker Ram v. State of Rajasthan, AIR 1985 SC 969 : 1985 Cri L.J. 1175, it is held that the Court should be loathe to exercise discretion and grant anticipatory bail to the petitioner. In the present case, I have found from the attending circumstances that prosecution has been launched by the victim by setting criminal law into motion after about an year of the occurrence with some addition or modification or embellishment in the prosecution case. In this regard, the intention of the legislature is very clear. There is a need for granting anticipatory bail. It arises mainly because the victim has tried to implicate the petitioners in criminal case for the purpose of degrading them or for other purposes by getting them detained in the jail custody. That apart, in the facts and circumstances of the case, I am of the considered view that the petitioners who are entitled to the benefit of presumption of innocence of the accusation made in the FIR by the victim are entitled to anticipatory bail particularly when the nature of charges levelled against the petitioners are not free from doubt and also do not constitute specific offences under the Indian Penal Code.

(20.) With the aforesaid observation, I exercise my judicial discretion judiciously in favour of the petitioners while granting them anticipatory bail. Accordingly, it is directed that in the event of their arrest in Chandra Sekharpur P. S. Case No. 64/2000 they shallbe admitted to bail on their furnishing bail bonds for Rs. 5000/- (Rupees five thousand each with one surety each for the like amount to the satisfaction of the officer effecting the arrest.The Criminal Misc. Case is disposed of.Urgent certified copy of this order be granted on proper application. Order accordingly.

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Cross Citation :2009-CRI.L.J.-1031

HIGH COURT OF KERALA

Hon'ble Judge(s) : Mrs. K. HEMA, J.

RAJEEVAN ….V/s….STATE OF KERALA
Aug 08,2008

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Cr. P.C. 438, 437, 439 – Anticipatory bail – Refusal of anticipatory bail is no ground to refuse regular bail to accused under Sec. 437 or 439. – Considerations for grantirng anticipatory regular bail are different than that of regular bail.

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JUDGEMENT

(1.) THE petitioner is the sole accused in a case involving offences under sections 279 and 337 of IPC, which is pending before the Magistrate Court. He failed to appear in Court, in disobedience of summons issued from the Court, and hence non-bailable warrants were

issued against him. Proceedings under Sections 82 and 83 of the Code of Criminal Procedure Code ('the code', for short) were also initiated against him, to proclaim him as an absconding accused. He, therefore, apprehends arrest and hence, this application for anticipatory bail.

(2.) ON hearing both sides and on a reading of section 438 of the Code, and on consideration of the object of the said provision, i find that anticipatory bail cannot be granted to petitioner mainly for three reasons: (i) apprehension of arrest of petitioner is not on accusation of having committed any non bailable offence, since the offences involved are only bailable offences; (ii) the arrest sought for is consequent to lawful non-bailable warrant issued by a Court having jurisdiction since the accused failed to appear on receipt of summons issued by the court; and (iii) discretionary relief under section 438 is not intended to be extended in favour of a person who absconded and against whom, coercive steps are initiated by a Court, as per law, to secure his presence.

(3.) SECTION 438 of the Code reads as follows :

"438. Direction for grant of bail to person apprehending arrest.- (1) When any person has reason to believe that he may be arrested on an accusation of having com-mitted a non-bailable offence, he may apply to the High Court or the Court of Sessions for direction under this Section; and that court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. (2) When the High Court or the Court of session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, in-cluding- (i) a condition that the person shall make himself available for interrogation by a police officer as and when required; (ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer; (iii) a condition that the person shall not leave India without the previous permission of the Court. (iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that Section. (3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under subsection (1)"

(4.) A reading of Section 438 of the Code shows that primarily, two factors must exist to invoke Section 438, to grant anticipatory bail. The Court must be satisfied that (i) there is a reason to believe that the petitioner may be arrested and that (ii) such apprehended arrest is on accusation of his having committed a non-bailable offence. Only if both these factors exist, the Court may grant anticipatory bail. But, in cases where those twin conditions do not exist, the Court shall not grant anticipatory bail under Section 438 of the Code.

(5.) IN this case, petitioner has reason to believe that he may be arrested, because non-bailable warrants are issued against him. Thus, there is satisfaction of one of the essentials under Section 438. But, the offences involved in this case are all bailable offences and hence there cannot be any apprehension of arrest, on accusation of

commission of a non-bailable offence. Therefore, in cases in which only bailable offences are involved, even if there is any threat of arrest of the accused, such arrest cannot be "on the accusation of having committed a non-bailable offence" and in such cases, there will not be satisfaction of the second factor. Therefore, anticipatory bail cannot be granted in a case where only bailable offence is involved, even if the accused apprehends arrest.

(6.) A person may have many reasons to apprehend arrest under various circumstances and at different stages of the case. It need not always be "on accusation of his having committed a non-bailable offence". An accused may apprehend arrest, irrespective of whether the offence committed is a bailable or a non-bailable offence and in certain circumstances, the nature of offence allegedly committed by the accused may not have any relevance to the apprehended arrest. For example, the accused may not appear in Court, even after receipt of summons. He may fail to appear in Court, in disobedience of the direction issued by the court to appear on a particular day or at a particular stage of the case. He may also default appearance in Court in breach of the bond executed by him for his appearance and abscond after his release on bail. Such situations may arise either in cases involving a bailable offence or a non-bailable offence.

(7.) BUT, in such cases, the nature of offence committed by the accused may not have relevance to the arrest apprehended. The character of the offence committed by the accused may not have direct nexus to the offence committed by the accused. The offence committed may only be a remote cause or reason for the arrest apprehended. Whether it be a bailable offence or not, the accused's presence will be sought to be procured in due execution of the non-bailable warrant which is lawfully issued by the court, having jurisdiction. Therefore, in such cases, the apprehension of arrest may not be "on accusation of having committed a non-bailable offence" (or a bailable offence), but the threat of arrest may be due to reasons other than what is stated in Section 438. Hence, in such cases also, Section 438 may not apply.

(8.) I may also, however, hasten to add that I do not intend to lay down, as an invariable proposition that in all cases where non-bailable warrants are issued by the court, anticipatory bail cannot be granted. Irrespective of issuance of warrant by Court, there are yet certain instances where the threat of arrest may still be there, on accusation of commission of a non-bailable offence. To cite an instance, in a case where charge is laid, showing the accused as an absconding accused, the Court may issue a non-bailable warrant. In such cases, the police might have deliberately shown the accused to be absconding, though he was available for arrest, with a view to harass him, by causing his arrest in execution of the warrant issued by Court. The accused might not even know that he was implicated as an accused in the crime. In such cases, there will be a reason to believe that a person may be arrested and such belief may not merely be due to the non-bailable warrant issued because of disobedience of the Court's order. But, apprehension of arrest may be "on accusation of having committed a non-bailable offence" that being the direct cause for issuance of arrest warrant.

(9.) THERE may be other circumstances also. In some cases, the Court may issue a non-bailable warrant in lieu of summons, after filing of charge sheet in a non-bailable offence and there may be a threat of arrest. The apprehension of arrest in such cases will have direct nexus to the nature of offence committed and his arrest may be sought for, "on accusation of having committed a non bailable offence" and not due to any reason other than this. Hence, in cases in which the Court is satisfied that a person has reason to

believe that he may be arrested "on accusation of having committed a non-bailable offence", anticipatory bail may be granted. But the threat of arrest must have direct nexus to the non-bailable offence committed by him and it may not be a remote cause for the arrest and the Court must be satisfied that there was no justification in issuing a non-bailable warrant against the accused.

(10.) IN this case, arrest apprehended by petitioner is not on the ground that he committed any bailable or non-bailable offence. Irrespective of nature of the offence which he allegedly committed, his arrest is sought for, to secure his presence in execution of non-bailable warrant lawfully issued by the court having jurisdiction. He failed to appear in court, in disobedience of the summons issued from the Court, and he also absconded and evaded all coercive steps taken by the Court to procure his presence in Court. So, the nature of offence committed by him is not the direct cause for the apprehended arrest but, the arrest is necessitated because of reasons other than on accusation of commission of a particular offence.

(11.) THE petitioner has no case that warrant was issued illegally or without jurisdiction. There is also nothing on record at present to show that the Magistrate Court committed an error or impropriety in issuing warrant against petitioner. Thus, in any view of the matter, no ground exists to invoke section 438 to grant anticipatory bail to petitioner. At any rate, the apprehended arrest is for reason other than "on an accusation of having committed a non-bailable offence. "

(12.) APART from all these, Section 438 of the Code has a well-intended object. It is introduced into the Code as a benevolent provision, by which, a person is granted bail, even before arrest is effected, in anticipation of his arrest. The Court must bear in mind that this equity, benevolence or luxury is extended to a person who is accused of a non-bailable offence and too, ordinarily, without hearing the alleged victim. So, there must be a definite object for laying down such a benevolent provision in favour of an accused. It is not unusual that a person may be falsely implicated in an offence and it is also likely that he may be harassed or humiliated, without any basis, by an arrest and detention. This may be done on the basis of a false or ill-motivated complaint. It may also be likely that police may subject a person to custodial torture, under the pretext of interrogation. So, the provision under Section 438 is brought into the Code, with the intention to protect a person from being subjected to unnecessary and unwarranted harassment or humiliation after arrest, by custodial torture or unwarranted pre-trial detention.

(13.) THEREFORE, the benefit under Section 438 of the Code may not be invoked, in favour of anybody and everybody, on the mere request made by him or her, and on merely being satisfied that there is apprehension of his arrest on commission of a non-bailable offence. It is not enough that the twin factors in Section 438 are satisfied but, the Court must also confirm that the equity is shown only to the right and deserving person. The Court will grant the relief only to the person who deserves the relief and to ensure that the benefit under section 438 of the Code goes only to a deserving person, the Court has to evaluate the various facts and circumstances of each case and distinguish between the right and the wrong. This will be possible, only if the court exercises its discretion in a judicial manner.

(14.) "in its ordinary meaning, the word "discretion" signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of

will; the liberty or power of acting without control other than one's own judgment. But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore, whoever hath power to act at discretion, is bound by the rule of reason and law". (See Tomlin's Law dictionary) (vide Union of India v. Kuldeep singh, (2004) 2 SCC 590): (2004 Cri L.J. 836).

(15.) THUS, while invoking section 438 of the Code, the Court must pay attention to discern between right and wrong and it is bound by the reason and law also, while exercising its discretion. In this case, petitioner defaulted in appearance in Court during trial and non-bailable warrants were issued repeatedly to secure his presence during trial. Steps under sections 82 and 83 of the Code were also initiated to proclaim him, as an absconding accused. The petitioner absconded and failed to appear in Court, despite repeated issuance of warrants. His act caused considerable delay in disposal of the case, by his default. All these consumed considerable time of the Court and ultimately, this case remained pending even af-ter a long period. It could not be disposed of, because of the default of the accused.

(16.) IN my considered view, it may not be proper to invoke power under Section 438 of the Code, in favour of a person who absconded, without reasonable cause and whereby, the trial Court was forced to initiate coercive steps to procure his presence in Court. Section 438 of the Code is not intended to be used in favour of any 'chronic absconder'. If exercise of judicial discretion is the criteria to invoke Section 438 of the code, I am of view that the provision may not be used in favour of a defaulter, who jumped bail, without any reasonable excuse. In cases where non-bailable warrants are issued against the accused, unless the Court is satisfied that there was some impropriety or illegality in issuing the warrant or that the warrant was issued wrongly, the Court shall not ordinarily intervene in the lawful proceedings before the lower Court. Because, the discretion under Section 438, Cr. P. C. is not intended to be exercised to interfere with the lawful proceedings before another Court.

(17.) THUS, on facts and on law, Section 438 of the Code will not apply to the facts of this case and hence, anticipatory bail cannot be granted to petitioner. Still, I make it clear that it is open to the petitioner to surrender before the Magistrate Court and to file an application for bail, and satisfy learned Magistrate that he was not evading the process of the Court, or that he did not intend to abscond. In such event, learned magistrate shall dispose of the bail application, untrammalled by any of the observations made in this order, on merit. I also make it clear that the observations made in this order are all based only on the oral submissions made, without being any supporting materials.

(18.) I would also add that the considerations for granting bail are different from the consideration for granting anticipatory bail and the refusal of anticipatory bail under section 438 of the Code may not by itself be a ground to refuse bail to an accused, under Section 437 or 439 of the Code. Petition is dismissed.

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Cross Citation :2009 CRI. L. J. 1067

DELHI HIGH COURT

Hon'ble Judge(s) : ARUNA SURESH, J.

Madhu Garg ….V/s…. State and Ors.

Crl. M.C. No. 3075 of 2007, Dt. 31 -7 -2008.

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(A) Criminal P.C. (2 of 1974), S.439 - BAIL - Ball - Cancellation of - Conduct of accused subsequent to his release on bail and supervening circumstances alone are relevant. (Para 11)

(B) Criminal P.C. (2 of 1974), S.438 - ANTICIPATORY BAIL - Cancellation of - Dispute Inter se petitioner and accused persons relates to immovable property which is more of civil in nature - No allegations of any attempt by any of accused persons to avoid their presence before Investigating Officer for Investigation purposes - Anticipatory bail granted to accused persons - Cannot be cancelled. (Paras 12, 13, 14, 16)

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JUDGEMENT

ARUNA SURESH, J. :- Since both the petitions are connected matters and have been filed seeking cancellation of anticipatory bail granted to Ghanshyam Das Gupta on 14-5-2007 and Pooja Aggarwal on 12-5-2007 who are co-accused persons in FIR No. 369/2007 Police Station Sultanpuri, registered under Ss. 468/471/420/120-B, Indian Penal Code (hereinafter referred to as IPC).

2. Accused Pooja Aggarwal allegedly purchased a Plot No. 141, Pocket 21, Sector-24, Rohini from Smt. Manorama on 12-4-2001 by way of General Power of Attorney, agreement to sell etc. The petitioner Madhu Garg had allegedly purchased the said plot from Manorama the original allottee of DDA by way of registered documents on 17-10-1997 that is prior to the transaction which allegedly took place between Pooja Aggarwal and Smt. Manorama.

3. Pooja Aggarwal claims that she had raised construction on the said plot in October, 2006 and the house was assessed by the MCD in her name. Pooja Aggarwal also filed a civil suit seeking relief of injunction against the petitioner and she obtained an ex parte stay from this Court on 5-2-2007. Probably, the present FIR was registered at the

instance of the petitioner subsequent to the stay order granted in favour of accused-Pooja Aggarwal. The said civil litigation is going on inter se the parties.

4. Allegations as against Ghanshyam Dass Gupta co-accused are that he in conspiracy with the other accused persons had stolen the property papers from the petitioner and thereafter forged a false and second set of title documents in favour of co-accused Pooja Aggarwal with respect to the said property bearing Plot No. 141, Sector 24, Rohini, Delhi. Pooja Aggarwal was granted anticipatory bail in view of the civil case pending inter se the parties and in view of the fact that she had obtained an ex parte injunction against the petitioner in respect of the impugned property which is the subject-matter of registration of an FIR on behest' of the petitioner against Pooja Aggarwal and others.

5. Considering the fact that Pooja Aggarwal had been admitted on anticipatory bail and co-accused-Sunita Goel had been granted interim bail by this Court vide order dated 19-4-2007 uptil 8-5-2007 and extended till 10-7-2007 and co-accused-Ghanshyam Dass Gupta was also granted anticipatory bail on 14-5-2007. The petitioner has sought cancellation of bail of both the accused persons on the grounds that at the time when Ghanshyam Dass Gupta and Pooja Aggarwal were granted bail by the learned ASJ, the police had not brought various facts to the notice of the Court as detailed in the petition.

6. For cancellation of bail, the conduct of the accused subsequent to his release on bail and supervening circumstances alone are relevant.

7. Under S. 437(5) of the Code of Criminal Procedure (hereinafter referred to as Code) any Court which has released a person on bail under sub-section (1), or subsection (2), can if it considers necessary to do, direct that such person be arrested and commit him to custody. Similarly, under S. 439(2) of the Code, a High Court or a Court of Session can direct that any person who has been released on bail under any of the provisions governing bail be arrested and commit him to custody.

8. Generally, the grounds for cancellation of bail to be considered by the Court are interference by the accused or attempt to interfere with the due course of administration of justice i.e. abuse of the liberty granted to him, tampering with the investigation of the case, tampering with the evi: dence, intimidating the witnesses by creating or causing disappearance of evidence etc. This evasion of justice can also be an attempt by the accused to leave the country or going underground or otherwise placing himself beyond the reach of the sureties. He may misuse the liberty granted to him by indulging into similar or other unlawful acts etc.

9. In Raghubir, Singh v. State of Bihar, AIR 1987 SC 149 : (1987 Cri L.J. 157), the Supreme Court laid down the principles and grounds to be considered and followed by a Court while considering an application for cancellation of bail. It has been observed. :

"The result of our discussion and the case law is this : An order for release on bail made under the proviso to S. 167(2) is not defeated by lapse of time, the filing of the charge-sheet or by remand to custody under S. 309(2). The order for release on bail may however be cancelled under S. 437(5) or S. 439(2). Generally the grounds for cancellation of bail, broadly, are, interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of

the liberty granted to him. The due administration of justice may be interfered with by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence etc. the course of justice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the sureties. He may abuse the liberty granted to him by indulging in similar or other unlawful acts. Where bail has been granted under the proviso to S. 167(2) for the default of the prosecution in not completing the investigation in sixty days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very wrong grounds indeed."

10. Similar were the observations in Dolat Ram v. State of Haryana (1995) 1 SCC 349 and 1995 SCC (Cri) 237. It was observed :

"4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are interference or attempt to, interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the Court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reasons justifying the cancellation of bail. However, bail once granted should not be supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."

11. Hence, it is considerably clear that in an application for cancellation of bail, conduct of the accused subsequent to his release on bail and supervening circumstances alone are relevant.

12. In the present petitioner has not alleged any misuse of bail by any of the accused persons like tampering with evidence or tampering with investigation or influencing her being complainant or other prosecution witnesses so as not to support the investigation of the case. There are no allegations of any attempt by any of these two accused persons to avoid their presence before the Investigating Officer for investigation purposes. The only grievance of the petitioner is that the accused-Ghanshyam Dass Gupta and Pooja Aggarwal should not have been granted anticipatory bail as their custodial interrogation was mandatory in view of the facts and circumstances as narrated in the FIR.

13. The petitioner has referred to State represented by CBI v. Anil Sharma (1997) 7 SCC 187 : (1997 Cri L.J. 4414) in support of her submissions that custodial interrogation is qualitatively more elicitation - oriented than questioning a suspect after his release on anticipatory bail. In the said case, the Court had released the accused on anticipatory bail when the investigation was in progress and the respondent being a member of legislative assembly of the State of Himachal Pradesh and an ex-Minister of the, Himachal Pradesh State Government was an influential person and the apprehension of the CBI was justified that the respondent-accused would influence the witnesses considering the high position

which the accused held and the nature of accusation relating to the period during which he held such office and the High Court while granting bail had kept in mind the principles applicable for grant of regular ball after arrest and not for grant of anticipatory bail. It was under these circumstances that the criminal appeal was allowed and the anticipatory bail granted to the accused by the High Court was revoked.

14. The considerations which should weigh with the Court while granting anticipatory bail need not of the same as for application of bail after arrest.

15. The petitioner has also referred Muraleedharan v. State of Kerala (2001) 4 SCC 638 : (2001 Cri L.J. 2187). In the said case, a number of criminal cases were registered as a sequel to the large scale deaths of persons now known as the liquor tragedy in Kollam District, Kerala. The appellant was described by the Investigating Officer as one of the kingpins in a series of grave crimes including the offence under S. 8 of the Kerala Abkari Act. While absconding, he moved the Court seeking anticipatory bail. His application was allowed and he was released on anticipatory bail. The High Court in appeal set aside the said order of the Sessions Judge. It was against the order of the High Court that appellant-Muraleedharan filed a criminal appeal before the Supreme Court. While dismissing this appeal, it was observed by the Apex Court that one of the offences involved is S. 8 of the Kerala Abkari Act which is punishable with imprisonment for a term which may extend to ten years and fine which shall not be less than Rs. 1 lac. Section 41 -A of the Act says that no person accused of offence punishable for a term of imprisonment for three years or more shall be released on ball or on his own bond unless the Public Prosecutor or the Assistant Public Prosecutor has been given an opportunity to oppose the application for such release. The Public Prosecutor or the Assistant Public Prosecutor if opposed an application for bail, the Court has to be satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. Therefore, the Sessions Judge committed a grave error in observing that no material could be collected by the investigating agency to connect the petiitioner with the crime except the confessional statement of the co-accused. It was observed by the Supreme Court that no Court can afford to presume that the investigating agency would fail to trace but more materials to prove the accusation against an accused. It was in view of the erroneous approach of the Sessions Judge while granting anticipatory bail to the appellant, that the Apex Court dismissed the appeal upholding the order of the High Court of Kerala.

16. None of these judgments are of any help to the petitioner as the facts and circumstances of the present case are different. The dispute inter se the petitioner and the accused persons relates to immovable property which is more of civil in nature. Under the circumstances of the case, I do not find any reason to reverse the orders of the learned ASJ dated 12-5-2007 and 14-5-2007 whereby respondents-Pooja Aggarwal and Ghanshyam Dass Gupta were granted anticipatory bail.

17. Hence, the petitions are dismissed.

18. Registry is directed to place copy of this order in connected case No. Crl. M.C. No. 3077/2007.

Petition dismissed.

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Cross Citation : 2006 Cri. L. J. 4346

CHATTISGARH HIGH COURT

Hon'ble Judge(s) : SUNIL KUMAR SINHA, J.

Bhupendra Das Vaishnava and Anr…..V/s…. State of Chhattisgarh.

M. Cr. C. No. 3304 of 2005, D/- 18 -1 -2006.

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Criminal P.C. (2 of 1974), S.438 - ANTICIPATORY BAIL – SC & ST ACT (POA) - Anticipatory bail - Grant of - Offence alleged under Atrocities Act - F.I.R., recommendations of Superintendent of Police not prima facie disclosing commission of offence - Anticipatory bail to be granted.

Cases Referred : Chronological Paras
2004 (1) Cg L.J. 162 8

1996 Cri L.J. 1368 : AIR 1996 SC 1042 15

1996 Cri L.J. 2743 (Ori) 10

1993 (1) MPJR 223 9

Sudhir Verma, for Petitioner; Sudhir Bajpai, Panel Lawyer, for State.

JUDGEMENT

ORDER :- This is an application filed under S. 438 of the Cr. P.C. for grant of anticipatory bail to the applicants, who apprehended their arrest in connection with Crime No. 389/2005 registered at Police Station Kawardha, District Kabirdham (C.G.) for the offence punishable under Ss. 452, 294, 323, 506 of the I.P.C. and S. 3(i)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short Special Act).

2. At the very outset, learned counsel for the State, referring to the memo dated 6-12-2005, written by Superintendent of Police, District Kabirdham to the Deputy Superintendent of Police A.J.K. Kawardha, submitted that on the direction of the Superintendent of Police, which was made on the basis of an application given by the

father of the complainant, the offence under the Special Act has been withdrawn by the prosecution and now, the case is registered only under the aforementioned sections of the I.P.C. and there is no case under the Special Act.

3. The case of the prosecution is that the complainant namely, Devesh Devdas, a young boy aged about 15 years is a student of Class X. He had some quarrel with the son of applicant of No. 1 prior to 24-10-2005. The allegations are that on account of this, the applicants entered into the house of the complainant at about 20.30 hours on 24-10-2005 and thereafter, assaulted him.

4. Learned counsel for the applicants submits that in fact, the applicants had gone to make enquiry as to why the complainant has assaulted the son of applicant No. 1. The allegations levelled against them are false and baselss. He further submits that these applicants have not committed any such act as has been alleged against them. He also submits that the action taken by the father of the complainant would show that nothing like the earlier report was done by the applicants and for this reason only; the offence under the Special Act has been withdrawn against them. Therefore, he prays for releasing the applicants on anticipatory bail.

5. On the other hand, learned State counsel opposes the bail application.

6. I have heard learned counsel for the parties at length.

7. No doubt, it is the dominion of the State to register an offence under a particular section applying all its wisdom, but the fact remains that when the matter is placed before the Court of law for ascertaining about the prima facie case for the purpose of bail, the Court is always well within the jurisdiction to look into the material placed before it and to assess as to whether any particular offence is made out or not. Even if, the prosecution has not registered a case under a particular section and the material placed before the Court goes to show that a particular section other than the sections already mentioned by the prosecution is made out, the Court is to act on the substance of the material placed before it with a view to find out a prima facie case on the basis of such materials and not on the basis of the sections levelled by the prosecution. It is more so required when the legislature mandates a command about the jurisdiction of a Court of law and prohibits the entertainment of certain cases by the Court of law under the overriding provisions made in the Act, like S. 18 in the present Act.

8. The law in relation to entertaining the application under S. 438, Cr. P.C. in such offences is well settled. The point raised is no longer res integra. It has been held that if the contents of the F.I.R. or the complaint disclose the commission of offence under the special Act, the Courts would not be justified in entering into a further enquiry by summoning the case diary or any other material as to whether the allegations are true or false or whether there is preponderance of probability for commission of such an offence. At this stage, the Court cannot examine and scrutinise the record of the case in order to ascertain the veracity of the F.I.R./complaint. The provisions of S. 18 of the Act, 1989 put a complete bar against the entertainment of an application for anticipatory bail where prima facie the contents of the FIR disclose the ingredients of the commission of the offence under the Act of 1989 which is apparent from the perusal of the section itself and thus the Court at the most would be required to evaluate the F.I.R. itself with a view to find out if the facts emerging taken at their face value disclose the existence of the

ingredients constituting the alleged offence, then the Court would not be justified in entering into an enquiry as to the reliability or a genuineness or otherwise of the allegations made in the F.I.R. or the complaint. Please see Satya Prakash v. State of C.G., 2004 (1) CgL.J. 162.

9. It has also been held by High Court of Madhya Pradesh in the matter of Dule Singh v. State of M.P. through Police Raigarh, 1993 (1) MPJR 223 that a strict construction should be placed on the word "accusation" within the meaning of S. 18 of the Act. As such the 'intention' or 'intent' which is material ingredient of the offence under S. 3(1)(x) of the Act not being clearly stated by the witnesses and there being no statement that the offence was committed because the complainant belonged to Scheduled Caste, it cannot amount to an 'accusation' of an offence within the meaning of S.18 of the Act so as to bar an application u/S. 438, Cr. P.C.

10. The High Court of Orissa has also held in the matter of Ramesh Prasad Bhanja v. State of Orissa, 1996 Cri L.J. 2743 that if no prima facie case under S. 3 of the Act has been made out, it cannot be said that there is an "accusation of commission of an offence under the Act" and in that case there can be no hesitation to say that the applicability of the provision of S. 438 of the Code is not excluded.

11. If we examine the contents of the FIR and also the recommendations of the Superintendent of Police, on the basis of which, it is stated, that the offence under Special Act has been withdrawn by the prosecution, it would appear that even otherwise also prima facie, there appears to be no material to attract the provisions of S. 3(i)(x) of the Special Act. Prima facie, the contents of the FIR would show that the elements of intentional insult or intimidation with intent to humiliate a member of a Scheduled Caste or Scheduled Tribe in any place within the public view, as provided in part (x) of sub-section (1) of S. 3 of the aforesaid Act is not available in this case. Therefore, this anticipatory bail application would be maintainable.

12. Considering the facts and circumstances of this case, particularly considering the contents of the FIR and also the conduct of the father of the applicant, along with their statements, I am of the opinion that present is a fit case to extend the benefit of S. 438 of the Cr. P.C. to the applicants.

13. In the result, the petition is allowed.

14. It is directed that in the event of arrest, these applicants shall be released on bail on each of them furnishing a personal bond in sum of Rs. 5,000/- (Rupees five thousand) with one surety each in the like amount to the satisfaction of the officer arresting them.

15. Keeping in view the principles laid down in the matter of Salauddin Abdul Samad Sheikh v. State of Maharashtra (1996) 1 SCC 667 : (1996 Cri L.J. 1368), it is hereby directed that this order shall remain in force for a period of six weeks from today, during which the applicants may apply for regular bail before the concerned Court.

Certified copy as per rules.

Petition allowed.

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[See also : 2010 ALL MR (Cri.) 1223 :- Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), S.18, S.3(1)(x) - ANTICIPATORY BAIL - One day delay is ground for anticipatory bail]

Cross Citation :2004 CRI. L. J. 680

CHATTISGARH HIGH COURT

Hon'ble Judge(s) : L. C. BHADOO, J.

Somesh Das, Petitioner …..–Vs-…..State of Chhattisgarh

M. Cr. C. No. 1600 of 2003, D/- 21 -8 -2003.

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Criminal P.C. (2 of 1974), S.438 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), S.18, S.3(1)(x) - ANTICIPATORY BAIL - - If complaint is found to be false, anticipatory bail cannot be denied - Complaint lodged after delay of 14 days - It raises doubt about genuineness of complaint - Further there was dispute going on between accused official and complainant - In such circumstances, accused entitled to anticipatory bail.

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Merely because a case has been registered by the police under the Act of 1989, an application for grant of anticipatory bail should not be thrown out without finding out whether there are accusation of commission of offence under that Act.

Cases Referred : Chronological Paras

Mukesh Kumar Saini v. State (Delhi Administration), 2001 Cri L.J. 4587 (Delhi) 8

Om Parkash Sharma v. Union Territory Chandigarh, (2001) 4 Crimes 208 :

(2001) 3 Rec Cri R 840 (Punj and Hry) 8

Raj Kumar Jain v. State of MP, (2000) 3 MPL.J. 6 8

Phulla Dass v. State of Punjab, 1998 Cri L.J. 157 (Punj and Hry) 8

Bablu v. State of MP, 1996 (2) MPWN 141 8

Ramesh Prasad Bhanja v. State of Orissa, 1996 Cri L.J. 2743 (Orissa) 8

Dule Singh v. State, 1993 (1) MPJR 223 8

Pankaj D. Suthar v. State of Gujarat, (1992) 1 Crimes 1122 : (1992) 1 Guj LR 405 8

S. C. Dutt, Sr. Advocate with Manindra Shrivastava, for Petitioners; Pravin Das, Panel Lawyer, for Respondent.

JUDGEMENT

ORDER :- The accused/applicant has preferred this application under Section 438 of the Cr.P.C. apprehending arrest in Crime No. 88/22003, Police Station Surajpur, District, Sarguja, of the offence punishable under Sections 294 and 506 of the I.P.C. and Section 3(i)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for releasing him on anticipatory bail before arrest.

2. The prosecution case is that on 27-4-2003 Naib Tehsildar had convened a meeting of villagers in the primary school of the village Gaitera with regard to settlement of disputes of the claimants whose land was acquired for South Eastern Coalfields Ltd., and in that meeting the complainant and other persons were present, Naib Tehsildar H.S. Dhurve, Up Tehsil Lakhanpur was also present. At about 3 p.m. accused Someth Das Bangali arrived at that place in his car. On seeing him, complainant Kalicharan greeted him. Accused Somesh Das Bangali started abusing him with the filthy language and said that you do not deserve to greet me and abused him that "Madarchod Bhosadiwale Gond Adivasi" how you are, creating hurdles in their work, you will be killed. On hearing this, all the persons who were sitting on the spot felt it bad and they did not took it in a good taste. Being aggrieved by the behaviour of the accused Kalicharan lodged a complaint in the Police Station Surajpur. A case was registered under Sections 294 and 506 of the IPC and Section 3(i)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, the matter is still under investigation.

3. I have heard Shri S.C. Dutt, Senior, Advocate for the accused/applicant and Shri Pravin Das, Panel Lawyer for the State.

4. Mr. Dutt argued that it is not disputed that the agricultural land of the village Gaitera was acquired for the mining purposes for South Eastern Coalfields Ltd., and compensation to the tune of Rs. 3,31,960/- was paid to the complainant. Compensation to Devcharan and other villagers was also paid, as per the agreement grand son of Kalicharan, Bhagat Singh was given employment. Similarly, son of Devcharan, Amrit Singh was also given employment and Kripal Singh son of Arjun Singh was also given employment. But, even then the complainant was not satisfied and he was asking for other employment which was not possible. Therefore, this false complaint has been lodged against the accused/applicant, who is very senior officer of the South Eastern Coalfields Ltd., it cannot be believed that such a senior officer would use such filthy language and abuse the complainant by calling him in the name of caste. He further argued that the report itself was lodged on 11th May, 2003, i.e., after 14 days of the incident which itself shows that the complaint is false and in this complaint itself it has been written that on account of compromise talks which were going on, the same was delayed. He further argued that on 2nd July 2003, the complainant himself made an application before the

Station House Officer Surajpur with a copy to Police Station Scheduled Castes and Scheduled Tribes, Ambikapur to the effect that he made the complaint on account of anger because the sufficient compensation was not paid to them and now they have compromised the matter and he does not want to pursue the matter. He further argued that moreover by using the word "Madorchod Bhosadiwale Gond Adivasi" prima facie the offence is not made out, therefore, the accused/applicant is entitled for bail under Section 438 of the Cr.P.C. He further argued that as the villagers were not allowing for mining activities to the persons of S.E.C.L., therefore, officers of S.E.C.L. made complaints on 7-11-2002 and 7-5-2003 to the S.H.O. Surajpur.

5. On the other hand, Mr. Das, Panel Lawyer opposed the bail application and submits that as per the provisions of Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'Act') anticipatory bail cannot be granted. The accused/applicant is not entitled for the benefit of Section 438 of the Cr.P.C.

6. In order to appreciate the argument of the learned Panel Lawyer if we look into the Section 18 of the Act, Section 18 lays down that :-

"Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

The provisions of Section 18 time and again, came up before the various High Courts for their consideration as to whether in view of the provisions of Section 18 of the Act there is a complete ban and the Court is not entitled to extend the benefit of Section 438 of the Cr.P.C. to a person against whom an accusation of having committed an offence under the Act has been levelled or in the appropriate cases, looking to the facts and circumstances of the case, whether the Court can extend the benefit of Section 438 of the Cr.P.C. to a person against whom an accusation has been levelled.

7. The offences which are enumerated in Section 3 of the Act are offences which, denigrate members of Scheduled Castes and Scheduled Tribes in the eyes of society, and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and harass the members of Scheduled Castes and Scheduled Tribes with a view to keep them in state of servitude. These offences constitute a separate class and cannot be compared with offences under the Penal Code. Therefore, Section 18 of the Act which excludes the provision of anticipatory bail under Section 438 of Criminal Procedure Code from being applicable to persons committing offences under the Act. After considering the provisions of Section 18 of the Act, the general view which has been taken by the various High Courts is that merely because a case has been registered by the police under this Act, an application for grant of anticipatory bail should not be thrown out without finding out whether there are accusations of commission of offence under this Act. Thus, wherever it is pointed out by the accused/applicant in an offence registered under this Act while moving application for release under Section 438, of Cr.P.C. that the accusation made in the F.I.R. do not constitute any offence under this Act, the complaint is false or stems out of mala fides to blackmail or to wreck some personal vengeance for settling and scoring personal vendetta or by way of some counter-blasts or found to be misuse of judicial process. It is the duty of the Court to examine and judicially scrutinize whether on its facts, the F.I.R. and the case diary do constitute any offence under this Act before refusing bail on that ground and whether there is no material for prima facie

suspecting the petitioner of having committed an offence under the Act, the ban imposed by Section 18, does not, come into play and the petitioner under the circumstances deserves the benefit of anticipatory bail.

8. The High Court of Madhya Pradesh in the matter of Dule Singh v. State through Police, Rajgarh reported in 1993 (1) MPJR 223 held that :-

"A strict construction should be placed on the word "accusation" within the meaning of Section 18 of the Act. As such, the 'intention' or 'intent' which is material ingredient of the offence under Section 3(1)(x) of the Act not being clearly stated by the witnesses and there being no statement that the offence was committed because the complainant belogned to Scheduled Caste, it cannot amount to an 'accusation' of an offence within the meaning of Section 18 of the Act so as to bar an application under Section 438, Cr.P.C."

Again the Madhya Pradesh High Court in the matter of Bablu v. State of M. P. reported in 1996 (2) MPWN 141 held that :-

"Delayed FIR lodged after lodging the complaint by accused - commission of offences found doubtful even by police officers - anticipatory bail granted."

Similarly, the same High Court in the matter of Raj Kumar Jain v. State of M.P. reported in 2000 (3) MPL.J. 6 held that :-

"There was exchange of hot words and in that the applicant was said to have uttered word "Chamar" - Contention that merely by using the word "Chamar", Atrocities Act, 1989 was not attracted - Bar of applicability of Section 438 was not attracted - Complainant Principal of Institution and applicant a teacher in the same Institution - Incident arose due to non-disbursement of scholarship to students by complainant."

High Court of Delhi in the matter of Mukesh Kumar Saini v. State (Delhi Administration) reported in 2001 Cri L.J. 4587 has also held that :-

"Humiliating words allegedly uttered by petitioner while dragging complainant inside his house - Neighbours gathered thereafter to rescue him - Humiliating words thus not uttered before public view - Prima facie offence under Section 3(1)(x) not made out, therefore, anticipatory bail can be granted.

When the provisions of Section 18 of the Act and Section 438 of the Cr.P.C. came up for consideration before the Punjab and Haryana High Court in the case of Phulla Dass v. State of Punjab reported in 1998 Cri L.J. 157 the Court held that (Para 10) :-

"If the Court comes to the conclusion that the process of law is being misused, the petition is totally mala fide and vexatious, on the basis of which first information report is recorded, the Court would certainly exercise its inherent powers."

The High Court of Punjab and Haryana in the matter of Om Parkash Sharma v. Union Territory Chandigarh reported in 2001 (4) Crimes 208 held that :-

"Petitioner summoned for offences under Atrocities Act for having humiliated complainant by calling him Chura - Scope of scrutiny of process of law being misused or that complaint was mala fide or vexatious - Anticipatory bail was granted while referring the question to the larger Bench."

The High Court of Orissa in the matter of Ramesh Prasad Bhanja v. State of Orissa reported in 1996 Cri L.J. 2743 held that :-

"If no prima facie under Section 3 of the Act has been made out, it cannot be said that there is an "accusation of commission of oan offence under the Act" and in that case there can be no hesitation to say that the applicability of the provision of Section 438 of the Code is not excluded."

The High Court of Gujarat in the matter of Pankaj D. Suthar v. State of Gujarat reported in (1992) 1 Crimes 1122 held that:-

"..... beneficial legislation cannot be permitted to be abused and converted into an instrument to blackmail to wreck some personal vengeance for settling and scoring personal vendetta or by way of some counter blasts against opponents some public servants, as prima facie appears to have been done in the present case. The basic question in such circumstances, therefore - Whether a torch which is lighted to dispel the darkness can it be permitted to set on fire the innocent surroundings ? Whether a knife, an instrument which is meant for saving human life by using the same in the course of operation by a surgeon, can it be permitted to be used in taking the life of some innocent? When the accusation is found false, vexatious and by way of counter-blast as stemming from the ulterior motive to humiliate, disgrace and demoralize the petitioner, accused who is a public servant and such circumstances the provision of Section 18 of the Act cannot come in the way of Section 438 of the Cr.P.C."

8. The sum and substance of the above decisions is that the benefit of Section 438 of the Cr.P.C. can be extended to a person against whom an accusation is levelled of having committed offences enumerated in Section 3 of the Act in the following, circumstances :-

(i) If on the basis of the complaint and other material evidence collected by the Investigating Agency on the face of the material prima facie no offence is constituted/made out i.e. if the essential ingredients to constitute the offence under Section 3 of the Act are missing than the benefit of anticipatory bail can be extended to such person.

(ii) If on judicial scrutiny by the Court the facts of the case discloses that the complaint is false, vexatious, frivolous and by way of counter-blasts and found to be misuse of judicial process and stems from the ulterior motive to humiliate, disgrace and demoralise the person in order to blackmail to wreck some personal vengeance for settling and scoring personal vendetta.

10. Now, coming to the present case, it is not disputed that the land of the complainant and other villagers of village Gaitera was acquired for the purposes of mining activities to be conducted by the S.E.C.L. and the present applicant Somesh Das is Deputy Chief Mining Engineer/Sub-Area Manager, Rehar and some dispute had arisen regarding

the distribution of compensation and other related issues and for that purpose a meeting was convened by the Naib Tehsildar, on the fateful day i.e. on 27-4-2003 therefore, it is apparent that the relations between the S.E.C.L. officials on the one hand and the villagers on the other hand were not good on account of dispute regarding the payment of compensation and for giving employment to the family members of those persons whose land was acquired.

11. It is also admitted position, that as per the complaint of complainant Kalicharan the alleged offence was committed by the applicant on 27-4-2003, whereas the complaint was lodged on 11-5-2003 i.e. about 14 days after the incident and in the complaint itself it has been written that it is delayed because some compromise talks were going on and moreover, as per the complaint, the allegations against the present accused/applicant are that when he reached at the site Kalicharan greeted him. Accused Somesh Das said that you do not deserve 'Namaskar', Madarchod Bhosadiwale Gond Adivasi, how are you creating hurdles in their activities, you will be murdered. This complaint was lodged after consultation and after 14 days of the incident. This fact itself creates doubt about the genuineness of the complaint.

12. It has also come on record that the villagers sat on "Dharna" on 6, 7 and 8th May 2003 and they had not allowed the mining activities of the S.E.C.L. and in that connection on 7th May, 2003 a complaint was lodged by the S.E.C.L. authorities against the villagers and much prior to that on 7-11-2002 also engineer of S.E.C.L. made complaint to the S.H.O. that the villagers are not allowing mining activities and huge loss is being caused to the public money. Thereafter on 11th May, 2003 this complaint was lodged. Moreover, in order to attract penal consequences of Section 3(1)(x) of the Act it is necessary that the person against whom accusations have been levelled must have used those words intentionally to insult or intimidate with an intent to humiliate the member of Scheduled Castes and Scheduled Tribes and with the intention to denigrate the members of the castes.

13. Here, from the allegations as alleged by Kalicharan the accused/applicant used the word 'Madarchod Bhosadiwala Gond Adivasi' and for using filthy languages separate offence under Sections 294 and 506 of the I.P.C. has also been registered.

14. Without expressing any further opinion on this subject, as mentioned above in the earlier judgments of High Court of Madhya Pradesh and High Court of Punjab and Haryana merely using the word "Chura" and "Chamar" and calling in the name of the caste creates reasonable doubts as to whether the provision of Section 3(1)(x) of the Act are attracted.

15. Therefore, having regard to the above facts and circumstances of the case and also having regard to the law laid down by the various High Courts with regard to the ban imposed by Section 18 of the Act, I am of the opinion that it is a fit case in which the accused/applicant should be enlarged on anticipatory bail by extending the benefit of Section 438 of the Cr.P.C. Accordingly, the application is allowed. It is, therefore, directed that in the event of arrest of the accused/applicant, if the accused/applicant furnishes a personal bond in sum of Rs. 10,000/- with one surety in the likewise amount to the satisfaction of the Investigating Officer, he be released on anticipatory bail. However, he shall abide the conditions provided under Section 438, of the Cr.P.C. i.e. he shall make himself available for interrogation by a police officer as and when required, he shall not directly or indirectly, make any inducement, threat or promise to any person acquainted

with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.

1 6. This order will remain effective for a period of two months from today.

17. Meanwhile, the accused/applicant is at liberty to approach the regular court for grant of regular bail.

18. Parties are entitled for certified copy of this order.

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Cross Citation :1986-Crimes(2) 61 ,

HIGH COURT OF ASSAM

(Guwahati High Court)
(Division Bench)
'Hon'ble Judge(s) : K.N.Saikia, S. Hague,JJ
Arun Sharma .....V/s.....The State of Assam
Criminal Original Application 45 Of 1985, Jun 12,1985

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Cr. P.C. Sec. 438 – Anticipatory bail – I. P.C. sec. 366 – Applicant's name does not appear in F.I.R. – Accused already grnted bail – Applicant belongs to respectable family -Deserves to be granted with anticipatory bail.

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JUDGEMENT

(1.) The petitioner of this application for anticipatory bail under Section 438 of the Code of Criminal Procedure, shortly the Code, is a Commerce Graduate from Gauhati University and has been temporarily looking after the day to day management of the Hotel Nandan owned by Mis. Shyam Udyog (P) Limited. On 2.5.1985 at 11.55 p.m. one Dwijen Phookan lodged a First Information Report (Annexure-I to the application) at the Pan Bazar Police Station, Gauhati stating in with reference to the information lodged thereat same morning regarding the missing of his daughter Smt. Smita Phukan, that she had been recovered from the Hotel Nandan, G.S. Road at about 6.30 p.m. from the unlawful custody of one Shri Abhijeet Choudhury, who was a receptionist of the said hotel and Shri Himanshu Sharma, who was known to be a Director of the said hotel. It was further stated that the girl had been kidnapped and enticed away from the lawful custody of her parents by Shri Abhijeet Choudhury in collusion with Shri Himanshu Sharma and other persons who kept her concealed in the said Hotel Nandan. The girl was stated to be a minor of about 14 years and a student of Class VIII. The aforesaid FIR. was forwarded to the Paltan Bazar Police Station whereunder Hotel Nandan fell vide G.D. Entry No. 54 of 2.5.84. The Paltan Bazar Police Station vide G.D. Entry No. 87 of 2.5.85 forwarded the FIR. to the Chandmari Police Station as the complainants house fell within its jurisdiction. The Chandmari Police Station thereupon registered its case No. 84/85 under Section 366A

I.P.C. It is stated in this application that the said Shri Abhijit Choudhury who was the receptionist was forcibly taken away from the premises of the Hotel Nandan at about 5.30 p.m. on 2.5.85 and was produced before the Chief. Judicial Magistrate, Gauhati on 3.5.85 and the Forwarding Report (Annexure II to the application) of the Officer-in-Charge Chandmari Police Station stated that at about 6.30 p.m. the victim girl was recovered from the unlawful custody of the accused person by the complainant.

(2.) The petitioner states that he happened to be present in the hotel on 2.5.85 in connection with the day to day management of the hotel and since the date of occurrence the police has been making discreat enquiries about him and his brother in connection with the said case and therefore he has reasons to believe that he may be arrested in connection with the above case. He further states that he hails from a very reputed family of Gauhati. His grand father is an Advocate and his father is a reputed Chartered Accountant and his family members own both movable and immovable properties at Gauhati and other places. He also states that there is absolutely no chance of his tampering evidence or hampering the investigation and he shall make himself available as and when required by the police and he shall not in any manner make inducement, threat or promise to any person acquaints or connected with the case and he undertakes to abide by any condition, direction or order from the Court.

(3.) Mr. J.P. Bhattacharjee, the learned Advocate General, Nagaland for the petitioner submits: The petitioners apprehension of arrest in connection with the case is reasonable. He hails from a respectable family. His grand father being an Advocate, his father being a reputed Chartered Accountant and his brother the Managing Director of MIs. Shyam Udyog (P) Limited, there is no likelihood of his evading the process of the criminal court or not attending the trial or in any way tampering with the evidence or witnesses of the case. If he is kept in custody for some days before granting bail he will immeasurably suffer in prestige and business goodwill. His name does not appear in the FIR. and Shri Abhijeet Choudhury whose name appears has already been granted bail by the Chief Judicial Magistrate Gauhati on 7.5.85 till 18.5.85. The petitioner has come before this Court with the prayer for anticipatory bail which may be granted. The petitioner has not been arrested so far because of the interim order passed by this Court on 10.5.85.

(4.) Mr. D.N. Choudhury, the learned Additional Advocate General, Assam submits: This is not a case with any exceptional feature so as to justify anticipatory bail. The interim order dated 10.5.85 which stated that the petitioner should not be arrested by the police authority is not in accordance with law and requires immediate modification. Considering the nature of the case and the social alarm caused by it, a girl of 14 years having been allegedly kidnapped and kept concealed in the Hotel Nandan, anticipatory bail may not be granted to the petitioner. This Division Bench should formulate some guidelines so that such blanket orders not to arrest the accused are not passed so as to stisle the investigating agency.

(5.) Mr. Bhattacharjee very fairly states that he appeared for the petitioner on 10.5.85 when the aforesaid interim order was passed and it was his duty to point out to the Court that the order was not in accordance with law but his attention was not attracted to the last part of the order and he has no objection if that part of the order is now modified so as to conform to the provisions of Section 438 of the Code.

(6.) We have perused the provisions of Section 439A of the Code as inserted by the Code of Criminal procedure Assam Amendment Act, 1983. While Sections 364, 365, 367 and 368 I.P.C. are mentioned in that Section, Sections 366 and 366A I.P.C. do not find mention in the Section. Offences under both Sections 366 and 366A are non-bailable. The constraints laid down in Section 439A of the Code are, therefore, not applicable to this case.

(7.) The first question is whether anticipatory bail may be granted in this type of cases. It is not denied that the alleged kidnapping of a minor girl of 14 years, a student of Class VIII and keeping her concealed in a hotel would cause alarm in the society. However, a person is guilty of an offence only after being found to be so by a competent criminal court. Since the processing of a case by the police and the subsequent trial in the Court may take some time it is desirable that, wherever it is expedient to do so, the accused person may be released on bail since his guilt is yet to be established. Section 438 of the Code providing for anticipatory bail is a new provision which enables the superior courts to direct the release of a person on bail prior to his arrest. In its 41st report the Law Commission in recommending this provision a observed: Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail). Section 438 deals with direction for grant of bail to person apprehending arrest. Under sub-section (1) thereof When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. Sub-section (2) deals with the directions and conditions which may be made. Under subsection (3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall, be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1)

(8.) The question whether or not to grant anticipatory bail, involves, as was observed in Gurbaksh Singh Sibbia etc. v. The State of Punjab, a question of great public importance bearing, at once on personal liberty and the investigational powers of the police, and the society has a vital stake in both these interests, though their relative importance at any given time depends upon the complexion and restrains of political conditions. The question is how best to balance these interests while acting under Section 43 of the Code? The arrest of a person immediately affects his freedom of movement and an order of bail gives back to the accused that freedom. Besides, the arrest by itself may have some effect on the dignity of a person. Section 46 Cr.P.C. provides how arrest is made. Under sub-section (1) thereof, In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a

submission to the custody by word or action. The touching or confining may thus be avoided by submission to the custody by word or action. It is a natural impulse of man to avoid arbitrary arrest. Guarantee against it has been insisted by mankind. In the Magna Carta, clause III embodied : No freeman shall be taken or imprisoned or diseased or outlawed or exiled or in any way destroyed, nor will we go upon him nor will we send upon him, save by the lawful judgment of his peers or the law of the land. To no one will we sell, deny or delay right or justice.

(9.) The universal declaration of human rights adopted in the General Assembly Resolution 217QU) on December 10, 1948 included the right to freedom from arbitrary arrest and detention and the right to be presumed innocent until Court finds guilty. Article 21 of the Constitution of India provides for protection of life and personal liberty and under it no person shall be deprived of his life or personal liberty except according to procedure established by law. However, in the interest of the society and public prosecution law provides for arrest of a person under prescribed circumstances. Section 41 of the Code of Criminal Procedure provides when police may arrest a person without warrant. This section confers very wide powers on the police in order that they may act swiftly for the prevention or detention of cognizable offences without the formality and delay of having to go to a Magistrate for order of arrest. Section 42 of the Code provides for arrest of a person on refusal to give name and residence. Section 43 provides for arrest by private person and procedure on such arrest. Section 44 provides for arrest by Magistrate. Section 46 provides for arrest and Section 48 provides for pursuit of offenders into other jurisdictions. Section 49 lays down that the person arrested shall not be subjected to more restraint than is necessary to prevent his escape. Under Section so a person arrested should be informed of grounds of arrest and of right to bail. Section 57 provides that no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrates Court. Article 22 of the Constitution of India also provides for protection against arrest and detention in certain cases. Under sub-article (1) no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Under sub-article (2) every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of forty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of

Magistrate. The foundation of the right to arrest a person is at being concerned with commission of an offence. As was held in H.N. Rishbud v. State of Delhi,2 discovery and arrest of the suspected offender is one of the stages in investigation of an offence. This was reiterated Hi the State of Madhya Pradesh v. Mubarak Ali,3 and in Jagdish Mitter v. The Union of India4. It is settled law that under the Code investigation consists generally

of the following stages: (1) proceeding to the spot; (2) ascertainment of the facts and circumstances of the case; (3) discovery and arrest of the suspected offender; (4) collection of evidence relating to the commission of the offence, which may consist of (a) examination of various persons including the accused, and reduction of their statements into writing, if the officer thinks fit, and (b) search of the places and seizure of things is necessary for the investigation and to be produced in the trial; (5) formation of the opinion as to whether on the materials collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by filing a charge-sheet under Section 173. This discovery and arrest of the suspected offender is a part of the investigation. Besides, even for taking other steps in course of investigation the arrest of the suspected offender may be helpful. Any order not to arrest the suspected offender may, to that extent, affect investigation and the right of the investigating agency. It is at the point of discovery and arrest of the suspected offender that the police discretion is to be exercised. Exercise of police discretion interacts with the members of the public. Facing the problem of law enforcement and social control the police should act in conformity with broader aim of social purpose. It is for the police to decide whether to pursue strictly a law enforcement attitude or at the same time be conscious of social values and thereby obtain social support.

(10.) Investigation is done under the provisions of Chapter XII of the Code of Criminal Procedure. In England the Royal on Criminal Procedure (1981) said: The ultimate purpose of arrest is to bring before a Court for trial a person who commits a criminal offence or is reasonably suspected of so doing. But because arrest deprives the citizen of his liberty, its use is to be restricted generally to offences that carry the penalty of imprisonment that is to say of course arrestable offences and to persons against whom summons procedure will not be effective. The period of detention upon arrest may be used for certain purposes, and the power of arrest is also related to them. It may be used to prevent the suspect from destroying evidence or interfering with witnesses or warning accomplices who have not yet been affected. Where there is good reason to suspect a repetition of the offence, especially but not exclusively offences of violence it may be used to stop such an occurrence. Finally, the criterion of having reasonable grounds for suspicion sufficient to justify a charge; hearsay evidence for example, may be sufficient grounds for reasonable suspicion, but it is not sufficient for a person to be charged, since it will not be admissible in evidence at trial. Accordingly the period of detention may be used to dispel or confirm that reasonable suspicion by questioning the suspect or seeking further material evidence with his assistance. This has not always been the law or practice but now seems to be well established as one of the primary purposes of detention upon arrest. The Royal Commission further observed: Although this is common practice and, if properly conducted, entirely permissible practice, once the person has been arrested, it is not by itself a legitimate cause of arrest or the purpose of the exercise of the power of arrest otherwise available. There must be present in the mind of the person who effects the arrest, if it is to be reasonably effected, a fear that the process of interrogation will be initiated by the presence of one or other of the following circumstances. The destruction of evidence, interference with other potential witnesses, the warning of an accomplice, a repetition of the offence or the escape of the suspect. The other is that if there are other steps which the arresting constable could take for the furtherance of the investigation, then the constable should take those other steps, first, unless it is demonstrated to be necessary or at least desirable that the other steps should not be taken first. It was observed in State of West Bengal and others v. Swapan Kumar Guha,5 that if the Court interferes with the proper investigation in a case where an offence has been disclosed, the

offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the Court normally does not interfere with the investigation of a case where an offence has been disclosed. But it cannot be said that an investigation must necessarily be permitted to continue and will not be prevented by the Court at the stage of investigation. A condition precedent to the commencement of investigation under Section 157 of the Code is that the FIR. must disclose, prima facie, that a cognizable offence has been committed. An FIR. which does not allege or disclose that the essential requirements of the penal provision are prima facie satisfied, cannot form the foundation or constitute the starting point of a lawful investigation. An investigation can be quashed if no cognizable offence is disclosed by the FIR. It is surely not within the province of the police to investigate into a Report (FIR.) which does not disclose the commission of a cognizable offence and the Code does not impose upon them the duty of inquiry in such cases.

(11.) The distinction between an ordinary order of bail and an order of anticipatory bail, has been pointed out by their Lordships of the Supreme Court in Gurbaksh Singh (supra). Whereas an order of bail is granted after arrest and therefore means release from the custody of the police. An anticipatory bail is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. It is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail.

(12.) Several questions arise while deciding whether or not to grant anticipatory bail in a particular case. The first question is what are the types of cases in which anticipatory bail should be granted; secondly, what is the stage of the case at which or until which anticipatory bail may be granted; thirdly, what should be duration of the anticipatory bail order; fourthly, what are the directions or conditions to be imposed; fifthly, whether notice should be given to the respondents; and lastly, whether interim order need be passed. The answers to these questions are to be found in Gurbaksh Singh (supra) where Chandrachud, C.]. discussed all these aspects. The Court should bear in mind the law enunciated therein. The Law Commission, in paragraph 31 of its 48th Report agreed that it is in very exceptional cases that such power of anticipatory bail should be exercised and that the provision should not be put to abuse at the instance of unscrupulous petitioners; and that the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. However, their Lordships observed: But the crimes, the criminals and even the complainants can occasionally possess extraordinary features. When the even flow of life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism. The powerful processes of criminal law on then be perverted for achieving extraneous ends. Attendant upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation.

That can even take the form of the parading of a respectable person in handcuffs, apparently on way to a court of justice. The foul deed is done when an adversary is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code

of 1973. Section 438 is designed to ensure a valuable right like the right to personal freedom. It is to be noted that the ordinary provision for bail under Sections 437 and 439 Cr.P.C. have not been made otiose by the provision of Section 438. However, as their Lordships observed: An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The directions and conditions should be in conformity with those objectives and not to hamper investigation at all. Relying on the observations made in Balch and Jam, AIR. 1977 S.C. 366: (1977) 2 5CR. 62, their Lordships agreed that the power conferred by Section 438 is of an extraordinary character and that it is not ordinarily resorted to like the power conferred by Sections 437 and 439. Their Lordships also agreed that the power to grant anticipatory bail should be exercised with due care and circumspection. The guidelines are found in para 31 of the decision which reads: In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of those propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicants presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and the larger interests of the public or the State are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. However, their Lordships clearly stated that no hard and fast rules can be laid down in discretionary matters like the grant or refusal of bail, whether anticipatory or otherwise. No such rules can be laid down for the simple reason that a circumstance which, in a given case, turns out to be conclusive, may have no more than ordinary signification in another case. Their Lordships preferred to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 Cr.P.C. by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. Their Lordships observed that the ends of justice would be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down flexible rules of general application. Their Lordships held that the Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR. in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR. as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time. Thus, there is nothing to show that an order of anticipatory bail is to continue till the end of the trial. A blanket order of anticipatory bail should not generally be passed. An order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, is a blanket order. A blanket order is bound to

cause serious interference with the rights and duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order call then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicted when the order was passed. The Court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective.(13.) Applying the above guidelines to the facts and circumstances of the instant case we find that the petitioners name is not mentioned in the FIR.; he has not denied his presence at the hotel; accused Abhijeet Choudhury has already been granted bail by the Chief Judicial Magistrate, Gauhati; he hails from a respectable family, has deep roots in the society, is not likely to abscond or evade the process of the Court or in any way hamper investigation of the case or tamper with the evidence. He undertakes to abide by any condition imposed by this Court. There has been reasonable apprehension of his being arrested in connection with the case, as the police has been making discreet enquiries about him. We accordingly vacate our interim order dated 10.5.1985 and finally order and direct that if the petitioner is hereafter arrested without warrant by an Officer in Charge of a Police Station in connection with Chandmari Police Station Case No. 84/85, and is prepared either at the time of arrest or at any time while in custody of such officer to give bail, he shall be released on bail of Rs. 5000/- (Five thousand) to the satisfaction of the police officer arresting him; and if a magistrate taking cognizance of the offence decides that warrant should be issued in the first instance against the petitioner, he shall issue a bailable warrant in conformity with the directions given in this order. We further direct that in the event of the petitioner being arrested and enlarged on bail, he shall immediately thereafter make himself available for interrogation by any police officer and subsequently also as and when required by the police. He shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer. He shall not leave Assam without permission from the Chief Judicial Magistrate, Gauhati. This order shall continue till the trial starts whereafter the petitioner shall obtain a bail order from the trial court.

(14.) In the result, this application is allowed. Application allowed.

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Cross Citation : 1998 CRI. L. J. 3969

BOMBAY HIGH COURT

Hon'ble Judge(s) : S. S. NIJJAR, J

Akhalaq Ahmed F. Patel .... Vs .... State of Maharashtra

Criminal Anticipatory Bail Appln. No. 960 of 1998, D/- 26 -3 -1998.

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(A) Criminal P.C. (2 of 1974), S.438, S.204 - ANTICIPATORY BAIL - Can be granted even after summons or warrant is issued by Magistrate - It is not

possible to hold as a proposition of law that Sessions Court or the High Court will have no power to entertain the application for anticipatory bail where either summons or warrants have been issued against the accused. The Court has the jurisdiction to grant anticipatory bail on being satisfied that the accused apprehends arrest in a non-bailable offence

B) Criminal P.C. (2 of 1974), S.438 - ANTICIPATORY BAIL - Grant of - Petitioner in Government service - No apprehension of his absconding – He entitled for anticipatory bail.

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K. R. Sutrale, for Applicant; R. Y. Mirza, A. P. P. for the State.

JUDGEMENT

ORDER :- The petitioner was arrested for offences under Sections 498A, 306 and 34 of I.P.C. He was released on bail on 24-1-1996. The petitioner is a Police Constable and now attached to Azad Maidan Police Station and is a permament resident in Mumbai. The deceased, who is the wife of the petitioner suffered burn injuries at her parents house on 10th November, 1995 at around 00.15 hrs. The father of the deceased is said to have come home at 2.00 a.m. The deceased had been removed to hospital. A statement was recorded of the deceased in the presence of the Executive Magistrate wherein she stated that the husband is not responsible. A statement of the father was also recorded. He also stated that the husband was not responsible. However, the father made another statement on 18th November, 1995 wherein he stated that he had come to know from his daughter that the petitioner and his father were having illicit relations with the sister-in-law of the deceased and, therefore, she was feeling insulted and that is why she has committed suicide. On the basis of this, FIR was registered on 18th November, 1995. However, the petitioner was released on bail on 4-1-1996. Subsequent thereto the father of the deceased has filed a complaint before the Additional Chief Metropolitan Magistrate, 24th Court, Borivli, Mumbai. On the basis of this, the learned Magistrate issued non-bailable warrant. The petitioner came to know about the issue of non-bailable warrant when a newspaper report was published on 10th March, 1998. In view of the above, the petitioner moved an application for anticipatory bail under Section 438 of the Cr.P.C. which has been rejected by the Additional Sessions Judge, Gr. Mumbai by his order dated 30th March, 1998.

1. It was submitted before the learned Additional Sessions Judge that the learned Magistrate has taken cognizance of an alleged offence punishable under Section 302, I.P.C. It was submitted that this is a clear abuse of the process of Court. The petitioner has already been released on bail for offences which are based on the same incident. It was submitted that the petitioner cannot be arrested again and again for the same incident. It was also submitted that the application for anticipatory bail is maintainable before the Sessions Court in view of the fact that non-bailable warrants had been issued. In support of his submission, the learned Counsel has relied on a Full Bench decision of the Andhra Pradesh High Court reported at 1986 Cri L.J. 1303 : (AIR 1986 Andh Pra 345), (Smt. Sheik Khasim v. State). It was, however, submitted by Counsel for the State that in view of the judgment of this Court reported in 1992 Cri L.J. 2373, (Ambalal P. Rashamwala v. State of Maharashtra) the Sessions Court had no jurisdiction to entertain the application

under Section 438 of the Cr.P.C. In paragraph 6 of the impugned judgment the learned Additional Sessions Judge has held thus :-

"The point which needs consideration is whether the apprehension of arrest is at the hand of police or at the instance of Magistrate. The Hon'ble Bombay High Court has clearly ruled that if the arrest is being apprehended in execution of warrant issued by the Magistrate, the provisions of Section 438, Cr.P.C. has no application. Therefore, in my considered opinion the application is misconceived and needs to be rejected."

These observations have been made by the learned Special Judge on the basis of the judgment of this Court. It would be apt to reproduce the whole judgment delivered by A. A. Cazi, J :-

"ORDER :- The petitioner seeks (a) an anticipatory bail and (b) order to respondent No. 1 (State of Maharashtra) not to execute the fresh non-bailable warrant which has been issued in Case No. 9/S/81 by the learned Metropolitan Magistrate of Tis Hajari Court, Delhi and to stay execution of that warrant till 18th December, 1991.

2. As far back as 10 years ago in 1981 a criminal case was filed by Respondent No. 2, Bashir Beg, against the present petitioner. It appears that the applicant has attended that Court several times and has even engaged Advocate Dinesh Chawla from Delhi to conduct his defence. The matter in the Delhi Court was fixed on 9th September, 1991 and has pointed out various reasons as to why he could not attend the Delhi Court on that date. As regards his Advocate not attending the Court he has pointed out that the Advocates to Tis Hajari were on strike. Thereafter the petitioner received a letter dated 10th October, 1991 from his surety. Shri Shyam Sunder informing the petitioner that the learned Metropolitan Magistrate had issued a fresh non-bailable warrant against the petitioner because of his absence in the Court and had now fixed the next date as 18th December 1991 for trial. The p etitioner also received a letter dated 5-10-1991 from his Advocate informing him that as the Advocates were on strike he had not appeared in the Court of the learned Metropolitan Magistrate and therefore the learned Metropolitan Magistrate had issued a fresh non-bailable warrant against the petitioner and had adjourned the case to 18th December, 1991. The petitioner says that he had already booked a ticket for 14th December, 1991 and he would leave Bombay on 14th December 1991 by Paschim Express by 11 a.m. and that he would go to Delhi and then he would get the non-bailable warrant cancelled and he undertakes to remain present in the Tis Hajari Court of the learned Metropolitan Magistrate, Smt. Sangita Dhingara on 18th December 1991 to face the trial.

3. The present application is clearly misconceived. No such anticipatory bail can be granted after a Magistrate has issued a warrant. The application is dismissed."

3. It is submitted by Mr. Sutrale, appearing for the petitioner, that the observations relied upon by the learned Additional Sessions Judge of Greater Bombay are contrary to the judgments given by Full Bench of the Andhra Pradesh High Court noticed above, Division Bench of the Calcutta High Court reported in 1996 (2) Crimes 555 (Pankaj Lochan Sahoo v. State), Division Bench of the Delhi High Court reported in 1997 Cri L.J. 961, Full Bench of the Madhya Pradesh High Court reported in 1996 (1) Crimes 238 : (1995 Cri L.J. 3317) (Nirbhay Singh v. State of M.P.) and a Division Bench judgment of the Punjab and Haryana High Court reported in 1985 Cri L.J. 897 (Puran Singh v. Ajit Singh). A perusal of

the judgment of Cazi, J. given in the case of Ambalal (1992 Cri L.J. 2373) (supra) shows that there is absolutely no discussion whatsoever of the relevant provisions of the Criminal Procedure Code or the principles governing the grant or refusal of anticipatory bail. The learned Judge has merely expressed an opinion to the effect that no anticipatory bail can be granted after a Magistrate has issued a warrant. These obser-vations in my view cannot be treated as a ratio which is legally binding. They can at best be treated as obiter dicta being observations without consideration of the relevant provisions of law. On the other hand the Full Bench decision of the Andhra Pradesh in the case of Sheik Khasim, (1986 Cri L.J. 1303) (supra) considered the various provisions of the Criminal Procedure Code and the whole gamut of case law on anticipatory bail. The Full Bench notices the off quoted judgment of the Supreme Court in the case of Gurbaksh Singh Sibbia v. State of Punjab, AIR 1980 SC 1632 : (1980 Cri L.J. 1125). In the aforesaid case the Supreme Court observed as follows (Paras 33 and 38) :

"We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under S. 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these Courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application."

Then coming to the modalities regarding the passing of bail orders under S. 438(1), Cr.P.C. the Supreme Court held as follows :

"But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under S. 438(1) be limited in point of time? Not necessarily. The Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under S. 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time."

After noticing the aforesaid observations the Full Bench has held that similar modalities can also be applied in the case of granting anticipatory bail under Section 438(1) even in a case where the Criminal Court takes cognizance and issues the warrant. Thus the question has been specifically answered after considering the various provisions of the Criminal Procedure Code. In paragraph 13 the Full Bench observed as follows :

"13. For all the aforesaid reasons we hold that the filing of a charge-sheet by the police and issuing of a warrant by the magistrate do not put an end to the power to grant bail under S. 438(1) Cr.P.C. and on the other hand we are of the view that the High Court or the Court of Session has power to grant anticipatory bail under S. 438(1) to a person after the criminal Court has taken cognizance of the case and has issued process viz. the warrant of arrest of that accused person. Therefore, the decision of the Division Bench in Kamalakara Rao's case (1983) 1 APL.J. 97 : 1983 Cri L.J. 872 (supra), upholding the view

taken by Madhusudhan Rao J. in N. Dasaratha Reddy's case (1975) 2 APL.J. (HC) 214 (supra), and by Ramachandra Raju, J. in Cr.M.P. 884 of 1981 does not lay down the correct legal position and consequently all these rulings are overruled."

The aforesaid observations leave no manner of doubt that the Sessions Court as well as the High Court have powers to grant anticipatory bail even in cases where warrant has been issued by the Magistrate. The aforesaid view of the Andhra Pradesh Full Bench has been reiterated by a Full Bench of the Madhya Pradesh High Court in the case of Nirbhay Singh v. State of M. P., 1996 (1) Crimes 238 : (1995 Cri L.J. 3317). In that very case the Division Bench judgment of the Punjab and Haryana High Court given in the case of Puran Singh v. Ajit Singh, 1985 Cri L.J. 897 has also been approved. Referring to the decisions of the Division Bench of the Punjab and Haryana High Court and the Full Bench of the Andhra Pradesh High Court it has been observed as follows :

"5. A Division Bench of the Punjab and Haryana High Court took a contrary (sic) view in Puran Singh v. Ajit Singh. In that case, charge-sheet was filed against the accused named in the F.I.R. after exonerating one of them. A private complaint was filed against the excluded person and the Magistrate ultimately issued non-bailable warrant. The Sessions Court rejected an application moved under Sec. 438, Cr.P.C. on the ground that it was not maintainable. A similar application was filed in the High Court and the Division Bench considered the matter though the trial was almost over, since the question has been referred to by a learned single Judge. A learned single Judge of the Punjab and Haryana High Court had taken a view against the maintainability of such an application in Ramlal v. State of Punjab. The Division Bench held that jurisdiction under Section 438 is not dependent on whether the Magistrate acting under Section 204 has issued bailable or non-bailable warrant, that the arrest may be at the instance of the police or at the instance of the Magistrate who has issued the warrant and in either case it may give rise to an apprehension in the mind of the accused that he may be arrested and such apprehension, if it arises in relation to a non-bailable offence, entitles him to move for anticipatory bail. The Court held that the Court may refuse to give relief if the warrant is a bailable one since it has the same effect as an order under Sec. 438.

6. The Sheikh Khasim Bi v. State, (1996 Cri L.J. 1303) a Full Bench of the Andhra Pradesh High Court agreed with the view taken by the Punjab and Haryana High Court after elaborate consideration of the legislative history of the provision. The Court held that the provisions in Section 438(3) do not have the amplitude of the provisions in Section 438(1) and the filing of charge-sheet does not put an end to the power under Sec. 438. The Full Bench relied on a Division Bench decision of this Court in Ramsewak v. State of M. P., 1979 Cri L.J. 1485. The Court considered the contention that there may be conflict between non-bailable warrant issued by a Magistrate and an order of anticipatory bail granted by the Sessions Court or High Court and held that in such a case the police shall execute the warrant by arresting the accused and produce him before the Magistrate and shall thereafter release the accused on bail as per the order granting anticipatory bail."

7. The Division Bench of Delhi High Court in the case of P. V. Narasimha Rao v. State (CBI), 1997 Cri L.J. 961 has also approved the judgment of the Punjab and Haryana High Court given in Puran Singh's case (1985 Cri L.J. 897) (supra). In this case, however, the proposition canvassed was converse. It was argued that since only summons had been issued there may be no apprehension of arrest. Considering the submissions made by the Counsel, the Division Bench of Delhi High Court has observed as follows :

8. It is thus crystal clear from above that the power under Section 438, Cr.P.C. to grant anticipatory bail is of an extraordinary character in as much as the bail is granted only after arrest whereas an order of anticipatory bail is to be passed only before arrest. It is of a wider amplitude. It is without any strings and fetters attached to it except those referred to above. The legislators in their wisdom have chosen not to impose any sort of checks, restrictions and impediments in the way of the Courts to grant bail in cases where the Courts come to the conclusion that it is a fit case for them to do so. They will be free to do so without any let or hindrance."

Thereafter the Division Bench of the Delhi High Court adverted to the circumstances which led to the incorporation of Section 438 into the body of the Criminal Prodedure Code. Again the Delhi High Court also noticed the judgment of the Supreme Court in the case of Gurbaksh Singh Sibbia. The judgment of the Division Bench of the Punjab and Haryana High Court in Puran Singh's case (1985 Cri L.J. 897) (supra) was approved as follows :

"24. A situation very much akin to the situation in hand arose before the Punjab and Haryana High Court in the case of Puran Singh v Ajit Singh reported as 1985 Cri L.J. 897. While dealing with the said situation it was observed. . . "The main governing factor for the exercise of jurisdiction under S. 438, Cr.P.C. is the apprehension of arrest by a person accused of the commission of a non-bailable offence. The section makes no distinction whether the arrest is apprehended at the hands of the police or at the instance of the Magistrate. The issuance of a warrant by the Magistrate against a person, to my mind justifiably gives rise to such an apprehension and well entitles a person to make prayer for his anticipatory bail. The High Court or the Court of Session may, however, decline to exercise its powers under S. 438(1), Cr.P.C. keeping in view the fact that the Magistrate has summoned the accused through bailable warrant i.e. a relief almost similar to what can be granted by the Court under S. 438(1), Cr.P.C. yet that does not mean that the Court has no jurisdiction to grant anticipatory bail to such an accused person. The grant of bail under S. 438(1) by the High Court or the Court of Session is, to my mind, dependent on the merits of a particular case and not the order of the Magistrate choosing to summon an accused through bailable or non-bailable warrant."

Thereafter the ratio of the judgment is in paragraph 26 which is as follows :-

"26. The above view which we are taking also finds support from the observations of the Andhra Pradesh High Court (Full Bench) in Smt. Shaik Khasim Bi v. The State, AIR 1986 AP 345 : (1986 Cri L.J. 1303). For all the aforesaid reasons we hold that the filing of a charge-sheet by the police and issuing of a warrant by the Magistrate do not put an end to the power to grant bail under S. 438(1), Cr.P.C. and on the other hand we are of the view that the High Court or the Court of Session has power to grant anticipatory bail under S. 438(1) to a person after the criminal Court has taken cognizance of the case and has issued process viz. the warrant of arrest of that accused person."

The Division Bench of Calcutta High Court in the case of Pankaj Lochan Sahoo v. State, (1996) 2 Crimes 555 also notices the judgment of the Supreme Court in Gurbaksh Singh Sibbia's case. In view of the aforesaid enunciation of law by various Courts of this Country it is not possible to hold as a proposition of law that Sessions Court or the High Court will have no power to entertain the application for anticipatory bail where either summons or warrants have been issued against the accused. The Court has the jurisdiction to grant anticipatory bail on being satisfied that the accused apprehends arrest in a non-bailable

offence. It is difficult, therefore, to appreciate the reasoning of the learned Additional Sessions Judge to the effect that the application for anticipatory bail is inconceivable because the applicant is liable to be arrested on the basis of the directions issued by the Magistrate rather than the police. This reasoning, in my view, does not conform with the provisions of Section 438 of the Criminal Procedure Code.

4. On merits admittedly on the basis of the same incident an FIR has been registered against the applicant on 18th Nove. 1995. It is also a matter of record that in the said case the petitioner has been released on bail by order dated 4-1-96. The present complaint has been lodged before the Court after a period of two and half years. The petitioner is in Government service. There is hardly any apprehension of the petitioner absconding. At this late stage it can hardly be said that the petitioner is likely to tamper with the evidence or interfere with the witnesses. In view of the above I find this to be a fit case in which the petitioner deserves to be granted anticipatory bail.

5. In view of the above, it is ordered that in the event of the arrest of the petitioner on the basis of the non-bailable warrant issued by the Magistrate, 24th Court, Borivli, Mumbai in case No. 170/W/98 he shall be released on bail on his furnishing PR Bond in the sum of Rs. 5,000/- with one surety in the like amount to the satisfaction of the learned Metropolitan Magistrate, 24th Court, Borivli. The petitioner is entitled to deposit cash till the surety is furnished to the satisfaction of the Magistrate, 24th Court, Borivli, Bombay. Application is allowed.

Certified copy expedited. Application allowed.

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Cross Citation :2010 ALL MR (Cri) 2368 , 2010-Crimes-3-604 ,

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : V.M. Kanade, J.
Ramesh Kotecha ….V/s….State of Maharashtra
Criminal Application No. 2966 of 2010 Of, Jun 28,2010

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Cr. P.C. SS. 205, 251, 71 – Issurance of Non – bailable warrants – It should be issued as alast resort – Magistrate may issue a summons and then a bailable warrant and only if presence of accused is not secured then only N.B.W. may be issued – Magistrate should not insist on the presence of the accused at all times unless it is necessary – There is no need for accused or his advocate to apply for exemption on every date of heareing – If the accused makes even the first appearance through a counsel, he may be allowed to do so.

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JUDGEMENT

(1.) Heard the learned counsel for the applicant and APP for the State.

(2.) By this application which is filed under Section 482 of the CrPC, the applicant takes exception to the order passed by the Chief Metropolitan Magistrate, Esplanade, Mumbai, dated 18th June, 2010. By the said order, the learned Magistrate was pleased to reject the application made by the applicant's Advocate for exemption and refused to cancel the non-bailable warrant. Brief facts are as under:

(3.) A complaint was filed against the present applicant for the offence punishable under Section 354 of the IPC which was registered with the Cuffe Parade police station, Mumbai. After filing of the complaint, the complainant remained absent on number of dates. Thereafter, however, her statement was partly recorded on 11th June, 2009. Thereafter, the case was adjourned to 11th August, 2009, 27th August, 2009, 8th October, 2009, 24th November, 2009, 15th December, 2009, 7th April, 2010, 13th April, 2010 and finally to 18th June, 2010. On 13th April, 2010, when the matter appeared before the court, complainant Ms. Leena Francis Soaz was present and she informed the trial court that she was contemplating not to proceed with the case and therefore, sought time to consider this aspect. The learned Magistrate, accordingly, in view of the request made by her, adjourned the case on 18th June, 2010. On 18th June, 2010 when the matter was called out, the applicant's Advocate was not present. The accused also was not present. An application was filed for exemption and the said application was ready. However, since the applicant's Advocate before entering the court room, the learned Magistrate was pleased to issue non-bailable warrant by passing the following order: "Accused remains absent. Issue NBW against accused." Thereafter, the applicant's Advocate made an application for exemption. In the said application, it was mentioned that the applicant was unwell and was unable to attend the Court and therefore, it was prayed that the accused should be exempted from appearing in the court on that day. This application was also rejected by passing the following order: "Learned APP present. Holding Advocate present. Application for exemption rejected. Issue NBW." Being aggrieved by the said order, the applicant has preferred this application under Section 482 of the Cr PC.

(4.) The learned counsel for the applicant submitted that the learned Magistrate erred in issuing non-bailable warrant and in not granting exemption to the accused from appearing in the court. He submitted that the complainant had remained absent on number of occasions and she was also contemplating withdrawal of the complaint. Under these circumstances, the learned Magistrate was not justified in issuing the non-bailable warrant and thereafter, refusing to cancel it when an application for exemption was made. He invited my attention to the judgment of the Apex Court in Inder Mohan Goswami and another v. State of Uttaranchal and others.1 He submitted that the Apex Court had held that non-bailable warrant should normally not be issued if the presence of the accused could be secured. The circumstances under which the said warrant could be issued was laid down in the said judgment. He also invited my attention to judgment of the learned Single Judge of this Court in the case of Bhaskar Sen v. State of Maharashtra and others2, wherein similar guidelines were laid down by the learned Single Judge of this Court.

(5.) I have heard both the learned counsel for the applicant and APP for the State. In my view, the learned Magistrate was not justified in not granting exemption to the applicant and not canceling non-bailable warrant which was earlier issued. The Roznama clearly indicate that the complainant had remained absent on number of dates which are mentioned hereinabove. She had also made a request for a further date in order to

reconsider the continuation of the complaint. Under these circumstances, the learned Magistrate ought to have granted exemption particularly, when the application for exemption was filed in which it was stated that the accused was unwell and he could not appear before the Magistrate on that day. It would be relevant to refer to the observations made by the Apex Court in the case of Inder Mohan Goswami (supra) in this context. The Apex Court in paragraphs 50 to 54 has observed as under:

"50. Civilised countries have recognised that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776. French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with procedure prescribed by law.

51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants. 52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non bailable warrants should be issued. When non-bailable warrants should be issued

52. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when; it is reasonable to believe that the person will not voluntarily appear in court; or the police authorities are unable to find the person to serve him with a summon; or it is considered that the person could harm someone if not placed into custody immediately. 54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive."

(6.) Similarly, in the case of Bhaskar Sen (supra), the learned Single Judge had occasion to consider the provisions of Sections 205 and 251 of the Cr PC. In para 10 of the said judgment, the learned Single Judge has observed as under:

"10. A large number of cases are being filed in this Court seeking cancellation of NBW issued either while rejecting the application for exemption or for nonappearance of the accused on one date of hearing even if Advocate for the accused appears on his behalf. It is also observed that the complaints under Section 138 of the Act are being filed against the companies in which all the directors are being arraigned as accused and their presence is being insisted on every date of hearing and no proceedings are being taken up in their absence. It is further observed that the progress of the cases under Section 138 impedes for want of their presence. The fact remains as to why their presence is being insisted on every date of hearing. The idea is to see that the progress of the case is not hindered for want of presence of the accused or even the complainant for that matter. Keeping this in

view and against a backdrop of the observations made in the foregoing paragraphs, I deem it appropriate to issue the following directions to the courts trying summons cases and in particular, cases under Section 138 of the Act.

(i) Ordinarily the Court should be generous and liberal in exercising powers under Sections 205 and 317 of the Code and grant exemption to the accused from personal appearance unless presence is imperatively needed or becomes indispensable. While considering the application for exemption, the Court should also bear in mind the nature of accusations and prejudice, if any, likely to be caused to the prosecution or the complainant, if personal attendance of the accused is dispensed with or to the accused if personal attendance is insisted upon, as case may be.

(ii) If an accused makes even the first appearance through a counsel, he may be allowed to do so.

(iii) If an accused is seeking permanent exemption in a case, the Court, while dealing with such application, should take precautions that the accused gives an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in the Court on all dates of hearing and that he has no objection for recording a plea on his behalf of a counsel and in taking evidence in his absence.

(iv) While dealing with the application seeking permanent exemption from appearing in the case as afor-estated, if, the Court for any reasons is of the opinion that such exemption should not be granted, it may do so by recording or indicating reasons for rejecting such prayer.

(v) It is open for the Court to grant exemption which is either permanent or for a specific period, depending upon the facts of each case, on the conditions as it deems fit and proper, requiring the accused to file an undertaking as indicated earlier.

(vi) In a given case, the Court may record a plea of the accused even when his Advocate makes such plea on his behalf in a case where personal appearance of the accused is dispensed with on his furnishing the undertaking in terms of Clause (iii). However, it is open for the Court to refuse such permission for reasons to be recorded separately.

(vii) The Court should avoid issuance of non-bailable warrant in the first instance to secure presence of the accused facing trial and it should be applied as a last resort.

(viii) If a counsel for the accused fails to appear in the matter and his absence impedes further progress of the proceedings including examination of witnesses, the Court may resort to any other course as may be available under the provisions of the Code to secure presence of the accused, including issuance of NBW and may cancel the order of exemption and in such case may or may not grant exemption any more.

(ix) The Court should avoid requiring the accused or his Advocate to apply for exemption on every date of hearing.

(x) While exercising the powers to grant exemption under any circumstance, the Court shall not compromise with the further progress of the proceedings and see to it that the presence or absence of either of the parties does not impede the proceedings.

(xi) In a given case, similar parameters be applied for granting exemption to the complainant if his absence is not likely to cause prejudice, if any, to the accused or hinder the progress of the complaint."

(7.) Perusal of the guidelines laid down by the Supreme Court shows that the Magistrate has a power to issue non-bailable warrant but that should ordinarily be issued as a last resort. Before issuing a non-bailable warrant, the Magistrate may issue summons and then a bailable warrant and only if the presence of the accused is not secured, he may have to take resort to the provision of issuance of non-bailable warrant. In number of judgments of the Apex Court and this Court, it has been held that that Magistrate should not insist on the presence of the accused at all times unless it is absolutely necessary. The ratio of the said judgments, therefore, in my view, squarely applies to the facts of the present case.

(8.) Order is, accordingly, set aside. The non-bailable warrant issued by the Magistrate is quashed.

(9.) Application is allowed and disposed of. Petition allowed.

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DECEMBER 24, 2013

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

WRIT PETITION NO. 4429 OF 2013

Arunkumar N. Chaturvedi ..Petitioner

Vs.

The State of Maharashtra and Anr ..Respondents

Mr.Rishi Bhuta,for the Petitioner.

Mr. A. R. Patil, APP,for the Respondent State**.**

CORAM :¬M. L. TAHALIYANI,J.

DATE :¬ DECEMBER 24, 2013**.**

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Application for cancellation of Non – bailable warrant – There is no necessity for accused to remain present – Warrant can be cancelled in absence of accused – Court can not require presence of accused before dealing with application.

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P. C.:Heard the learned counsel Mr. Rishi Bhuta for the Petitioner and the learned Additional P. P. Mr. Patil, for the State of Maharashtra.

The judgments of Andhrapradesh High Court and Delhi High Court were cited before the learned Magistrate. The learned Magistrate without considering those judgments has stated that the said judgments were not binding upon him.

Since the Applicant was ready to appear before the Magistrate after cancellation of warrant and since there was reasonable apprehension in the mind of the Applicant that he might be put beyond the bars if he appeared before cancellation of warrant, the learned Magistrate should have considered the application on merits.

In my considered opinion, there is no law that the accused shall personally remain present for cancellation of warrant. If the lawyer makes an application for cancellation of warrant, the same needs to be considered on merits by the learned Magistrate without insisting the for appearance of the Applicant/accused. It is noted by this Court that many Writ Petitions are filed in this Court only because the learned Magistrate straight way take a view that warrant cannot be cancelled unless accused appears before the Court. The view taken by a few of the Magistrates particularly in the city of Bombay, in my opinion, is not correct. It is high time that this Court lets the Magistrate note that the appearance of the applicant/accused is not necessary when application for cancellation of warrant is made. In the circumstances, I pass the following order:¬
(I)The non¬bailable warrant issued against the Applicant stands cancelled.
(II)The Applicant shall appear before the Trial Court on next date of hearing.
(III)The copy of this order shall be forwarded to the Chief Metropolitan Magistrate, Bombay for being circulated to all the Additional Chief Metropolitan/ Magistrate and Metropolitan Magistrate.
(IV)The Writ Petition stands disposed of.

(M. L. TAHALIYANI, J.)

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Cross Citation :2001-DCR-1-500 , 2001-ALLMR(CRI)(JOUR)-0-33

HIGH COURT OF DELHI

Hon'ble Judge(s) : R.S.Sodhi,J

PREM CASHEW INDUSTRIES .....V/s

(Zen Pareo) LIEUTENANT GOVERNOR, UNION TERRITORY OF DELHI

Criminal 55 Of 1999, Criminal Miscellaneous 1051 Of 1999, Sep 22,2000

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Application for cancellation of Non – bailable warrant – There is no necessity for accused to remain present – Warrant can be cancelled in absence of accused – Court can not require presence of accused before dealing with application.

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(1.) This is a revision petition challenging the order dated 16.1.1999 of the Metropolitan Magistrated where by the learned Magistrate has rejected the application of

the petitioner praying for withdrawal of non-bailable warrants. The revision petition before me, besides challenging the order dated 16.1.1999, also raises question of jurisdiction.

(2.) It has been argued before me by learned counsel for the petitioner that the Courts below have no jurisdiction to entertain the complaint inasmuch as the cause of action which arose on the failure to make payment within fifteen days from the date of receipt of the notice, necessarily restricts the jurisdiction to the place where notice has been served and from where the amount has not been released. In support of this contention learned senior counsel has drawn my attention to the judgment of the Supreme Court in Sadanandan Bhadran v. Madhavan Sunil Kumar, 1988 (6) SCC 514. Learned counsel relies upon that following observations in the judgment:

"5. The next question that falls for our determination is whether dishonour of the cheque on each occasion of its presentation gives rise to a fresh cause for action within the meaning for Section 142(b) of he Act. Section 142 reads as under: "142. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974). (a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be holder in due course of the cheque; (b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138; (c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138."

(3.) From a plain reading of the above Section, it is manifest that a competent court can take cognizance of a written complaint of an offence under Section 138 if it is made within one month of the date on which the case of action arises under clause (c) of the proviso to Section 138.

(4.) In a generic and wide sense (as in Section 20 of the Civil Procedure Code, 1908) "cause of action" means every fact which it is necessary to establish to support a right or obtain a judgment. Viewed in that context, the following facts are required to be proved to successfully prosecutes the drawer for an offence under Section 138 of the Act:

(a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and. the cheque was dishonoured; (b) that the cheque was presented within the prescribed period; (c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period ; and (d) that the drawer failed to make the payment within 15 days of the receipt of the notice.

(5.) If we were to proceed on the basis of the generic meaning of the term "cause of action", certainly each of the above facts would constitute a part of the cause of action but then it is significant to note that clause (b) of Section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. The reason behind giving such a restrictive meaning is not far to seek. Consequent upon the failure of the drawer to pay the money within the period 15 days as envisaged under clause (c) of the proviso to Section 138, the liability for the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under Section 142 is to be reckoned accordingly. The combined reading of the

above two Sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142(c) arises -- and can arise only once.

(6.) If we were to proceed on the basis of the generic meaning of the term "cause of action", certainly each of the above facts would constitute a part of the cause of action but then it is significant to note that clause (b) of Section 142 gives it a restrictive meaning, in that, it refers to only one fact which will give rise to the cause of action and that is the failure to make the payment within 15 days from the date of the receipt of the notice. The reason behind giving such a restrictive meaning is not far to seek. Consequent upon the failure of the drawer to pay the money within the period 15 days as envisaged under clause (c) of the proviso to Section 138, the liability for the drawer for being prosecuted for the offence he has committed arises, and the period of one month for filing the complaint under Section 142 is to be reckoned accordingly. The combined reading of the above two Sections of the Act leaves no room for doubt that cause of action within the meaning of Section 142(c) arises -- and can arise only once.

(7.) From the learned counsel wants me to deduce that the cause of action and jurisdiction are one and the same thing, namely, the cause of action is a concept in time and place while jurisdiction is situs, but, however, the same amalgamate into one and that is what is termed as 'cause of action'. On the other hand, my attention has been drawn to the judgment of the Supreme Court in K. Bhaskaran v. Sankaran Vaidhyan Balan and Another, JT 1999 (7) SC 558 where the question of jurisdiction has been adverted to and answered by the Supreme Court as follows:

"11. We fail to comprehend as to how the trial court could have round so regarding the jurisdiction question. Under Section 177 of the Code "every offence shall ordinarily be inquired into and tried in a court within whose jurisdiction it was committed." The locality where the bank (which dishonoured the cheque) is situated cannot be regarded as the sole criteria to determine the place of offence. It must be remembered that offence under Section 138 would not be completed with the dishonour of the cheque.

(8.) It attains completion only with the failure of the drawer of the cheque to pay .the cheque amount within the expiry of 15 days mentioned in Clause (c) of the proviso to Section 138 of the Act. It is normally difficult to fix up a particular locality as the place of failure to pay the amount covered by the cheque. A place, for that purpose, would depend upon a variety of factors. It can either be at the place where the drawer resides or at the place where the payee resides or at the place where either of them carries on business. Hence, the difficulty to fix up any particular locality as the place of occurrence for the offence under Section 138 of the Act.

(9.) Even otherwise the rule that every offence shall be tried by a court within whose jurisdiction it was committed is not an unexceptional or unchangeable principle. Section 177 itself has been framed by the legislature thoughtfully by using the precautionary word "ordinarily" to indicate that the rule is not invariable in all cases. Section 178 of the Code suggests that if there is uncertainty as to where, among different localities, the offence would have been committed the trail can be had in a court have jurisdiction over any of those localities. The provision has further widened the scope by stating that in case where the offence was committed partly in one local area and partly in another local area the court in either of the localities can exercise jurisdiction to try the case. Further again, Section 179 of the Code stretches its scope to a still wider horizon. It reads thus:

"179. Offence triable where act is done of consequence ensues. When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."

(10.) The above provisions in the Code should have been borne in mind when the question regarding territorial jurisdiction of the courts to try the offence was sought to be determined.

(11.) The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence : (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.

(12.) It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at 5 different localities. But concatenation of all the above five is a sine qua non for the completion of the offence under Section 138 of the Code. In this context a reference to Section 178(d) of the Code is useful. It is extracted below:

"Where the offence consists of several acts done in different local areas, it may be inquired into or tried by a court having jurisdiction over any of such local areas."

(13.) Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words; the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence under Section 138 of the Act."

(14.) Faced with these two different judgments, learned counsel for the petitioner wants me to notice that the judgment in K. Bhaskaran's case (supra) did notice the earlier judgment of the Supreme Court in Sadanandan's case (supra) and, therefore, according to him, this is an observation but not the ratio of the judgment.

(15.) Having heard learned counsel for the parties. I have carefully gone through the judgments cited at the bar. I am of the opinion that cause of action is something quite different from jurisdiction. Cause of action must restrict itself to time whereas jurisdiction is a situs. Cause of action has been dealt with in Sadanandan's case while situs has been dealt with in K. Bhaskaran's case. There is no question of each overlapping the other. There is no ambiguity whatsoever, to my mind, and, therefore, I hold that in the facts and circumstances of this case since the cheque had been presented at Delhi and also notice issued from Delhi, the courts at Delhi have jurisdiction to entertain the complaint. However, now coming to the challenge to the order dated 16.1.99, learned counsel submits that the court below ought to have, in the first instance, disposed of the application and only thereafter required the presence of the accused if the need did them arise. The court ought not to have, according to him, first required the presence of the

accused before dealing with the application for cancellation of non- bailable warrants and that court having not decided the application insisting upon the accused to be present, has passed an order without applying its mind to the contentions raised in the application for cancellation of non-bailable warrants. There appears to be a great deal of force in this argument. It is also contended that the application that has been moved must first be decided before the consequences thereon can visit the accused. In this view of the matter, I hold that the order dated 16.1.1999 is bad and remand the matter to the Metropolitan Magistrate to first consider the applications for recall of the non-bailable warrants before passing any other order.

(15.) In view of what has been stated above, the revision petition is disposed of.

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Cross Citation :2009-Cri.L.J.-0-523,2009-AIR JharR-2-203

HIGH COURT OF BIHAR

Hon'ble Judge(s) : SAMARENDRA PRATAP SINGH, JJ.

SANDEEP KUMAR TEKRIWAL ….V/s….STATE OF BIHAR

Sep 09,2008

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Cr. P.C. S. 317 – Trail in absence of accused – Non – bailable warrant issued against accused- Held- Nothing to show thant any order was passed on previous dates asking accused to remain present – Held, issurance of warrant unjustified – Hence quashed.

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JUDGEMENT

(1.) HEARD learned counsel for the parties.

(2.) IN the instant writ petition, the petitioner has prayed for quashing the order dated 28-6-2008: passed by Judicial Magistrate, 1st class, Bhagalpur, in connection with Tr. No. 2853 of 2008, arising out of kotwali PS Case No. 0152 of 2000, for offences under Sections 406, 419, 420, 467, 468, 120b of the I. P. C. , whereby his representation under Section 317, Cr. P. C. was not accepted and as such his bail bond was cancelled, and non-bailable warrant (NBW)for arrest was also issued against him.

(3.) THE facts of the case in short is as follows :-

Pursuant to order dated 27-9-2000; passed by the Apex Court in S. L. A. (Cri)No. 3079 of 2000, the petitioner surrendered in the Court below and was released on bail. After taking of cognizance, the matter was transferred to the Court of Md. Sahid Khan, judicial Magistrate, Ist class, Bhagalpur for disposal. The petitioner duly appeared before the trial Court on transfer of case, who vide his order dated 5-3-2000 allowed the petitioner to remain on previous bail. However, the case remained pending, awaiting appearance of accused Prem prakash trivedi. Learned counsel submits, that the aforesaid fact would also transpire from orders of the trial Court including order dated 31-10-2005.

(4.) ON 28-6-2008, the date fixed in the case, three out of four accused including the petitioner were represented under, Section 317 of the Cr. P. C. The other accused Prem prakash Trivedi was as usual absent. The learned magistrate did not accept the representation under Section 317, Cr, P, C. and cancelled bail bond and issued NBW against the petitioner and Bothers.

(5.) LEARNED counsel for the petitioner submits that the rejection of representation under Section 317, Cr. P. C. and cancellation of bail bond and issuance of NBW by a composite order dated 28-6-2008, is in violation of provision of Section 317 of the Cr. P C. itself.

(6.) LEARNED counsel for the State submits that instant writ application is "not maintainable. Furthermore, forfeiture of bond under Section 446, Cr. P. C. is appealable under Section 449, Cr. P. C. He further submits that under Section 317, Cr. P. C. the magistrate by one composite order can cancel the representation, bail bond and can issue NBW also.

(7.) AS maintainability of the writ petition has also been raised by learned State counsel, this Court proceeds to examine the same also.

(8.) LEARNED counsel for the State submits that the petitioner has alternative remedy and could have filed quashing application instead of rushing to this Court in writ jurisdiction. In this respect, he relied upon decisions of the Apex Court in cases of Hari vishnu Kamath v. Ahmad Ishaque and others, reported in AIR 1955 SC 233, Surya Dev rai v. Ram Chander Rai and others, reported in AIR 2003 SC 3044, as well as Ranjit Singh v. Ravi Prakash, reported in AIR SC 3892.

(9.) IN case of Hari Vishnu Kamath (supra), the Apex Court laid down the circumstances in which writ of Certiorari can be issued. Extract of the judgment laid down in para 10 is quoted herein as follows :-

"according to the common law of England 'certiorari' is a high prerogative writ issued by the Court of the King's Bench or Chancery to inferior Courts or tribunals in the exercise of supervisory jurisdiction with a view to ensure that they acted within the bounds of their jurisdiction. To this end, they were commanded to transmit the records of a cause or matter pending with them to the superior Court to be dealt with there, and if the order was found to be without jurisdiction, it was quashed. The Court issuing certiorari to quash, however could not substitute its own decision on the merits, or give directions to be complied with by the Court or the tribunal. Its work-was destructive; it simply wiped out the order passed without jurisdicion and left the matter there. "

(10.) IN the case of Surya Deo Raiv. Ram chander Rai (AIR 2003 SC 3044) (supra), the Apex Court in sub paras (3) and (8) of para 38 extensively laid down scope, limits and circumstances in which writ Of certiorari can be issued. These sub paras are as follows:-

(3) Certiorari, tinder Article 226 of the constitution, is issued for correcting gross errors of jurisdiction, i. e. . , when a subordinate court is found to Have acted (i) without jurisdiction by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping of crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law Or the rules of procedure or acting in violation of principles of natural justice whether

there is no procedure specified, and thereby occasioning failure of justice. (8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing Inferences or correct errors of mere formal or technical character;

(11.) THE Apex Court further observed that when theree is manifest error apparent ont the face of proceedings and based on clear ignorance or disregard of Provision of law, the writ would be maintainable

(12.) IN the case of Ranjit Singh (AIR 2004 sc 3892) (supra)there was dispute regarding landlord and tenant in respect of suit premises. The learned Sessions Court was persuaded to form an opinion that the shop, was an old construction which was needed to be demolished as it was in bad condition. The informant Ravi Prakash moved the High court for setting aside the judgment of Appellate court and restoring that of trial Court which relief the High Court granted. The high Court observed that considering the evidence on record, the order of Session's court was not sustainable, In these such circumstances, the Apex Court observed the High Court while exercising jurisdiction under Articles 226 and 227 of the Constitution of India cannot act like an Appellate Court,

(13.) ON the other, hand, Learned counsel for the petitioner submits that it is well established,by judicial pronouncement that high Court under Articles 226 and 227 of the Constitution of India can can interfere in the following circumstances which are enumerated herein below-

> (a) Erroneous, assumption or excess of jurisdiction, (b) Refusal to exercise jurisdiction (c) Error of law apparent on the face of the record, as distinguished from a mere mistake of law or error of law relating to jurisdiction. (d) Violation of the principles of natural justice. (e) Arbitrary or capricious exercise of authority, or discretion. (f) Arriving at a finding which is perverse or based on no material. (g) A patent or flagrant error in procedure. (h) Order resulting in manifest injustice.

(14.) HAVING heard the learned counsel for the parties, there cannot be any dispute to the proposition that while exercising jurisdiction under Sections 226 and 227 of the Constitution of India, the High Court cannot act like an Appellate Court. The jurisdiction is supervisory in nature, Article 227 of the Constitution is for keeping the subordinate Courts within the bounds of jurisdiction. When the subordinate Court has jurisdiction which it does not have, or has failed to exercise the jurisdiction, or exercises jurisdiction in a manner not permitted by law and thereby has occasioned, a failure of justice, the High Court would step in to exercise its supervisory jurisdiction. However, the distinction between exercise of jurisdiction, for issuance of writ of certiorari under Article 226 of the Constitution and that of supervisory jurisdiction has obliterated to quite an extent over the years. While issuing writ of certiorari the High court may annul or set aside the act, order or proceeding but cannot substitute its own decision in place thereof. In appropriate cases, the jurisdiction of the High Court may not be limited to giving suitable direction, but can pass order in suppression or substitution of the order of the subordinate court as the Court could have made in the facts and circumstances of the case

(15.) HAVING noticed the extent and scope of jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, I would now examine whether the instant case

would fall within the aforesaid ambits. It would be necessary to examine section 317, cr. P. C. at the first instance itself which is quoted herein below :-

317. Provision for inquiries and trial being held in the absence, of accused in certain cases.- (1) At any stage of an inquiry or trial under this Code, if the Judge or magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused. (2) If the accused in any such case is not represented by a pleader, or if the Judge or magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourns such inquiry or trial, order that the case of such accused be taken up or tried separately.

(16.) SECTION 317, Cr. P. C. provides for inquiries and trial being held in the absence of accused in certain cases. However, if the magistrate finds that personal appearance of the accused is necessary, he would direct that accused would no longer be represented on the next date by a pleader under Section 317, Cr. P. C. but would appear in person. If the accused in spite of such order does not appear in person, it would be open for the learned Magistrate to issue warrant of arrest and proceed in accordance with the procedure prescribed in Chapter-VI of the cr. P. C. and may also cancel bail and bail bond and proceed in accordance with Chapter XXXIII of the Cr. P. C. It does not appear from the order of the preceding dates i. e. 31-1-2008, 26-3-2008 that personal attendance of petitioner would no longer be dispensed with, and he is required tp attend in person. The Magistrate in view of Section 317 (1) Cr. P. C. ought to have given an opportunity to an accused to appear in person who was being allowed to be represented through a pleader. The order of preceding dates in the case on the contrary shows that magistrate in fact accepted the representation under section 317, Cr. P. C. The magistrate has to follow the procedure prescribed therein, if it does not dispenses with his personal attendance. A Magistrate while rejecting a representation under section 317 Cr. P. C. , cannot at the same time cancel bail bond and issue non-bailable warrant of arrest, if on preceding dates has not clearly directed that personal attendance under section 317, Cr. P. C. will no longer be dispensed with. The Court ought to provide a reasonable opportunity to the accused to appear in person whose representation was earlier being allowed under Section 317, Cr. P. C. In this case, it appears that trial lingered as a co-accused Prem Prakash was absconding. Learned counsel for the petitioner has also submitted that there have been no latches on his part.

(17.) IN the instant case, the learned magistrate not only rejected application under section 317, Cr, P. C. but also cancelled the bail bond and issued non-bailable warrant of arrest by a composite order dated 28-6-2008, which is impermissible under Section 317, Cr. P. C. If the Magistrate did not think it appropriate to allow the representation of petitioner under Section 317 Cr. P. C. any more, it could have directed the petitioner to appear in person on dates next. Even then if petitioner or accused does not appear for reasons which do not seem valid to the Magistrate he may proceed to issue warrants as provided in Chapter VI of Cr. P. C. and cancel bail and bail bonds as engrafted in Chapter XXXIII, Cr. P. C. as noticed in para 16. The learned magistrate as such exceeded jurisdiction vested in him and exercised the same erroneously.

(18.) NOW, the Court comes to next submission of the petitioner that appeal lies under Section 449, Cr. P. C. against orders passed under Section 446, Cr. P. C. , which deals with the procedure, when bond is forfeited. He submits that the impugned order is one which has been substantially passed under Section 446 Cr. P. C. as such, writ petition is not maintainable. Let us examine whether the impugned order is one which is passed under Section 446 or Section 446a Cr. P. C.

(19.) SECTION 446a, Cr. P. C. has been inserted in the Code of Criminal Procedure by act No. 63 of 1980, and it relates to cancellation of bail and bail bond. Section 446a, cr. P. C. reads as follows :-

> (a) the bond executed by such person as well as the bond if any, executed by one or more of his sureties in that case shall stand cancelled; and (b) thereafter no such person shall be released only on his Own bond in that case, if the police officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition.

(20.) THE impugned order as such is one which would come under purview of Section 446a and not Section 446, Cr. P. C.

(21.) THERE is no corresponding amendment in section 449 of the Cr. P. C. providing for appeal against order cancelling of bail or against order of issuance of NBW under section 446a which is an independent provision and not a clause or sub-section of section 446. In view of aforesaid circumstances, I am not in agreement with the learned counsel for the State that order cancelling bail and bail bond is also appealable under Section 449, Cr. P. C.

(22.) IN view of aforesaid findings, I find that the learned Magistrate exceeded his jurisdiction by cancelling bail and bail bond and issuing no bailable warrant of arrest while rejecting the representation under section 317, Cr. P. C. vide one composite order dated 28-6-2008, without any prior order on preceding dates directing the personal attendance of petitioner, and as result the same is set aside. The petitioner is directed to appear before the learned magistrate within six weeks from today who would allow him to remain on previous bond. The petitioner would abide by any further direction of magistrate in the proceeding. Order accordingly.

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Cross Citation :2007-AllMR(Cri)-0-2283 , 2008-CRIMES-4-151

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : B.R. GAVAI, J.

Mohd.Sajid Husain Mohd. Shakir Husain .... Vs...State of Maharashtra

Criminal Application 1751 of 2007 Criminal Application 1786 of 2007 Of Criminal Application 1789 of 2007, Jun 27,2007

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Cr. P.C. 438 – Anticipatory Bail – I.P.c. 376, 343, r/w 34 and u.s 5 of prevention of Immoral Traffic act – All the applicants are Social Workers, Politicians and Police officers – As such having deep roots in the society – No possibility of fleeing away from the ends of justice – Court inclined to allow bail application.

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JUDGEMENT

(1.) BY way of present applications, the applicants are seeking anticipatory bail, in connection with Crime No. 160/2007, registered with Kranti Chowk Police Station, Aurangabad, for the offence punishable under Sections 376, 342 read with Section 34 of the Indian Penal Code, and under Section 5 of the Prevention of Immoral Traffic Act.

(2.) HEARD Shri B. R. Warma, Mrs. S. S. Jadhav, Shri N. S. Ghanekar, Shri A. N. Nagargoje, Shri B. S. Deshmukh, Shri Joydeep Chatterjee, Shri H. T. Joshi, learned counsel, for the applicants and Shri N. B. Khandare, learned Public Prosecutor, for the respondent/ State.

(3.) IT is submitted on behalf of the learned counsel for the applicants that initially in the FIR, which has been lodged by the prosecutrix on 22nd April, 2007, the names of the present applicants, do not appear. It is submitted that only in her supplementary statement and so also in her statement recorded under Section 164 of the Code of Criminal Procedure, 1973, before the learned Magistrate, the names of the present applicants, for the first time, have been implicated by her on 25th April, 2007. It is submitted that taking the prosecution case to be true in entirety, still no case is made out, so as to prima facie book the applicants for the offence punishable under Section 376 of the Indian Penal Code. It is further submitted that the liberty granted by this court vide order dated 11th June, 2007, has not been misused by the applicants and the applicants have been regularly attending the Investigating Officer and cooperating with the Investigating Agency.

(4.) IT is further submitted that from the missing report, which was lodged by the Aunt of the prosecutrix, in the month of November, 2006, at Parbhani, the age of the prosecutrix, is shown to be 16 years. It is further submitted that from the certificate, which has been produced on record by the Investigating Agency, it could be seen that the said certificate is, at least prima facie, not genuine inasmuch as the entry of birth, which is said to be of the year 1991, has been recorded in the year 1996, which is after the period of one year from the date of birth, and as such beyond the statutory period as provided under the Birth and Death Registration Act.

(5.) SHRI Khandare, learned Public Prosecutor, submits that from the school certificate of the prosecutrix, it can be clearly seen that her age on the date of registration of crime was 15 years, 9 months and 22 days. He submits that from the perusal of her statement recorded under Section 164 of the Code of Criminal Procedure, 1973, it would appear that she was compelled to have sexual intercourse with the accused and as such an offence under Section 376 of the IPC, was committed. He submits that for a moment, assuming without admitting that said act was with her consent, still since her age is below 16 years, her consent would be immaterial and even in that event, the accused could be booked for the offence punishable under Section 376 of the IPC. The learned Public Prosecutor further submits that most of the applicants are Police Officers and others are political and social workers and as such, influential citizens. It is submitted that the accused have indulged into acts of tampering with the evidence and influencing the witnesses. He further submits that the Aunt of the prosecutrix has made an application to the Authorities of Remand Home for custody of the prosecutrix. It is submitted that it was done at the behest of the accused in order to secure her release from the Remand Home, where she is protected by the police. He submits that though the applicants have attended the police station as directed by this court, they have not co-operated with the investigation by either refusing to give answers or by giving vague answers.

(6.) THE learned Public Prosecutor relies on the judgment of the Apex Court in the case of Dukhishyam Benupani, Asstt. Director, Enforcement Directorate (FERA) Vs. Arun Kumar Bajoria reported in 1998 (1) Supreme Court Cases 52 and State Rep. by the C. B. I. Vs. Anil Sharma reported in 1997 (7) Supreme Court Cases 187, in support of the proposition that the investigation of a person armed with a pre-arrest order cannot be equated with a custodial interrogation and as such the application for grant of anticipatory bail should be rejected.

(7.) I have perused the first statement of the prosecutrix, her supplementary statement and so also her statement recorded under Section 164 of the Code of Criminal Procedure, 1973, before the learned Magistrate, in the presence of the social worker.

(8.) SINCE the matter is still under investigation, it will not be appropriate for me to reproduce the evidence collected by the prosecution, in view of the Law laid down by the Apex Court in the case of Niranjan Singh and another Vs. Prabhakar Rajaram Kharote and others, reported in 1980 (2) Supreme Court Cases 559.

(9.) IN that view of the matter, I refrain myself from dealing with the statement of the prosecutrix, recorded under Section 164 of the Code of Criminal Procedure, in detail. However, for consideration of the applications, it would be necessary to refer to some part of the statement of the prosecutrix recorded under Section 164 of the Code of Criminal Procedure. It is not in dispute that the present applicants have been, for the first time, implicated in the supplementary statement recorded under Section 164 of the Code of Criminal Procedure, on 25th of April, 2007 and that they were not implicated in the FIR which was registered on 22nd of April, 2007. From the statement of the prosecutrix, it appears that after the death of her father, her mother had remarried. As such, she was residing along with her maternal aunt. She has stated that on one occasion her aunt Mahananda had abused and assaulted her, and

therefore, she left house at Parbhani and started for Aurangabad. It is stated that after she came to Aurangabad, she stayed there for some time and after that she returned to Parbhani. However, after her return to Parbhani, her cousin again assaulted her and thereafter, she again came back to Aurangabad and was residing at Mukundwadi. It is stated that at that time she met the accused Tabassum who was also known as Baji. It is alleged that thereafter, she went to reside with said Tabassum. After 2-4 days, she was taken to Mhaismal by Tabassum in one white car. When they went to Mhaismal, one person was sitting there. He was taking drinks. It is alleged that she was made to drink 7-8 glasses of cold drink and after consuming these drinks, she became dizzy and thereafter that unknown person took her inside the room and had forcible sexual intercourse with her. It is stated that thereafter they returned to Aurangabad. She took medical treatment for some time.

(10.) INSOFAR as the present applicants are concerned, the prosecutrix, in her statement under Section 164 of the Code of Criminal Procedure, has stated that after she recovered from the first incident, she thought that since the other girls were also indulging in the profession, there was nothing wrong for her to continue with the said profession. She has further stated that thereafter accused Tabassum compelled her to have sexual intercourse with various other persons in consideration of money. It is stated that she had intercourse with many persons. However, she was remembering the names of few of them and accordingly the present applicants are roped in by her.

(11.) HOWEVER, from the perusal of the statement, it would reveal that she has stated that all these persons had paid certain amount to her in consideration of having sexual intercourse with her. It has been further stated by her that while accused Tabassum had kept entire money for herself on some occasions, on other occasions, the amount was shared by Tabassum and her in the ratio of fifty/fifty. It has been further stated that she had purchased clothes and ornaments out of the amount earned by her.

(12.) INSOFAR as her age is concerned, no doubt that the prosecution has placed on record, her birth certificate, which shows that on the date of the incident, she was 15 years, 9 months and 22 days. However, her missing report is also on record, wherein her Aunt has shown her age to be 16 years, in the month of November, 2006. At least, at this stage, there is no conclusive proof to show that she was less than 16 years of age. It cannot also be said at this stage that accused were aware of her age at the time of having sexual intercourse with her. From the perusal of the statement of the prosecutrix, at least, prima facie, it appears that she had attained the age of understanding and she was knowing as to what would be right or wrong and after the first incident, she had voluntarily indulged in the profession and had intercourse with the applicants and other persons in consideration of money. She has given the details about the amount received by her from various applicants, which varies from person to person. As already observed by me in the order dated 11th June, 2007 that all the applicants are Police Officers or social workers or political workers and as such, are expected to keep high moral standards. However, while considering the application, this court cannot be swayed away by moralistic principles but has to consider the application on its own merit in the light of material available against the applicants.

(13.) FROM the perusal of her statement under Section 164 of the Code of Criminal Procedure, therefore, at least, prima facie, it would appear that the case under Section 376 of the IPC could be made out against accused Tabassum and the first person who had forcible sexual intercourse with her at Mhaismal. Insofar as, the present applicants are concerned, prima facie, it is clear from her statement that the prosecutrix had a sexual intercourse with the applicants on her own accord in consideration of money.

(14.) INSOFAR as the Judgment of the Apex Court in the case of State Rep. by the C. B. I. Vs. Anil Sharma (supra), relied on by the learned Public Prosecutor, is concerned, the prosecution in the said case was under Section 13 (2) of the Prevention of Corruption Act, and the accused was charged with acquiring huge wealth far in excess of his known sources of income. In that view of the matter, the court found that the custodial interrogation of the applicant was necessary, so as to investigate the case properly. In the said case, there was also apprehension that the accused would influence the witness and that the said apprehension was found to be reasonable by the court.

(15.) INSOFAR as the Judgment of the Apex Court in the case of Dukhishyam Benupani, Asstt. Director, Enforcement Directorate (FERA) Vs. Arun Kumar Bajoria (supra), is concerned, wherein Their Lordships of the Apex Court, after perusal of the files found that the seriousness of allegations and magnitude of amount involved, did not entitle the person to be enlarged on anticipatory bail. In that view of the matter, the bail granted to the accused therein, came to be rejected.

(16.) WHILE considering the application for grant of anticipatory bail, the following four factors would be relevant.

(i) the nature and gravity or seriousness of accusation as apprehended by the applicant;
(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court, previously undergone imprisonment for a term in respect of any cognizable offence;
(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested; and
(iv) the possibility of the appellant, if granted anticipatory bail, fleeing from justice.

(17.) INSOFAR as the first factor is concerned, no doubt that the applicants are charged with a serious offence under Section 376 of the IPC. However, as already discussed here-in-above, at least prima facie and at least insofar as the present applicants are concerned, the accusation under Section 376 of the IPC, does not appear to be well founded.

(18.) INSOFAR as the second factor is concerned, it is not the case of the prosecution that the present applicants are having any criminal antecedents or are convicted by the Court or have previously undergone any imprisonment in respect of any cognizable offence.

(19.) INSOFAR as the third factor is concerned, that would not be relevant for the present case. Though there may not be a prima facie case under Section 376 of the IPC, but still, the applicants could be involved in the offence punishable under Section 5 of the Prevention of Immoral Traffic Act.

(19.) INSOFAR as the third factor is concerned, that would not be relevant for the present case. Though there may not be a prima facie case under Section 376 of the IPC, but still, the applicants could be involved in the offence punishable under Section 5 of the Prevention of Immoral Traffic Act.

(20.) INSOFAR as the fourth factor is concerned, it could be seen that all the applicants are either Police Officers, Political and Social Workers and they all are permanent residents of Aurangabad or nearby Districts. All of them have deep roots in the society and as such there is no possibility of fleeing away from the ends of the justice.

(21.) INSOFAR as the contention of the learned Public Prosecutor that the applicants have not abided the conditions, is concerned, it is not disputed that on almost all dates, the applicants have attended the Investigating Officer, as directed by this court. The only contention is that they have not answered some of the questions and have answered some of the questions vaguely. However, except the vague allegations in this respect, no details are given. In no case, the accused can be compelled to give evidence against him.

(22.) INSOFAR as the apprehension of the learned Public Prosecutor, in respect of the influencing of the witnesses are concerned, it can be seen that the only evidence against the applicants, is the statement of the prosecutrix. The prosecutrix is now stationed in the Remand Home at Aurangabad. As already stated, she is fully protected in the Remand Home and is under the protection of the police, so there appears no question of applicants being in a position to influence the prosecutrix.

(23.) IN that view of the matter, I am inclined to allow the applications.

(i) The applications are allowed on the same terms and conditions as were imposed by this court vide order dated 11th June, 2007. However, all the applicants are directed to report to the Investigating Officer, on every Tuesday and Friday, between 10. 00 a. m. to 01. 00 p. m. , till filing of the charge sheet. ii) It is made clear that the observations made here-in-above are prima facie in nature and limited for the disposal of the present applications for anticipatory bail. Nothing observed herein should be construed to have been observed on the merits of the matter. The learned trial court shall not be influenced by the same at the time of trial and will decide the case on merit.

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Cross Citation :2009-ALL MR (Cri)-0-433

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : V.M.KANADE, J.
VIRENDRA SHIV SHANKAR ….V/s….STATE OF MAHARASHTRA

Dec 04, 2008

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Cr. P.C. 439, 389 – Accused convicted U.S. 307 of I.P.C. – conflicting version of accused and prosecution witnesses – Prima facie case made out for granting bail – Bail granted.

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JUDGEMENT

Heard the learned Counsel appearing on behalf of the applicant and the learned APP appearing on behalf of the State. 2. Applicant has been convicted for the offence punishable under section 307 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for five years. 3. Prosecution case is that the applicant fired two rounds from his 12 bore gun and, as a result, two persons were injured in the said firing. Counsel for the applicant submitted that the applicant is a retired army personnel and he was working as a security guard at Central Warehousing Corporation of India at JNPT, Uran. It is the case of the applicant that two persons injured in the incident were involved in commission

of theft and, therefore, in order to protect the property, he has fired two rounds from his 12 bore gun. The learned Counsel appearing on behalf of the applicant invited my attention to cross - examination of P. W. 8 - Tanavkumar Siakiya who has admitted that he was arrested in connection with theft case and that while giving deposition in this case, he was in jail and the case was registered against him at Uran Police Station. He has also admitted that he was removed from the service of Amar Jyoti Security Company. Prosecution case, on the other hand, is that one B. U. Lushkar had informed that he wanted to recover the hand- loan which he had given to the applicant and for that purpose he demanded money from the applicant. However, the applicant instead of returning the hand-loan which was given to him by the said Lushkar fired one round in the air and, thereafter, fired two shots at these two persons. 4. Taking into consideration the said conflicting versions of the accused and the prosecution witnesses, prima facie case is made out for grant of bail. Applicant, admittedly, was working as a security guard at the said urea where the incident took place. Two persons were injured at that site. One injured person had been arrested in connection with the theft case. Defence theory is, therefore, plausible. Applicant is retired from the army. 5. Applicant, therefore, be released on bail in the sum of Rs. 5,000/- with one or two sureties in the like amount. Applicant shall report to the concerned Police Station once in a month. 6. Application is disposed of. Application allowed.

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Cross Citation :2003-CRIMES-1-558

HIGH COURT OF CHHATTISGARH

Hon'ble Judge(s) : K.H.N.Kuranga,J

Bisahu ….V/s….State of Chhattisgarh

Misc. Crl. Case 2697 Of 2002, Jan 29,2003

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Cri. P.C. S. 439 – I.P.c. – 363, 366, 376 – Bail – Accused was alleged to have induced girl – Prosecutrix, aged 17 years to go with him promising her to marry with her – Held, the prosecutrix moved with applicant from place to place – Fit case to grant bail.

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JUDGEMENT

(1.) Heard both the counsel. This petition under Section 439 of Cr.P.C. has been filed by applicant - Bisahu for grant of bail. He is the accused in Crime No. 800 of 2002 registered in Police Station: Chhawni Durg, for the offences punishable under Section 363, 366 and 376 of I.P.C. Name of prosecutrix is Veena Sahu aged about 17 years. The case of the prosecution is that on 30/6/2002 she was missing from her house. It is stated that the applicant induced her to go with him promising her to marry her. He took her to Nagpur and from Nagpur to Bhilai and committed rape on her forcibly. Meena Sahu - mother of the prosecutrix filed a missing report on 30/6/2002 before Chhawani Police and thereafter

the applicant and the girl were traced in Bhilai on 7/9/2002. After tracing the girl the mother of the girl filed Dehati Nallshi on the same day. It is stated that the statement of the girl was also recorded on the same day. Learned counsel appearing for the applicant submitted that according to the radiological report the girl was aged about 17 years. The fact that the prosecuth-x was moving with the applicant from 30/6/2002 to 7/9/2002 from place to place itself shows that she is a consenting party and the mother of the prosecutrix has not stated in her Dehati Nallshi recorded on 7/9/2002 that the applicant committed rape on the prosecutrix. Having regard to the facts and circumstances of the case. I am of the opinion that it is a fit case to admit the applicant to bail. The petition is accordingly allowed. Applicant Bisahu is directed to be released on bail on his executing a bond in sum of Rs. 5,000.00 with two sureties for the like sum to the satisfaction of the concerned Magistrate for his appearance before the said Court/trial Court, or as and where so directed. Parties are entitled for certified copy of this order. Application allowed.

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Cross Citation :2009 CRI. L. J. 1887

SUPREME COURT OF INDIA

Hon'ble Judge(s) : R. V. RAVEENDRAN AND J. M. PANCHAL, JJ.

Rasiklal ….V/s….Kishor Khanchand Wadhwani.

Criminal Appeal No. 343 of 2009 (arising out of SLP (Cri.) No. 4008 of 2008), D/- 20 -2 - 2009.

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(A) Criminal P.C. (2 of 1974), S.436, S.437 - BAIL – Bailable OFFENCE - In case of bailable offence, there is no question of discretion in granting bail. (Para 6)

(B) Criminal P.C. (2 of 1974), S.436 - Penal Code (45 of 1860), S.500 - BAIL - DEFAMATION - Bail - Release of person accused of bailable offence - Court is not bound to issue notice to complainant and hear him - Cancellation of bail on ground that complainant was not heard and thus principles of natural justice were violated – is illegal.

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Harish N. Salve and Sushil Kumar Sr. Advocate, Ankur Chawla, Abhishek Singh, Rahul Pratap and Siddhartha Chowdhury, for Appellant; Dr. Abhishek Manu Singhvi, Sr.. Advocate Sanjeev Sachdeva, Saurabh Sharma and Amit Bhandari, for Respondent.

JUDGEMENT

1. M. PANCHAL, J. :- Leave granted.

2. The appellant is accused in Criminal Complaint No. 1604 of 2005 filed in the Court of learned Judicial Magistrate First Class, Indore, M. P. for alleged commission of offence punishable under Sections 499 and 500 of the Indian Penal Code and assails the order

dated March 24, 2008, rendered by the learned single Judge of High Court of Madhya Pradesh, Bench at Indore, in Criminal Revision No. 1362 of 2006 by which bail granted to the appellant by the learned Judicial Magistrate First Class, Indore, M. P. on December 1, 2006 is cancelled on the ground that the order granting bail was passed by the learned Judicial Magistrate First Class, Indore, without hearing the original complainant and was, therefore, bad for violation of principles of natural justice.

3. It is the case of the respondent that the appellant gave an interview on December 15, 2004 on Star News TV Channel and defamed him. The respondent, therefore, filed a Criminal Complaint No. 1604 of 2005 in the Court of learned Judicial Magistrate First Class, Indore, M. P. on January 27, 2005 for alleged commission of offences punishable under Sections 499 and 500 of the Indian Penal Code. The learned Judicial Magistrate examined the respondent on oath as required by Section 200 of the Code of Criminal Procedure, 1973 and issued summons to the appellant for commission of alleged offences under Sections 499 and 500 of the Indian Penal Code vide order dated May 9, 2006. The appellant appeared before the Court on November 20, 2006 and submitted an application under Section 317 of the Code of Criminal Procedure, 1973 seeking exemption for personal appearance along with vakalatnama of his counsel. In the said application prayer for grant of bail was also made. The application was fixed for hearing on December, 26, 2006. However, on December 1, 2006 the appellant filed an application mentioning his appearance before the Court and to consider his prayer for grant of bail under Section 436 of the Code of Criminal Procedure, 1973 as offences alleged to have been committed by him under Sections 499 and 500 of the Indian Penal Code are bailable. The application was heard on the day on which it was filed. The learned Magistrate noticed that the offences alleged to have been committed by the appellant were bailable. Therefore, the appellant was admitted to bail on his furnishing a surety in the sum of Rs. 5000/- and also furnishing a bond of the same amount. While enlarging the appellant on bail the learned Magistrate imposed a condition on the appellant that he would appear before the Court on each date of hearing or else he would be taken into custody and sent to jail. The order dated December 1, 2006 passed by the learned Judicial Magistrate further indicates that in compliance of the direction issued by the Court the appellant furnished a bail bond in the sum of Rs. 5,000/- and also executed a bond for the said amount and that the bail bonds were accepted by the Court after which the appellant was released on bail.

4. The respondent, who is original complainant, filed Criminal Revision No. 1362 of 2006 in the High Court of Madhya Pradesh, Bench at Indore, on December 26, 2006 for cancelling the bail granted to the appellant by the learned Judicial Magistrate First Class, Indore, on the ground that he was not heard and, therefore, the order was violative of principles of natural justice. The learned single Judge, before whom the revision application was notified for hearing, had issued notice to the appellant but the appellant did not remain present before the High Court. The revision application filed by the respondent was taken up for final disposal on March 24, 2008. The learned single Judge, by order dated March 24, 2008, has cancelled the bail granted to the appellant by the learned Judicial Magistrate on the ground that the respondent, who was original complainant, was not heard and, therefore, the order granting bail violates the principles of natural justice. After cancelling the bail granted to the appellant the learned single Judge remitted the matter to the Court below with a direction that the matter be taken up according to law between the parties relating to the grant of bail to the appellant. Feeling aggrieved the appellant has invoked appellate jurisdiction of this Court under Article 136 of the Constitution.

5. This Court has heard the learned counsel for the parties and taken into consideration the documents forming part of the appeal.

6. As is evident, the appellant is being tried for alleged commission of offences punishable under Sections 499 and 500 of the Indian Penal Code. Admittedly, both the offences are bailable. The grant of bail to a person accused of bailable offence is governed by the provisions of Section 436 of the Code of Criminal Procedure, 1973. The said section reads as under :- 436 - In what cases bail to be taken. - (1) When any person other than a person accused of a non bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail :

Provided that such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided :

Explanation. - Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of Section 116 or section 446A.

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under Section 446."

There is no doubt that under Section 436 of the Code of Criminal Procedure a person accused of a bailable offence is entitled to be released on bail pending his trial. As soon as it appears that the accused person is prepared to give bail, the police officer or the Court before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the Court to be reasonable. It would even be open to the officer or the Court to discharge such person on his executing a bond as provided in the Section instead of taking bail from him. The position of persons accused of non-bailable offence is entirely different. The right to claim bail granted by Section 436 of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences there is no question of discretion in granting bail as the words of Section 436 are imperative. The only choice available to the officer or the Court is as between taking a simple recognizance of the accused and demanding security with surety. The persons contemplated by Section 436 cannot be taken into custody unless they are unable or willing to offer bail or to execute personal bonds. There is no manner of doubt that bail in a bailable offence can be claimed by accused as of right and the officer or the Court, as the case may be, is bound to release the accused on bail if he is willing to abide by reasonable conditions which may be imposed on him.

7. There is no express provision in the Code prohibiting the Court from re-arresting an accused release on bail under Section 436 of the Code. However, the settled judicial trend is that the High Court can cancel the bail bond while exercising inherent powers under Section 482 of the Code. According to this Court a person accused of a bailable offence is entitled to be released on bail pending his trial, but he forfeits his right to be released on bail if his conduct subsequent to his release is found to be prejudicial to a fair trial. And this forfeiture can be made effective by invoking the inherent powers of the High Court under Section 482 of the Code. (See : Talab Haji Hussain v. Madhukar Purushottam Mondkar and another (1958 SCR 1226)) reiterated by a Constitution Bench in Ratilal Bhanji Mithani v. Asstt. Collector of Customs and Ann (1967 (3) SCR 926)).

8. It may be noticed that sub-section (2) of Section 436 of the 1973 Code empowers any Court to refuse bail without prejudice to action under Section 446 where a person fails to comply with the conditions of bail bond giving effect to the view expressed by this Court in the above mentioned case. However, it is well settled that bail granted to an accused with reference to bailable offence can be cancelled only if the accused (1) misuses his liberty by indulging in similar criminal activity, (2) interferes with the course of investigation, (3) attempts to tamper with evidence of witnesses, (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (5) attempts to flee to another country, (6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (7) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard. As mandated by Section 436 of the Code what is to be ascertained by the officer or the Court is whether the offence alleged to have been committed is a bailable offence and whether he is ready to give bail as may be directed by the officer or the Court. When a police officer releases a person accused of a bailable offence, he is not required to hear the complainant at all. Similarly, a Court while exercising powers under Section 436 of the Code is not bound to issue notice to the complainant and hear him.

9. The contention raised by the learned counsel for the respondent on the basis of decision of this Court in Arun Kumar v. State of Bihar and another (JT 2008 (2) SC 584), that the complainant should have been heard by the Magistrate before granting bail to the appellant, cannot be accepted. In the decision relied upon by the learned counsel for the respondent challenge was to the order passed by a learned single Judge of the Patna High Court quashing the order passed by the learned Fast Track Court holding that the respondent No. 2 therein was not juvenile and, therefore, there was no need to refer his case to the Juvenile Justice Board for ascertaining his age and then for trial. The High Court was of the view that the prayer was rejected only on the ground that two or three witnesses were examined and though the accused was in possession of school leaving certificate, mark sheet, etc. to show that he was a juvenile, the prayer could not have been rejected. This Court found that the High Court in a very cryptic manner had observed that the application of the accused deserved to be allowed and directed the Court below to consider, the accused as a juvenile and proceed accordingly. Before this Court it was submitted by the learned counsel for the informant that the documents produced had been analysed by the trial Court and it was found at the time of framing charge that he was major without any doubt. The grievance was made on behalf of the informant before this Court that the High Court did not even consider as. to how the, conclusions of the trial Court suffered from any infirmity and merely referring to the stand of the accused and

even without analyzing the correctness or otherwise of the observations and conclusions made by the trial Court the learned single Judge camp, to the conclusion that the accused was a juvenile. This Court concluded that the High Court had failed to notice several relevant factors and no discussion was made as to how the conclusions of the trial Court suffered from any infirmity. It was also noticed by this Court that no notice was issued to the appellant before the matter was disposed of. In view of the above position the order impugned in the appeal was set aside by this Court. To say the least, the facts of the present case are quite different from those mentioned in the above reported decision. Therefore the ratio laid down in the said decision cannot be applied to the fact of the instant case. 2008 AIR SCW 1616

10. Even if notice had been issued to the respondent before granting bail to the appellant, the respondent could not have pointed out to the Court that the appellant had allegedly committed non-bailable offences. As observed earlier, what has to be ascertained by the officer or the Court is as to whether the person accused is alleged to have committed bailable offences and if the same is found to be in affirmative, the officer or the Court has no other alternative but to release such person on bail if he is ready and willing to abide by reasonable conditions, which may be imposed on him. Having regard to the facts of the case this Court is of the firm opinion that the bail granted to the appellant for alleged commission of bailable offence could not have been cancelled by the High Court on the ground that the complainant was not heard and, thus, principles of natural justice were violated. Principles of natural justice is not a 'mantra' to be applied in vacuum in all cases. The question as to what extent, the principles of natural justice are required to be complied with, will depend upon the facts of the case. They are not required to be complied with when it will lead to an empty formality (See State Bank of Patialav. S. K. Sharma (1996 (3) SCC 364) and Karnataka State Road Transport Corporation v. S. G. Kotturappa (2005 (3) SCC 409)). The impugned order is, therefore, liable to be set aside.

11. For the foregoing reasons the appeal succeeds. The order dated March 24, 2008, passed by the learned single Judge of High Court of Madhya Pradesh, Bench at Indore, in Criminal Revision No. 1362 of 2006 cancelling the bail granted to the appellant by the learned Judicial Magistrate is Hereby set aside and order dated December" 1, 2006, passed by the learned Judicial Magistrate First Class, Indore, M. P., in Criminal Complaint No. 1604 of 2005 is hereby restored.

12. The appeal accordingly stands disposed of.

Appeal allowed.

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Cross Citation :2001 CRI. L. J. 2835

ALLAHABAD HIGH COURT

Hon'ble Judge(s) : S. K. AGARWAL, J.

Yogesh Kumar Bhargava ….V/s….State of U.P

Criminal Misc. Application No. 5927 of 2000, D/- 27 -2 -2001.

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Criminal P.C. (2 of 1974), S.70, S.482 - BAIL - Non-bailable warrant - Execution - Stay of - Accused is willing to surrender himself and seeking permission to appear before Court - Execution of non-bailable warrant issued against him stayed in interest of justice.

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JUDGEMENT

ORDER :-

1. Heard learned counsel for the applicant and learned AGA.

2. This application has been filed with a prayer to quash the criminal proceeding under Section 3/7 of the Essential Commodities Act pending in the Court of 1st Additional Chief Judicial Magistrate, Budaun vide Case No. 2971 of 1999 - State of U. P. v. Yogesh Kumar and another on the ground that no case is made out against this applicant. It is also prayed that further proceeding may be stayed. It has also orally been prayed that if this Court is not convinced with the arguments of the learned counsel for the applicant then non-bailable warrant issued against the applicant may be quashed and he may be allowed to appear before the Court concerned.

3. Taking up the first two prayers initially I am of the view that proceeding cannot be quashed at this stage. The questions raised before the Court rest on the decision of various facts. Disputed questions of fact cannot be gone into by this Court at this stage because determination of his contention is subject to the recording and appreciation of the evidence. In this view of the matter the first contention of the learned counsel for the applicant has no merit and it is accordingly discarded. Coming to the next submission of

the learned counsel for the applicant that he cannot be prosecuted under Clause 19 of the Fertiliser (Control) Order, 1985 for breach of provisions contained in Clause 23 of the said Control Order. He alleges that it is not reported in the first information report that the sub-standard article which was recovered from the shop of the applicant was not in conformity to the specifications prescribed under sub-clauses (1), (2) and (3) of Clause 23 of the aforesaid Order. His case is that it was not substandard but was a non-standard fertiliser. Clause 23 of the aforesaid Order deals with the disposal of non-standard fertiliser. For ready reference sub-clauses 1(a), (b) and (c) of Clause 23 of the aforesaid Order are quoted as under :

(a) the container of such non-standard fertilizer is conspicuously super scribed in red colour with the words "non-standard" and also with the sign "X"; and

(b) an application for the disposal of non-standard fertiliser in Form H is submitted to the registering authority to grant a certificate of authorisation for sale of such fertilisers and a certificate of authorisation with regard to their disposal and price is obtained in Form I;

(c) such non-standard fertiliser shall be sold only to the manufacturers of mixtures of fertilisers or special mixtures of fertilisers or research farms of Government or universities or such bodies.

4. According to these clauses a non-standard fertilisers can be sold by any licensee. The requisite is that it must not be an adulterated fertiliser. Sub-clause (1)(a) of Clause 23 further requires a retailer or whole-seller of such a non-standard fertiliser to print or publish on the wrapper in which such fertiliser is contained in red colour words 'non-setandard' and also sign "X". Sub-clause (1)(b) of Clause 23 of the aforesaid Order requires such a dealer to obtain a certificate of authorisation for sale of such fertiliser regarding its storage as well as regarding its disposal and price in Form I. Sub-clause 1(c) of Clause 23 of the aforesaid Order further creates a kind of a bar. It requires that such non-standard fertiliser shall be sold only to the manufacturers of mixtures of fertiliser or special mixtures of fertilisers or research farms of Government or Universities or other such bodies. When read together these clauses apparently non-standard fertiliser is not open to sale to the farmers or public in general. The sale of such non-standard fertiliser can be made only to the authorities specified in (b) and (c) of sub-clause (1) of Clause 23 of the aforesaid Order. Apart from that sub-clauses (2) and (3) of Clause 23 also prescribe certain other conditions. Regarding fixation of price of such non-standard fertiliser the registering authority after satisfying itself that the sample taken is a representative one may fix its price. While doing so he will also take into consideration the nutrient contents in the sample determined on the basis of a chemical analysis of such non-standard fertiliser. Sub-clause (3) of Clause 23 of the aforesaid Order entitles the Central Government to publish a notification in the official gazette and subject to the conditions prescribed therein for persons who are agent to comply with the condition laid down in (a) and (b) of sub-clause (1) of Clause 23 may exempt the handling agents. As earlier stated, in nut shell, the non-standard fertiliser cannot be sold to any individual farmer or public at large. It can be sold only in accordance with clause 23(1)(c) of the aforesaid Order alone.

5. From perusal of these sub-clauses (a), (b), (c) of clause 28 it is apparent that the non-standard fertiliser can be sold only to these authorities who are specified in Clause

23(1)(c) subject to the condition prescribed in Clause 23(1)(a) of the said Order. The purpose behind imposing the above sanction on sale of non-standard fertiliser to the institutions specified in sub-clause (1)(c) is to provide such institutions, who are engaged in the study of fertiflisers, to enable them to buy fertilisers at much lower price than the price of the standard fertiliser for research. It is so done with a view to encourage research. The person selling such fertiliser has to print on its container (wrapper) "sub-standard" and "X" in red ink. If these conditions are complied with there cannot be any prosecution under Clause 19 of the aforesaid Order of any person for selling non-standard fertiliser. If these conditions are not fulfilled by the dealer then he shall certainly be liable to prosecution. It is contended that there is absolutely no evidence before the Court to warrant his trail. This question requires examination of evidence, which may be done by the trial Court alone after evidence of the witnesses is taken or at the stage of charge. The question right now does not arise, as the prosecution has come up with a case that it is storage for sale of sub-standard fertiliser. It shall be positively a sub-standard fertiliser if the conditions laid down in Clause 23(1) are not fulfilled. Learned counsel for the applicant still may raise this issue before the trial Court at an appropriate stage.

6. The last submission of the learned counsel for the applicant that execution of non-bailable warrant be stayed and the applicant may be permitted to appear before the Court below. Apart from that it is also urged that if an accused is willing to surrender himself it shall not be proper to send him to jail. He must be given an opportunity to do so. In view of the above discussion it shall be expedient in the interest of justice that non-bailable warrant issued against the applicant by the Court below be stayed. In the result, execution of non-bailable warrant is stayed for three weeks. The applicant is directed to appear before the trial Court and make an application for bail, which shall be considered as expeditiously as possible.

With these directions this application is finally disposed of. Ordered accordingly.

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Cross Citation :2010-ALL MR(CRI)1798 ,

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : RANJAN A DESAI, MRIDULA BHATKAR.JJ

Irfan Shamimulla Shaikh ….V/s…State of Maharashtra

Criminal Bail Application No.1001 of 2009 IN Criminal Appeal No.1280 of 2007 Of Mar 03,2010

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Cr. P.C. Sec. 439, 389 - Murder case –Conviction – Bail- Disclosure Statement of accused was not properly recorded – Also, there is no evidence on motive – Accused entitled to bail.

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JUDGEMENT

(1.) The applicant/accused is convicted for the offence of murder punishable under section 302 of the Indian Penal Code and sentenced to life imprisonment and to pay fine of Rs.5,000/- i/d. to suffer R.I. for one year and also convicted for the offence punishable under sections 392,397,201 of the Indian Penal Code and sentenced to suffer R.I. for seven years each and to pay fine of Rs.5,000/- each i/d to suffer S.I. for one year each by judgment and order dated .30/8/2007 passed by the Ad Hoc Additional Sessions Judge, Sewree, Mumbai.

(2.) The accused was arrested in Crime No.283/2005 registered under sections 454,457,380 of the Indian Penal Code at Deonar Police Station. During the interrogation it was transpired that the applicant/accused had committed murder of his friend one Kama) who has come to Mumbai with money. After such disclosure the applicant accused took police and the panchas near his hut and as per the information given by the applicant accused the police dug the constructed Koba of the platform and found bones, footwear and rope. The said skeleton of the deceased was exhumed from the pit and the present offence was registered. After investigation the applicant accused was tried alongwith the other accused and was convicted for the offence of murder as well as other offences.

(3.) Learned counsel Mr. Mooman for the applicant accused has submitted that the applicant accused is in jail since 6/10/2005, however, learned Judge has taken erroneous approach while appreciating the evidence and he has good chances of getting acquittal in the appeal. Learned counsel has further submitted that though the skeleton was found in the pit, the prosecution failed to prove that it was of Kamal. It is further submitted that the alleged statement u/s.27 of the Evidence Act disclosing the information about the burial of the body is not admissible as it travels beyond the scope of the section. He has further submitted that in the said room alongwith accused Irfan other 2-3 persons were residing and there is no evidence to show when the body was buried. He has further submitted that the super-imposition work which was done by P.W.10 is not authentic to arrive at conclusion that the body was of Kamal. He has further submitted that the prosecution neither brought any motive on record nor did examine wife of Kamal showing that he was missing. Learned counsel hence prayed that the bail application maybe allowed.

(4.) Learned A.P.P. while opposing the bail application argued that the body was found at the instance of the applicant accused under the constructed Koba itself is a clinching circumstance. He has further submitted that the prosecution has examined P.Ws.8 and 9, the neighbours of the applicant/accused who have stated that one Kamal was residing there alongwith the accused during May and June, 2005. P.W.5. Abdul Hamid has deposed that the constructed Koba. Learned APP has further submitted that the medical evidence is against the accused and supports the case of the prosecution and considering the nature of the evidence the applicant/accused is not entitled to bail.

(5.) The prosecution has tendered the evidence on the point of digging of pit, finding of skeleton and also the person who constructed the platform in May/June, 2005. The skeleton was found at the instance of the applicant/ accused. However, it appears from the record that disclosure of the fact by the applicant/ accused was not properly recorded in the form of Section 27 of the Indian Evidence Act. Moreover, the submissions of learned defence counsel Mr. Mooman appeal to us that the prosecution did not lead any evidence on motive. On the point of missing of Kamal evidence of the wife of Kamal or any relative from his native place was required to complete the chain. No such evidence was adduced. Considering these factors and nature of the evidence adduced by the prosecution we are

inclined to grant the bail. Under such circumstances Application for bail is allowed. The applicant accused be released on bail of Rs.35.000.00 (Rupees thirty five thousand) with one or two sureties to make up the sum. The applicant/accused is directed to attend Deonar Police Station once in a month. Application allowed.

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[2009(3) Mh.L.J.(Cri.)19]

SUPREME COURT OF INDIA

R.V Raveendran and J.M. Panchal, JJ.

MUNISH BHASIN AND Others

Vs

STATE (GOVERNMENT OF NCT OF DELHI and another

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Criminal Procedure Code (2 of 1974), S. 438 — Anticipatory bail — Court Cannot impose conditions which are harsh, onerous of excessive so as to frustrate the very object of grant of anticipatory bail - Court should be extremely chary in imposing conditions while enlarging an acc used on bail ——Accused cannot be subjected to any irrelevant condition at all — To subject an accused to any other condition than mentioned in sections 437 and 438 would be beyond jurisdiction of the power conferred on Court — Condition imposed by the High Court directing appellant to pay a sum of Rs. 12,500/- per month as maintenance to his wife and child is onerous, unwarranted and is liable to be set aside, (Para 8)

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For appellants : Ms. Kiran Suri

For respondents : Ms. Madhumita Bhattacharjee

JUDGMENT

J. M. PANCHAL, J. :— Leave granted. The complainant (wife of first appellant) to whom notice was ordered on 25-1-2008 is impleaded as second respondent. "

2. Heard Counsel.

3. The appellant (accused No. 1) assails the condition imposed by the High Court requiring him to pay a sum of Rs. 12,500/- as maintenance to his wife and child while granting anticipatory bail to him and his parents with reference to the complaint filed by his wife for. alleged commission of offences punishable under sections 498A and 406 read with section 34 of the Indian Penal Code.

4. The marriage of the appellant was solemnized with Ms. Renuka on December 05, 2004. She.iias filed a complaint in November 2006, against the

Cri. Appeal No\ 344'of 2009 decided on 20-2-2009"
20 MUNISH vs. STATE (GOVT. OF NCT OF DELHI) [2009(3) Mh.L.J. (Cri.)

appellant and his parents for alleged commission of offences punishable under sections 498A and 406 read with section 34 of the Penal Code on the grounds that after marriage she was subjected to mental and physical cruelty for bringing less dowry and that her stridhan entrusted to them has been dishonestly misappropriated by them.

5. Apprehending arrest, the appellant and his parents moved High Court of Delhi for anticipatory bail. The application came up for consideration before a Learned Single Judge of the High Court on 22-2-2007. The Learned Additional Public Prosecutor accepted notice and submitted that the matter was essentially a matrimonial dispute and therefore the parties should be referred to the Mediation and Conciliation Cell of the Delhi High Court. The Learned Judge agreed with the suggestion made by the Additional Public Prosecutor and directed the parties to appear before the Mediation and Conciliation Cell of the Delhi High Court on March 02, 2007. The case was ordered to be listed on 10-5-2007, The Learned Judge further directed that in the event of arrest of the appellant and his parents, before the next date of hearing, they shall be released on bail on their furnishing personal bond in the sum of Rs. 25,000/- each with one surety of like amount to the satisfaction of the Investigating Officer/ Arresting Officer concerned, subject however, to the condition that the appellant and his parents shall surrender their passports to the Investigating Officer and shall file affidavits in the Court that they would not leave the country without prior permission of the Court

6. From the records, it appears that the conciliation proceedings failed and therefore the bail application was taken up for hearing on merits. On representation made by the wife of the appellant, the counsel of the appellant was directed to produce appellant's salary slip. Accordingly, the salary slip of the appellant was produced before the Court which indicated.that the appellant was drawing gross salary of Rs. 41,598/- and after deductions of advance tax etc., his net salary was Rs. 33,000/-. The Learned Single Judge of the High Court took the notice of the fact that the appellant had the duty to maintain his wife and the child and therefore as a condition for grant of anticipatory bail, directed the appellant, by the order dated 7-8-2007 to pay a sum of Rs. 12,500/- per month by way of maintenance to his wife and child. The Learned Single Judge also directed to pay arrears at the rate of Rs. 12,500/- per month from August 2005, that is Rs. 3,00,000/- within six months. The imposition of these conditions for grant of anticipatory bail is the subject-matter of challenge in the instant appeal. ,

7. From the perusal of the provisions of sub-section (2) of section 438, it is evident that when the High Court or the Court of Session makes a direction under sub-secfion (1) to release an accused alleged to have committed non-bailable -offence, the Court may include such conditions in such direction in the light of the facts of the particular case, as it may think fit, including (i) a condition that a person shall make himself available for interrogation by police officer as and when required, (ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted witi the facts of the case so as to dissuade him from disclosing such facts to the Couit or to any police officer, (iii) a condition that the person shall not leave India without the previous permission of the Court and (iv) such other conditions as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section. Sub-section (3) of section 437, inter alia, provides that when a

2009(3) Mh.LJ. (Cri.)] MUN1SH vs. STATE (GOVT. OF NCT OF DELHI) 21

person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVH of the Indian Penal Code or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court shall impose the following conditions — >>,

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

^c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police - officer or tamper with the evidence.

The Court may also impose, in the interests of justice, such other conditions as it considers necessary.

8. It is well settled that while exercising discretion to release an accused under section 438 of the Code neither the High Court nor the Session Court would be justified in imposing freakish conditions. There is no manner of doubt that the Court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all. The conditions which can be imposed by the Court while granting anticipatory bail are enumerated in sub-section (2) of section 438 and sub-section (3) of section 437 of the Code. Normally, conditions can be imposed (i) to secure the presence of the accused before the investigating officer .or before the Court, (ii) to prevent him from fleeing the course of justice, (iii) to prevent him from tampering with the evidence or to prevent him from inducing or intimidating the witnesses so as to dissuade them from disclosing the facts before the police or Court or (iv) restricting the movements of the accused in a particular area or locality or to maintain law and order etc. To subject an accused to any other condition would be beyond jurisdiction of the power conferred on Court vnder section 438 of the Code. While imposing conditions on an accused who approaches the Court under section 438 of the Code, the Court should be extremely chary in imposing conditions and should not transgress its jurisdiction or power by imposing the conditions which are not called for at all. There is no manner of doubt that the conditions to be imposed under section 438 of the Code cannot be harsh, onerous or excessive so as to frustrate the very object of grant of anticipatory bail under section 438 of the Code. In the instant case, the question before the Court was whether having regard to the averments ma'de by Ms. Renuka in her complaint, the appellant and his parents were entitled to bail under section 438 of the Code. When the High Court had found that a case for grant of bail under section 438 was made out, it was not open to the Court to direct the appellant to pay Rs. 3,00,000/- for past maintenance and a sum of Rs. 12,500/-per month as future maintenance to his wife and child. In a proceeding under section 438 of the Code, the Court would not be justified in awarding maintenance to the wife and child. The case of the appellant is that his wife Renuka is employed and receiving a handsome salary and therefore is not entitled to maintenance. Normally, the question of grant of maintenance should be left to be 'decided by the competent Court in an appropriate proceedings where the

parties can adduce evidence in support of their respective case, after which liability of husband to pay maintenance could be determined and appropriate order would be passed directing the husband to pay amount of maintenance to his wife. The record of the instant case indicates that the wife of the appellant has already approached appropriate Court for grant of maintenance and therefore the High Court should have refrained from granting maintenance to the wife and child of the appellant while exercising powers under section 438 of the Code. The condition imposed by the High Court directing the appellant to pay a sum of Rs. 12,500/- per month as maintenance to his wife and child is onerous, unwarranted and is liable to be set aside.

9. For the foregoing reasons, the appeal succeeds.

The direction contained in order dated August 07, 2007 rendered by Learned Single Judge of Delhi High Court in Bail Application No. 423 of 2007 requiring the appellant to pay a sum of Rs. 12,500/- per month by way of maintenance (both past and future) to his wife and child is hereby deleted. Rest of the directions contained in the said order are maintained. It is however clarified that any amount received by the wife of the- appellant pursuant .to the order of the High Court need not be refunded by her to the appellant and will be adjusted subject to the result of application for maintenance filed by wife of the appellant under section 125 of the Code before the appropriate Court. [v]

10. The Appeal is accordingly disposed of

Appeal allowed.

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Cross Citation :2003-ALLMR(CRI)(JOUR)-0-45, 2003-Cr. L.J-0-353

HIGH COURT OF KARNATAKA

Hon'ble Judge(s) : S.R.BANNURMATH,J

Kaleem alias Kaleem Pasha ....V/s....**State by Central Police Station, Bangalore**

Criminal petition 2260 of 2002 Of, Aug 14,2002

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Cr. P.C.S. 437 – Bail – Conditions – I.P.C. 363, 392 – Accused directed to pay cash deposit of Rs. 10,000/- - Held- insistence on cash deposit is illegal and liable to be quashed.

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JUDGEMENT

(1.) HEARD the learned counsel for the petitioner and the learned High Court Government Pleader appearing for the respondent.

(2.) THE petitioner and others are the accused in Crime No. 65/2002 for the offences under Ss. 363 and 392, IPC. Immediately after the arrest, the petitioner and other accused have sought for releasing them on bail. Considering the rival contentions, the learned

Magistrate by the order dated 7-6-2002 allowed the application and ordered releasing of the petitioner and others on bail on the following conditions :

1. Accused Nos. 1-5 are released on bail on each of them furnishing personal bond of a sum of Rs. 50,000/- and two sureties each. 2. Accused Nos. 1-5 shall deposit a sum of Rs. 10,000/- cash within one month from the day of release. 3. Accused Nos. 1-5 shall mark their attendance before Central Police Station, for 3 months or till laying of the charge-sheet which ever is earlier, every Sunday in between 10-12 a. m. 4. Accused Nos. 1-5 shall not leave the jurisdiction of Bangalore City or Bangalore Rural until charge-sheet is filed. 5. Accused Nos. 1-5 shall not threaten/tamper the complainant or complainant witnesses.

(3.) IN this petition, the petitioner has challenged the imposition of condition No. 2 namely accused depositing a sum of Rs. 10,000/- cash within one month from the date of release on the ground that imposition of this condition is illegal and amounts to miscarriage of justice. It is contended that nowhere under the Code, the law prescribes insistence of cash security. In this regard, the learned counsel has relied upon the pronouncement of this Court in the case of Afsar Khan v. State reported in ILR 1992 Kant 2894 : 1992 Cri L.J. 1676.

(4.) ON the other hand, the learned Government Pleader contended that as per the provision of Sec. 437, especially Clause 131, when a person accused or suspected of a commission of an offence punishable with imprisonment which may extend to 7 years or more or an offence under Chapters 6, 16, 27 of IPC if any such offender is to be released on bail, the Court may impose any condition which the Court considers necessary.

(5.) IN the present case, it is to be considered whether the wording 'any conditions' gives unfettering power to the Court to impose any conditions literally it deems fit. As long back as in the year 1978, the Apex Court in the case of Moti Ram v. State of Madhya Pradesh reported in AIR 1978 SC 1594 : (1978 Cri L.J. 1703) noted that while granting bail it should not be an illusory order. The accused to be released on bail must be able to comply with the conditions and if the conditions are like insistence of heavy cash security or deposit, it would amount to discrimination, inasmuch as moneyed accused may be able to come out on bail by depositing heavy amount, whereas the persons belonging to poor strata, only because he is poor will not be able to get the benefit of the bail granted. As such, the Apex Court directed that the Court should consider prudently to the conditions to be imposed against the accused who is to be released on bail keeping in view certain aspects.

(6.) EVEN in a later case in the case of Keshab Narayan Banerjee v. The State of Bihar reported in AIR 1985 SC 1666 : (1985 Cri L.J. 1857) the Hon'ble Supreme Court held that "insistence of heavy cash security would virtually amount to denial of bail and as such imposition of such conditions are illegal and erroneous". This aspect has again been considered by this Court also in the case of Afsar Khan's case referred to supra.

(7.) TAKING into consideration these aspects, in my view, imposition of Condition No. 2 i. e. insistence of cash deposit of Rs. 10,000/- each on the accused is illegal and liable to be quashed. It is made clear that rests of the conditions are to be maintained. Accordingly, the petition is allowed.

Petition allowed.

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Cross Citation :2010(3) Crimes 151 (Del)

DELHI HIGH COURT

Hon'ble Judge(s) : V.K. Shalt, J.

R Vasudevan .....V/s....**CBI New Delhi**
Bail Application No. 2381 of 2009, Decided on 14.1.2010

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Section 120B—Prevention of Corruption Act, 1988—Sections 7, 8, 12, 13(2) rw/s 13(l)(d) —Bail—Grant of—Petitioner - Prosecution case that petitioner demanded and agreed to accept an illegal gratification of Rs. 7,00,000 from one 'MKB'— Allegations that 'MKB' demanded Rs. 10,00,000 from an Advocate representing a faction of a company who was to get in touch with the petitioner for getting an favourable judgment in the matter of appointing President of the company—Recovery of an amount of Rs. 55,00,000 in cash from residence of petitioner—Recovery of Rs. 1,21,23,800 from a number of lockers of petitioner—Petitioner was arrested on 23.11.2009—Petitioner entitled to be released on bail-

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Counsel for the Parties:

For the Petitioners: K.K. Sud, Sr. Advocate with Ghanshyam Sharma, Advocate.

For the Respondent: Sonia Mathur, Standing Counsel for CBI.

JUDGMENT

1. V.K. Shali, J. — This is a bail application filed by the petitioner under Section 439 Cr. P.C. for an offence under Section 120B IPC and Section 7, 8, 12, 13(2) read with Section 13(l)(d) of the Prevention of Corruption Act, 1988 registered by the respondent vide case No.03 (A) 9-ACU-IX.

2. Briefly stated the facts of the prosecution case are that CBI had received an information from a reliable source that one Manoj Kumar Banthia vvas approached by Ankur Chawla, Advocate representing a faction of M/s Amar Ujala Publications who was to get in touch with Sh. R. Vasudevan, present petitioner Member of Company Law Board for

getting a favourable judgment in the matter of appointing an independent President of the Amar Ujala Publication. It was allegedly revealed that a case relating to Amar Ujala Publication was pending before Mr. R Vasudevan, the present petitioner Member of Company Law Board who had allegedly demanded and agreed to accept an illegal gratification of Rs.7,00,000 from Manoj Kumar Banthia. It is further alleged that Manoj Kumar Banthia in turn demanded Rs.10,00,000 from Ankur Chawla. The information was that this illegal gratification of Rs. 10,00,000 will be paid to Manoj who will then pay Rs.7,00,000 to the petitioner at his official residence located at 11, W-Block, HUDCO Place Extension, Andrews Ganj, New Delhi. On the basis of this information a case under Section 120B IPC read with Sections 7, 8, 12, 13(2) read with Section 13(l)(d) of the Prevention of Corruption Act, 1988 was registered against petitioner, Manoj Kumar Banthia, Company Secretary and Ankur Chawla and the matter was handed over to Shri Satyender Gosain, Inspector, ACU (IX) for investigation.

3. On 23rd November, 2009 at about 9.00 p.m. a CBI team consisting of Satender Gosain (Inspector), Sudhansu Shekhar (Inspector) Bhaskar Pratap Singh (Constable), Virender Singh (Constable) along with two independent witnesses Sh. Ashok Kumar and Dr. Sudhir Gupta were organized. The CBI team along with independent witnesses arrived at HUDCO and took suitable position. At about 9.40 p.m. it was seen that a taxi bearing registration No. DL1T 6672 black colour ambassador stopped at the entry of the residential flat leading to the house of the petitioner. A person of the physical description which was disclosed in the source information came out of the taxi who was later on identified as Manoj Kumar Banthia. He was carrying cash to the house of the petitioner. At about 10.35 p.m. Manoj Kumar was seen coming out of the house and going without the paper bag which he was initially carrying. On being intercepted and inquired about the paper bag which he was carrying, initially he got perplexed but on further questioning he revealed that he had left the paper bag at the residence of the petitioner. Thereafter, a raid was conducted at the residence of the petitioner and an amount of Rs. 55,00,000 in cash was recovered from his residence,

4. In the recovery memo cum seizure memo it has been stated by Manoj Kumar that the aforesaid money was given to him by Ankur Chawla. The present petitioner/ accused was arrested and remanded to police custody for a week on the ground that he will be taken to Chennai for the purpose of effecting some recovery, however, he was not taken. It is the case of the respondent that from Chennai a recovery of approximately Rs. 1,21,23,800 or so was effected in cash from the number of lockers of the petitioner apart from the fact that he had number of other bank accounts where 51,00,000 lakhs of rupees were found in balance. The present petitioner was remanded to judicial custody as no further police remand was sought by the CBI.

5. The petitioner filed an application for grant of bail which was dismissed by the learned Special Judge/Sessions Judge vide order dated 4th December, 2009 on the ground that the case was at the initial stages and further that Rs. 1,21,23,800 found in four bank lockers of the petitioner. Apart from that Rs.51,00,000 was found in 13 accounts of different banks of Chennai and Delhi. The learned Special Judge referred to the observations passed by the Apex Court in Surain Singh v. State of Punjab, 2009 II AD (SO 589, wherein it has been observed that the illegal gratification is a gigantic problem with the public servants which is increasing day by day and is corroding the system like cancer.

6. The petitioner feeling aggrieved has filed the present application seeking grant of bail to which reply has been filed by the CBI.

7. I have heard Sh. K.K. Sud the learned senior counsel for the petitioner as well as Ms. Soma Mathur on behalf of the CBI. The contentions of the learned senior counsel for the petitioner are as under:

(a) It was contended by Mr. Sud that admittedly the petitioner was arrested on 23rd November, 2009 and he was remanded to police custody for a period of seven days. After expiry of the said period further police remand was not sought by the respondent and he was remanded to judicial custody which is indicative of the fact that the petitioner was not required for any custodial interrogation. It was urged that no useful purpose would be served by keeping the petitioner incarcerated further especially in the light of the fact that he is a heart patient as he had undergone bypass surgery. It was also contended that although the respondent had sought remand of the petitioner for a period of seven days for the purpose of taking him to Chennai but without taking the petitioner to Chennai the respondent have affected the recovery of cash amounting to Rs. 1,21,23,800 approximately from the lockers of the petitioner, and therefore, the present petitioner is not required for the purpose of any interrogation.

(b) The second contention of the learned senior counsel is to the effect that the case which has been registered against the petitioner is under Section 120B IPC, Sections 7, 8, 12, 13(2) read with Section 13(1)(d) of the PC Act. So far as the Sections 7, 8 & 12 are concerned. it was contended that they carry a maximum sentence of five years although it was contended that the offence of abetment will not be made out against the petitioner. So far as the Section 13(2) of the P.C. Act is concerned, it was contended that what was invoked by the respondent was Section 13(l)(d) (ii) of the P.C. Act which makes it a criminal misconduct by a public servant if he by abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. It was contended that the offence under Section 13(l)(d)(ii) of the P.C. Act carries a maximum punishment of seven years. In the light of these punishments prescribed for the various alleged offences it was contended that the petitioner at best, assuming though not admitting that he had committed an offence of corruption was carrying a maximum sentence of five years or seven years and therefore in terms of Section 437(1) Cr.P.C. which guidelines 'are applicable to Section 439 also the petitioner may not be denied bail. The petitioner has already remained in custody for more than 51 days and no useful purpose would be served by keeping the petitioner incarcerated.

(c) The third argument by the learned Senior Counsel was to the effect that as on date there is no charge under Section 13(l)(e) P.C. Act which is registered against the present petitioner which makes possession of disproportionate assets to the known sources of income of the accused, as a criminal offence inviting the harsh punishment. This submission was urged by the learned counsel for the petitioner on the ground that the

effort of the respondent is to create a bias in the mind of the Court qua the present petitioner by alleging, that there was a recovery of Rs.55,00,000 in cash from the petitioner from his Delhi residence and a sum of Rs. 1,21,23,800 by way of cash from four lockers in Chennai apart other recoveries. It was contended that as and when the FIR under Section 13(1)(e) of the Prevention of Corruption Act is registered the petitioner will be issued a show cause notice to which he will have time to reply.

(d) The fourth submission is that the respondent is adopting a discriminatory attitude in the investigation of the matter qua the present petitioner. It is contended that the respondent are hobnobbing with the co-accused Ankur Chawla and are trying to obtain evidence from him only with a view to fix up the present petitioner knowing full well that it was Ankur Chawla king-pin who was representing the group before the present petitioner in the Company Law Board which is alleged to be requiring a favourable order from the petitioner. It was contended that such discriminatory attitude adopted by the CBI cannot be approved, so as to deprive the benefit of bail being granted to the petitioner. On the contrary, it was contended that this is one of the important consideration on the basis of which the Court must take cognizance and consider it to be a relevant factor for the purpose of grant of bail to the present petitioner. The learned senior counsel for the petitioner in this regard has referred to the observations of this High Court in case Binoy Jacob v. CBI, 1993 JCC 131. The learned counsel contended that the petitioner will abide by all such terms and conditions which the Court may like to impose for enlargement of the petitioner on the ground that he has already suffered incarceration for more than 51 days and he is not likely to flee away from the processes of law.

8. The learned counsel for CBI Ms. Sonia Mathur has vehemently contested the grounds urged by the present petitioner for grant of bail. It was contended that the case is at the crucial stage, therefore, the petitioner may not be enlarged on bail. It was contended that the petitioner is an influent tial person, and therefore, not only he with run away from the processes of law but he may even tamper with the evidence. The learned standing counsel further contended that so far as the allegation of adopting a discriminatory attitude qua the present petitioner is concerned, it was contended that the respondent has not exonerated the person named as an accused in the FIR but as and when evidence comes on record against him appropriate action will be initiator against him.

9. The learned counsel for CBI has cor mat nu casu unuer oecuon ioi, of the Prevention of Corruption Act as on date has been registered against the present petitioner, however, as and when the evidence comes on record against the present petitioner of the said offences an appropriate action will be initiated against him. As regards the petitioner being not medically fit it was contended that even the perusal of discharge summary and the other medical papers of the present petitioner indicate that the petitioner had undergone bypass surgery way back in 2007 and he is being provided with facility of necessary medical checkup at regular intervals.

10. I have heard the learned counsel for the petitioner as well as the learned Standing Counsel for CBI on the bail application. I have also carefully gone through the record.

11. No doubt, the offence of corruption is a serious offence and has eaten the vitals of out system more so when it is done by persons who are holding positions of power and authority. But still the question which needs to be considered dispassionately and objectively at this stage is that as to whether in a given case the petitioner who is alleged to save committed the offence under the Prevention of Corruption Act deserves to be enlarged on bail or not. No doubt the grant of bail in a non-bailable offence is a matter of discretion which the Court has exercised judicially but at the same time the bail should not be denied to an accused only as a matter of punishment. There are two paramount considerations which the Court has consider while enlarging the accused on bed. First as to what is the gravity of the and whether the accused would sub- himself to processes of law or not? Sec-sill the grant of bail endanger the fair investigation or the holding of a fair trial or a ---r words will the accused tamper with sentence.

12. Keeping in view me above Droaa parameters no doubt the petitioner was arrested on 23rd November, 2009 immediately after the other co-accused Manoj had delivered a sum of Rs.7,00,000 and the consequent recovery of Rs.55,00,000 which included prima facie this amount shows that the petitioner had been ostensibly misusing his official position in amassing huge cash/wealth for which he has not been able to give any plausible explanation weighs heavily against him. This view further gets fortified by the huge cash recovery of Rs. 1,21,23,800 or so from Chennai but then this ground in itself cannot be ground to deny the bail because then we will be punishing the accused even before he has been found guilty.

13. The next question which arises is whether he will subject himself to processes of law. The learned standing counsel for CBI had raised the question that the petitioner is being quite influential, and therefore, capable of influencing witnesses and consequently bail is denied. As against this the learned senior counsel had referred to the judgment in case titled Ravi Singhal v. UOI & Anr., 1993 JCC 306, in order to urge that a very fact that the petitioner is holding a very high status in the society or a higher position in itself is a sure shot consideration to show that the petitioner is not going to flee from processes of law. He will subject himself to law as and when called upon.

14. I am of the considered opinion that the petitioner is holding a high position, or is influential, or is resourceful works as a double edged weapon which can cut both ways. The position, the status and the influence of an accused person can no doubt be a ground for denial of bail in a case where the apprehension expressed by the investigating agency is genuine and where there are sufficient prima facie reasons to believe that he would influence the witnesses or tamper the evidence to deny the bail to him, but at the same time such a status, position can also be valid consideration to show that the accused has roots in the society and is therefore not going to run away from the processes of law. He will permit and make himself available during the course of investigation or the trial as the case may be. In the instant case the statements of witness have already been recorded. No doubt, the petitioner was holding a sensitive and a high position, but I feel that this is a case where he will not be able to influence the investigation which is almost already complete. Most of the evidence against him is in the nature of recoveries and the documentary evidence regarding the recovery of huge ill gotten money both from his residence in Delhi as well as from Chennai which he cannot tamper. Apart from this the concern of the

investigating agency regarding the tampering of evidence or influencing the witnesses, can be taken care of imposing suitable conditions on the accused, while granting bail. Further nothing precludes the investigating agency to move an application for cancellation of the bail of an accused in case it has slightest prima facie evidence to show that he is influencing or trying to influence the investigation or the witnesses. Accordingly, 1 feel in the instant case since the nature of evidence which has been collected by the investigating agency is in the form of huge recovery of unaccounted money in cash both from the Delhi residence and Chennai residence, apart from other circumstantial evidence, I feel that the chances of the petitioner trying to erase the evidence or influence that witness are remote and if he tries to do the same investigating agency shall be free to file the application seeking cancellation of his bail.

15. Another point which arises for consideration is the discriminatory treatment of the petitioner qua the other co-accused Ankur Chawla who is named in the FIR The Sessions Judge had rejected this plea of the petitioner by observing that it is not for the Court to say as to when and which of the accused is to be arrested. This is true that the investigation is in the exclusive domain of the police or the investigating agency and ordinarily the Court would not interfere in the investigation except to the extent what is permitted under Chapter XII of the CPC. But at the same time, the High Court cannot ignore the fact, in case the investigating agency is acting in a discriminatory or arbitrary manner.

16. Coming back to the facts of the present case the FIR has been registered against not only the petitioner but also against the co-accused Manoj who is in custody and one Ankur Chawla a legal practitioner representing a group of shareholders headed by Atul Maheshwari, who were litigating for control of management of Amar Ujala Publication in respect of which a dispute was pending before the present petitioner. The FIR is against all the three persons has been registered on the basis of source information that they were indulging in a conspiracy to commit an offence under various sections of Prevention of Corruption Act yet no action has been taken against the said person by the investigating agency on the ground that the investigating agency has recorded his statement and as and when anything incriminating is brought on record he will be also treated in the same manner in which the petitioner has been. The court fails of understand as to what other evidence ought to have been there before any action could be taken against a co-accused named in the FIR who had prima facie been responsible for arranging the funds and actively participating in giving the bribe. The Santhanam Committee Report which was constituted almost five decades back had observed that there 15 no dearth of people who want to be corrupted and who want to corrupt. If this cancer of corruption is to be treated and eliminated, both of them have to be dealt with equally with a even and heavy hand. That is why the abettor of prevention of corruption entails punishment of five years under P.C Act.

17. In the instant case it seems that colour of dress of the co-accused has weighed with the investigating agency and it has for reasons best known to them chosen to record the statements of the co-accused on couple of occasions who is bound to feign ignorance and make his statement exculpating himself. Such an unfair approach does not befit the premier investigation agency like CBI as it certainly shows discrimination qua the petitioner. Our own High Court in Binoy Jacob (supra) case has very categorically observed that our country is governed by rule of law which envisages that all persons must be dealt with the same manner while doing so. The Court has certainly not only an obligation but

also a right to call upon the investigating agency to explain its actions qua a particular co-accused and in case any reasonable explanation is not given it nay draw its own conclusion. .

18. These observations of our own High Court are important consideration. In the present case, I feel that the investigating agency has not adopted a just and fair approach in treating all the accused persons on a even pedestal while as the petitioner has been arrested on 23.11.2009 yet no ac-aon has been taken against the third co accused Ankur Chawla despite the fact that he is specifically named in the FIR and where in view of the Court prima facie there a sufficient evidence to show that he was also a part of the conspiracy not only to commit the offence but also abettor of the offence. Beyond this the Court does not want to observe anything and leave the things to the wisdom of the investigating agency, therefore Court takes this also a valid consideration to exercise discretion for grant of bail to the present petitioner.

19. The learned senior counsel for the petitioner at the fag end had also referred to Section 6A of the Delhi Special Police Establishment Act which requires obtaining of a sanction before registration of an FIR against the petitioner being holder of an office of the rank of the Joint Secretary or above. It was also urged that before his appointment as a Member of the Company Law Board a report from Vigilance as well as IB shows that there is nothing incriminating against him so far as his integrity is concerned which is also a ground for bail. I feel that merely because the petitioner's earlier of criminal misconduct of misusing of his position and amassing a huge cash, for which he is not able to give any reasonable explanation till date has gone un-noticed is not in itself a ground for release of bail. Similarly the vigilance or the IB reports also do not help him in any manner. The alleged non-compliance of Section 6A also does not help the petitioner because I agree with the contention of the learned counsel for the CBI that the offence of corruption may so sudden that in a given case it may defeat the ends of justice if one has to obtain the sanction for registration of the offence.

20. There are two more considerations which weigh with the Court for enlarging the petitioner on bail. These are firstly that the petitioner's remand was obtained for seven days for taking him to Chennai but he was never taken thereafter he was remanded to judicial custody. The CBI never sought any permission to interrogate him, therefore, the continued incarceration of the petitioner in my view is not going to serve and purpose except to deny the benefit of bail to him by way of punishment. Secondly, the petitioner is admittedly patient who has undergone bypass surgery. Although no grievance has been raised by the learned senior counsel for the petitioner regarding the non-availability of medical aid or medical checkup but still the medical status of the petitioner which has been placed on record is certainly also a valid consideration that he had undergone a coronary bypass surgery only in 2007. This in my view is also a ground to be taken into account.

21. Keeping in view the aforesaid facts and the totality of circumstances. I feel that this is a fit case where the petitioner, who is in custody since 23.11.2009, should be released on bail on furnishing personal bond in the sum of Rs.50,000 with two sureties for the like amount to the satisfaction of the learned Special Judge and subject to the following conditions:

(a) That he shall surrender his passport if not already seized.

(b) That he shall not leave the National Capital Territory of Delhi without the permission of the Trial Court and in case he is given permission to leave NCT of Delhi he shall inform the purpose duration of visit as well the address where he is going to stay. Further, no permission be given to visit Chennai till charge sheet is filed.

(c) He shall not tamper with the evidence or influence the witnesses or do any act which will create a reasonable ground to assume that the petitioner is trying to create hurdle in the fair investigation or trial of the case which will entail cancellation of his bail.

(d) The petitioner shall report once in a week at 11.00 a.m. to the Superintendent of Police, Sanjay Kumar Singh. CBI ACU IX, at CGO Complex, New Delhi-03 or such other officer as may be authorized by him so as to enable them to question the petitioner, if so required, till the time his charge-sheet is filed.

22. With these directions, the bail application stands allowed. However, expression of any opinion hereinbefore may not be treated as an expression on the merits of the case.

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Cross Citation :2000 ALL MR (Cri) 1898

SUPREME COURT OF INDIA

Hon'ble Judge(s) : K. T. THOMAS & D. P. MOHAPATRA, J J.

Jagroop Singh .....Versus.... K. Chatterjee
Cri. A. No. 107 of 2000 1st February, 2000.

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Criminal P.C. (1973), S.439 –Capacity of accused - Court should examine capacity of prisoner before fixing amount of bail bond - Amount of bail bond reduced from Rs. 2,00,000/- to Rs. 50,000/-.

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JUDGMENT :-

1. Leave granted.

2. We heard both sides. If the appellant found it difficult to execute a bond in a sum of Rs. 2,00,000/- (rupees two lakhs) it should not be a ground to continue to detain him in prison. The affordability of the prisoner must also be a consideration for the Court in fixing up the amount of the bond. Subsequently, the High Court reduced the bond amount to Rs. 1,00,000/- (rupees one lakh) and even that was beyond the capacity of the appellant and hence appellant filed this appeal by special leave.

3. We are told that appellant was undergoing detention under an order passed as per the provision of COFEPOSA and the period of detention is to expire on 2-2-2000. We feel that the grievance of the appellant is genuine, as the trouble would not have been undertaken by the appellant in approaching this Court for this limited purpose.

4. After hearing learned Counsel for the appellant and also learned Solicitor General of India we are of the opinion that the bond amount can be reduced again to Rs.50,000 (rupees fifty thousand). We, therefore direct that appellant be released on bail (on completion of his detention period) on his executing a bond in a sum of Rs. 50,000/ - with one solvent surety to the satisfaction of ACMM, New Delhi.

5. The appeal is disposed of.

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Cross Citation :2002 ALL MR (Cri) 565

BOMBAY HIGH COURT

Hon'ble Judge(s) : J.G.CHITRE,J.

Mahipati Bapu Bandgar…..V/s……State of Maharashtra

Criminal Application No.3352 of 2001. 8th October, 2001.

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Criminal P.C. (1973), S.436 – Absconding of accused is not a ground to be given weightage in grant of bail - Court would not be impressed by the surmises and conjectures- While considering the prayer for bail, the Court has to consider the strength of material which the investigating agency has collected for going to the trial against the accused. Fact of absconding would not by itself disentitle the accused to get the bail. It is a matter of experience that on some occasions even innocent persons hide themselves from police on account of fear.

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JUDGMENT

1. Heard. Counsel appearing for the applicant submitted that r.fter the applicant knew that he was wanted for criminal prosecution revolving around the provisions of section 302IPC, he surrendered himself before the concerned Police Station and, therefore, he is in custody and praying for bail. She submitted that there is no evidence against this applicant so as to go to trial for bidding conviction against him. Ms. Kantharia brought it to the notice of this Court that this accused gave a statement showing his willingness to lead the investigating officers to his house where little nail cutter was kept in a cupboard used for storing grocery articles.

2. While considering the prayer for bail, the Court has to consider the strength of material which the investigating agency has collected for going to the trial against the accused. The Court would not be impressed by the surmises and conjecturers.

3. The little nail cutter is a common use article and it can be stored by anybody in the house. The prosecution cannot achieve the advantage unless it establishes prima facie a nexus between such an article and the crime by which the accused has been indicated.

4. In this case, the prosecution has also collected the evidence to show that this accused was seen in the association of the co-accused and his brother some days prior to the murder of Laxmi @ Jaishree whom the main accused, as per the prosecution case, has murdered along with her two children. As per prosecution case, the main accused created a scene of dacoit and wanted to misguide the police machinery by indicating that his wife Laxmi @ Jaishree was murdered by dacoits while committing dacoity. It is the prosecution case that this applicant assisted the main accused in concealing the evidence of that murder. As the material on record shows, there is no evidence to show his active participation in the alleged act of committing the murder.

5. The fact of absconding would not by itself disentitle the accused to get the bail. It is a matter of experience that on some occasions even innocent persons hide themselves from police on account of fear.

6. Thus, this application is allowed. The applicant stands released on bail on furnishing security of Rs.25,000/- with one surety and P. R. Bond to that extent. He shall not threaten, contact, induce any of the prosecution witnesses. He should attend the Wadgaon Police Station twice in a week on Monday and Friday between 9.00 a.m. to 11.00 am. till further orders. The officers of the police station should not detain him for more than two hours.

7. Parties to act on an ordinary copy of this order duly authenticated by the Private Secretary.

Application allowed.

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Cross Citation :2009 (1) Bom.C.R.(Cri.) 411

BOMBAY HIGH COURT

Hon'ble Judge(s) : Tahilramani V.K. (Smt.), J.

Rafael Palafox Garcia .....V/s..... Union of India & anr.

Criminal Application No. 2015 of 2008, decided on 25-8/25-9-2008.

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Code of Criminal Procedure, 1973, Sec. 167(2)(a)(ii) -Bail application- On ground that charge-sheet when filed was incomplete because chemical analyst's report was not filed - That Chemical Analyzers report was filed much after 90 days period, hence he was entitled to a bail - Held, in this case seizure was affected on an information and contents had been tested positive for contraband with help of a field kit On merits contraband herein is Acetic Anhydride being a "controlled substance" which is a versatile substance, can be used in manufacture of innocuous medicines. Quantity seized is also less. Therefore, Court is inclined to release applicant on bail in sum of Rs. 1 lakh with two sureties with condition to report to NCB office once a week till conclusion of trial.

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Cases referred:

1. Sunil Vasantrao Phulbande Vs. State of Maharashtra, 2003(Supp.) Bom.C.R. 101: 2002(3) Mh.L.J. 689(N.B.): 2005 D.C. (Narcotics) 32.

2. Sharadchandra Vinayak Dongre Vs. State of Maharashtra, 1992 B.C.I, (soft) 182 : 1991(1) Mh.L.J. 656.

3. Joaquim M. Correia Vs. State of Goa, Cri.Misc.Appli.88/1998, dt. 18-7-1998.

4. Malin Lundberg Isabelle Vs. Union of India, 2006 B.C.I. 158.

5. Jagdish Budhroji Purohit Vs. State of Maharashtra, 1998 DGLS (soft) 837 : A.I.R. 1998 S.C. 3328 : 1998(7) S.C.C. 270.

6. Dinesh Dalmia Vs. CBI, 2008(Supp.) Bom.C.R. 128 : 2007 DGLS (soft) 946 : 2008(1) S.C.C. 36 : A.I.R. 2008 S.C. 78.

7. K. Veeraswami Vs. Union of India, 1991 DGLS (soft) 323 : 1991(3) S.C.C. 655.

8. Satya Narain Musadi Vs. State of Bihar, 1979 DGLS (soft) 393 : 1980(3) S.C.C. 152: A.I.R. 1980 S.C. 506.

9. Central Bureau of Investigation Vs. R.S. Pai, 2003 Bom.C.R.(Cri.) 572 (S. C.) 2002 DGLS (soft) 369 : 2002(5) S.C.C. 82 : A.I.R. 2002 S.C. 1644.

10. State of Haryana Vs. Mehal Singh, 1978 Cri.L.J. 1810 (P&H).

11. Shreeniwas Bansidhar Somani Vs. Intelligence Officer NCB, Cri Appli. 181/2002, dt. 14-2-2002.

Advocates appeared :

Anil Armey, Sr.Cou. a/w. Pravin Singhal, i/b. Rajeev Sawant & Ass., for applicant.

Smt. Revati M. Dere a/w. Mandar Goswami, for respondent No. 1.

S.S. Pednekar, A.P.P., for State.

JUDGEMENT

1. Heard the learned Counsel for the Applicant and the learned Counsel for the respondent NCB.

2. The applicant is seeking bail in N.D.P.S. Special Case No. 6 of 2008 of N.C.B. pending before the Special Judge for N.D.P.S. cases, Thane. The said case is under sections 29 r/w. 9-A and 25-A of the Narcotic Drugs and Psychotropic Substances Act, 1985.

3. The prosecution case briefly stated is that specific information was received that one Shahnawaz Khan with the help of two persons including the applicant are manufacturing pseudo-ephedrine which is a controlled substance at Siddiqui Farm House in Thane. When the Officers reached the said place, they found the present applicant along with others present there and 290 kgs. of pseudo-ephedrine which is a controlled substance came to be seized from the said place. Prior to seizure, tests were conducted by field test kit by taking small quantity from each packet. The said tests answered positive for presence of pseudo-ephedrine. The applicant-accused came to be arrested on 19.12.2007. He preferred an application for bail before the Special Court. The said bail application came to be rejected by Order dated 29.3.2008. Hence, this application.

4. Two grounds were raised by the learned Counsel for the applicant. The first ground is that at the time of filing of charge-sheet the C.A. report was not filed. Thus an incomplete charge-sheet was filed. At the time of filing of charge-sheet as the C.A. report was not filed, there was no material before the learned Judge to come to the conclusion

that the substance seized was pseudo-ephedrine and hence the Court could not have taken cognizance of the said case.

5. In order to appreciate the above contention, it would be necessary to give a few dates. The applicant came to be arrested on 19.12.2007. The charge-sheet came to be filed on 13.2.2008. As the offence is made punishable under Section 25-A admittedly the charge-sheet would have to be filed within 60 days i.e. approximately on 19.2.2008. Though, the charge-sheet was filed on 13.2.2008 at the time of filing charge-sheet, no C.A. report was filed and the C.A. report dated 28.3.2008 was produced before the Court on 29.3.2008. The bail application preferred by the applicant came to be rejected on 29.3.2008.

6. It is contended by the learned Counsel for the applicant that since the offences registered against the applicant are punishable with a term which may extend to 10 years. The case of the applicant would fall within the ambit of section 167(2)(a)(ii) ground that the C.A. report was not filed of the Code and the accused cannot be de- within the stipulated time, tained in custody beyond the period of 60 g. The learned Counsel for the applicant days from the date of first remand of the submitted that in a case under the N.D.P.S. applicant i.e. 19.12.2007 if the charge-sheet Act report of the C.A. is the foundation on is not filed within the said period. It is con- the basis of which the Court can proceed to tended that the prosecution ought to have take cognizance of the offence. It was con-filed the charge-sheet as contemplated un- tended that the Chemical Analyser's report der section 173(2) and (5) of the Code within is the basis to decide whether the substano: a period of 60 days. However, in the instant seized during the raid falls under section case, though the charge-sheet is filed by 9-A or not, which would determine whether the prosecution on 13.2.2008 i.e. within 60 the provisions of N.D.P.S Act are attracted days from the date of first remand of the or not. It was further contended that the applicant, the same being incomplete as it Magistrate in such situation cannot pro-was not accompanied with the documents ceed to take cognizance of the offence for contemplated under sub-section (5) of sec- want of complete charge-sheet/report. It tion 173 of the Code, cannot be treated as was submitted that in the instant case the a charge-sheet/report, which would em- c.A. report was filed in the Court beyond power the Court to take cognizance of the the period of 60 days i.e. on 29.3.2008 and offences and hence applicant is entitled to therefore the prosecution cannot take any be released on bail in view of provisions of advantage in this regard. As the investigate-section 167(2) of the Code.

7. Thus, it was submitted that when the sheet within the stipulated period of 60 days, charge-sheet was filed as the C.A. report a right accrued to the accused to seek release was not filed, it amounted to filing of an on bail under section 167(2) of Cri.P.C. incomplete charge-sheet which cannot be 9. Reliance is also placed on a decision said to be a charge-sheet within the mean- of another Single Judge of this Court in the ing of section 173(5) of Cri.P.C. and as the case oi\Sharadchandra VinayakDongreand charge-sheet, as contemplated under sec- others Vs. State of Maharashtra)[2], reported tion 173 of Cri.P.C. was not filed within the in 1992 B.C.I, (soft) 182 : 1991(1) Mh.L.J. stipulated period of 60 days a right accrued 656. In the said case, admittedly, an into the accused to seek release on bail. In complete charge-sheet had been filed. The support of this contention, reliance was Court held that the incomplete charge-sheet placed on a decision of a Single Judge of cannot be treated as a police report within this High Court in the case of (Sunil the meaning of sub-section (2) of section Vasantrao Phulhande and anotherVs.

State 173 of Cr.P.C. and there is no question of of Maharashtra)[1], reported in 2003(Supp.) Magistrate taking cognizance of the offence Bom.C.R. 101 : 2002(3) Mh.L.J. 689(N.B.): $_{w}i_{tn}$in meaning of section 190(l)(b) of 2005 Drugs Cases (Narcotics) 32. The Cri.P.C. on the basis of the incomplete

learned Counsel for the applicant pointed charge-sheet. The said case was under the out that the said case was also under the Bombay Prohibition Act. In this case, ad-N.D.P.S. Act . In the said case also within mutedly, the charge-sheet was incomplete the stipulated time complete charge-sheet as it was specifically stated therein that the was not filed. In the said case, C.A. report investigation is not yet completed. Conse-was filed beyond the stipulated period of quently, it was held that incomplete charge-90 days and prior to that only incomplete heet cannot be treated as police-report, charge-sheet with all other papers except However, such is not the case in the present C.A. report was filed. In the said case, the case, hence, this decision cannot apply in accused came to be released on bail on the the present case.

10. Thereafter, reliance was placed on an unreported decision of a Single Judge of this Court Panaji Bench dated 18.7.1998 in the case of (Joaquim M. Correia Vs. State of Goaf, passed in Criminal Misc. Application No. 88 of 1998. The said case was under the N.D.P.S Act involving charas. In the said case, the entire charge-sheet having been filed in time, the said decision would not be applicable to the facts of the present case.

11. Reliance was also placed on a decision of a Single Judge of this Court dated 22nd December, 2006 in the case of (Ms. Malin Lundberg Isabelle Vs. Union of India & anr.y, in Criminal Application No. 4178 of 2006 reported in 2006 B.C.I. 158. The applicant therein was a foreigner who was in custody since 10th May, 2006 for possession of 6534 gms. of Hashish which is a commercial quantity. The accused was produced before the Special Judge on 10th May, 2006. 180 days period expired on 5th November, 2006. However, entire charge-sheet came to be filed on 6th November, 2006. The reason for filing the charge-sheet on 6th November, 2006 was that 5th November, 2006 being a Sunday, the charge-sheet could not be filed on that day hence it was filed on the very next working day i.e. 6th November, 2006. The Court held that as the charge-sheet was not filed within time the applicant was entitled to be released on bail. However, as no such situation has arisen in the present matter, this decision too would not be applicable to the facts of the present case.

12. On the backdrop of above facts and decisions, the question which arises for my consideration in the present case is whether mere filing of charge-sheet within the pre-scribed time, unaccompanied by material papers as contemplated under section 173(5) of the Code renders it incomplete and such filing of charge-sheet amounts to failure to file the same, which in turn confers on the accused right to be released on bail under section 167(2) of the Code, as the Court would not be competent to take cognizance of the offence on the basis of such incomplete charge-sheet/report.

13. On perusal of all the decisions, it is seen that in the said cases there is no ref-erence to test of the contraband at the spot by field test kit. In the present case, the complaint as well as panchnama specifically mention about field testing kit being taken to the spot and the samples of the seized material being tested at the spot using field testing kit and the test answering positive for pseudo-ephedrine. In Sunil Phulbande's case

(supra) which is a case similar to the present case, there is no reference at all to any test kit report.

14. Useful reference may be made to the decision of the Supreme Court in the case of (Jagdish Budhroji Purohit Vs. State of Maharashtra)[5], reported in 1998 DGLS (soft) 837: A.I.R. 1998 S.C. 3328: 1998 (7) S.C.C. 270. In the said case, it was contended that Chemical Analysers report Exh.61 to 67 were not admissible in evidence. The Supreme Court observed that :

> "Moreover, in this case the prosecution had led evidence on P.W. 1 Vijay Kumar Shahasane and P.W. 3 Sidram Dhange, members of the raiding party, to prove that the powder which was found from the factory was Methaqualone and that the tablets which were found from the factory were methaqualone tablets. Both of them have stated that they have received sufficient training and thus have sufficient knowledge about narcotic substance and the methods of testing them. They had carried with them a kit for the purpose of testing when they had raided the factory. On analysis by them the powder was found to be methaqualone and tablets were found containing methaqualone. Therefore, even if Exhibits 61 to 67 are ignored there is sufficient evidence on record to show that methaqualone powder and tablets were found from the appellant's factory. Thus the appellant's conviction under section 22 of the N.D.P.S. Act is quite proper. Both the witnesses have further stated that on analysis the green substance which was found from one of the cabins was hashish. Therefore, conviction of the appellant under section 20(b)(ii) of the N.D.P.S. Act is also quite proper."

15. From the above decision, it is seen that even if there is any lacuna in the C.A. report the report of the field testing kit conducted by the Officers can be relied upon to convict the accused. If the report of the field testing kit can be relied upon to convict the accused then in the present case where similar test was conducted it cannot be said that an incomplete charge-sheet was filed on 13.2.2008. The charge-sheet forwarded to the Court on that day contained material which was sufficient for the Court to take cognizance of the offence. The material before the Court was sufficient for the Court to proceed further and to take cognizance as the material on record on that day clearly showed that 290 kgs. of pseudo-ephedrene came to be seized and the involvement of applicant and other accused was also seen from the material in the charge-sheet filed on 13.2.2008.

16. In the case of Sunil Phulbande (supra) this Court observed that The charge-sheet / report as contemplated under section 173(5) of the Code, forwarded to the Magistrate should be such that on the basis of which Magistrate should be able to proceed further and take cognizance." It was further observed that in a given case, certain documents even though they may not accompany the charge-sheet may not change the nature of the charge-sheet/report contemplated under section 173(2) and (5) of the Code particularly when the material is sufficient for the Court to take cognizance of the offence as per the provisions of the Code. In the present case, on 13.2.2008 there was sufficient material before the Court to take cognizance. Moreover, the C.A. report which was produced on 29.3.2008 was not such as to change the nature of the charge-sheet in this case.

17. In the present case the material at the time of filing of the charge-sheet on 13.2.2008 clearly showed that 290 kgs. of pseudo-ephedrine was found and the applicant was very much present in the farm house where the pseudo-ephedrine was found. Thus, at the time of filing charge-sheet the accused was made aware of the exact nature of the offence alleged against him, so also the Court was aware of the exact nature of the offence alleged against the accused. Thus, there is no question of causing any prejudice to the accused. In the present case, the applicant has not contended that he has been prejudiced in any manner as the C.A. report was not filed along with the charge-sheet. No such pleading infact has been taken by the applicant. As observed earlier, there was sufficient material before the Court and also made known to the accused regarding the prosecution case against the accused.

18. Useful reference may be made to the decision of the Supreme Court in the case of (Dinesh Dalmia Vs. CBI\[b], reported in 2008(Supp.) Bom.C.R. 128 : 2007 DGLS (soft) 946 : 2008(1) S.C.C. 36 : A.I.R. 2008 S.C. 78. In the said case also an incomplete charge-sheet came to be filed. In the said case, it was observed that:

> "It is true that ordinarily all documents accompany the charge-sheet. But, in this case, some documents could not be filed which were not in the possession of CBI. As indicated hereinbefore, the said documents are said to have been filed on 20.1.2006 whereas the appellant was arrested on 12.2.2006. The appellant does not contend that he has been prejudiced by not filing of such documents with the charge-sheet. No such plea in fact had been taken. Even if all the documents had not been filed, by reason thereof submission of charge-sheet itself does not become vitiated in law."

19. Indisputably, the power of the Investigating Officer to make a prayer for making further investigation in terms of subsection (8) of section 173 is not taken away only because a charge-sheet under sub-section (2) thereof has been filed. A further investigation is permissible even if order of cognizance of offence has been taken by the Magistrate. In the case of Dinesh Dalmia [supra), it has been further observed that:

> "We may notice that a Constitution Bench of this Court in (K. Veeraswami Vs. Union of India)[7], stated the law in the following terms , 1991 DGLS (soft) 323- . 1991(3) S.C.C. 655. (S.C.C. p. 716, para 76)
>
> "76..... As observed by this Court in (Satya Naram Musadi Vs. State of Bihar)[8], 1979 DGLS (soft) 393 : 1980(3) S.C.C. 152 : A.I.R. 1980 S.C. 506 that the statutory-requirement of the report under section 173(2) would be complied with if the various details prescribed therein are included in the report. This report is an intimation to the Magistrate that upon investigation into a cognizable offence the Investigating Officer has been able to procure sufficient evidence for the Court to inquire into the offence and the necessary information is being sent to the Court. In fact, the report under section 173(2) purports to be an opinion of the Investigating Officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the Court. The report is complete if it is accompanied with all the documents and statements of witnesses as required by section 175(5). Nothing more need be stated in the report of the Investigating Officer. It is also not necessary that all the details of the offence must be stated. The

> details of the offence are required to be proved to bring home the guilt to the accused at a later stage i.e. in the course of the trial of the case by adducing acceptable evidence."

20. The charge-sheet is an intimation to the Magistrate that upon investigation into a cognizable case the Investigating Officer has been able to procure sufficient evidence for the Court to enquire into the offence and the necessary information is being sent to the Court. A charge-sheet is a final report within he meaning of sub-section (2) of section 173 of the Code. It is filed so as to enable the Court concerned to apply its mind as to whether cognizance of the offence thereupon should be taken or not. The report is ordinarily filed in the form prescribed therefore. One of the requirement for submission of a police report is whether any offence appears to have been committed and, if so, by whom. In this case from the material available before the Court on 13.2.2008, it was clear that an offence had been committed under section 25 of the N.D.P.S. Act and the applicant was involved in the offence.

21. In the case of (Central Bureau of Investigation Vs. R.S. Pai and another)[9], reported in 2003 Bom.C.R.(Cri.) 572(S. C.) 2002 DGLS (soft) 369 : 2002(5) S.C.C. 82 : A.I.R. 2002 S.C. 1644, it was observed that "it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or charge-sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court." It was further observed that "the word 'shall' used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Further, the scheme of sub-section (8) of section 173 also makes it absolutely clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to investigation. In such cases, there cannot be any prejudice to the accused."

Thus, it is seen that though the Investigating Officer is required to produce all the relevant documents at the time of submitting the charge-sheet, at the same time there is no specific provision due to which no additional documents can be produced subsequently by the Investigating agency.

22. A Full Bench of the Punjab and Haryana Court in the case of (State of Haryana Vs. Mehal Singh and another)[I0], reported in 1978 Cri.L.J. 1810 has held that when a charge-sheet is submitted without the reports of experts well within the period of 60/90 days from the date of arrest, merely because the report of the expert was not filed along with it, the accused is not entitled to be released on bail under section 167 (2) Cri.P.C. In the said case it was observed that :

> "The investigation on of an offence cannot be considered to be inconclusive merely for the hat the Investigating Officer, when submitted his report in terms of subsection (2).of section 173 to the Magistrate, a waited the reports of the experts or by some chance, either inadvertently or by design, he failed to append to the police report such documents or the statements under section 161 of the Code,

> although these were available with him when he submitted the police report to the Magistrate. Therefore, when a charge-sheet is submitted without the reports of experts well within the period of 60 days from the date of arrest, the accused is not entitled to be released on bail under section 167(2).
>
> It was further observed that:
>
> "... Since a report to qualify itself to be a 'police report' is required to contain only such facts as are mentioned in sub-section (2) of section 173, so if once it j& found that the police report contained all those facts, then so far as the investigation is concerned the same has to be considered to have been completed. It is not incumbent on the Investigating Officer to reduce in writing the statements of the witnesses; he may merely include their names in the list of witnesses in support of the prosecution case when submitting the charge-sheet. Surely, if the charge-sheet thus submitted would be complete as enabling the Magistrate to take cognizance of the offence, there is no rational basis for holding that similar charge-sheet would not be a police report of the requisite kind if the statements of the witnesses although had been recorded under section 161(3), but either by design or by inadvertence are not appended with the report and section (2) of section 173 and from the evidence thus collected he is satisfied that the case deserves to be initiated against the ac* cused. And further even if the Investigating Officer had not received the report of the expert, so far as his job of collecting of the evidence is concerned, that is over the moment he despatches the material for the opinion of the expert and incidentally cites him as a witness if he relies on his testimony."

23. From the decisions referred to above, including that of the Supreme Court, it is clear that it is open to the Investigating Agency to file further documents even after the charge-sheet has been filed. In the present case, as stated earlier, samples in question were tested on the spot and on testing the report showed that the material was pseudo-ephedrine which is a controlled substance. When the charge-sheet was filed on 13.2.2008, it contained all necessary material as contemplated under section 173(5) of Cri.P.C. and the prosecution is not precluded from filing any additional material like the C.A. report at a later stage. Filing of C.A. report has not changed the nature of the offence or the charge-sheet. Thus, there was sufficient material to connect the accused with the offence and there was sufficient material before the Court on 13.2.2008 to take cognizance of the offence. In the present case even though the report of the C.A. was not filed, it cannot be said that an incomplete charge-sheet has been filed and hence the learned Magistrate could not have taken cognizance. Looking to all these facts, I am of the opinion that the applicant is not entitled to bail under the provisions of section 167(2) of Cri.P.C.

24. The second ground canvassed before me is that there is an amendment to the NDPS Act including section 37. In cases of offences under section 19 or 24 or 27-A and offences involving commercial quantity an accused would not be released on bail unless the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence. The present applicant is facing prosecution for charges under sections 25-A and 29 read with 9-A of the N.D.P.S. Act and hence ob his case would not be covered un-- section 37 of the NDPS Act. Moreover, far as section 9-A which deals with controlled substance is concerned, there is no categorization of small quantity or commercial quantity. Therefore, it was contended by the learned Counsel for the applicant and in

my view rightly so, that the concept of commercial quantity is applicable only to narcotic drugs and psychotropic substances and not to controlled substances.

25. Section 9-A of the NDPS Act deals with the power to control and regulate controlled substance. "Controlled substance" means any substance which the Central Government may, having regard to the available information as to its possible use in the production or manufacture of narcotic drugs or psychotropic substances or to the provisions of any international Convention, by notification in the Official Gazette, declare to be a controlled substance. The Ministry of Finance Department of Revenue vide its notification dated 28th December, 1999 has declared pseudo-ephe-drine a controlled substance under the Act. The Central Government being of the opinion that having regard to the use of the con-" trolled substances in the production or manufacture of any narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, in exercise of powers conferred by section 9-A of the Act has made the Narcotic Drugs and Psychotropic Substances (Regulation of Controlled Substance) Order, 1993, which has come into force w.e.f. 15th April, 1993.

26. A controlled substance is not necessarily used only to make narcotic drugs or psychotropic substance, but, it is a versatile substance which can be used in manufacturing of various things including innocuous medicines by the pharmaceutical industry. As far as controlled substances are concerned, there is no provision for minimum term of imprisonment unlike sections 19, 24 and 27-A of the N.D.P.S. Act.

27. In the decision of this Court in the case of (Shreeniwas Bansidhar Somani Vs. The Intelligence Officer NCB and another)", dated 14th February, 2002 in Criminal Application No. 181 of 2002, 1250 kgs. of Acetic Anhydride came to be seized which is a controlled substance. Acetic Anhydride is used to manufacture brown-sugar i.e. heroin. In the said case, this Court held that Acetic Anhydride being a controlled substance, rigors of section 37 of NDPS Act would not be attracted and bail came to be granted to the accused in the said case. It is pointed out that the quantity of the controlled substance in the present case is lesser than the quantity in the case of Shreeniwas Bansidhar [supra) and hence the applicant is entitled to be released on bail.

28. There is extensive amendment introduced in N.D.P.S. Act. The offence falling under section 9-A r/w section 25-A is punishable with imprisonment which may extend to 10 years and also fine which also may extend to Rs. 1 lakh. There was an embargo on the powers of the Court in granting bail under the old provisions of section 37(1)(b) of the Act. From section 37(l)(b) the term "imprisonment of 5 years or more" has been deleted and substituted t>y "for offence under section 19 or section 24 or section 27-A and also for offences involving commercial quantity", the case of the applicant is no more covered by section 37(l)(b) of the Act. The concept of commercial quantity does not apply to controlled substance in view of the provisions relating to commercial quantity specially section 2(viia) and section 2(viid) of the Act and the notification issued by the Government specifying the small quantities and commercial quantities also shows that this concept is peculiar to Narcotic Drugs and Psychotropic Substances.

29. In view of the above legal position and the decision in the case of Shreeniwas Bansidhar [supra) Somani [supra), I am inclined to grant bail to the applicant.

30. The applicant-Rafael Palafox Garcia to be released on bail in the sum of Rs.

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Cross Citation :2009 CRI. L. J. 160

ALLAHABAD HIGH COURT

Hon'ble Judge(s) : R. K. RASTOGI, J.

Rajpal & Anr. .....V/s.....State of U. P.

Criminal Appeal No. 5598 of 2008, D/-26-8-2008.

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Criminal P. C. (2 of 1974), S. 446 — Issuance of warrant for recovery of security bond — Accused was absconding — Forfeiture of bail bonds - Sureties producing accused before Court — Matter of recovery of amount of bail bond from sureties would require reconsideration — Order passed by trial Court for issuing the recovery warrant against surety is set aside.

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JUDGEMENT

ORDER:—This criminal appeal has been filed against the orders dated 20-12-2007, 8-4-2008 and 8-7-2008 passed by the learned Additional Sessions Judge, Xllth Fast Track Court No. 3, Mathura in Misc. case No. 1 of 2008 (State v. Rajpal and another).

2. The facts relevant for disposal of this appeal are that the accused appellants had stood sureties for the accused Maluka in ST. No. 180 of 2005 (State v. Maluka) pending before the above Court. The accused Maluka had absented and a report was received that he had been absconding. Notices were issued to the appellant sureties to produce the accused Maluka. These notices were personally served upon the appellants but they did not appear. Hence an order was passed on 20-12-07 for forfeiting the amount of bail bond and for issuing notices to the sureties under Section 446 Cr. P. C to show cause as to why the amount of 50,000/- should not be realised on them. The appellants did not appear in spite of service of this notice also. Hence an order was passed on 8-4-2008 for issuing warrant of recovery of the amount of surety bond which was of Rs. 50,000/-each against the appellants. Thereafter the appellants appeared in the Court and moved an application. A copy of this application has been filed as annexure 1 of the affidavit filed in the appeal in which it was stated that they were producing the accused Maluka before the court and he should be taken into custody. On this application, the Court passed an order on 24-6-08

for taking accused into custody and sending him to jail. He further ordered to put up the case on the date fixed for orders. The date 8-7-08 was fixed in the case. On that date an order was passed that the recovery warrant had not been received back after recovery, and so a letter be written to the SSP for recovery of the bail amount from the sureties. Aggrieved with that order the sureties have filed this appeal.

3. Heard learned counsel for the appellants and learned A.G.A. for the State. As the point involved in this appeal is legal one. I am deciding it on merits with the consent of the parties at the stage of admission.

4. It is to be seen that when the accused had not appeared, the amount of the surety bond was liable to be forfeited from the appellants and the Trial Court did not commit any illegality by passing an order on 20-12-07 for forfeiting the amount of bail bond. He also passed an order for issuing a notice to the sureties under Section 446 Cr. P. C to show cause as to why the amount of bail bond should not be recovered from them This notice was served upon the sureties a; is apparent from the order dated 8-4-08 by they did not appear. Hence the court right passed an order for issuing recovery war rant to recover the amount of bail bond furor the appellants. However, thereafter the appellants appeared before the court and produced the accused Maluka before the court and the accused was taken into custody or 24-6-2008. The Court also passed an order for putting up the case on the next date i.e., 8-7-2008. On that date the sureties did no1 appear in the Court, and since the recovery warrant had not been received back, the Court passed an order for issuing fresh recovery warrant. It is now to be seen that the appellants had produced the accused Maluka before the Court. Hence they should have filed an objection as provided under para -3 of Section 446 Cr. P.C., but they did not file any such objection.

5. However, since the appellants have produced the accused Maluka as is apparent from the order sheet of the Sessions Trial dated 24-6-2008, the matter of recovery of the amount of the bail bond requires reconsideration and the appeal deserves to be allowed to this extent only that the order passed by the Trial Court for issuing the recovery warrant against the appellant is set aside.

6. The appellants shall appear within a month from today before the court concerned and file their objection against the recovery proceedings as provided in para -3 of Section 446 (1) of Cr. P. C. and after providing reasonable opportunity of hearing to the parties the court shall pass suitable orders on that objection on merits.

7. It is further provided that if appellants fail to file any such objection during the time allowed by this Court, the court shall be at liberty to proceed with the recovery of amount of bail bond from the appellants in accordance with law.

8. The appeal is allowed to this extent.

Appeal allowed.

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Cross Citation :2003 ALL MR (Cri) 2379 (S.C.)

SUPREME COURT OF INDIA

Hon'ble Judge(s) : N. SANTOSH HEGDE & B. P. SINGH, JJ.

Bharat Chaudhary & Anr.....Vs.....State of Bihar & Anr.

Criminal Appeal No.1250 of 2003 (arising out of S.L.P. (Cri.) No.2243 of 2003), **8th October, 2003.**

Cri.P.C.Sec. 438 – Anitcipatory Bail can be granted even if charge-sheet is filed and cognizance is taken by the court.

The gravity of the offence, need for custodial interrogation, fact of filing of charge sheet etc. cannot by themselves be construed as a prohibition against the grant of anticipatory bail.

The object of S.438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a Court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, prevent the concerned Courts from granting anticipatory bail in appropriate cases. The Courts i.e. the Court of Sessions, High Court or Apex Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under S.438 of the Crl. P. C. even when cognizance is taken or charge-sheet is filed provided the facts of the case require the Court to do so.

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CASES CITED:
PARA

Salauddin Abdulsamad Shaikh Vs. State of Maharashtra, 1996(1) SCC 667..... .4

VIKASH SINGH, YUNUS MALIK & PRASHANT CHAUDHARY, Advocates, for - Appellants.

B. B. SINGH, SHAHID AZAD & HIMANSHU SHEKHAR, Advocates, for - Respondents.

JUDGEMENT

1. Heard learned counsel for the parties.

2. Leave granted.

3. Appellants in this case are husband and wife and were accused by their daughter-in-law of offences punishable under Ss.504, 498-A and 406 of the Indian Penal Code and Ss.3/4 of the Dowry Prohibition Act. Their application, filed under S.438 of the Crl.P.C. for grant of anticipatory bail has been rejected by the High Court of Judicature at Patna. The said order is under challenge in this appeal. When this matter came up for preliminary hearing of 19th May, 2003, we issued notice to the respondents and also made an interim order not to arrest the appellants in the meantime. Today after hearing the parties on facts, we are inclined to grant anticipatory bail to the appellants.

4. Shri. B. B. Singh, learned counsel appearing for the respondent-State, however, raised a legal objection. His contention was that since the Court of first instance has taken cognizance of the offence in question, S.438 of the Crl.P.C. cannot be used for granting anticipatory bail even by this Court and the only remedy available to the appellants is to approach the trial Court and surrender, thereafter apply for regular bail under S.439 of the Crl.P.C. In support of this contention the learned counsel relied on the judgment of this Court in the case of Salauddin A bdulsamad Shaikh Vs. State of Maharashtra, (1996(1) SCC 667).

5. If the arguments of the learned counsel for the respondent-State is to be accepted then in each and every case, where a complaint is made of an non-bailable offence and cognizance is taken by the competent Court then every Court under the Code including this Court would be denuded of its power to grant anticipatory bail under S.438 of the Cr.P.C.

6. We do not think that was the intention of the legislature when it incorporated S.438 in the Cri.P.C. which reads thus :

> "When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence^ he may apply to the High Court or the Court of Session for direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail."

7. From the perusal of this part of S.438 of the Crl.P.C, we find no restriction in regard to exercise of this power in a suitable case either by the Court of Sessions, High Court or this Court even when cognizance is taken or charge-sheet is filed. The object of S.438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a Court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, in our opinion, prevent the concerned Courts from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the concerned Courts while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of charge-sheet cannot by themselves be construed as a prohibition against the grant of anticipatory bail. In our

opinion, the Courts i.e. the Court of Sessions, High Court or this Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under S.438 of the Crl.P.C. even when cognizance is taken or charge-sheet is filed provided the facts of the case require the Court to do so.

8. The learned counsel, as stated above, has relied on the judgment of this Court referred to herein above. In that case i.e. namely Salauddin Abdulsamad Shaikh, a three-Judge Bench of this Court stated thus :

> "When the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration, the Court granting anticipatory bail should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.
>
> Ordinarily the Court granting anticipatory bail should not substitute itself for the original Court which is expected to deal with the offence. It is that Court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail."

9. From a careful reading of th,e said judgment we do not find any restriction or absolute bar on the concerned Court granting anticipatory bail even in cases where either cognizance has been taken or a charge-sheet has been filed. This judgment only lays down a guideline that while considering the prima facie case against an accused the factum of cognizance having been taken and the laying of charge-sheet would be of some assistance for corning to the conclusion whether the claimant for an anticipatory bail is entitled for such bail or not. This is clear from the following observations of the Court in the above case :

> "It is, therefore, necessary that such anticipatory bail orders should be of limited duration only and ordinarily on the expiry of the duration or extended duration, Court, granting anticipatory bail, should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or charge-sheet is submitted."

10. From the above observations, we are unable to read any restriction on the power of the Courts empowered to grant anticipatory bail under S.438 of the Crl.P.C.

11. We respectfully agree with the observations of this Court in the said case that the duration of anticipatory bail should be normally limited till the trial Court has the necessary material before it to pass such orders and it thinks fit on the material available before it. That is only a restriction in regard to blanket anticipatory bail for an unspecified period. This judgment in our opinion does not support the extreme argument addressed on behalf of the learned counsel for the respondent-State that the Courts specified in S.438 of the Crl.P.C. are denuded of their power under the said section where either the cognizance is taken by the concerned Court or charge-sheet is filed before the appropriate Court. As

stated above this would only amount to defeat the very object for which S.438 was introduced in the Crl.P.C. in the year 1973.

12. As observed above and having heard the learned counsel for the parties, we are of the considered opinion that the appellants in this case should be released on bail, in the event of their being arrested, on their furnishing a self-bond each for a sum of Rs.5,000/- and a surety to the like sum. The appellants shall abide by the conditions enumerated in S.438 of the Code.

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Cross Citation :2008 ALL SCR 1480

SUPREME COURT OF INDIA

Hon'ble Judge(s) : S. B. SINHA & P. P. NAOLEKAR, JJ.

Azar Sah ……V/s…..State of Bihar & Ors.

Criminal Appeal No.604 of 2008 4th April, 2008.

D. N. GOBURDHAN, Ms. PINKY ANAND, Ms. GEETA LUTHRA, for Appellant. NAGENDRA RAI, Sr. Advocate, M. K. CHOUDHARY, Ms. NAMITA CHOUDHARY, GOPAL SINGH, S. K. VERMA, for Respondents.

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Criminal P.C. (1973), S.437 – Bail – Murder - Long-lasting litigation between two groups - Complainant and family members wanted to take forcible possession - Cross-firing and attack followed - Several persons from both sides receiving injuries - It was not possible to say that respondent applicant had caused injuries to deceased and was the only person responsible for injuries resulting in death -Grant of bail to him justified.

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JUDGEMENT

1. Leave granted.

2. On 12.12.2005, an FIR was registered at Turkaulia P.S., District East Champaran, Bihar on the basis of a complaint lodged by the appellant Md. Azhar Sah, alleging that on that date he along with other villagers were ploughing the field at around 1.30 in the afternoon, which is the subject matter of litigation. Soon thereafter, the Sharma brothers including Sudhanshu Kumar Sharma came to the field holding guns in their hands. There were several other persons who came along with the Sharma brothers who were also

armed with guns, country-made pistols and rifles. Soon after arriving at the spot, they used filthy language on the complainant. Loknath Sharma and Binda Rai ordered their men to shoot at the complainant party. Following this, Subodh Sharma fired at Ujair Sah and as a result of the injuries sustained he fell down. Further, Loknath Sharma fired at the complainant and Sudhanshu Kumar Sharma, respondent No.4, herein fired at Aseem Sah. Other Sharma brothers fired at different persons. At the end of the fight, the complainant saw the dead bodies of four persons of the complainant party and Ujair Sah was lying badly injured. He was later on taken to the hospital where he died. Five people were brutally killed.

3. Sudhanshu Kumar Sharma moved a bail application before the High Court which was granted by the High Court on the reasoning that although the other accused persons have been refused bail the case of respondent No.4 herein is different than that of persons who have been refused bail.

4. As per the High Court, several persons from both sides had received injuries. It appeared to the High Court, a case of free-fight wherein other persons from the Sharmas received injuries whereas respondent No.4 did not sustain any injury. It is also the case of respondent No.4 that he is a Bank Manager posted at Gopalganj and was not present at the spot when the incident occurred. Submission of the counsel for the respondent was in a way accepted on the basis of the orders of the Court indicating the accused persons to be in possession of the land at the relevant time and that the informant and his other family members were aggressors. There is also the version.of the eye-witnesses that the attack was made on Aseem Sah (since deceased) by different persons. On the cumulative assessment of these facts, the High Court was of the view that the case was made out by respondent No.4 for grant of bail and he was accordingly granted bail by the High Court. Aggrieved by the said order, the appellant-complainant is before this Court by way of this appeal by special leave.

5. As per the version of respondent No.4 from his counter affidavit, the property (agricultural land) where the incident took place was purchased by the Sharma family by registered sale deeds dated 7.8.1962, 6.8.1962, 4.10.1962 and 8.2.1963 whereby they were put in possession of the property and since then they have continuously been enjoying the property in their possession. There was a long-lasting litigation between the two groups regarding the possession and ownership of the property where the incident took place. It was the complainant and his family members who wanted to trespass over the property and take forcible possession over it. That is how the incident occurred. Several persons had assembled at the place of the incident and there was connective cross-firing and attack, as a result of which several persons sustained injuries from the side of Sharmas and Ajay Sharma, nephew of respondent No.4, was murdered and seven other persons received grievous injuries. In the statements recorded by the police of the eyewitnesses, one Mohd. Seraz said that it was Subodh Sharma who was assailant of Aseem Sah, whereas the witnesses Abdul Khair and Abdul Wahab gave names of other accused persons, namely, Shri. Ram Sharma and Kashi Rai as the assailants.

6. From the facts alleged by the appellant as well as respondent No.4, it appears that several persons from both sides received injuries and several persons are responsible for causing injuries to each other's side. Under the circumstances, if different persons have been alleged to have caused injuries to the deceased Aseem Sah, then on the face of it, it cannot be said with certainty at this stage that it was respondent No.4 who caused injuries

to the deceased or was the only person who was responsible for causing injuries resulting in death of Aseem Sah.

7. In overall view of the matter, we do not find any good or sufficient reason to take a different view in the case. The appeal is, accordingly, dismissed.

Appeal dismissed.

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Cross Citation :1987-Cri.L.J.-0-1100 , 1987-MPL.J.-0-380

HIGH COURT OF MADHYA PRADESH

Hon'ble Judge(s) : K.K.VERMA, J

Mithun …..Vs….State of M.P.

Criminal Misc.Case 1378 Of 1986 Nov 27,1986

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Bail – Murder case – oppose of bail application by state- Held- whenever the state opposes an application for grant of bil to an under trial prisoner it has to ensure a speedy trial – failure to take appropriate steps by state accused is entitled to get bail.

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JUDGEMENT

(1.) Applicant Mithun alias Shamshad was arrested by the Bahodapur police on or about 10-6-1985 in crime No. 135/85 registered initially under S.307/34 I.P.C. on 6-6-1985 in respect of a transaction in which one Madan @ Pappoo had received injuries from others. Pappoo died from the injuries on 12-6-1985. The case was converted into one under S.302 I.P.C.

(2.) The challan was filed in the month of Sept. '85. The charge of murder was framed on 31-10-1985. Out of a list of 20 prosecution witnesses so far only six have been examined. In criminal misc. case No. 1214/86 decided on 17-10-1986. This Court rejected there preceding bail application with the following observations :-

"From the copies of the order-sheets of the trial Judge, right from 27-12-1985 to 26-8-1986, and also the statement of both the counsel that the case now stands adjourned to 21-10-1986 for recording of prosecution evidence. It is clear that the time from 27-12-1985 till the date of the bail application, was consumed by lack of system in the process of the trial and want of care in securing the attendance of witnesses on the part of the

Presiding Judge, the Public Prosecutor and also by the Police Officers. For example, so far only 5 witnesses out of a list of 22 witnesses, have been examined. The learned Judge and the prosecution seem to think that the remaining witnesses would be examined in one day, namely 21-10-1986. There is, however, still an opportunity to the prosecution to obtain dates for day to day trial in the case, if they had their heart set in the matter. I hope and expect that they have..."

(3.) Now, what happened in the sequel is as follows : - On 21-10-1986 no prosecution witnesses were in attendance. On 22-10-1986 one Rambabu's cross-examination was concluded. Then P.W.7 Kanhaiya was examined and discharged. A reference was made to 4 other witnesses. It was said that one Bodharam had died while Anilkumar and Kalloo and one Gita were absent. It was also observed that the summonses issued for service on Anilkumar and Kalloo had not been received back. The learned Public Prosecutor's prayer to produce these witnesses on the next working day was granted. On 23-10-1986 Gita was examined and discharged, but, Anil and Kalloo remained absent. They were ordered to be summoned, and the case was adjourned to 24-10-1986 for remaining witnesses but without having ordered them to be summoned. On 24-10-1986 prosecution witnesses were absent. The Court ordered the prosecutor to keep witnesses in attendance or get them summoned. The case was adjourned to 28-10-1986. The applicant's learned counsel states that on 28-10-1986 no prosecution witnesses were examined. On 29-10-1986 there were no prosecution witnesses. The case was adjourned to 14-11-1986, when only Head Constable Onkarnath Pandey was in attendance who could not be examined in the absence of some record. What was that record is not disclosed in the order sheet. Other witnesses were absent. The Prosecutor prayed for time and the learned trial Judge gave it, and the case now stands adjourned to 29-11-1986. The order sheet does not show the number and the names of the witnesses against whom warrants of arrest bailable in the sum of Rs. 50/- were to be issued.

(4.) The applicant's learned counsel's plea for grant of bail is that there has been no serious attempt at all on behalf of the prosecution and the Trial Court for a speedy trial and, as such, if what has happened so far is any indication, the applicant is surely going to languish for quite some time in jail for no fault of his so far as the tardiness of the trial is concerned, at any rate after 17-10-1986.

(5.) The learned Govt. Advocate says that there is a chance that the remaining witnesses may come and may be examined. What has happened so far does not show that the prosecution and the Trial Court have been mindful to any meaningful degree about the observations made by this Court on 17-10-1986. I may observe - as I have had occasion to say on a few occasions - whenever the State opposes an application for grant of bail to an under-trial prisoner, during trial it has a corresponding liability to ensure a speedy trial. What is more, the trial Judge has also a similar duty to expedite such a trial from day to day, and to take a personal supervisory interest in the matter of issue of summonses and warrants and fixation of dates of hearing. I am afraid the hope and expectation expressed by this Court on 17-10-1986 seemingly did not activate the prosecution and the Trial Court.

(6.) Taking al **Cross Citation :**l these circumstances into consideration, I am of the view that the change in circumstances since 17-10-1986 makes it clear that any further continuance of the applicant as an under-trial prisoner would amount to a sort of custodial punishment for him. I allow the bail application.

(7.) The applicant be released on a personal bond of Rs. 10,000/- with one surety in the like amount to the satisfaction of the C.J.M. Gwalior for his appearance in the trial on the dates now fixed and on other dates.

(8.) Certified copy on payment of usual charges be furnished to the counsel for the applicant during the course of the day. Application allowed.

Cross Citation :2007 (1) CRJ 635

DELHI HIGH COURT

Hon'ble Judge(s) : S. N. AGGARWAL, J

J.K. Jayram & Anr. ….. V/s ….. State

Bail Application No. 3008-09 of 2006 Decided on 30.8.2006 ..

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Indian Penal Code, 1860— Section 120-B/406/409/420/468/ 471—Anticipatory Bail—Facts of purely civil nature-—Business transaction— Co-accused already on bail;— Held—Where petitioner have done no criminal wrong who had roots in the society - There is no apprehension of absconding—Petitioner cannot be denied of bail – Anticipatory bail granted.

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Case Referred :

1. G. Sagar Suri v. State of U.P., 2000 (2) SCC 636

Counsel :

Mr. Deepak A. Masih with Mr. Anish Shrestha for Petitioner

Mr. Sunil Sharma, APR for State Mr. Lalit Kumar for Complainant

JUDGEMENT

1. Mr. Sunil Sharma, APP for the State, accepts notice of this application on behalf of the respondent. Mr. Lalit Kumar, Advocate is also present on behalf of the complainant.

2. This bail application is opposed by the learned APP for the State. He has opposed this bail application on the ground that the amount of alleged cheating involved in this case is quite huge and that other C&F Agents appointed by the petitioners have also filed similar complaints against him in the State of Gujrat, Kerala and West Bengal.

3. The facts relevant for the decision of this bail application are as follows :—

The petitioners are accused of offences under Section 120B/4Q6/ 409/420/467/468/471 IPC in case registered against them vide FIR No. 736/2005 with Police Station Punjabi Bagh. The Petitioned' No. 1. is the Chairman of a company called India Household and Health Care Ltd. -(hereinafter referred as IHHL) which was doing the business of importing the health care and household goods of South Korean company named LG House Hold and Health Care Ltd. (hereinafter referred as M/s LGHHL) into India. The Petitioner No.2 is the wife of the Petitioner No.l and a Director of the above named company called IHHL which has been accused by the complainant -for cheating and defrauding.

4. The complainant M/s Akshatha Services Pvt. Ltd. was appointed as Clearing & Forwarding Agent (C&F Agent) by the IHHL. when the IHHL was at the advance stage of discussion to acquire exclusive marketing rights for Indian territory for the Fast Moving Corir sumer Products (FMCG) with the above named South Korean company LGHHL. An agreement dated 01.06.2004 between IHHL and the complainant company is Annexure A-l at Page 18 of the paper book.

5. On Q.I. 11.2003, the LGHHL had entered into a Memorandum of Understanding (MOU), annexed as Annexure A-2 at page 58 of the paper book. As per the terms of the MOU, the LGHHL had appointed IHHL as its sole representative, importer and licensee for the import, promotion, sale and marketing of the whole range of Fast Moving Consumer Goods of LGHHL. The said MOU contemplated the achievement of sale of products of LGHHL by 'IHHL worth 4.5 million USD in two years and had an automatic renewal clause based on the performance. The LGHHL had acted upon the MOU and exported its products to India from their factories in Korea, Vietnam. All the products were emblazoned with LG logo along with the name of IHHL printed as sole licensee.

6. In order to promote the business, IHHL had appointed several Clearing & Forwarding Agents. The complainant on whose complaint the present FIR was registered against the petitioners and others is one of such C&F Agents. In continuation of the MOU, the LGHHL had executed a License Agreement with the IHHL on 08.05.2004 crystallizing the rights and liabilities of the parlies. A copy of the said License Agreement is at pages 67 to 90 of the'paper book.

7. It is contended.that pursuant to the aforementioned MOU and the License Agreement, the IHHL had invested huge amount 'to the tune of Rs.500 Crores on promotion, advertisement, creation of the network of distributors and established 23 ware-houses across the India, 4 Regional Headquarters, one Corporate Office, appointed 23 major C&F Agents and also created other nation wise infrastructure. It is further contended that under the MOU, the IHHL had given a purchase commitment of 2 million USD for the year 2004-05 and 2.5 million USD for the year 2005-06. However the IHHL had achieved the entire target of 4.5 million USD in just 7-8 months and had purchased products worth 4.5 million USD from LGHHL by August, 2004. The contention of the counsel for the petitioner is that the achievement of the target by .the IHHL in such a short time had unearthed the potential of the Indian Market and it has .polluted the minds of the officials of LGHHL and on that count LGHHL allegedly started to distant itself from IHHL since September, 2004 onwards, the LGHHL had instructed the IHHL to put on hold the business on the pretext that a serious internal dispute regarding the use of LG logo had arisen in the company and further instructed to put on hold the business until the confusion pertaining to the use of LG logo was resolved within the LG Company. The LGHHL thereafter terminated all business relations with IHHL through a legal notice dated

05.02.2005 sent to IHHL. In the aforesaid notice the stand taken by LGHHL was that the documents viz. the MOD dated 01.il.2003 and the License Agreement dated 08.05.2004 are null and void as the same'were executed on behalf of LGHHL by working level officers who were junior in rank to the Management, The counsel for petitioner has contended that the LGHHL official who had signed the contract with IHHL had also signed the contract with many other countries also. He has referred to page 118-A to 118-1 of the paper book (Annexure-A-6-A) to show the copy of one such Agreement.

8. The learned counsel for the petitioners has argued that the petitioners and the Management of IHHL had done all that was possible to sort out the problem but on account of unilateral termination of the contract of IHHL by LGHHL, the IHHL ran into huge losses on account of-unexpected and unforeseen situation created by LGHHL. It is submitted that the IHHL has filed an arbitration agreement before the Supreme Court and the dispute arising out of unilateral termination of its contract by LGHHL is presently pending in the Supreme Court where a prayer has been made for referring the same to the panel of arbitrators. The counsel has further contended that the LGHHL has colluded with the complainant in order to defeat and circumvent the claim of the IHHL for the unfortunate and most arbitrary termination of the contractual relationship with IHHL by the LGHHL. The FIR in question registered against the petitioners is alleged to be the outcome of that collusion between LGHHL and the complainant company. The counsel for the complainant has contended that the complainant company was induced by IHHL to make a security deposit of Rs. 1.5 crores on the pretext that the complainant was going to be appointed as C&F Agent for LG Company. This contention is denied by the learned counsel for the petitioners. At this stage, the learned APP for the State has contended that the goods supplied by M/s IHHL to the complainant company were of substandard quality and the complainant had asked IHHL to take it back and to return the security deposit of the complainant.' It is submitted that neither the goods were taken back by IHHL nor the security amount of the complainant was refunded to it.

9. The learned counsel for the petitioners has also argued that Vijay R. Singh, Managing Director of IHHL was arrested and he was admitted to regular bail by the Court of Shri CXP. Gupta, ASJ, Rohini, Delhi. In the bail order of petitioners' co-accused Vijay R. Singh, it is mentioned that the dispute between the parties seems to be of civil nature. It is also mentioned in the bail order pertaining to Vijay R. Singh that the genuineness of the documents by and between LGHHL and IHHL is not in dispute, rather the I;O. confirms having verified the same. The bail order in relation to petitioners' co-accused Vijay R. Singh is at pages 152-153 of the paper book. The learned counsel for the petitioners has urged that the petitioners are also entitled to-be admitted to bail applying the principle of parity as their co-accused Vijay R. Singh has already been admitted to bail by the Sessions Court.

10. The learned APP for the State has disputed the parity claimed by the petitioners. He has submitted that the petitioners' co-accused Vijay R. Singh was granted bail by the Sessions Court after he remained in custody for 45 days. According to him since the petitioners are asking for anticipatory bail, they cannot claim parity with their co-accused Vijay R. Singh. The learned APP has also contended that the custodial presence of the petitioners is required for making recovery of account books and other related documents of the company M/s IHHL from them. He has also submitted that the petitioners' go-accused Vijay R. Singh has stated in his disclosure statement that the petitioner No.l alone can tell where security deposit of the complainant worth Rs. 1.5 crores has gone and for

that purpose also the custodial presence of the petitioner No.l is required. The learned APP has further submitted that the peti-

tioner No.l despite orders of the Court in his first anticipatory bail application has not co-operated in the investigation. He has said that except for once the petitioner No.l did not appear before the I.O. for his interrogation. This submission of the learned APP implies that the petitioner No.l had attended the inquiry into the case before the I.O. at least on one occasion. The contention of the learned APP that custodial presence of petitioner No.l is required for making recovery of the account books and other related documents of IHHL does not hold any water. I am of the view that if the I.O. could not recover the account books of IHHL from the Managing Director of the said company though he remained in police custody for five days, how could recovery of account books be made from the petitioner No.l.

11. In G. Sagar Suri v. State of U.P., 2000 (2} SCO 636,.the Supreme Court has observed as under:

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence, criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution, for the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

12. In Mis. Indian Oil Corporation v, M/s. NEPC India Ltd. & Qrs. (Criminal Appeal No. 834/2002 decided on 20.7.2006), the Supreme Court has observed that there is a growing tendency in the business circles to convert purely civil disputes into criminal cases on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect th£ interest of lenders/creditors.

13. The ratio of law'laid down by the Supreme Court in the aforementioned two judgments squarely applies to the facts of the present case. In this case also, it prima-facie appears that the complainant company has filed the FIR in question against the petitioners to convert a business dispute of purely civil nature into a criminal case. I am further of the view that in case the petitioners have done any criminal wrong for which FIR in question is registered against them, they can be punished as per law after the trial against them is over. Both the petitioners seeking their anticipatory bail in the present case have roots in the society. There fe no apprehension of their absconding the trial. In my view, the .petitioners cannot be denied bail particularly when their co-accused Vijay R. Singh has already been admitted to bail.

14. In view of the above and having regard to all the facts and circumstances of the case, the petitioners are admitted to anticipatory bail on their executing bail bonds in the sum of Rs.5 lacs each with two sureties each in the like amount to the satisfaction of the concerned Arresting Officer and subject to the further condition that they shall not leave the country without prior permission of the Court. The petitioners are directed that they shall join the investigation as and when called by the I.O.

15. Order dasti to both sides.

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Cross Citation :2005 (6) CRJ 443

DELHI HIGH COURT

Hon'ble Judge(s) : BADAR DURREZ AHMED, J.

Mohd. Afroj @ Ajay .....V/s ..... NCT Of Delhi

Bail Application No. 1416 of 2006 Decided on 18.5.2006

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Indian Penal Code, i860—Section 363/366/342/506 and 376—Bail—Petitioner is in custody—Victim already examined—Victim has married to some one else and has a child therefrom—Witnesses also examined—Held—No question arises to tempering the evidence—Accused entitled to bail.

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Counsel :

Mr. S. K. Ral for Petitioner Ms. Richa Kapoor for State

JUDGEMENT

ORDER

1. The learned counsel for the petitioner has submitted that the prosecutrix has already been examined. He submitted that as per the ossification report, the age of the prosecutrix has been given between 16.4 years to 19 years. In other words, the Radiologist has fixed the minimum age of the girl to be 16.4 years which may extend upto 19 years. As a result, the prosecutrix would not be less than 16 years of age and her consent would be material. He submits that even as per the FIR, it would appear as if the prosecutrix fiad consented to the relationship. He further submits that, in any event, now the prosecutrix has been examined and all the public witnesses have been examined and only police witnesses remain to be examined. He requested that the petitioner be released on bail, particularly, because he wants to setup his case for defence.

2. The learned counsel for the State opposed the grant of bail on the ground that the prosecutrix has supported the prosecution case in her statement as PW4. Without going into the merits of the matter, I note that thel petitoiner has already been in custody since 02.02.2005, the prosecutrix hajj already been examined and, therefore, there is no question of the petitioner trying to influence the prosecutrix. It is also informed that the

prosecutrix has since been married to somebody else and also has a child. The public witnesses have also been exationer tampering with the evidence or Influencing any of the witnesses. Accordingly, I direct that the petitioner be released on bail on furnishing a personal bond in the sumof Bs. 10.00Q/—witiit two localstireties of the like amount to the satisfaction of the concerned court; The petitioner shall riot make any attempt direct or indirect to contact the prosecutrix.

3. This batt application stands disposed of. Dasti.

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Cross Citation :2003-DRJ-70-327 ,

HIGH COURT OF DELHI

Hon'ble Judge(s) : S.K.Agarwal J.

Shameet Mukherjee …..Vs….. C.B.I.

Crl. M. (M) 2471 Of 2003 Sep 05,2003

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Cr. P.C. – Section 439 – Accused was a Judge of High Court – Arrested under section 120 – B, IPC r/w sec. 7,8,11,12,13 (1) of prevention of corruption Act.- Charges of misuse of power for passing favourable order – Petitioner/accused is having relationship with another accused – Petitioner used to enjoy his hospitality in terms of wine and women – 12 days police remand granted but nothing incriminating was found – Petitioner's wife is ill – Held petitioner entitled to be released on bail.

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JUDGEMENT

(1) . By this petition under Sections 439 read with Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.')/ petitioner, who was a former judge of this Court, is seeking bail in the case R.C. No. 3(A)/2003/ACU- X/CBI/AC-III, New Delhi under Sections 120-B, IPC, read with Sections 7, 8, 11 and 12 read with Sections 13(2) and 13(1) of Prevention of Corruption Act, 1988 (hereinafter'POC Act').

(2) . CBI has filed reply opposing the petition and also praying for cancellation of interim bail granted to the petitioner vide order dated 5.5.2003 passed in Crl. M. (M) No. 1817/2003. On 4.6.2003 Hon'ble Mr. Justice B.A. Khan, while issuing notice, extended the interim bail till further orders, observing:

"Meanwhile, he is asking for extension of interim bail granted to him by order dated 5.5.2003 on medical grounds of his wife and on other attendant circumstances which is to expire on 12.6.2003. The basis of his application remains the same though he asserts that condition of his wife Buffering from advance stage of Amyotrophic Lateral Sclerosis disease

was deteriorating and that she had became totally paralysed by now. It is also submitted that due to advanced stagesof the progression disease, her lung function had also dropped requiring outside machine assisted respiratory support which could be operated by petitioner or his son who had left for Kolkata on 27.5.2003. It is also averred that petitioner's problems had multiplied due to his mother's illness, shifting of his house and refusal of specialist doctors of Mata Chanan Devi Hospital to attend to his wife. Considering all this and also that petitioner had remained in police custody for 12 days and had co-operated with the investigation, interim bail granted to him shall stand extended after 12.06.2003 till further orders from the court on his furnishing personal bond of Rs. 50,000/- with one surety in the like amount to the satisfaction of trial court/duty Magistrate. List on 15.7.2003."

(3) . The case of the prosecution, in brief, is as follows: One Dharamvir Khattar (for short 'DVK'), a businessman, was having close relationship with petitioner and Subhash Sharma, IAS, vice-chairman, Delhi Development Authority (for short 'VC-DDA'); petitioner used to enjoy his hospitality in terms of wine and women and DVK used to act as a conduit for the parties, who wanted their cases pending in petitioner's court to be settled favourably. Official record of petitioner's court used to be taken to the offices of DVK at Mathura Road and Khel Gaon. On 26.3.2003 CBI caught Ashok Kapur, P.S. to former VC-DDA (under suspension) when he was taking out files from the office of DVK at Mathura Road, including the files of the cases in petitioner's court and six page unsigned corrected draft of the order dated 20.02.2003, passed by the petitioner in the suit Azad Singh v. DDA and Ors., (No. 1493/2000) (hereinafter 'the order in question'). Facts leading to the filing of this suit are : that in 1993 DDA decided to widen Aruna Asaf Ali Road, connecting outer ring road and the Mehrauli-Mahilpur Road, to 30 meters; in 1995, it was decided to increase its width to 45 meters. The work was entrusted to Public Works Department (PWD). A strip of land passing through village Kishangarh, could not be handed over to PWD as there were several encroachments. The demolition of unauthorised structures could not be carried because of injunction orders passed by different courts in favour of the affected parties. Two such suits were pending in the Delhi High Court (i) Suit No. 236/2000 titled Simla Choudhury v. DDA and Ors., wherein Hon'ble Mr. Justice J.D. Kapoor vide order dated 1.2.2003 had restrained the defendant DDA from dispossessing the plaintiff without due process of law and (ii) Suit No. 1493/2000 titled Azad Singh v. DDA and Ore., wherein vide order dated 30.9.2002, passed by the petitioner, parties were directed to maintain status quo, as regards possession and construction in relation to the suit property. Vinod Khatri was interested in both these suits. He approached DVK through Mr. Jagdish Chandra, then Director (Lands), DDA for help.) DVK, in turn, approached the petitioner and Vice-Chairman, DDA and they agreed to help by directing the SDM of area for demarcation showing actual possession of the land in village Kishangarh, adjacent to Aruna Asaf Ali Road and by changing the lawyer who was representing these cases on behalf of DDA. It is alleged that as per plan, petitioner passed the order dated 20.2.2003, but did not sign the order immediately. The draft order was recovered on 26.3.2003 by the CBI from Ashok Kapur, as noted above. Prosecution in support of its case has placed reliance on the tape recorded conversation amongst the accused persons; draft copy of the unsigned order dated 20.2.2003; and the statements of the witnesses, recorded during the investigation.

(4) . Learned counsel for the parties were heard at length. Shri A.K. Dutt, learned counsel for the CBI, opposed the bail and referred to the various statements. "Synopsis of Evidence" collected was also filed. Learned counsel for the petitioner, refusing the

allegations, argued to the contrary, inter alia, submitting that order dated 20.2.2003, passed in Suit No. 1493/2000 did not confer any right, title or interest on the plaintiff therein and, therefore, it could not be termed as a fruit of conspiracy, as claimed by CBI. After hearing the arguments, on 3.9.2003 the order was reserved. On 5.9.2003, learned standing counsel for CBI mentioned the matter and also filed supplementary affidavit of the Investigating Officer, seeking to withdraw the "Synopsis of Evidence" filed by them, stating, "subsequently, in the course of hearing the respondent filed Synopsis of Evidence, which is not pressed at this stage". It was also submitted that medical condition of petitioner's wife continued to be the same, therefore, CBI does not oppose the bail. In view of this statement, it is not necessary to deal with other submissions made by learned counsel for the parties and the bail is to be confirmed.

(5) . Even on merits, as per the settled law, tape recorded conversation, if proved to be genuine and not tampered with, at best constitutes a corroborative piece of evidence, as held by Supreme Court in Mahabir Prasad v. Surender Kumar, 1982 SC 1043. There is no charge that petitioner had assets disproportionate to the known source of his income. Nothing incriminating was found from his possession or at his instance, during the 12 days police remand, to support the charge. The case was registered on 29.4.2003 and investigation is still in progress; other accused persons, namely, Subhash Sharma, Vinod Khatri and Ashok Kapur, are already on regular bail. The material collected by CBI during investigation would constitute what offence can be considered only after investigation is complete and challan filed. Needless to say that conduct involving moral violations by itself cannot constitute a proof for an offence. For any moral deviation a person may suffer social condemnation. Even a grossly vicious conduct, when alleged to be an offence, has to be established in accordance with the procedure established by law.

(6) . For the foregoing reasons, order dated 4.6.2003, granting interim bail to the petitioner, is confirmed. Petitioner shall remain on bail pending final disposal of the case, on his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of the trial court. Bail bond be executed within two weeks.

(7) . Any observation made in this order would not affect the merits of the case during trial. Petition stands disposed of. Order dasti.

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Cross Citation : 2011 CRI. L. J. (NOC) 415 (RAJ.)

RAJASTHAN HIGH COURT (JAIPUR)

Hon'ble Judge(s) : RAGHUVENDRA S. RATHORE, J

Chandra Shekhar …..V/s…..State of Rajasthan

S. B. Criminal Misc. Bail Appln No. 1601 of 2011 - Decided On 23/03/2011

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Criminal P. C. (2 of 1974) - S. 439 Bail -Allegation of causing bomb explosion against petitioner – On consideration of over all facts and circumstances of case

as well as evidence on record, - It will be proper to release petitioner on bail without going in to merits of controversy (Para 10)

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JUDGEMENT

ORDER:- Heard the learned counsel for the parties.

2. The case of the prosecution is that a bomb exploded in the area falling within Police Station, Dargah, Ajmer on 11.10.2007 at about 6.00 pm. Thereafter on a report lodged by one Syed Sarwar Chisti, a resident of Khadim Mohalla, Ajmer, the investigation commenced. From the place of incident an unclaimed bag, containing an unexploded bomb, was recovered by the investigation agency. Further, it is disclosed from the investigation that from the bombs (one exploded and another unexploded), two simcards were recovered out of which one was damaged and two mobile phones are said to have been used as timer devices. The number of the damaged simcard, recovered from the exploded bomb, was 89915220000005190837 and the mobile number was 9931304642. The said simcard was that of AIRTEL services in Bihar and Jharkhand and was activated on 02.06.2006. The holder of the simcard was Babulal Yadav son of Shri Ramphar Yadav, resident of House No.210, Village Kangoi, Post Mihijam, District Dumka. Number of the mobile which was used as timer device for the unexploded bomb was 97321-10207. The simcard was that of VODAFONE services in West Bengal. The holder of the said simcard was Babu Lai Yadav son of Shri Manohar Yadav, resident of Samdhi Road, Roop Narayanpur, Asansol, Vardhman. It is also revealed from the investigation that in all 11 simcards were purchased between the period 24.05.2006 to 26.11.2006, on the basis of fabricated voter I.D. Cards and driving licences.

3. During the course of interrogation, Prasad Shrikant Purohit is said to have stated that on 29.12.2007 Swami Aseemanand had told him on phone that one of his close associate Sunil Joshi had been murdered at Devas (Madhya Pradesh) because he had got the bomb exploded at Ajmer. Another accused Devendra Gupta is said to have stated, during interrogation, that late Sunil Joshi had worked for the bomb blast at Ajmer and he alongwith Sandeep Dange, Ramji Kalsangra and Lokesh Sharma were with him. Further, it was revealed that the arrangement for the explosive was made by Lokesh Sharma alongwith Sunil Joshi. Lokesh Sharma was arrested on 15.05.2010 and he had given the information about the place from where the explosive was purchased and also other places where the planning was made and the bombs were prepared. According to Lokesh Sharma, the time device used in the form of mobile phone was purchased from Faridabad. Ishant Chawla was the salesman of L.E.C. Communications, Faridabad and he sold two mobile sets to Lokesh Sharma on 24.04.2007.

4. As per the investigation, the entire planning and steps for its execution was done by late Sunil Joshi @ Manoj Kumar since the month of October, 2005 alongwith other associates. On the basis of fabricated voter I.D. card, one simcards with mobile number 9931310168 and a Nokia 2600 Mobile was purchased on 24.05.2006 from Sarawagi Communication, Jamtada, Another Simcard having mobile number 9931304642 was purchased on 31.05.2006 in the name of Babu Lai Yadav, on the basis of fabricated voter I.D. Card, from the shop being run hv Raiesh Kumar in the name of Mobile Care at Bus Stand, Dumka (Jharkhand). Another simcard with mobile phone number 9732110207 was

purchased in the name of Babu Lai Yadav on the basis of fabricated driving licence from Sargam Audio Vision, Station Road, Chitranjan (West Bengal). On arrest of Devendra Gupta, driving licences of West Bengal were recovered from him. The other driving licence on the basis of fabricated ration card and school transfer certificate, in the name of late Sunil Joshi @ Manoj Kumar, was also got prepared by him. After receiving the simcards and mobile phones, the accused Sandeep Dange, Ramji Kalsnagra and Sunil Joshi are said to have prepared the bombs and used them as timer device. On 11.10.2007, soon after the incident, Sunil Joshi had informed Bharat Bhai Rateshwar, resident of Balsad (Gujrat) on mobile phone that bomb blast had taken place at Ajmer.

5. On having come to know, during the course of investigation, that the mobile phones were functioning then their location was traced so as to seize them for the purpose of evidence. On 19.10.2009, the investigation team reached Sujalpur (M.P.) and recovered three mobile phones from the petitioner, Ravindra Patidar and Santosh Patidar, after preparing the seizure memos. Further it had come in the investigation that four mobile phones were received by the accused Chandra Shekhar in the year 2008 from co-accused Sandeep Dange who had kept the mobiles in an atechi and given it to Goverdhan Singh, a resident of Chakrond, District Shajapur (M.P.) and Harinarayan Patidar, as per their statements under Section 164 Cr.P.C. recorded on 23.09.2010 for handing over the same to the petitioner. One mobile phone was then used by the accused petitioner himself and the other three were handed over to Vishnu Patidar, a resident of Khardon Kalan who had destroyed one mobile which was not working.

6. On conclusion of the investigation, challan was filed on 20.10.2010 against six persons for various offences under the Indian Penal Code, The Explosive Substance Act, 1908 and The Unlawful Activities (Prevention) Act, 1967.

7. It has been submitted by the counsel for the petitioner that the accused petitioner had no concern with the commission of crime and there is no evidence against him in the charge sheet, in respect of the incident of bomb explosion at Ajmer on 11.10.2007. Further, he has submitted that the accused petitioner was neither involved, in any manner, prior to the incident which took place on 11.10.2007, nor he was a member of the group which had planned for bomb explosion or in furtherance of it took steps for collecting the explosive, preparing the bomb, fabricating the I.D. cards and other documents for the purchase of simcard/ mobile phones. According to him, even if the evidence on record is taken as it is, the allegation against the petitioner at the most can be said to be in respect of offence under Sections 201 or 202 IPC. Therefore, he has submitted that the petitioner is in jail since 01.05.2010 and taking into consideration the evidence collected during investigation which has already been concluded, he may now be enlarged on bail.

8. On the other hand, learned Public Prosecutor has strongly opposed the bail application. He has submitted that there is evidence on record, collected during the course of investigation, so as to connect the petitioner with the crime. Further, he has submitted that the mobile phone which was found in possession of the petitioner, on 19.10.2009, was one of those which was used at the time of incident on 11.10.2007. He has also submitted that it has come on record, at later point of time, that the accused petitioner had asked Vishnu Patidar that in case he is asked about the mobiles then he should take the name of Pankaj Patidar. Thus, he has submitted that taking into consideration the facts and circumstances of the case, the bail application of the accused petitioner be dismissed by this Court.

9. In a recent judgment passed by the Hon'bleSupreme Court in the case of State of Kerala vs. Raneef, (2011) 1 SCC 784, decided on 03.01.2011, the order of Kerala High Court passed on 17.09.2010, granting bail to the respondent Dr. Raneef, was upheld and the SLP filed by State of Kerala was dismissed. In the said case, the respondent gave medical aid to one of the wounded accused in pursuance of a previous plan that if and when any of the assailants got injured in the attack on Professor Jacob then immediate medical treatment would be given by the respondent. The respondent had stitched the back of an assailant. The respondent, alongwith other accused was a member of Popular Front of India, a Muslim organisation, and was also the head of its medical committee. Certain documents, CDs, mobile phone, books, etc. including a book called a€<AJehada€™ were allegedly seized from his house and car. The Hon'bleSupreme Court held that the case of the respondent Dr. Raneef was different from those who were the alleged assailants. There was no allegation that the respondent was one of the assailants. Further, it was observed, in para 12 (2), that prima facie the only offence that can be levelled against the respondent (therein) is that under Section 202 IPC, that is, of omitting to give information of the crime to the police, and this offence has also to be proved beyond reasonable doubt. Section 202 is a bailable offence. Accordingly, the appeal filed by the State of Kerala was dismissed by the Hon'bleApex Court.

10. On having carefully considered the overall facts and circumstances of the case as well as the evidence on record filed alongwith the challan, particularly about the persons involved in planning, preparation and commission of the crime which had taken place by way of bomb explosion on 11.10.2007 at Ajmer and without expressing any opinion on the merits of the case, I deem it just and proper to enlarge the petitioner on bail.

11. Consequently, the bail application is allowed and it is ordered that the accused-petitioner Chandra Shekhar S/o Shri Laxmi Narayan Leve in F.I.R. No.85/2007, registered at Police Station Dargah, Ajmer, shall be released on bail; provided he furnishes a personal bond of Rs. 1,00,0007- and two surety bonds of Rs. 50,0007- each to the satisfaction of the learned trial court with the stipulation to appear before that Court on all dates of hearing and as and when called upon to do so.

Petition allowed.

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Cross Citation :2011 CRI. L. J. (NOC) 430 (MAD.)

MADRAS HIGH COURT

Hon'ble Judge(s) : K. N. BASHA J.

Jayalakshmi & Ors. ……V/s ….. State of Tamil Nadu.

Crl. O.P. No. 3270 of 2011 - Decided On 08/02/2011

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Criminal P. C. (2 of 1974) - S. 439 - Bail- Case of abetment of suicide - **Allegation in complaint that petitioners teachers searched victim by**

stripping her clothes for theft of cash and as a result, she had committed suicide by hanging herself at her residence - Allegation of searching victim by stripping her clothes not mentioned in suicidal note - Petitioners are ladies and they are very much available in the college premises and there is no allegation that they are attempting to evade the due process of law by absconding or fleeing from justice – They entitled to bail. (Paras 19,22)

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JUDGEMENT

ORDER :- The petitioners, who have been arrayed as Al to A4, were arrested on 2.2.2011 for the offence punishable under Section 306IPC in Cr.No.265/2011 on the file of the respondent police have come forward with this petition, seeking for the relief of bail.

2. Mr.K.S.Dinakaran, learned Senior Counsel appearing for the petitioners submitted that the 1st petitioner is the Professor and Head of the Department of BCS in Dr.MGR Janaki College of Arts and Science, Adyar, Chennai and petitioners 2 to 4 are the lecturers working in the same department in the said college. It is submitted that the case of the prosecution is to the effect that a complaint was preferred by a classmate of the victim in this case on 29.1.2011, alleging that a cash of Rs.3,000/- was missing from her hand bag. It is further alleged that in view of the said complaint, the petitioners said to have searched by stripping the clothes of the victim in this case namely Divya, studying in 3rd year BCS course in the said college and as a result, she has committed suicide on 1.2.2011 at 7.45 p.m. by hanging herself at her residence. It is submitted that the further allegation is to the effect that a suicidal note was also left by the victim stating that the teachers enquired all the students for the theft of cash amount in the classroom of the victim.

3. The learned Senior Counsel for the petitioners submitted that the allegations contained in the complaint do not even constitute the ingredients to attract the offence under Section 306 IPC. It is contended that there is absolutely no material available on record to the effect that the petitioners instigated or intentionally aided the victim to commit suicide. The learned Senior Counsel for the petitioners further contended that the alleged suicidal note said to have been written in a notebook of the victim does not disclose the names of the petitioners and the said suicidal note is also very vague and bald. It is pointed out by the learned Senior Counsel for the petitioners that in the suicidal note it is merely stated that the victim was enquired along with other students and the allegations of stripping is not at all mentioned in the alleged suicidal note. It is contended that not only the victim alone was searched, but the other classmates of the victim were also searched even as per the admitted case of the prosecution.

4. The learned Senior Counsel contended that the prosecution claimed that the victim informed her mother on the same day i.e., on 29.1.2011 about the alleged search by stripping her clothes. The parents of the victim has not reported the matter to the Principal of the College. It is contended that the lecturers and the Head of the Department of BCS in the said college have been arrested without any basis and without any valid reasons.

5. The learned Senior Counsel for the petitioners submitted that the victim was said to have been searched on 29.1.2011 and she has attended the college on 31.1.2011 and on 1.2.2011 and the victim alleged to have committed suicide only on 1.2.2011 at 7.45 p.m. at her residence. The learned Senior Counsel contended that the petitioners are very much available and they are hailing from respectable family and they are attending the college for teaching the students and there is absolutely no material whatsoever available on record to show that the petitioners are likely to abscond or flee from justice. The learned Senior counsel submitted that in spite of the above said factors, the respondent police has chosen to arrest the petitioners on 2.2.2011 and they were remanded to judicial custody. Therefore, it is contended that the petitioners are entitled to seek the relief of bail.

6. Per contra, Mr.A.Saravanan, learned Government Advocate (Crl.side) submitted that the case of the prosecution is to the effect that on the basis of the complaint of theft of cash of Rs.3,000/- preferred by the classmate of the victim namely Divya, a 3rd year BCS student of Dr.MGR Janaki College of Arts and Science, Adyar, Chennai, the petitioners, who are working as Professor/Head of the Department of BCS and Lecturers of the same department in the said college said to have searched the victim by stripping her clothes. It is contended that though the allegation of stripping is not mentioned in the suicidal note, the said allegation was made by the mother of the victim as per her statement recorded under Section 161 Cr.P.C. It is further submitted that the friend of the victim also stated the same in her statement recorded under Section 161 Cr.P.C. The learned Government Advocate (Crl.side) submitted that the investigation is now pending at the crucial stage and in the event of granting bail, the likelihood of tampering and interfering in the investigation by the petitioners could not be ruled out as some more students have to be examined by the Investigating Officer. The learned Government Advocate (Crl.side) also produced the case diary before this Court.

7. This Court carefully considered the rival contentions put forward by either side and perused the entire materials available on record including the counter filed by the respondent and the case diary.

8. This is a very unfortunate case wherein it is alleged that a victim girl who was studying in the 3rd year BCS course has taken the extreme step of putting an end to her life by hanging herself on the ground that the teachers enquired her by stripping her clothes on the complaint of her classmate for missing of Rs.3,000/- cash. It is equally unfortunate that the petitioners, who are working as Professor/Head of the Department of BCS and Lecturers in the same department of the college, have been implicated in this case and the respondent police arrested and they were languishing in prison right from 2.2.2011. It is pertinent to note that the alleged enquiry and search were taken place on 29.1.2011 and admittedly the victim girl attended the college on 31.1.2011 and on 1.2.2011 and she has taken the extreme step of putting an end to her life at 7.45 p.m. on 1.2.2011.

9. A perusal of the alleged suicidal note said to have been written by the victim in a note book discloses that the same does not contain the signature of the victim. It is relevant to incorporate the exact note hereunder :

(Vernaular matter omitted. Ed)

The above said note does not disclose that the victim has expressed her intention to commit suicide. The said note is addressed to the teacher generally. Yet another aspect to be seen from the said note is that the present allegation of searching the victim by stripping her clothes was not mentioned in the said note. The prosecution alleged that the said version was given by the mother of the victim and by her friend during the course of investigation. It is the admitted version of the prosecution that the victim alone was not subjected to search but her classmates were also subjected to search. One of the classmates by name Padmavathi has stated in her statement recorded under Section 161 Cr.P.C. that all the classmatesa€™ handbags have been searched uniformly and they have also been searched independently and in a similar way, the victim, Divya, was also searched and she has not stated that the victim was subiected to search by stripping her clothes. At this stage it is also relevant to state that though the mother claimed that she was informed on the same day, i.e., on 29.01.2011 about striping of the clothes by the victim, she has not enquired the teachers and she has not given any report to the Principal. It is seen from the materials available on record by the perusal of the case diary that the victim was attending the college for two days, i.e., on 31.01.2011 and 01.02.2011 and only on the evening of 01.02.2011, i.e., at 7.45 p.m., she has committed suicide. It is pertinent to note that the case was originally registered only under Section 174 Cr.P.C. and the same was altered to one under Section 306 IPC only on 02.02.2011. The names of the petitioners were neither mentioned in the First Information Report nor mentioned in the altered First Information Report while altering the offence under Section 306 IPC. It is merely stated in the altered First Information Report that the college lecturers enquired and searched the victim along with her classmates for missing of cash of Rs.3,000/-from one Anuratha, the classmate of the victim.

10. The learned Senior Counsel for the petitioners vehemently contended that neither the complaint nor other materials available on record do not attract the ingredients for the offence under Sections 306 IPC.

It is relevant to refer few decisions in respect of the ingredients to attract the offence under Section 306 IPC. The Hon'bleApex Court in Mahendra Singh v. State of M.P. reported in 1995 SCC (Cri.) 1157 held hereunder:

a€oeWhoever abets the commission of suicide, and if any person commits suicide due to that reason, he shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. Abetment has been defined in Section 107 IPC to mean mat a person abets the doing of a thing who firstly instigates any person to do a thing, or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing.a€

11. In a latest decision reported in Gangula Mohan Reddy v. State of Andhra Pradesh reported in (2010) 1 SCC (Cri) 917, the Hon'bleApex Court has held her under:

a€oeAbetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing.....It also requires an active act or direct act which leads deceased to commit suicide seeing no option and this act must have been intended to push deceased into such a position that he commits suicide.a€

In the said decision, the Hon'bleApex Court has also held that in order to attract the penal provision under Section 306 IPC, there has to be a clear mens rea to commit the offence.

12. At this stage, this Court cannot go deep into the merits of the case by assessing the materials as the said exercise would amount to appreciation of evidence. It is suffice for this Court to evaluate the materials available on record to find out whether there is prima facie ground made out for granting the relief of bail.

13. By keeping the above said principle, it is to be reiterated, as pointed out earlier, that the alleged suicidal note cannot be construed to be a suicidal note and the same does not disclose the intention of the victim to commit suicide. The said note does not contain the names of the petitioners. Above all, the present allegation of searching the victim by stripping her clothes not mentioned in the said note and the signature of the victim is also not found. Added to above such admitted factors, it is to be seen that the perusal of the case diary does not disclose any valid reasons for resorting to the action of arrest. The arrest is not a must in every case. The police officials cannot resort to arrest in arbitrary and mechanical fashion. The facts and circumstances of each case to be considered for taking a decision to arrest an accused.

14. At this juncture, it is relevant to refer a landmark decision rendered by the Hon'bleApex Court in Joginder Kumar v. State of U.P and Others reported in (1999) 4 SCC 260 wherein it was held hereunder:

a€oe The Court has been receiving complaints about violation of human rights because of indiscriminate arrests. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first- the criminal or society, the law violator of the law abide.

a€oeNo arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the persona€™s complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified.a€

15. The same principle was reiterated by the Hon'bleApex Court again in D.K.Basu v. State of West Bengal reported in AIR 1997 SC 610 by following the principle laid down by the Hon'bleApex Court in Joginder Kumara€™s case.

16. The Hon'bleApex Court again in Som Mittal v. Government of Karnataka reported in (2008) 3 SCC 753, has held as under:

a€oeSection 2(c) CrPC defines a cognizable ofence as an offence in which a police officer may arrest without warrant. Similarly Section 41 Cr.P.C., states that a police officer may arrest a person involved in a cognizable offence. The use of the word a€cemaya€ shows that a police officer is not bound to arrest even in a case of a cognizable offence. Again in Section 157(1) CrPC it is mentioned that a police officer shall investigate a case relating to a cognizable offence, and if necessary take measures for the arrest of a offender. This again makes it clear that arrest is not a must in every case of a cognizable offence. When a police officer should arrest and when not is clarified in Joginder Kumar case.a€

17. At this stage, it is also relevant to refer one of the reports of the National Police Commission, in which it is stated as here under:

a€oeNearly 60% of the arrests were unnecessary, and as such, unjustified. The Commission estimated that 43.25% expenditure in the connected jails was over such prisoners who in the ultimate analysis need not have been arrested at all.a€

18. In a latest decision, the Hon'bleApex Court in Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors. reported in 2010 (6) Kar LJ 930, has held as under:

a€ce93.....According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the accused. The courts considering the bail application should try to maintain the balance between the societal interest vis-a-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused is presumed to be innocent till he is found guilty by the competent court.

95. The gravity of charge and exact role of the accused must be properly apprehended. Before arrest; the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the Court,

97. A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage of post-conviction stage.a€

The principle laid down by the Hon'bleApex Court in the decision cited supra makes it crystal clear that the investigating agency cannot resort to the action of arresting the accused in a mechanical and arbitrary fashion. They have to exercise such power by

assigning valid reasons for resorting to arrest the accused. The perusal of the case diary produced by the learned Government Advocate (Crl.side) before this Court reveals that there is absolutely no reason much less valid reason recorded by the investigating agency in the case diary for arresting the accused. Only in the remand report, it is stated that the accused namely the petitioners herein admitted their guilt during his enquiry and accordingly all the four petitioners have been arrested on 2.2.2011 at 1.30 p.m. At this stage, this Court need not go into the admissibility of such statements said to have been recorded by the police as the legal position is very much clear even as per the provision empowering the police officials to record such statements.

19. The perusal of the case diary reveals that the confessional statement said to have been recorded only from the 1st petitioner viz. Jayalakshmi and the 3rd petitioner viz., P.Selvi. It is seen that it was shown by the arresting officer that a confessional statement was recorded from the 1st petitioner in the presence of two witnesses. But as far as the 3rd petitioner viz., P. Selvi is concerned, there is no indication that the said statement was recorded in the presence of witnesses. In respect of the other two petitioners, the case diary does not disclose alleged confession said to have been recorded by the arresting officer. Except the above said two alleged confessional statements said to have been given to the arresting officer, the perusal of the case diary does not disclose that the arresting officer recorded valid reasons in the case diary for arresting the accused. At this juncture, it is relevant to state that all the petitioners are ladies and they are very much available in the college premises and there is no allegation that they are attempting to evade the due process of law by absconding or fleeing from justice. In view of the aforesaid reasons, this Court is of the considered view that the arrest of the petitioners is unnecessary, unwarranted and unjustified.

20. It is pertinent to note that entire faculty members of a particular department of the college have been arrested including the Head of the Department. It is needless to state that such a measure would cause serious hardship to the students of the collge as they have been deprived of their teachings in the respective course in view of the absence of the teachers.

21. A reading of the counter filed by the respondent itself discloses that already material witnesses have been examined and their statements recorded under Section 164 Cr.P.C. and the petitioners are languishing in the prison right from 02.02.2011 and as such, there is no justification for further incarceration.

22. Accordingly, the petitioners are ordered to be released on bail on each of them executing a personal bond for a sum of Rs. 10,000 (Rupees Five thousand only) with one surety for a likesum to the satisfaction of the learned IX Metropolitan Magistrate, Saidapet, Chennai, and on condition that the petitioners shall report before the respondent police daily at 4.30 p.m. to 6.30 p.m. for a period of ten days and thereafter as and when required for interrogation.

Order accordingly.

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Cross Citation :1992 CRI. L. J. 2873

RAJASTHAN HIGH COURT

Hon'ble Judge(s) : SH. N. L. TIBREWAL, J.

Jar Singh .....V/s ..... State of Rajasthan
S. B. Criminal Misc. IIIrd Bail Appl. No. 2353/ 1991, D/- 16 -8 -1991.

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Cri. P.c. Section 439 – Bail – Grant of – Accused in jail – Trial is going very slow – Unnecessary harassment to accused – Held – It appeared that the Judge forgotten his duties towards poor accused who is in jail – An expeditious criminal trial is an fundamental right of the accused – High Court granted bail to the accused even though it was rejected earlier – it is disturbing that the trial courts are so unware of liberties of the citizens- as Preciding Officer is transferred contempt notice is not issued against him.

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Mr. I. R. Saini, for Petitioner; Mr. M. K. Kaushik, Public Prosecutor.

Judgement

ORDER :- Though this is a third bail application under Section 439, Cr. P. C., but it requires serious consideration due to circumstances developed later on.

The petitioner is facing trial in Sessions Case No. 53/90 in the court of Addl. Sessions Judge No. 1, Alwar under Sections 498-A and 304-B, I.P.C.

While rejecting the second bail application this Court had observed as under:--

"The contention of the learned counsel for the petitioner is that the petitioner is in jail since June, 1990 and not a single witness has been examined so far though the charges were framed on 23-10-1990. It is the duty of the trial Court to see that no undue delay is caused in the trial of a Sessions Case, and all efforts should be made that after framing of the charges, the trial is completed within two or three months, which had been the usual practice. I expect from the trial Court that all efforts shall be made to complete the trial expeditiously in Sessions Cases, not only in this case but in other cases also in which the accused persons are in jail."

2. There is no dispute that Smt. Sunita committed suicide by swallowing some poisonous pill. The report of the incident was made at Police Station Alwar on March, 31, 1990 by Sh. Roshanlal, the father of the deceased. In the report, an allegation was also made about the demand of dowry by the petitioner and the co-accused Smt. Sharda. The petitioner is the husband of the deceased.

3. The contention of the learned counsel for the petitioner is that in spite of the earlier order of this Court, no progress has been made in the trial of the case. He submits that the petitioner is in jail since June, 1990 and about fourteen months have passed since then, but practically no progress has been made in the trial. The learned counsel submits that the conduct of the petitioner indicates his innocence, in as much as, when he came to know about the illness of his wife he immediately provided her medical aid and when her condition deteriorated, she was shifted to the hospital by him. The learned

counsel argues that a day prior to the incident, the petitioner had taken the deceased to her parent's house on the festival of 'Gangor' and they had gone on a bi-cycle. According to the learned counsel, in such cases it has become the fashion and practice to make false accusation of the demand of dowry, though in the community of the petitioner no such demand is made on the part of bridegroom. The learned counsel submits that in fact, in Mali-community, the bridegroom has to pay money to the bride's father for the marriage of his daughter.

4. I would not like to make any comment on the merits of the case, but there are some striking features which are alarming and I would like to highlight the same in this order. The manner in which the trial of the present case has proceeded is not only shocking and painful, but it also demonstrates slackness and indifference towards the duties by the Presiding Officers.

5. Some important dates relevant for the decision of this petition and various relevant order-sheets from the file of the trial court may be referred :

The case was registered at Police Station Alwar on March 31, 1990. The police, after completion of the investigation, submitted a charge-sheet in the month of July, 1990. Then, the case was committed by the Chief Judicial Magistrate and the record of the case was received in the court of Sessions Judge on Oct. 8, 1990. The learned Sessions Judge transferred the case to the court of Addl. Sessions Judge No. 1, Alwar and fixed the next date as 23rd Oct. 1990. On 23rd Oct. 1990, the trial Judge framed charges against the petitioner and the co-accused Smt.Sharda. Thereafter, he fixed the next date as January 9 and 10, 1991 for recording the statements of the prosecution witnesses. On Jan. 9, 1991 no prosecution witness was present, as such, the case was adjourned to Jan. 10, 1991. On Jan. 10, 1991 also no prosecution witness was present and the learned Judge fixed the next date as 12th and 13th March, 1991, for recording statement of the prosecution witnesses. On 12th and 13th March, 1991, it appears that some witnesses were present, but the Judge did not record their statements on a lame execuse that he was under transfer orders. The next date was fixed as April 30, 1991. On April 30, 1991, three prosecution witnesses were present, but their statements could not be recorded as the accused petitioner was not produced in court by the jail authorities on the ground of his being sent to hospital for treatment. Consequently, the next date was fixed as July 12, 1991. On July 12, 1991 statement of only one witness was recorded and the next date has been fixed as Aug. 22, 1991 for recording the statements of other witnesses.

6. It is really disturbing that the trial courts are so unaware of liberties of the citizens. Now, it is a settled proposition of law that expeditious criminal trial is a fundamental right of the accused, especially when he is in jail. No accused can be kept in jail for uncertain period, as an under-trial prisoner, especially when there is no fault on his part. In criminal cases in which the accused is in jail, it is the duty of the Presiding Officer to complete the trial as expeditiously as possible and to record the statements of the prosecution witnesses without any delay, rather day to day; and all efforts are to be made through the police agency to secure the attendance of the witnesses on the date fixed for recording their statements. It is also his duty not to grant adjournment unless it is found extremely necessary. Even if the case has to be adjourned, then the next date should not be after a long period.

7. In the instant case, I find that the case was committed to the Court of Sessions in the month of Oct. 1990. The charges were framed on Oct. 23, 1990. The trial Judge fixed Jan 9 and 10, 1991 as the next dates for recording the prosecution evidence i.e. after more than two and half months. On these two dates not a single prosecution witness was present and the trial Judge adjourned the case and fixed dates as March 12 and 13, 1991

without caring that the petitioner is in jail and the case should not have been adjourned for such a long period.

On March 12 and 13, 1991, some witnesses were present. The Presiding Officer was also there, but he did not choose to record their statements on a lame excuse of his being under transfer orders. Nothing can be more shocking and painful for me to notice that the statements of the witnesses could not be recorded though the Presiding Officer and the witnesses were available on the ground that the Presiding Officer was under transfer orders. Till a Presiding Officer does not give charge, he is expected to work and recording the statements of the witnesses can hardly be a matter of any grievance to anybody. It only shows that the Presiding Officer did not want to work on a lame excuse.

On April 30, 1991, the accused-petitioner was not produced in the Court by the police on the ground that he had been sent to a hospital for treatment. Though, the Court was bound to adjourn the case on this ground but the shocking fact is that the Presiding officer again gave the next date after two and half months.

8. It appears that in the instant case the Presiding Officers have completely forgotten their duties towards the poor accused who is in jell.

I would like to draw the attention of the subordinate courts towards the General Rules (Criminal) 1980.

Chapter (IV) in the General Rules (Criminal) 1980 provides the procedure and manner of 'trials in court of Sessions'.

Just for the guidance and to refresh the memory of the subordinate courts, I may refer some relevant Rules. Rule 39 provides that when an order of commitment for trial has been made, the Magistrate shall at once report the fact to the Court to which commitment is made by a letter in the prescribed form; and shall within eight days from making the said order, submit the entire record to the Court of Sessions and shall send material exhibits and articles within for night thereof together with a calendar in the prescribed form. (Emphasis provided).

Then, Rule 42 provides that Sessions cases should be disposed of with the greatest possible expedition and that Sessions Judge should reserve particular number of days in a week for sessions work.

Rule 43 provides expeditious disposal of Sessions cases, which runs as under :-

"Rule 43 - Expeditious disposal of Sessions trials should ordinarily be held in order in which commitments are made. The Presiding Officer may however exercise his discretion in the matter of giving priority to certain cases particularly cases involving capital sentence subsequently received or where the accused is in jail. Once a sessions trial is opened the Sessions Judge shall see that it is disposed of in the same session and not adjourned to next session. The sessions cases shall be taken up day to day until all the witnesses in attendance have been examined and discharged. The sessions Judge shall take necessary steps to get the summons served on the witnesses in time and if necessary the Superintendent of Police of the district may be asked to make special efforts to secure the attendance of the witnesses. A sessions trial should not be adjounred or postponed except in exceptional circumstances for reasons to recorded in writing."

(Emphasis supplied)

The aforesaid Rules indicate that Session trials should be disposed of in a most expeditious manner and once a session trial is opened, it is the duty of the concerned Judge to see that it is disposed of in thesame session. The case has to be taken day do day until all the witnesses in the cases are examined. It is also the duty of the Presiding Officer to take necessary steps to get the summons served on the witnesses in time and, if necessary, the Superintendent of Police of the district may be asked to make special efforts to secure the

attendance of the witnesses. Further, the trial shall not be adjourned or postponed except in exceptional circumstances for reasons to be recorded in writing.

9. In spite of the aforesaid, Rules, the present case has been dealt with in a most casual manner. Keeping utmost judicial restrain I can only express my displeasure about the manner in which the trial has proceeded in this case.

I can expect not only from the Presiding Officer of the Addl. Sessions Judge, Alwar, but from other Sessions Judges also not to forget and ignore the aforesaid Criminal Rules which are meant for their guidance. These rules are meant to be followed. These rules assume importance when the accused is in jail and who can rightly claim an expeditious trial as his fundamental right provided by the Constitution of India.

10. Yet another shocking feature of this case is that in spite of the specific directions given by this Court by order dated April 15, 1991 to complete the trial expeditiously within two or three months, the same has been disobeyed. The manner in which adjournments have been granted and that too by giving long dates undisputedly establishes that the disobedience of the aforesaid order of this court is wilful and deliberate. Subordinate courts are bound to obey the orders of the higher courts. This is also a judicial propriety which is necessary to be strictly followed to maintain judicial system intact. If the orders of the higher courts are willfully and deliberately disobeyed by the subordinate court it amounts to a contempt of the court.

In the course of arguments, at one time I had thought to issue a conempt notice to the concerned Presiding Officer/Officers, but having come to know that the earlier Presiding Officer has been transferred and the new Presiding Officer has taken the charge sometime in the month of March-April, 1991, it shall be suffice to record a warning against them to be vigilant and careful in following the directions of the superior courts.

In the aforesaid background, I have no option, but to release the petitioner on bail under S. 439, Cr. P.C.

Consequently, this petition is allowed and it is hereby directed that the petitioner Jai Singh S/o Pyarelal shall be released on bail provided he furnishes a personal bond in the sum of Rs. 10,000/- (ten thousand only) with two sureties in the sum of Rs. 5,000/- (five thousand only) each to the satisfaction of the trial court for his appearance in the said court or any other court on all the dates of hearing and as and when called upon to do so during the pendency of the trial in this case.

A copy of this order be kept in the personal file of the concerned Presiding Officer.

The Dy. Registrar (Judicial) is also directed to send cyclo-style copy of this order to all Sessions Judges/Addl. Sessions Judges for their guidance and to draw their attention towards Chapter (IV) 'trials in courts of Sessions' contained in General Rules (Criminal) 1980, which are meant to be strictly followed.

Petition allowed.

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Cross Citation : 1994-IJR-0-267 , 1994-AIR(SC)-0-1349

SUPREME COURT OF INDIA

[FULL BENCH]

Hon'ble Judge(s) : M. N. VENKATACHALIAH, C.J.I., S. MOHAN AND DR. A. S. ANAND, JJ.

JOGINDER KUMAR .....V/s.....State of Uttar Pradesh
Writ Petition (Criminal) 9 Of 1994 Apr 25,1994

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[A] Police – Arrest – Guidelines by Supreme Court – It shall be the duty of the Magistrate before whom the arrested person is produced to satisfy himself that the guidelines regarding arrest are complied by the Police.

[B] Right of arrestee to consult privately with lawyer are fundamental rights.

[C] No arrest can be made in routing manner immediately after the registration of crime – Except in heinous offences arrest must be avoided – If a Police Officer issues notice to attend the station house and not to leave the area without permission can be made, because it is lawful for the police officer to do so – The existence of the power to arrest is one thing but the justification for arrest is another thing. – The Police officer must be able to justify the arrest - Arrest and detention in police lock up of a person can cause incalculable harm to the reputation and self esteem of a person-D.G.P. of all states shall issue necessary instructions requiring due observance of guidelines issued by Supreme Court.

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(1.) ORDER - This is a petition under Art. 32 of the Constitution of India. The petitioner is a young man of 28 years of age who has completed his LL. B. and has enrolled himself as an advocate. The Senior Superientendent of Police, Ghaziabad, respondent No.4 called the petitioner in his office for making enquiries in some case. The petitioner on 7-1-1994 at about 10 O'clock appeared personally along with his brothers Sri Mangeram Choudhary, Nahar Singh Yadav, Harinder Singh Tewatia, Amar Singh and others before the respondent No. 4. Respondent No. 4 kept the petitioner in his custody. When the brother of the petitioner made enquiries about .the petitioner, he was told that the petitioner will be set free in the evening after making some enquiries in connection with a case.

(2.) On 7-1-1994 at about 12-55 p.m., the brother of the petitioner being apprehensive of the intentions of respondent No. 4, sent a telegram to the Chief Minister of U. P. apprehending his brother's implication in some criminal case and also further apprehending the petitioner being shot dead in fake encounter.

(3.) In spite of the frequent enquiries, the whereabouts of the petitioner could not be located. On the evening of 7-1-1994, it came to be known that petitioner is detained in illegal custody of 5th respondent, S.H.O , P. S. Mussorie.

(4.) On 8-1-1994, it was informed that the 5th respondent was keeping the petitioner in detention to make further enquiries in some case. So far as petitioner has not been produced before the concerned Magistrate. Instead the 5th respondent directed the

relative of the petitioner to approach the 4th respondent S.S.P. Ghaziabad for release of the petitioner.

(5.) On 9-1-1994, in the evening when the brother of petitioner along with relatives went to P.S. Mussorie to enquire about the wellbeing of his brother, it was found that the petitioner had been taken to some undisclosed destination. Under these circumstances, the present petition has been preferred for the release of Joginder Kumar, the petitioner herein.

(6.) This Court on 11-1-1994 ordered notice to State of U.P. as well as S.S.P. Ghaziabad.

(7.) The said Senior Superintendent of Police along with petitioner appeared before this Court on 14-1-1994. According to him, the petitioner has been released. The question as to why the petitioner was detained for a period of five days, he would submit that the petitioner was not in detention at all. His help was taken for detecting some cases relating to abduction and the petitioner was helpful in co-operating with the police. Therefore, there is no question of detaining him. Though, as on today the relief in habeas corpus petition cannot be granted yet this Court cannot put an end to the writ petition on this score. Where was the need to detain the petitioner for five days; if really the petitioner was not in detention, why was not this Court informed are some questions which remain unanswered. If really, there was detention for five days, for what reason was he detained? These matters require to be enquiried into. Therefore, we direct the learned District Judge, Ghaziabad to make a detailed enquiry and submit his report within four weeks from the date of receipt of this order.

(8.) The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

(9.) A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first - the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered. In People v. Defore, (1926) 242 NY 13, 24:150 NE 585, 589, justice Cardozo observed:

"The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the Adams case (People v. Adams, (1903) 176 NY 351 : 68 NE 636) strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected shall give notice to the courts that change has come to pass."

(10.) To the same effect is the statement by Judge learned Hand, In Re Fried, 161 F 2d 453, 465 (2d Cir. 1947):

"The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise."

(11.) The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law.

(12.) This Court in Smt. Nandinia Satpathy v. P. L. Dani AIR 1978 SC 1025 at page 1032 quoting Lewis Mayers stated:

The paradox has been put sharply by Lewis Mayers:

"To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right."

Again in para 21 at page 1033 it was observed:

"We have earlier spoken of the conflicing claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between societal interest in effecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America. Since Miranda ((1966) 334 US 436) there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting law-brakers. Currently, the trend in the American jurisdiction according to legal journals, is that 'respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws ... (Couch v. United States (1972) 409 US 322, 336). Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice."

(13.) The National Police Commission in its Third Report referring to the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60 Per Cent of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2 Per Cent of the expenditure of the jails. The said Commission in its Third Report at page 31 observed thus:

"It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 per cent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all."

(14.) As on today, arrest with or without warrant depending upon the circumstances of a particular case is governed by the Code of Criminal Procedure.

(15.) Whenever a public servant is arrested that matter should be intimated to the superior officers, if possible, before the arrest and in any case, immediately after the arrest. In cases of members of Armed Forces, Army, Navy or Air Force, intimation should be sent to the Officer commanding the unit to which the member belongs. It should be done immediately after the arrest is effected.

(16.) Under Rule 229 of the Procedure and Conduct of Business in Lok Sabha, when a Member is arrested on a criminal charge or is detained under an executive order of the Magistrate, the executive authority must inform without delay such fact to the Speaker. As soon as any arrest, detention, conviction or release is effected intimation should invariably be sent to the Government concerned concurrently with the intimation sent to the Speaker/Chairman of the Legislative Assembly/Council/Lok Sabha/Rajya Sabha. This should be sent through telegrams and also by post and the intimation should not be on the ground of holiday.

(17.) With regard to the apprehension of juvenile offenders S. 58 of the Code of Criminal Procedure lays down as under:

"Officers in charge of police stations shall report to the District Magistrate or, if he so directs, to the Sub-Divisional Magistrate, the cases of all persons arrested without warrant, within the limit of their respective stations whether such persons have been admitted to bail or otherwise."

(18.) Section 19(a) of the Children Act makes the following provision: "the parent or guardian of the child, if he can be found, of such arrest and direct him to be present at the children's court before which the child will appear."

(19.) In England, the police powers of Arrest, Detention and lnterrogation have been streamlined by the Police and Criminal Evidence Act, 1984 based on the report of Sir Cyril Philips Committee (Report of a Royal Commission on Criminal Procedure, Command-papers 8092 19811).

(20.) It is worth quoting the following passage from Police Powers and Accountability by John L. Lambert, page 93:

"More recently, the Royal Commission on Criminal Procedure recognised that "there is a critically important relationship between the police and the public in the detection and investigation of crime" and suggested that public confidence in police powers required that these conform to three principal standards : fairness, openness and workability."

(Emphasis supplied)

(21.) The Royal Commission suggested restrictions on the power of arrest on the basis of the 'necessity of principle'. The two main objectives of this principle are that police can exercise powers only in those cases in which it was genuinely necessary to enable them to execute their duty to prevent the Commission of offences, to investigate crime. The Royal Commission was of the view that such restrictions would diminish the use of arrest and produce more uniform use of powers. The Royal Commission Report on Criminal Procedure - Sir Cyril Philips at page 45 said:

"... ... We recommend that detention upon arrest for an offence should continue only on one or more of the following crtiteria;

(a) the person's unwillingness to identify himself so that a summons may be served upon him;

(b) the need to prevent the continuation or repetition of that offence;

(c) the need to protect the arrested person himself or other persons or property;

(d) the need to secure or preserve evidence of or relating to that offence or to obtain such specified guidelines evidence from the suspect by questioning him; and

(e) the likelihood of the person failing to appear at court to answer any charge made against him."

(22.) The Royal Commission in the abovesaid Report at page 46 also suggested:

"To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an

appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case ... ... "

(23.) In India, Third Report of the National Police Commission at page 32 also suggested:

"....An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances :-

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines... .."

(24.) The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave Station without permission would do.

(25.) Then, there is the right to have someone informed. That right of the arrested person, upon request, to have someone informed and to consult privately with a lawyer was recognised by Section 56(1) of the Police and Criminal Evidence Act, 1984 in England (Civil Actions Against the Police -Richard Clayton and Hugh Tomlinson; page 313). That Section provides:

"where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable except to the extent that delay is permitted by this section, that he has been arrested and is being detained there."

(26.) These rights are inherent in Articles 21 and 22(1) of the Constitution and require to be recognised and scrupulously protected. For effective enforcement of these fundamental rights, we issue the following requirements:

1. An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where is being detained.

2. The Police Officer shall inform the arrested person when he is brought to the police station of this right.

3. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.

(27.) It shall be the duty of the Magistrate, before whom the arrested person is produced, to statisfy himself that these requirements have been complied with.

(28.) The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various Police Manuals.

(29.) These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements. In addition, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrest. Order accordingly.

Cross Citation :1978-AIR(SC)-0-1025 , 1978-SCC-2-424

SUPREME COURT OF INDIA

Hon'ble Judge(s) : V. R. KRISHNA IYER, JASWANT SINGH AND V. D. TULZAPURKAR, JJ.

NANDINISATPATHY Vs P.L.DANI
Civil 315 Of 1978, Criminal 101 Of 1978 Apr 07,1978

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A] Criminal procedure code, 1973 – Sec 160 (1), 161 (2), - Constitution of India Article 20 (3) and 22(1) – Rights to keep silence – Held – Accused has *constitutional right to keep silence till end of the trial – the Police Officer* cannot pressurize the accused to give answer to their questions– Secondly the Police cannot summon a woman at Police Station – Compelled Testimony includes both physical and psychological compulsion – Threats of prosecution for failure to answer and manner of delivery of answers amounts to compulsion – Proceeding against accused quashed – Appellant – accused given protection under Article 20 (3) that he should not be compelled to answer the questions asked by the police which are self incriminating.

B] Use of torture/third degree is not permissible – However worthy the end is, it will not be permissible to achieve it by sacrificing the dignity of the individual and freedom of the human person by improper

means – We have to draw up clear lines between whirl – Pool and the rock where the safety of society and the worth of the human person may co-exist in peace.

C] Police cannot be the law unto themselves expecting others to obey the law. If the alibi is that the Sessions Court had directed the accused to appear at the police station, that is no absolution for a police officer from disobedience of the law.

D] Before discussing the core issues, we wish to note our regret, in this case, at a higher level police officer, ignorantly insisting on a woman appearing at the police station, in flagrant contravention of the whole-some proviso to Section 160 (1) of the Cr. P. C. Such deviance must be visited with prompt punishment since policemen may not be a law unto themselves expecting others to obey the law. The wages of indifference is reprimand, of intransigence disciplinary action. If the alibi is that the Sessions Court had directed the accused to appear at the police station, that is no absolution for a police officer from disobedience of the law. There is public policy, not complimentary to the police personnel, behind this legislative proscription which keeps juveniles and females from Police Company except at the former's safe residence. May be, in later years, community confidence and consciousness will regard the police force as entitled to better trust and soften the stigmatizing or suspicious provisions now writ across the Code.

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V.R.KRISHNA IYER

(1.) Every litigation has a touch of human crisis and, as here, it is but a legal projection of life's vicissitudes.

(2.) A complaint was filed by the Deputy Superintendent of Police, Vigilance (Directorate of Vigilance) Cuttack, against the appellant, the former Chief Minister of Orissa under S. 179. Indian Penal Code, before the Sub-Divisional Judicial Magistrate, Sadar, Cuttack alleging offending facts which we will presently explain. There upon the Magistrate took cognizance of the offence and issued summons for appearance against the accused (Smt. Nandini Satpathy). Aggrieved by the action of the Magistrate and urging that the complaint did not and could not disclose an offence, the agitated accused-appellant moved the High Court under Art. 226 of the Constitution as well as under S. 401 of the Cr. P. Code, challenging the validity of the Magisterial proceeding. The broad submissions, unsuccessfully made before the High Court, was that the charge rested upon a failure to answer interrogations by the police but this charge was unsustainable because the umbrella of Art. 20 (3) of the Constitution and the immunity under S. 161 (2) of the Cr. P. Code were wide enough to shield her in her refusal. The plea of unconstitutionality and illegality, put forward by this pre-emptive proceeding was rebuffed by the High Court and so she appealed to this Court by certificate granted under Art. 132 (1), resulting in the above two appeals, thereby taking a calculated risk which might boomerang on the litigant if she failed, because what this Court now decides finally binds.

(3.) Every appeal to this Court transcends the particular is to incarnate as an appeal to the future by the invisible many whose legal lot we decide by laying down the law for the

nation under Article 141; and, so, we are filled with humility in essaying the task of unravelling the sense and sensibility, the breadth and depth, of the principle against self-incrimination enshrined in Art. 20 (3) of our Constitution and embraced with specificity by S. 161 (2) of the Cr. P. Code. Here we must remember, concerned as we are in expounding an aspect of the Constitution bearing on social defence and individual freedom, that humanism is the highest law which enlivens the printed legislative text with the life-breath of civilized values. The Judge who forgets this rule of law any day regrets his nescient verdict some day.

(4.) Now, we move on to the riddle of Art. 20 (3), the range of the 'right to silence' and the insulation of an accused person from police interrogation under S. 161 (2) of the Cr. P. Code. Counsel on both sides have presented the rival viewpoints with utmost fairness and some scholarship and we have listened to them, not as an abstract intellectual exercises peppered by lexical and precedential erudition but as deeper dives into the meaning of meanings and the exalted adventures in translation of twinkling symbols. Our Constitutional guarantees are phrased like the great sutras - pregnant brevities enwombing founding faiths.

(5.) The basic facts which have given rise to this case need to be narrated but the law we have to settle reminds us, not of a quondam Minister, the appellant, but of the numerous indigents, illiterates and agnostics who are tensed and perplexed by police processes in station recesses, being unversed in the arcane implications of Art. 20 (3) and unable to stand up to rough handling despite S. 161 (2). Law-in-action is tested b its restless barks and bites in the streets and its sting in hostile camps, especially when the consumers are unaware of the essential contents of the protective provisions, and not by its polished manners and sweet reasonableness in forensic precincts. The pulse of the agitated accused. hand-cuffed and interrogated the rude voice and ready rod of the head constable and the psychic strain, verging on consternation, sobbing into involuntary incriminations, are part of the scenario of police investigation which must educate the Court as it unveils the nuances of Art. 20 (3) and its inherited phraseology. A people whose consciousness of rights is poor a land where legal services at the incipient stages are rare and an investigative personnel whose random resort to third degree technology has ancient roots - these and a host of other realistic factors must come into the court's ken when interpreting and effectuating the constitutional right of the suspect accused to remain silent. That is why quick surgery, when constitutional questions affecting the weaker numbers are involved, can be successful failure. We are cognizant of the improved methods and refined processes of the police forces, especially the Vigilance wings and Intelligence squads with special training in expert investigation and use of brains as against brawn. This remarkable improvement, in Free India, in police practices has not unfortunately been consistent and torture tactics have not been transported for life from our land as some recent happenings have regrettably revealed. Necessarily, the court must be guided by principled pragmaticism, not cloud cuckoo land idealism. This sets our perspective.

The facts:

(6.) Back to the facts, Smt. Nandini Satpathy, a former Chief Minister of Orissa and one time minister at the national level, was directed to appear at the Vigilance Police Station. Cuttack, in September last year for being examined in connection with a case registered against her by the Deputy Superintendent of Police, Vigilance, Cuttack under section 5 (2) read with section 5 (1) (d) and (e) of the Prevention of Corruption Act and under sections 161/165 and 120-B and 109 I. P. C. On the strength of this first information, in which the appellant, her son and others were shown as accused persons, investigation was

commenced. During the course of the investigation it was that she was interrogated with reference to a long string of questions, given to her in writing. Skipping the details of the dates and forgetting the niceties of the provisions, the gravamen of the accusation was one of acquisition of assets disproportionate to the known, licit sources of income and probable resources over the years of the accused, who occupied a public position and exercised public power for a long spell during which, the police version runs, the lady by receipt of illegal gratification aggrandized herself - a pattern of accusation tragically and traumatically so common against public persons who have exercised and exited from public power, and a phenomenon so suggestive of Lord Actin's famous dictum. The charge, it is so obvious has a wide-ranging scope and considerable temporal sweep, covering activities and acquisitions, sources and resources, private and public dealings and nexus with finances personal and of relatives. The dimensions of the offences naturally broadened the area of investigation, and to do justice to such investigation, the net of interrogation had to be cast wide. Inevitably, a police officer who is not too precise, too sensitive and too constitutionally conscientious is apt to trample under foot the guaranteed right of testimonial tacitness. This is precisely the grievance of the appellant, and the defence of the respondent is the absence of the 'right of silence', to use the familiar phrase of 20th century vintage.

Our Approach :

(7.) Counsel's submissions have zeroed in on some basic questions. Speaking broadly, there are two competing social interests a reconciliation of which gives the clue to a balance between the curtailed or expanded meaning for the sententious clause against self-incrimination in our Constitution. Section 161 (2) Cr. P. C. is more concrete. We may read both before venturing a bhashyam on their text :

"Art. 20 (3) - No person accused of any offence shall be compelled to be a witness against himself."

(8.) Section 161 (2) Cr. P. C. enjoins :

"Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answer to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture."

(9.) The elucidation and application of these provisions will be better appreciated in the specific setting of the points formulated in the course of the arguments. And so we now set down the pivotal issues on which the submissions were focused, reminding ourselves that we cannot travel beyond the Atlantic to lay down Indian law although counsel invited us, with a few citations, to embark on that journey. India is Indian not alien, and jurisprudence is neither eternal nor universal but molded by the national genius, life's realities culture and ethos of each country. Even so, humanist jurists will agree that in this indivisible human planet certain values, though divergently expressed, have cosmic status, spreading out with the march of civilization in space and time. To understand ourselves, we must listen to voices from afar, without forsaking our identity. The Gandhian guideline has a golden lesson for judges when rulings and text books outside one's jurisdiction are cited :

"I do not want my house to be walled in on all sides any my windows to be stuffed. I want the cultures of all lands to be blown about my house as freely as possible. But I refuse to be blown off my feet by any."

(Young India 1-6-1921)".

To build bridges of juridical understanding based on higher values, is good; to don imported legal haberdashery, on meretricious appeal, is clumsy.

The Issues :

(10.) The points in controversy may flexibly be formulated thus :

1. Is a person likely to be accused of crimes i.e. a suspect accused, entitled to the sanctuary of silence as one 'accused of any offence'? Is it sufficient that he is a potential - of course, not distant - candidate for accusation by the police?
2. Does the bar against self-incrimination operate not merely with reference to a particular accusation in regard to which the police investigator interrogates, or does it extend also to other pending or potential accusations outside the specific investigation which has led to the questioning? That is to say, can an accused person who is being questioned by a police officer in a certain case, refuse to answer questions plainly non-criminatory so far as that case is concerned but probably exposes him to the perils of inculpation in other cases in posse or in esse elsewhere?
3. Does the constitutional shield of silence swing into action only in court or can it barricade the 'accused' against incriminating interrogation at the stages of police investigation?
4. What is the ambit of the cryptic expression 'compelled to be a witness against himself' occurring in Article 20 (3) of the Constitution? Does 'compulsion' involve physical or like pressure or duress of an unlawful texture or does it cover also the crypto-compulsion or psychic coercion, given a tense situation or officer in authority interrogating an accused person, armed with power to insist on an answer?
5. Does being 'a witness against oneself' include testimonial tendency to incriminate or probative probability of guilt flowing from the answer?
6. What are the parameters of Section 161 (2) of the Cr. Procedure Code? Does tendency to expose a person to a criminal charge embrace answers which have an inculpatory impact in other criminal cases actually or about to be investigated or tried?
7. Does 'any person' in Section 161 Cr. Procedure Code include an accused person or only a witness?
8. When does an answer self-incriminate or tend to expose one to a charge? What distinguishing features mark off nocent and innocent, permissible and impermissible interrogations and answers? Is the setting relevant or should the answer, in vacuo, bear a guilty badge on its bosom?
9. Does mens rea form a necessary component of section 179 Indian Penal Code, and, if so, what is its precise nature? Can a mere apprehension that any answer has a guilty potential salvage the accused or bring into play the exclusionary rule?
10. Where do we demarcate the boundaries of benefit of doubt in the setting of section 161 (2) Cr. P. C. and Section 179 Indian Penal Code?

Sec 179 Indian Penal Code :

(11.) This formulation does focus our attention on the plural range of rural concerns when a court is confronted with an issue of testimonial compulsion followed by a prosecution for recusancy. Preliminarily, let us see the requirements of section 179 I. P. C. since the appeals directly turn on them. The rule of law becomes a rope of sand if the lawful authority of public servants can be defied or disdained by those bound to obey. The might of the law, in the last resort, of guarantees the right of the citizen, and no one, be he minister or higher, has the discretion to disobey without running a punitive risk. Chapter X of the Indian Penal Code is designed to penalize disobedience of public servants exercising lawful authority. Section 179 is one of the provisions to enforce compliance when a public servant legally demands truthful answers but is met with blank refusal or plain mendacity. The section reads :

"179: Whoever, being legally bound to state the truth on any subject to any public servant refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with

simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

(12.) A break-down of the provision yields the following pieces : a, the demanding authority must be a public servant; a police officer is obviously one, b, The demand must be to state the truth on a subject in the exercise of legal powers; and, indubitably, an investigating officer enjoys such powers under the Cr. P.C., and here, the requisition was precisely to tell the truth on matters supposedly pertinent to the offences under investigation. Section 161 of the Cr. P. C. obligates 'any person supposed to be acquainted with the facts and circumstances of the case' to answer truthfully 'all questions relating to such case ... other than questions the answers to which would have a tendency to expose him to a criminal charge'. In the present case, admittedly, oral answers to written interrogatories were sought, although not honest speech but 'constitutional' silence greeted the public servant. And this refuge by the accused under Art. 20 (3) drove the disenchanted officer to seek the sanction of section 179 Indian Penal Code If the literal force of the text governs the complex of facts, the court must convict, lest the long arm of the investigatory law should hang limp when challenged by the negative attitude of inscrutability, worn by the 'interrogatee' - unless within the text and texture of the section built-in defenses exist. They do, is the appellant's plea; and this stance is the subject of the debate before us.

(13.) What are the defenses open under Section 179 Indian Penal Code read with Section 161 Cr. P.C.? Two exculpatory channels are pointed out by Sri Rath, supplemented by a third paramount right founded on constitutional immunity against testimonial self-incrimination. To itemise them for ready reference, the arguments are that a, 'any person' in section 161 (1) excludes an accused person, b, that questions which form links in the chain of the prosecution case - these include all except irrelevant ones - are prone to expose the accused to a criminal charge or charges since several other cases are in the offing or have been charge sheeted against the appellant and c, the expansive operation of the benignant shield against self-accusation inhibits elicitation of any answers which the accused apprehends may throw inculpatory glow. This wide vindication, if valid, will be the biggest interpretative bonus the court can award to criminals as it foredooms to failure criminal justice and police truth tracking, says the learned Advocate General. True, courts self-criminate themselves if they keep the gates ajar for culprits to flee justice under the guise of interpretative enlargement of golden rules of criminal jurisprudence, The Constitution and the criminal :

(14.) The inherent quandary of the penal law in this area springs from the implanted dilemma of exacting solicitude for possible (14.) The inherent quandary of the penal law in this area springs from the implanted dilemma of exacting solicitude for possible innocents forced to convict themselves out of their own lips by police tantrums and the social obligation of the limbs of the law and agencies of justice to garner truth from every quarter, to discover guilt, wherever hidden, and to fulfil the final tryst of the justice system with society, which is to shield the community against criminality by relentless pursuit of the culprit, by proof of guilt and punishment of crime, not facilitation of the fleeing criminal from the chase of the appointed authorities of the State charged with the task of investigating, testing proving and getting punished those whose anti-social exploits make citizen's life vulnerable.

(15.) The paradox has been put sharply by Lawis Mayers :

"To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years

has swung to the right. Even as long ago as the opening of the twentieth century, Justice Holmes declared that 'at the present time in this country there is more danger that criminals will escape justice then that they will be subject to tyranny.' As the century has unfolded, the danger has increased.
Conspiracies to defeat the law have, in recent decades, become more widely and powerfully organized and have been able to use modern advances in communication and movement to make detection more difficult. Law-breaking tends to increase. During the same period, an increasing awareness of the potentialities of abuse of power by law-enforcement officials has resulted, in both the judicial and the legislative spheres, in a tendency to tighten restrictions on such officials, and to safeguard even more jealously the rights of the accused, the suspect, and the witness. It is not too much to say that at mid-century we confront a real dilemma in law enforcement.

In consequence, there is clearly discernible a tendency to re-examine the assumptions on which rest our complex of rules and doctrines which offer obstacles, perhaps wisely, to the discovery and proof of violations of law. In such a re-examination, the cluster of rules commonly grouped under the term 'privilege against self-incrimination', which has for many decades been under attack, peculiarly calls for restudy. In the words of Wigmore, 'Neither the history of the privilege, nor its firm constitutional anchorage need deter us from discussing at this day its policy. As a bequest of the 1600's, it is but a relic of controversies and convulsions which have along since ceased ... .. Nor does its constitutional sanction, embodied in a clause of half a dozen words, relieve us of the necessity of considering its policy ... A sound and intelligent opinion must be formed upon the merits of the policy."
(16.) Justice Douglas made this telling comment :
"As an original matter it might the debatable whether the provision of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" serves the ends of justice (1952)".
These prologuic lines serve as background to a balanced approach to the crucial question posed before us.
A police lapse :
(17.) Before discussing the core issues, we wish to note our regret, in this case, at a higher level police officer, ignorantly insisting on a woman appearing at the police station, in flagrant contravention of the whole-some proviso to Section 160 (1) of the Cr. P. C. Such deviance must be visited with prompt punishment since policemen may not be a law unto themselves expecting others to obey the law. The wages of indifference is reprimand, of intransigence disciplinary action. If the alibi is that the Sessions Court had directed the accused to appear at the police station, that is no absolution for a police officer from disobedience of the law. There is public policy, not complimentary to the police personnel, behind this legislative proscription which keeps juveniles and females from police company except at the former's safe residence. May be, in later years, community confidence and consciousness will regard the police force as entitled to better trust and soften the stigmatising or suspicious provisions now writ across the Code.
(18.) It is necessary, to appreciate the submissions, to remember the admitted fact that this is not the only case or investigation against the appellant and her mind may move around these many investigations, born and unborn, as she is confronted with questions. The relevance of this factor will be adverted to later.
Setting the perspective of Art. 20 (3) and Sec. 161 (2) :
(19.) Back to the constitutional quintessence invigorating the ban on self-incrimination. The area covered by Art. 20 (3) and Section 161 (2) is substantially the same. So much so,

we are inclined to the view, terminological expansion apart, that Section 161 (2) of the Cr. P. C. is a parliamentary gloss on the constitutional clause. The learned Advocate General argued that Art. 20 (3), unlike Section 161 (1), did not operate at the anterior stages before the case came to court and the accused's incriminating utterance, previously recorded, was attempted to be introduced. He relied on some passages in American decisions but, in our understanding, those passages do not so circumscribe and, on the other hand. the land mark Miranda (1966) 384 US 436 ruling did extend the embargo to police investigation also. Moreover, Art 20 (3), which is our provision, warrants no such truncation. Such a narrow meaning may emasculate a necessary protection. There are only two primary queries involved in this clause that seals the lips into permissible silence. (i). Is the person called upon to testify 'accused of any offence'? (ii) Is he being compelled to be witness against himself? A constitutional provision receives its full semantic range and so it follows that a wider connotation must be imparted to the expressions 'accused of any offence' and 'to be witness against himself'. The learned Advocate General, influenced by American decisions rightly agreed that in expression Section 161 (2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Art. 20 (3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161 (2). This latter provision meaningfully uses the expression 'expose himself to a criminal charge' : Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges. In Art. 20 (3), the expression 'accused of any offence' must mean formally accused in praesenti not in futuro - not even imminently as decisions now stand. The expression 'to be witness against himself' means more than the court process. Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being witness against oneself. Not being limited to the forensic stage by express words in Art. 20 (3), we have to construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Art. 20 (3). This is precisely what section 161 (2) means. That sub-section relates to oral examination by police officers and grants immunity at that stage. Briefly, the Constitution and the Code are conterminous in the protective area while the Code may be changed, the Constitution is more enduring. Therefore, we have to base our conclusion not merely upon Section 161 (2) but on the more fundamental protection, although equal in ambit, contained in Art. 20 (3).

(20.) In a way this position brings us nearer to the Miranda ((1966) 384 U. S. 436) mantle of exclusion which extends the right against self-incrimination, to police examination and custodial interrogation and takes in suspects as much as regular accused persons. Under the Indian Evidence Act, the Miranda exclusionary rule that custodial interrogations are inherently coercive find expression (section 26), although the Indian provision confines it to confession which is a narrower concept than self-crimination.

(21.) We have earlier spoken of the conflicting claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between societal interest in effecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America. Since Miranda ((1966) 384 U.S. 436) there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting lawbreakers. Currently, the trend in the American jurisdiction according to legal journals, is that 'respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws ... ..' (Couch v.

Unites States. (1972) 409 U.S. 322, 336). Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice.

(22.) Whether we consider the Talmudic law or the Magna Carta, the Fifth Amendment, the provisions of other constitutions or Article 20 (3), the driving force behind the refusal to permit forced self-crimination is the system of torture by investigators and courts from medieval times to modern days. Law is a response to life and the English rule of the accused's privilege of silence may easily be traced as a sharp reaction to the court of Star Chamber when self-incrimination was not regarded as wrongful. Indeed , then the central feature of the criminal proceedings, as Holdsworth has noted, was the examination of the accused.

(23.) The horror and terror that then prevailed did as a reaction, ... give rise to the reverential principle of immunity from interrogation for the accused. Sir James Stephen has observed :

"For at least a century and a half the (English) Courts have acted upon the supposition that to question a prisoner is illegal... ... This opinion arose from a peculiar and accidental state of things which has long since passed away and our modern law is in fact derived from somewhat questionable source though it may not doubt be defended (Sir James Stephen (1857)."

(24.) Two important considerations must be placed at the forefront before sizing up the importance and impregnability of the anti-self-incrimination guarantee. The first is that we cannot afford to write off the fear of police torture leading to forced self-incrimination as a thing of the past. Recent Indian history does into permit it, contemporary world history does not condone it. A recent article entitled 'Minds behind Bar's, published in the December, 1977 issue of the Listener, tells an awesome story: "The technology of torture all over the world is growing ever more sophisticated - new devises can destroy a prisoner's will in a matter of hours - but leave no visible marks or signs of brutality. And government-inflicted terror has evolved its own dark sub-culture. All over the world, torturers seem to feel a desire to appear respectable to their victims. ... . There is an endlessly inventive list of new methods of inflicting pain and suffering on fellow human beings that quickly cross continents and ideological barriers through some kind of international secret-police net work.

... . "What is encouraging in all this dark picture is that we feel that public opinion in several countries is much more aware of our general line than before. And that is positive. I think, in the long run, Governments can't ignore that. We are also encouraged by the fact that, today, human rights are discussed between governments - they are now on the international political agenda. But, in the end, what matters is the pain and suffering the individual endures in police station or cell."

(25.) Many police officers, Indian and foreign, may be perfect gentlemen, many police stations, here and elsewhere, may be wholesome. Even so, the law is made for the generality and Gresham's Law does not spare the Police force.

(26.) On the other hand, we must never forget that crimes, in India and internationally, are growing and criminals are outwitting the detectives. What holds good in the cities of the United States is infecting other countries, including our own. An American author in a recent book has stated ; "What do you think the city of tomorrow will be? In 1969 the National Commission on the Causes and Prevention of Violence made alarming predictions. You will live in a city where everyone has guns. Houses will be protected by grills and spy equipment. Armed citizen patrols will be necessary. The political extremes will be small

armies. Buses will have to carry armed guards. There will be hatred and war between the races, and between the rich and the poor. In other words, your city will be place of terror.
"From 1969 to 1974 the number of crimes for each hundred thousand people is up 38% (48, pg. 12). Violent crimes rose 47% (48, pg. 23). Robbery increased 48% (48, pg. 25). Burglary went up a whopping 53% (48, pg. 29). Theft rose 35% (48, pg. 32). The chances are becoming better and better that you or someone dear to you will be a victim. The chances are also better that a close relative will be involved in crime as criminal.
"... ..In only 12% of the serious crimes is there a suspect arrested. Half of those are convicted. (Serious crime includes homicide, burglary, aggravated assault, larceny over $50, forcible rape, robbery, and auto theft). (63, pg. XVIII).
"The situation is so discouraging that only half the people bother to report serious crime (63, pg. XVIII). Even then, in 1974, 82% of the known burglaries went unsolved (48, pg. 42). That means only 18% of the half known to the police were solved.
"... . President Johnson's message to Congress 8/03/1965 is as true today as it was then:
'Crime has become a malignant enemy in America's midst... . We must arrest and reverse the trend towards lawlessness .... We cannot tolerate an endless, self-defeating cycle of imprisonment, release, and reimprisonment which fails to alter undesirable attitudes and behavior. We must find ways to help the first offender avoid a continuing career to crime.'
"

(27.) The first obligation of the criminal justice system is to secure justice by seeking and substantiating truth through proof. Of course, the means must be as good as the ends and the dignity of the individual and the freedom of the human person cannot be sacrificed by report to improper means, however worthy the ends. Therefore, 'Third degree' has to be outlawed and indeed has been. We have to draw up clear lines between the whirl-pool and the rock where the safety of society and the worth of the human person may co-exist in peace.
(28.) We now move down to the role of the Latin Maxim ' nemo tenetur se ipsum tenetur' which literally translated means, a man cannot represent himself as guilty. This rule prevailed in the Rabbinic courts and found a place in the Talmud (no one can incriminate himself). Later came the Star Chamber history and Anglo-American revulsion. Imperial Britain transplanted part of it into India in the Cr. P. C. Our Constitution was inspired by the high-minded inhibition against self-incrimination from Anglo-American sources. Thus we have a broad review of the origins and bearings of the fundamental right to silence and the procedural embargo on testimonial compulsion. The American cases need not detain us, although Miranda v. Arizona ((1966) 384 U. S. 436) being the Lodestar on the subject, may be referred to for grasping the basics of the Fifth Amendment bearing on oral incrimination by accused persons.
(29.) We have said sufficient to drive home the anxious point that this cherished principle which proscribes compulsory self-accusation, should not be dangerously over-broad or illusorily whittled down. And it must openly work in practice and not be a talismanic symbol. The Miranda ((1966) 384 U. S. 436) ruling clothed the Fifth Amendment with flesh and blood and so must we, if Art. 20 (3) is not to prove a promise of unreality. Aware that the questions raised go to the root of criminal jurisprudence we seek light from Miranda for interpretation, not innovation, for principles in their settings, not borrowings for our conditions. The spiritual thrust of the two provisions is the same and it is best expressed in the words of Brown v. Walker (1895) Law Ed 819:
"Over 70 years ago, our predecessors on this Court eloquently stated:
'The maxim nemo tenetur se ipsum accusare had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which (have) long obtained in the continental system, and , until the expulsion of the Stuarts from the

British throne in 1688, and the erection of additional barries for the protection of the people against the exercise of arbitrary power, (were) not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the case with which the questions ((1966) 384 US 436, 443) put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

Chief Justice Warren mentioned the setting of the case and of the times such as official overbearing, 'third degree'. sustained and protracted questioning incommunicado, rooms cut off from the outside worked methods which flourished but were becoming exceptions. 'But', noted the Chief Justice, 'they are sufficiently widespread to be the object of concern'. The Miranda court quoted from the conclusion of the Wickersham Commission Report made nearly half a century ago, and continued - words which ring a bell in Indian bosoms and so we think it relevant to our consideration and read it:

"To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the preset Lord Chancellor of England (Lord Sankey): It is not admissible to do a great right by doing a little wrong ... . It is not sufficient to do justice by obtaining a proper result by irregular or improper means." Not only does the use of the third degree involve a flagrant violation of Law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'it is a short cut and makes the police lazy and unenterprising'. Or, as another official quoted remarked: 'If you use your fists, you are not so likely to use your units ((1966) 384 US 436, 448)' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.' "

(IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931).)

(7) Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since Chambers v. Florida, (1940) 309 US 227: (84 L Ed 716), this Court has recognized that coercion can be mental as well as physical and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. State of Alabama, (1960) 4 L Ed 2d 242. Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practises, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. These texts ((1966) 384 US 436,

449) are used by law enforcement agencies themselves as guides. It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other date, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy - being alone with the person under interrogation'. (Inbau and Reid, Criminal Interrogation and Confessions (1962), at p. 1). The efficacy of this tactic has been explained as follows:

'If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant. or recalcitrant. He is more keenly aware of his rights and more ((1966) 384 US 436, 450) reluctant to tell of his indiscretions or criminal behaviour within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.' (O'Hara, Fundamentals of Criminal Investigation (1956) at 99).

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than Court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequired desire for women. The officers are instructed to minimise the moral seriousness of the offence, (Inbau and Reid, supra at 34-43, 87) to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already-that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance. One writer ((1966) 384 US 436, 451) describes the efficacy of these characteristics in this manner:

'In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable. (O'Hara, Supra at 112)'.

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge-killing, for example, the interrogator may say:

'Joe, you probably did not go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun - for your own protection. You know him for what he was, no good. Then when you

met him he probably started using foul, abusive language and he gave some indication that ((1966) 384 US 436, 452) he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?' (Inbau and Reid, supra, at 40).

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defence explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defence 'out' at the time of trial." (Ibid).

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or the "Mutt and Jeff' act:"

A thorough and intimate sketch is made of the versatility of the arts of torture developed officially in American country calculated to break, by physical or psychological crafts, the morale of the suspect and make him cough up confessional answers. Police sops and syrups of many types are prescribed to wheedle unwitting words of guilt from tough or gentle subjects. The end product is involuntary incrimination, subtly secured, not crudely traditional. Our police processes are less 'scholarly' and sophisticated, but?

(30.) Another moral from the Miranda reasoning is the burning relevance of erecting protective fenders and to make their observance a police obligation so that the angelic Art. (20 (3)) may face upto satanic situations. Says Chief Justice Warren:

"In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment right is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in Miranda, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in Stewart, in which the defendant was an indigent Lost Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice. (8, 9) It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carried its own badge of intimidation. To be sure. this is not physical intimidation, but it is equally destructive of human dignity. (Professor Sutherland's recent article, crime and Confessions, 79 Harv I. Rev 21, 37 (1965)). The current practice of incommunicado interrogation is at odds with one of our Nations's ((1966) 384 US 436, 458) most cherished principles-that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel to compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

We feel that by successful interpretation judge-centered law must catalyze community-centered legality.

(31.) There is one touch of nature which makes the judicial world kin-the love of justice-in-action and concern for human values. So, regardless of historical origins and political borrowings, the framers of our Constitution have cognized certain pessimistic poignancies and mellow life meanings and obligated judges to maintain a 'fair state-individual balance'

and to broaden the fundamental right to fulfill its purpose, lest frequent martyrdoms reduce the article to a mock formula. Even silent approaches, furtive moves, slight deviations and subtle ingenuities may erode the article's validity unless the law outlaws illegitimate and unconstitutional procedures before they find their first firm footing. The silent cause of the final fall of the tall tower is the first stone obliquely and obliviously removed from the base. And Art. 20 (3) is a human article, a guarantee of dignity and integrity and of inviolability of the person and refusal to covert an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of a police station. And in the long run, that investigation is best which uses stratagems least, that policeman deserves respect who gives his fists rest and his wits restlessness. The police are part of us and must rise in people's esteem through firm and friendly, not foul and sneaky strategy. The police reflect the State. the State society. The Indian legal situation has led to judicial concern over the State v. individual balance. After tracing the English and American developments in the law against self-incrimination, Jagannadhadas, J., in M. P. Sharma's case 1954 SCR 1077 at pp. 1085, 1086 : (AIR 1954 SC 300 at p. 303) observed:

"Since the time when the principle of protection against self-incrimination became established in English law and in other systems of law which have followed it, there has been considerable debate as to the utility thereof and serious doubts were held in some quarters that this principle has a tendency to defeat justice. In support of the principle it is claimed that the protection of accused against self-incrimination promotes active investigation from external sources to find out the truth and proof of alleged or suspected crime instead of extortion of confessions on unverified suspicion.... On the other hand, the opinion has been strongly held in some quarters that this rule has an undesirable effect on social interests and that in the detection of crime, the State is confronted with overwhelming difficulties as a result of this privilege. It is said that has become a hiding place of crime and has outlived its usefulness and that the rights of accused persons are amply protected without this privilege and that no innocent person is in need of it...."

"In view of the above background, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range, Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to prevent its circumvention... "

Issues Answered, 'Any person' in S. 161, Cr. P. C.:

(32.) We will now answer the questions suggested at the beginning and advert to the decisions of our Court which set the tone and temper of the 'silence' clause and bind us willy nilly. We have earlier explained why we regard S. 161 (2) as a sort of parliamentary commentary on Art. 20 (3). So, the first point to decide is whether the police have power under Ss. 160 and 161 of the Cr. P. C. to question a person who, then was or, in the future may incarnate as, an accused person. The Privy Council and this Court have held that the scope of S. 161 does include actual accused and suspects and we deferentially agree without repeating the detailed reasons urged before us by counsel.

(33.) The Privy Council, in Pakala Narayana Swami's case (AIR 1939 PC 47) reasoned

"If one had to guess at the intention of the Legislature in framing a Section in the words used, one would suppose that they had in mind to encourage the free disclosure of information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both. In any case the reasons would apply as might be thought a fortiori to an alleged statement made by a person ultimately accused. But in truth when the meaning of words is plain it is not the duty of the Courts to busy themselves with supposed intentions.

I have been long and deeply impressed with the wisdom of the rule. Now I believe universally adopted, at least in the Courts of law in Westminster Hall, that in construing will and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther: Lord Wensleydale in (1857) 6 HLC 61 at p. 106.

My Lords, to quote from the language of Tindal, C. J. when delivering the opinion of the Judges in (1844) 11 CL and F 85 at page 143, 'The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law-giver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statue. and to have recourse to the preamble which according to Dyer, C. J. (1952) 1 Plowed 353 is a key to open the minds of the makers of the Act, and the mischiefs which they are intended to redress: Lord Halsbury LC in (1891) AC 531 at p. 542.

They reached the conclusion that 'any person' in S. 161, Cr. P. C.; would include persons then or ultimately accused. The view was approved in Mahabir Mandal's case ((1972) 3 SCR 639) at p. 657 : (AIR 1972 SC 1331). We hold that 'any person supposed to be acquainted with the facts and circumstances of the case' includes an accused person who fills that role because the police suppose him to have committed the crime and must, therefore, be familiar with the facts. The supposition may letter prove a fiction but that does not repel the section. Nor does the marginal note 'examination of witnesses by police' clinch the matter. A marginal not clears ambiguity but does not control meaning. Moreover, the suppositions accused figures functionally as a witness. 'To be a witness', from a functional angle, is to impart knowledge in respect of a relevant fact, and that is precisely the purpose of questioning the accused under S. 161, Cr. P. C. The dichotomy between 'witnesses' and 'accused' used as terms of art, does not hold good here. The amendment, by Act XV of 1941, of Section 162 (2) of the Cr. P. Code is a legislative acceptance of the Pakala Narayana Swamy reasoning and guards against a possible repercussion of that ruling. The appellant squarely fell within the interrogational ring. To hold otherwise is to fold up investigative exercise, since questioning suspect is desirable for detection of crime and even protection of the accused. Extreme positions may boomerang in law as in politics. Moreover, as the Miranda ((1966) 384 US 436) decision states :

"It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.

Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statements he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. (Emphasis added);

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See. e.g., Chambers v. Florida, (1940) 309 US 227, 240-241 : 84 L. Ed. 716, 724: 60 S Ct 472. The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of Government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

"Decency, security and liberty alike demand that Government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a Government of laws, existence of the Government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example, Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justified the means... bring terrible retribution, Against at the pernicious doctrine this Court should resolutely set its face." Olmstead v. United States, (1928) 277 US 438, 485: 72 L. Ed. 944, 959: 48 S Ct 564: 66 ALR 376 (dissenting opinion).

In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." (Emphasis supplied).

Article 20 (3) 'Accused of an offence':

(34.) It is idle to-day to ply the query whether a person formally brought into the police diary as an accused person is eligible for the prophylactic benefits of Art. 20 (3). He is, and the learned Advocate-General fairly stated, remembering the American cases and the rule of liberal construction, that suspects, not yet formally charged but embryonically are accused on record, also may swim into the harbour of Art. 20 (3). We note this position but do not have to pronounce upon it because certain observations in Oghad's case ((1962) 3 SCR 10): (AIR 1961 SC 1808) concludes the issue. And is Bansilal's case (1961) 1 SCR 417 at p. 438: (AIR 1961 SC 29 at pp. 38, 39) this Court observed:

"Similarly, for invoking the constitutional rights/against testimonial compulsion guaranteed under Art. 20 (3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution. Here again the nature of the accusation and its probable sequel or consequence are regarded as important.

Thus we go back to the question which we have already posed was the appellant accused of any offence at the time when the impugned notices were served on him? In answering this question in the light of the tests to which we have just referred it will be necessary to determine the scope and nature of the enquiry which the inspector undertakes under S. 240; for unless it is shown that an accusation of a crime can be made in such an enquiry, the appellant's plea under Art. 20 (3) cannot succeed. Section 240 shows that the enquiry which the inspector undertakes is in substance an enquiry into the affairs of the company concerned.

If, after receiving the report, the Central Government is satisfied that any person is guilty of an offence for which he is criminally liable, it may, after taking legal advice, institute criminal proceedings against the offending person under S. 242 (1); but the fact that a prosecution may ultimately be launched against the alleged offender will not retrospectively change the complexion or character of the proceedings held by the inspector when he makes the investigation. Have irregularities been committed in managing the affairs of the company if yes, what is the nature of the irregularities? Do they amount to the commission of an offence punishable under the criminal law? If they

do who is liable for the said offence? These and such other questions fall within the purview of the inspector's investigation. The scheme of the relevant sections is that the investigation begins broadly with a view to examine the management of the affairs of the company to find out whether any irregularities have been committed or not. In such a case there is no accusation, either formal or otherwise, against any specified individual; there may be a general allegation that the affairs are irregularly, improperly or illegally managed; but who would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry. At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser and no accusation against anyone that he has committed an offence. In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as an investigation which starts with an accusation contemplated in Art. 20 (3) of the Constitution. In this connection it is necessary to remember that the relevant sections of the Act appear in Part VI which generally deals with management and administration of the companies."

(35.) In Raja Narayanlal Bansilal v. Manek Phiroz Mistry ((1961) 1 SCR 417): (AIR 1961 SC 29). The admissibility of a statement made before an Inspector appointed by the Government of India under the Indian Companies Act. 1923, to investigate the affairs of a Company and to report thereon was canvassed. It was observed.

"... ..one of the essential conditions for invoking the constitutional guarantee enshrined in Art. 20 (3) is that a formal accusation relating to the commission of an offence, which would normally lead to his prosecution, must have been levelled against the party who is being compelled to give evidence against him."

Sinha, C. J., speaking for the majority of the Court in Kathi Oghad's case (AIR 1961 SC 1808), stated thus :

"To bring the statement in question within the prohibition of Art. 20 (3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

Further observations in Bansilal's case (AIR 1961 SC 29) make it out that in an enquiry undertaken by an Inspector to investigate into the affairs of a company, the statement of a person not yet an accused, is not hit by Art. 20 (3). Such a general enquiry has no specific accusation before it and, therefore, no specific accused whose guilt is to be investigated. Therefore, Art. 20 (3) stands excluded. In R. C. Mehta (1969) 2 SCR 461: (AIR 1970 SC 940) also the court observed:

"... Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an Officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, (which he is bound to do under Art. 22 (1) of the Constitution) for the purpose of holding an enquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate."

Reliance was placed on Goenka's case (Cri As. Nos. 131 and 132 of 1961, D/- 20-9-1963 (SC)) where this Court has said:

"The information collected under S. 19 is for the purpose of seeing whether a prosecution should be launched or not. At that stage when information is being collected there is no

accusation against the person from whom information is being collected. It may be that after the information has been collected the Central Government or the Reserve Bank may come to the conclusion that there is no case for prosecution and the person concerned may never be accused. It cannot therefore be predicted that the person from whom information is being collected under S. 19 is necessarily in the position of an accused. The question whether he should be made an accused is generally decided after the information is collected and it is when a show cause notice is issued, as was done in this case on 4/07/1955, that it can be said that a formal accusation has been made against the person concerned. We are therefore of the opinion that the appellant is not entitled to the protection of Art. 20 (3) with respect to the information that might have been collected from him under S. 19 before 4/07/1955."

(36.) It is plausible to argue that, where realism prevails over formalism and probability over possibility, the enquiries under criminal statutes with quasi-criminal investigations are of an accusatory nature and are sure to end in prosecution, if the offence is grave and the evidence gathered good. And to deny the protection of a constitutional shield designed to defend a suspect because the enquiry is preliminary and may possibly not reach the court is to erode the substance while paying hollow homage to the holy verbalism of the article. We are not directly concerned with this facet of Art. 20 (3); nor are we free to go against the settled view of this Court. There it is.

At what stage of the justice process does Art. 20 (3) operate?

(37.) Another fatuous opposition to the application of the constitutional inhibition may be noted and negatived. Does the ban in Art. 20 (3) operate only when the evidence previously procured from the accused is sought to be introduced into the case at the trial by the court? This submission, if approved, may sap the juice and retain the rind of art. 20 (3) doing interpretative violence to the humanist justice of the proscription.

(38.) The text of the clause contains no such clue, its intendment is stultified by such a judicial 'amendment' and an expansive construction has the merit of natural meaning, self-fulfilment of the 'silence zone' and the advancement of human rights. We over-rule the plea for narrowing down the play of the sub-article to the forensic phase of trial. It works where the mischief is, in the womb, i. e. the police process. In the language of Miranda ((1966) 384 US 436):

"Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."

The constitutional shield must be as broad as the contemplated danger. The Court in M. P. Sharma's case (AIR 1954 SC 300) took this extended view

"Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in Art. 20 (3) is "to be a witness" and not to "appear as a witness": It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been leveled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case (emphasis added):

(39.) Considered in this light, the guarantee under Article 20 (3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them.

(40.) We have to apply this rule of construction, an offshoot of the Heydon's case doctrine ((1584) 76 ER 637), while demarcating the suspect and the sensitive area of self-crimination and the protected sphere of defensive silence. If the police can interrogate to the point of self accusation, the subsequent exclusion of that evidence at the trial hardly helps because the harm has been already done. The police will prove through other evidence what they have procured through forced confession. So it is that the foresight of the framers has pre-tempted self incrimination at the incipient stages by not expressly restricting it to the trial stage in court. True, compelled testimony previously obtained is excluded. But the preventive blow falls also on pre-court testimonial compulsion. The condition, as the decisions now go, is that the person compelled must be an accused. Both precedent procurement and subsequent exhibition of self-criminating testimony are obviated by intelligent constitutional anticipation.

(i) What is an incriminatory statement? (ii) What is compelled testimony?

(41.) Two vital, yet knotty, problems demand solution at this stage. What is 'being witness against' oneself? Or. in the annotational language of Section 161 (2), when are answers tainted with the tendency to expose an accused to a criminal charge? When can testimony be castigated as 'compelled? The answer to the first has been generally outlined by us earlier. Not all relevant answers are criminatory; not all criminatory answers are confessions. Tenancy to expose to a criminal charge is wider than actual exposure to such charge. The spirit of the American rulings and the substance of this Court's observations justify this 'wheels within wheels' conceptualization of self-accusatory statements. The orbit of relevancy is large. Every fact which has a nexus to naypart of a case is relevant but such nexus with the case does not make it noxious to the accused. Relevance may co-exist with innocence and constitutional censure is attracted only when inference of nocence exists. And an incriminatory inference is not enough for a confession. Only, if, without more, the answer establishes guilt, dies it amount to a confession. An illustration will explicate our proposition.

(42.) Let us hypothesize a homocidal episode in which A dies and B is suspected of murder; the scene of the crime being 'C'. In such a case a bunch of questions may be relevant and yet be innocent. Any one who describes the scene as well-wooded or dark or near a stream may be giving relevant evidence of the landscape. Likewise, the medical evidence of the wounds on the deceased and the police evidence of the spots where blood pools were noticed are relevant but vis-a-vis B may have no incriminatory force. But an answer that B was seen at or near the scene, at or about the time of the occurrence or had blood on his clothes will be criminatory, is the hazard of inculpatory implication. In this sense A answers that would, in themselves, support a conviction are confessions but answers which have a reasonable tendency strongly to point out to the guilt of the accused are incriminatory. Relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Art. 20 (3) if elicited by pressure from the mouth of the accused. If the statement goes further to spell in terms that B killed A, it amounts to confession. An answer acquires confessional status only if, in terms or substantially, all the facts which constitute the offence are admitted by the offender. If his statement also contains self-exculpatory matter it ceases to be a confession. Article 20 (3) strikes at confessions and self-incriminations but leaves untouched other relevant facts.

(43.) In Hoffman v. United States ((1950) 341 US 479) the Supreme Court of the United States considered the scope of the privilege against self-incrimination and held that it would extend not only to answers that would in themselves support a conviction but likewise embrace those which would furnish a link in the chain of evidence needed to prosecute the claimant. However, it was clarified that the link must be reasonably strong to make the accused apprehend danger from such answer. Merely because he fancied that by such answer he would incriminate himself he could not claim the privilege of silence. It must appear to the court that the implications of the question, in the setting in which it is asked, made it evident that a responsive answer or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The apprehension of incrimination from the answer sought must be substantial and real as distinguished from danger of remote possibilities or fanciful flow of inference. Two things need emphasis. The setting of the particular case, the context and the environment i.e. the totality of circumstances must inform the perspective of the court adjudging the incriminatory injury, and where reasonable doubt exists, the benefit must go in favour of the right to silence by a liberal construction of the Article. In Malloy v. Hogan, ((1964) 12 L Ed 2-d 653), the Court unhesitatingly held that the claim of a witness of privilege against self-Incrimination has to be tested on a careful consideration of all the circumstances in the case and where it is clear that the claim is unjustified, the protection is unavailable. We have summarised the Hoffman standard and the Malloy test. Could the witness (accused) have reasonably sensed the peril of prosecution from his answer in the conspectus of circumstances? That is the true test. The perception of the peculiarities of the case cannot be irrelevant in proper appraisal of self-incriminatory potentiality. The cases of this Court have used different phraseology but set down substantially the same guidelines.

(44.) Phipson, it is true, has this to say on self-incrimination: 'The rule applies to questions not only as to direct criminal acts, but as to perfectly innocent matters forming merely links in the chain of proof.' We think this statement too widely drawn if applied to Indian Statutory and Constitutional Law. Cross also has overstated the law, going by Indian provisions by including in the prohibition even those answers 'which might be used as a step towards obtaining evidence against him.' The policy behind the privilege, under our scheme, does not swing so wide as to sweep out of admissibility statements neither confessional per se nor guilty in tendency but merely relevant facts which, viewed in any setting, does not have a sinister import. To spread the net so wide is to make a mockery of the examination of the suspect, so necessities in the search for truth. Overbreadth undermines, and we demur to such morbid exaggeration of a wholesome protection. Neither Hoffman ((1950) 341 US 479) nor Malloy (1964) 12 Law Ed 2d 653) nor Maness (1975) 42 L Ed 2d 574) drives us to this devaluation of the police process. And we are supported by meaningful hints from prior decisions. In Kathi Kalu Oghad's case (1962) 3 SCR 10 at p. 32: (AIR 1961 SC 1808 at p. 1815), this court authoritatively observed, on the bounds between constitutional proscription and testimonial permission:

"In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provisions, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable. considered by itself".

Again, the court indicated that Art. 20 (3) could be invoked only against statements which 'had a material bearing on the criminality of the maker of the statement'. 'By itself' does not exclude the setting or other integral circumstances but means something in the fact disclosed a guilt element. Blood on clothes, gold bars with notorious marks and presence

on the scene or possession of the lethal weapon or corrupt currency have a tale to tell, beyond red fluid, precious metal, gazing at the stars of testing sharpness or value of the rupee. The setting of the case is an implied component of the statement.

(45.) The problem that confronts us is amenable to reasonable solution. Relevancy is tendency to make a fact probable. Crimination is a tendency to make guilt probable. Confession is a potency to make crime conclusive. The taint of tendency, under Art. 20 (3) and section 161 (1), is more orless the same, It is not a remote, recondite, freak or fanciful inference but a reasonable, real, material or probable deduction. This governing test holds good, it is pragmatic, for you feel the effect, its guilty portent, fairly clearly.

(46.) We, however, underscore the importance of the specific setting of a given case for judging the tendency towards guilt. Equally emphatically, we stress the need for regard to the impact of the plurality of other investigations in the offing or prosecutions pending on the amplitude of the immunity. 'To be witness against oneself' is not confined to particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from 'tendency to be exposed to a criminal charge'. 'A criminal charge' covers any criminal charge then under investigation or trial or imminently threatens the accused.

(47.) The setting of the case or cases is also of the utmost significance in pronouncing on the guilty tendency of the question and answer. What in one milieu may be colourless, may, in another be criminal. 'Have you fifty rupees in your pocket? asks a police officer of a P. W. D. engineer. He may have. It spells no hint of crime. But if, after setting a trap, if the same policeman, on getting the signal, moves in and challenges the engineer, 'have you 50 rupees in your pocket?' The answer, if 'yes', virtually proves the guilt. ' Were you in a particular house at a particular time?' is an innocent question; but in the setting of a murder at that time in that house, where none else was present, an affirmative answer may be an affirmation of guilt. While subjectivism of the accused may exaggeratedly apprehend a guilty inference lingering behind every non-committal question, objectivism reasonably screens nocent from innocent answers. Therefore, making a fair margin for the accused's credible apprehension of implication from his own mouth, the court will view the interrogation objectively to hold it criminatory or otherwise, without surrendering to the haunting subjectivism of the accused. The dynamics of constitutional 'silence' cover many interacting factors and repercussions from 'speech'.

(48.) The next serious question debated before us is as to the connotation of 'compulsion' under Art. 20 (3) and its reflection in Section 161 (1). In Kathy Kalu Oghad's case (AIR 1961 SC 1808) (supra), Sinha C. J.. explained :

"In order to bring the evidence within the inhibition of cl. (3) of Art. 20 it must be shown not only that the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement, 'Compulsion' in the context, must mean what in law is called 'duress'. In the Dictionary of English Law by Earl Jowitt, 'duress' is explained as follows:

'Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress per minas). Duress also includes threatening, beating or imprisonment of the wife, parent or child of a person.'

The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by the some extraneous process as to render the making of the statement involuntary and,

therefore, extorted. Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Art. 20 (3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. In other words, it will be a question of fact in each case to be determined by the Court on weighing the facts and circumstances disclosed in the evidence before it."

This question of fact has to be carefully considered against the background of the circumstances disclosed in each case.

(49.) The policy of the law is that each individual, accused included, by virtue of his guaranteed dignity, has a right to a private enclave where he may lead a free life without overbearing investigatory invasion or even crypto-coercion. The protean forms gendarme duress assumes the environmental pressures of police presence, compounded by incommunicado confinement and psychic exhaustion, torturesome interrogation and physical menaces and other ingenious, sophisticated procedures - the condition, mental, physical, cultural and social, of the accused, the length of the interrogation and the manner of its conduct and a variety of like circumstances, will go into the pathology of coerced para-confessional answers. The benefit of doubt, where reasonable doubt exists, must go in favour of the accused. The U. S. Supreme Court declared, and we agree with it, that '... .our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning (1966) 384 US 436 (444)) and vitality of the Constitution have developed against narrow and restrictive construction.' ((1909) 54 L Ed 793, 810).

Making Art. 20 (3) effective in action.

(50.) Impregnability of the constitutional fortress built around Art. 20 (3) is the careful concern of the Court and, for this purpose, concrete directives must be spelt out. To leave the situation fluid, after a general discussion and statement of broad conclusions, may not be proper where glittering phrases pale into gloomy realities in the dark recesses where the law has to perform. Law is what law does and not what law says. This realisation obligates us to set down concrete guidelines to make the law a working companion of life. In this context we must certainly be aware of the burdens which law enforcement officials bear, often under trying circumstances and public ballyhoo and amidst escalating as well as novel crime proliferation. Our conclusions are, therefore, based upon an appreciation of the difficulties of the police and the necessities of the Constitution.

(51.) The functional role and practical sense of the law is of crucial moment. "An acre in Middlesex," said Macaulay, "is better than a principality in Utopia." (Introduction to 'Law in America' by Bernard Schwartz.) This realism has great relevance when dealing with interrogation, incrimination, police station, the Constitution and the code.

(52.) Now we will first formulate our findings on the various matters argued before us and discussed above. Then we will fortify the observance of the legal requirements by the police through practical prescriptions and proscriptions.

(53.) We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Art. 20 (3) goes back to the stage of police interrogation - not, as contended, commencing in court only. In our judgment the

provisions of Art. 20 (3) and Section 161 (1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative polixity, overbearing and intimidatory methods and the like - not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully. cannot be regarded as compulsion within the meaning of Art. 20 (3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Art. 20 (3).

(54.) A police officer is clearly a person in authority. Insistence on answering is a form of pressure especially in the atmosphere of the police station unless certain safeguards erasing duress are adhered to. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Art. 20 (3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.

(55.) We have explained elaborately and summed up, in substance, what is self-incrimination or tendency to expose oneself to a criminal charge. It is less than 'relevant' and more than 'confessional'. Irrelevance is impermissible but relevance is licit but when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. we hold further that the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation underway is not with reference to that. We have already explained that in determining the incriminatory character of an answer the accused is entitled to consider - and the Court while adjudging will take note of - the setting, the totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in effect guilty in import. However, fanciful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate.

(56.) We have no doubt that Section 179 I. P. C. has a component of mens rea and where there is no wilful refusal but only unwitting omission or innocent warding off, the offence is not made out. When there is reasonable doubt indicated by the accused's explanation he is entitled to its benefit and cannot be forced to substantiate his ground lest, by this process, be is constrained to surrender the very privilege for which he is fighting. What may apparently be innocent information may really be nocent or noxious viewed in the wider setting.

(57.) It may not be sufficient merely to state the rules of jurisprudence in a branch like this. The man who has to work it is the average police head constable in the Indian countryside. The man who has to defend himself with the constitutional shield is the little individual, by and large. The place where these principles have to have play is the unpleasant police station, unused to constitutional nuances and habituated to other strategies. Naturally practical points which lend themselves to adoption without much

sophistication muse be indicated if this judgment is to have full social relevance. In this perspective we address ourselves to the further task of concretizing guidelines.

(58.) Right at the beginning we must notice Art. 22 (1) of the Constitution, which reads: "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Art. 22 (1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice.

(59.) Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Art. 20 (3), is an assurance of awareness and observance of the right to silence. The Miranda decision ((1966) 384 US 436) has insisted that if an accused person asks for lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Art. 20 (3) and Art. 22 (1) may, in a way, be telescoped by making it prudent for the Police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Over-reaching Art. 20 (3) and section 161 (2) will be obviated by this requirement. We do not lay down that the Police must secure the services of a lawyer. That will lead to 'police-station-lawyer' system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project.

(60.) Not that a lawyer's presence is a panacea for all problems of involuntary self-crimination, for he cannot supply answers or whisper hints or otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried, caution his client where incrimination is attempted and insist on questions and answers being noted where objections are not otherwise fully appreciated. He cannot harangue the police but may help his client and complain on his behalf, although his very presence will ordinarily remove the implicit menace of a police station.

(61.) We realize that the presence of a lawyer is asking for the moon in many cases until a public defender system becomes ubiquitous. The police need not wait more than for a reasonable while for an advocate's arrival. But they must invariably warn - and record that fact -about the right to silence against self incrimination; and where the accused is literate take his written acknowledgment.

(62.) 'Third degree' is an easy temptation where the pressure to detect is heavy, the cerebration involved is hard and the resort to torture may yield high dividends. Das Gupta, J., dissenting for the minority on the bench, drove home a point which deserves attention while on constitutional construction:

"It is sufficient to remember that long before our Constitution came to be framed the wisdom of the policy underlying these rules had been well recognised. Not that there was no view to the contrary; but for long it has been generally agreed among those who have devoted serious thought to these problems that few things could be more harmful to the detection of crime or conviction of the real culprit, few things more likely to hamper the disclosure of truth than to allow investigators or prosecutors to slide down the easy path of producing by compulsion, evidence, whether oral or documentary, from an accused person. It has been felt that the existence of such an easy way would tend to dissuade

person in charge of investigation or prosecution from conducting diligent search for reliable independent evidence and from sifting or available materials with the care necessary for ascertainment of truth. If it is permissible in law to obtain evidence from the accused person by compulsion, why tread the hard path of laborious investigation and prolonged examination of other men, materials and documents? It has been well said that an abolition of this privilege would be an incentive for those in charge of enforcement of law 'to sit comfortably in the shade rubbing red pepper into a poor devil's eyes rather than to go about in the sun hunting up evidence.' (Stephen, History of Criminal Law, p. 442). No less serious is the danger that some accused persons at least, may be induced to furnish evidence against themselves which is totally false - out of sheer despair and an anxiety to avoid an unpleasant present. Of all these dangers the Constitution-makers were clearly well aware and it was to avoid them that Art. 20 (3) was put in the Constitution."

(63.) The symbiotic need to preserve the immunity without stifling legitimate investigation persuades us to indicate that after an examination of the accused, where lawyer of his choice is not available, the police official must take him to a magistrate, doctor or other willing and responsible non-partisan official or non-official and allow a secluded audience where he may unburden himself beyond the view of the police and tell whether he has suffered duress, which should be followed by judicial or some other custody for him where the police cannot teach him. The collocutor may briefly record the relevant conversation and communicate it - not to the police - but to the nearest magistrate, Pilot projects on this pattern may yield experience to guide the practical processes of implementing Art. 20 (3). We do not mandate but strongly suggest.

(64.) The statement of the accused, if voluntary, is admissible, indeed, invaluable. To erase involuntariness we must erect safeguards which will not 'kill the goose'. To ensure this free will by inbuilt structural changes is the deside-ratum. Short-run remedies apart, long-run recipes must be innovated whereby fists are replaced by wits, ignorance by awareness, 'third degree' by civilized tools and technology. The factotum policeman who does everything from a guard of honour to traffic patrol to subtle detection is an obsolescent survival. Special training, special legal courses, technological and other detective updating, are important. An aware policeman is the best social asset towards crimelessness. The consciousness of the official as much as of the community is the healing hope for a crime-ridden society. Judge-centred remedies don't work in the absence of community centered rights. All these add up to separation of investigatory personnel from the general mass and in service specialisation of many hues on a scientific basis. This should be done vertically and horizontally. More importantly, the policeman must be released from addiction to coercion and be sensitized to constitutional values.

(65.) The Indian Republic cannot fulfil its social justice tryst without a serious strategy of cultural and organisational transformation of police intelligence and investigation, abjuring first and emphasizing wits, setting apart a separate, sophisticated force with special skills, drills, techniques and technology and aloof from the fossilising, sometimes marginally feudal, assignments - like V.I.P. duty, sentry duty, traffic duty law and order functions, border security operations. They must develop an ethos and ethic and professionalism and probity which can effectively meet the challenge of criminal cunning the menace of macabre intricacies and the subtle machinations of white collar criminals in politics, business and professions and can do so without resort to vulgarity violence or other vice. The methods, manners and morals of the police force are the measure of a society's cultural tolerance and a Government's real refinement.

(66.) Such a broad project is overdue. Constitutions are not self-working. Judicial fire-fighting does not prevent fires. So it is that we stress hopefully the larger changes now needed especially because the recurrent theme of police role in a Welfare State is

reportedly engaging the attention of a national commission. Our observations are fragmentary being confined to the constitutional imperative of Art. 20 (3). A holistic perspective informs our suggestions. Our purpose is not to sterilise the police but to clothe the accused with his proper right of silence. Article 20 (3) is not a paper tiger but a provision to police the police and to silence coerced crimination. The dissenting words of Mr. Justice White bear quotation in this context :

"... . The court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice is 'to respect the inviolability of the human personality' and to require Government to produce the evidence against the accused by its own independent labors, (Ante, at 715). More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight."

"The obvious underpinning of the Court's decisions is a deep-seated distrust of all confessions. As the Court declares that the accused not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the ((1966) 384 US 436, 538) accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion that it is inherently wrong from the police to gather evidence from the accused himself. And this is precisely the nub of this discent. I see nothing wrong or immoral and certainly nothing unconstitutional in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent. Until today "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence'. Brown v. Walker, (1895) 40 L. Ed. 819, see also Hopt v. Utah, (1884) 28 L. Ed. 262. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injuries to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutary rule from which there should be no retreat."

The law will only limp along until the tools are turned. We have propose the first stone, not the last step.

(67.) A final note on the actual case on hand. While some aspects of Art. 20 (3) have been authoritatively expounded, other aspects have remained obscure and unexplored. A flash flood of demands against self-incriminatory interrogation has risen now when very important persons of yesterday have got caught in the criminal investigation coils of today. And when the big fight forensic battles the small gain by the victory, if any. The fact that the scope of the protection against self-accusation has not been clarified before in this area makes it necessary for us to take a gentler view in this case, in the interest of justice. Moreover on our interpretation, the Magistrate, trying the case under S. 179, Indian Penal Code and in a setting where the accused allegedly has a number of other offences to answer for, will be thrown into a larger enquiry than the simplistic one ordinarily needed :

(68.) We have declared the law on a thorny constitutional question where the amber light from American rulings and beacon beams from Indian precedents have aided us in our decision. It is quite probable that the very act of directing a woman to come to the police station in violation of S. 160 (1), Cr. P. C. may make for tension and negate voluntariness. It is likely that some of the questions are self-criminatory. More importantly, the admitted circumstances are such that the trying Magistrate may have to hold an elaborate enquiry about other investigations, potential and actual, to decide about the self-accusatory character of the answers. And, finally, the process of proving proneness for self-incrimination will itself strike a blow on the very protection under Art. 20 (3). We have more reasons than one to conclude that the ends of justice will be ill-served by endless magisterial chase of a charge the legal clarity of which is, by this judgment, being authoritatively unveiled and the factual foundation of which may have some infirmities. And the consequences of refusal to answer, if most of the questions are self-condemning and a few formal ones innocuous, were not gone into by us. So, we suggested to counsel that the authority of the law be vindicated by the accused undertaking to answer all relevant, not criminatory, interrogations and, on this pledge of compliance, the State withdrawn the prosecution pro tempore. If the accused went back on the undertaking a prosecution could again be launched and the party proceeded against for breach of the plighted word. The response from the State is a remarkable assertion of legal rectitude and exposition of the principles for exercise of the power to withdraw, and, finally, a conclusion couched thus :

"After careful consideration from all angles and in the facts and circumstances on record, Government have come to the conclusion, that there are no circumstances to justify withdrawal by the State Government."

(69.) We think that a litigant, be he the highest or lowest in the State, should not lecture to the Court but listen and explain its difficulties. We do not draw any inference about the prosecution as motivated, which was the appellant's recurrent theme; for that is irrelevant in Court. But we confess that the statement of the State calls to mind the words of Hamlet : "The lady protests too much, methinks."

(70.) We must record our appreciation of the services of the Advocate-general but in the statement put in, the State's counsel perhaps, had to 'speak the speech'. Maybe.

(71.) To conclude. We have bestowed some thought on the law and consider this case pre-eminently one where the Government, acting without ill-will or affection, should have withdrawn the prosecution. By Government we mean the complainant - public servant who is the party respondent. We do not need the Government to exercise its power to direct its subordinate to withdraw and know that it is not eo nomine party before us - a public servant is not a benamidar of Government but an officer, in his own right, saddled with statutory behests to execute. We note with satisfaction that this Government is moved only by legal, not extraneous, considerations in launching and refusing to withdraw the prosecution against the appellant. We have indicated some (not all) reasons, pertinent in law, for legitimately with-drawing a prosecution and the very fact that this Court suggested it is ordinarily sufficient to rule out the charge of improper grounds and yet the State argues overzealously about the proper criteria! We could have given more relevant reasons but do not do so since the correct course, at this stage is to quash the prosecution as its stands at present.

(72.) Why do we? To serve the ends of justice. When a woman is commanded into a police station, violating the commandment of S. 160 of the Code when a heavy load of questions is handed in, some permissible, some not, where the area of constitutional protection against self-crimination is (until this decision) blurred in some aspects, when in this Court, counsel for the accused unreservedly undertaken to answer in the light of the

law we here lay down, when the object of the prosecution is to compel contrite compliance with S. 161, Cr. P. C. abandoning all contumacy and this is achieved by the undertaking, when the pragmatic issues involved are so complex that effective barricades against police pressure to secure self-incrimination need more steps as indicated in our judgment, we hold that persistence in the prosecution is seeming homage to the rule of law and quashing the prosecution secures the ends of justice-the right thing to do is to quash the prosecution as it stands at present. We regret that this dimension of the problem has escaped the Executive's attention for reasons best left unexplored.

(73.) The conspectus of circumstances persuades us to exercise our power under Art. 266 read with Art. 136 and S. 401 of Cr. P. C. to make the following direction. We are satisfied that many of the questions put by the police are not self-incriminatory, remote apprehensions being wholly irrelevant. To answer is citizen's duty; failure is asking for convictions. The appellant shall undertake to answer all questions put to her which do not materially incriminate her in the pending or imminent investigations or prosecutions. If she claims immunity regarding any questions she will, without disclosing details, briefly state in which case or offence in the offing makes her reasonably apprehend self-incrimination by her refused answers. If, after the whole examination is over, the officer concerned reasonably regards any refusal to answer to be a wilful violation under pretence of immunity from self-incrimination, he will be free to prosecute the alleged offender after studying the refusal to answer in the light of the principles we have set out. Section 179, Indian Penal Code should not be unsheathed too promiscuously and teasingly to tense lay people into vague consternation and covert compulsion although the proper office of S. 179, Indian Penal Code is perfectly within the constitutional limits of Art. 20 (3).

(74.) The appellant, through her counsel, undertakes to abide by the above directions to answer all police interrogations relevant but not self-incriminatory (as explained earlier). The police officer shall not summons her to the police station but examine her in terms of the proviso to S. 160 (1) of the Cr. P. code. The appellant shall, within 10 days from today, file a written undertaking on the lines directed above, although, regardless thereof her counsel's undertaking will bind her. Indeed, we direct her to answer in accordance with the law we have just clarified.

(75.) The prosecution proceedings in complaint case No. 2 (c) 388 of 1977 on the file of the Sub-Divisional Magisttrate, Sadar, Cuttack, are hereby quashed and the appeals allowed.

Order accordingly.

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Cross Citation :JT 2012 (1) SC 159, LAWS(SC)-2012-1-28, ACC-2012-76-792

SUPREME COURT OF INDIA

Coram :- P.Sathasivam , J.Chelameswar JJ.
Decided on January 16, 2012
CRIMINAL APPEAL NO. 159 OF 2012
Maulana Mohd. Amir RashadiAppellant
VERSUS
State of Uttar PradeshRespondents

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BAIL- I.P.C. Sections 302,307, 325/34 - Murder - In an attack by Respondent, when appellant alongwith his supporters was going to attend *a* meeting, one died and others injured - FIR filed - Charge-sheet served - Application for bail, objected to by appellant on the ground that threats to life were being received from respondent for pursuing the case - High Court granted conditional bail - Justification - Respondent in jail since long time - Two important witnesses already examined - Adequate protection given to appellant - Assurance by State that trial will not be prolonged. Held, on facts no interference is needed specially when High Court has granted conditional bail and liberty to trial court to jail respondent in case of breach of conditions. Proper steps to be taken if fresh threats are given.

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JUDGEMENT
P.Sathasivam, J. –
1. LEAVE granted.
2. THIS appeal is directed against the final judgment and order dated 06.08.2010 passed by the High Court of Judicature at Allahabad in Criminal Misc. Bail Application No. 28420 of 2009 whereby the High Court has granted bail to Mr. Ramakant Yadav - respondent No.2/accused in Case Crime No. 622 of 2009, FIR No. 63 of 2009 under Sections 302 and 307 of the Indian Penal Code, 1860 (in short 'IPC'), Police Station Phoolpur, District Azamgarh, U.P.
Brief facts:
(a) According to the appellant, he is the President of a political party, namely, Rashtriya Ulema Council. On 12.08.2009, a meeting of the Party was to be held at Phoolpur, District Azamgarh, U.P. from 10 a.m. to 4 p.m. and he was to attend the said meeting in the capacity of Chief Guest. b) At about 1.45 p.m., the appellant started towards the venue of the meeting and his convoy was being led by 10 to 15 supporters who were riding on motorcycles. At that moment, the second respondent/accused came from behind in the

convoy of cars and immediately after crossing the appellant's car and his supporters, the convoy of cars belonging to the second respondent/accused suddenly stopped on the road without giving any signal and the second respondent/accused came out of his vehicle armed with a gun along with his supporters who were also carrying guns and they started giving kick blows to one of the motorcycle riders who fell down and the pillion riders of the said motorcycles were fired upon by the second respondent and his supporters from their respective guns and thereafter, they ran away from the place. Adbul Rehman-the pillion rider sustained serious fire arm injuries. When he was taken to the hospital at Varanasi, he succumbed to his injuries. c) On the basis of a written complaint in the Police Station, Phoolpur, FIR No. 63 of 2009 under Sections 302 and 307 IPC was registered. The second respondent was arrested only on 24.08.2009. It was further stated by the appellant that the accused is a habitual criminal and has a criminal background having more than three dozen cases involving serious offences against him. The second respondent filed a Criminal Bail Application being No. 28420 of 2009 before the High Court praying for his release. The appellant filed his objection. He also highlighted that from 14.08.2009, the appellant started receiving threatening calls from the second respondent warning him not to pursue the case otherwise he shall be eliminated. d) On completion of the investigation, charge sheet was filed on 15.07.2010 against respondent No.2 and three other persons under Sections 302, 307 and 325 read with 34 IPC and the trial of the case has been started by examining the injured witness - Farhan as PW-1 on 29.04.2010 and 15.07.2010. e) Pending proceeding of the trial, the High Court, by impugned order dated 06.08.2010, granted conditional bail to the second respondent. Questioning the same and of the fact that the appellant had received several threat calls, he filed the present appeal for setting aside the same.

Heard Mr. Jaspal Singh, learned senior counsel for the appellant and Mr. Basava Prabhu S. Patil, learned senior counsel for the contesting second respondent.

3. THE only point for consideration in this appeal is whether the High Court was justified in enlarging the second respondent on bail after imposing certain conditions.

It is not in dispute and highlighted that the second respondent is a sitting Member of Parliament facing several criminal cases. It is also not in dispute that most of the cases ended in acquittal for want of proper witnesses or pending trial. As observed by the High Court, merely on the basis of criminal antecedents, the claim of the second respondent cannot be rejected. In other words, it is the duty of the Court to find out the role of the accused in the case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the Court etc.

4. IN the case relating to FIR No. 63 of 2009, he was arrested and in jail since 24.08.2009. Another important aspect is that after filing of charge-sheet on 15.07.2010, prosecution examined two important witnesses as PWs 1 and 2. This was the position prevailing on 26.07.2010. Even thereafter, now more than a year has rolled. Counsel appearing for the State assured that the trial will not be prolonged at the instance of the prosecution and ready to complete the evidence within a period to be directed by this Court. The other objection of the appellant for grant of bail is that he had received threats from the second respondent and his supporters warning him not to pursue the case against him. It is brought to our notice that based on the representations of the appellant, adequate protection had already been provided to him.

Taking note of all these aspects, particularly, the fact that the second respondent was in jail since 24.08.2009, the trial has commenced by examining the two witnesses on the side of the prosecution and the assurance by the State that trial will not be prolonged and conclude within a reasonable time and also of the fact that the High Court while granting bail has imposed several conditions for strict adherence during the period of bail, we are

not inclined to interfere with the order of the High Court. In fact, in the impugned order itself, the High Court has made it clear that in case of breach of any of the conditions, the trial Court will have liberty to take steps to send the applicant therein (respondent No.2 herein) to jail again. In addition to the same, it is further made clear that if the appellant receives any fresh threat from the second respondent or from his supporters, he is free to inform the trial Court and in such event the trial Court is free to take appropriate steps as observed by the High Court. We also direct the Trial Court to complete the trial within a period of four months from the date of the receipt of copy of this order without unnecessary adjournments.

With the above observation, finding no merit for interference with the order of the High Court, the appeal is dismissed.

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Pendency of 28 Crimes cannot be a ground to reject the bail

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL BAIL APPLICATION NO.373 OF 2011

Raosaheb Patole …..V**s**…… The State of Maharashtra

Mr. V.R. Doifode, for the Applicant.

Mrs. G.P.Mulekar, APP for the Respondent State.

CORAM: R.C. CHAVAN, J.

DATED: 24th March, 2011

1. This is an application for bail by a person who had participated in robbery. He was not identified in the T.I. parade. No recovery has been made at his instance. The co-accused from whom recovery has been made, has been admitted to bail. Another co-accused who has been identified in T.I. Parade, has also been admitted to bail. But the applicant was refused bail as there were as many as 28 crimes registered against the applicant of similar nature. This cannot be a ground for refusing bail to the applicant. Some stringent conditions could be imposed on the applicant so that the applicant does not indulge in similar activities till the trial is over. In view of this, the applicant arrested in CR No. 75 of 2010, registered at Vimantal Police Station, Pune, be released on bail on his furnishing PR Bond in the sum of Rs.25,000/- with one or more solvent sureties in the aggregate sum of Rs. 25,000/-, on the condition that the applicant shall attend the concerned police station every night between 9.00 p.m. to 11.00 p.m. till the trial is over. No relaxation of condition would be sought by the applicant, till the trial is over.

2. Application is disposed of.

(R. C. CHAVAN, J.)

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Cross Citation :2002 CRI. L. J. 165

MADHYA PRADESH HIGH COURT

(GWALIOR BENCH)`

Coram : 1 FAKHRUDDIN, J. (Single Bench)

Crl. Revn. No. 8 of 2001, D/- 18 -5 -2001.

Tehsildar Singh, Petitioner v. State of M.P., Respondent.

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Criminal P.C. (2 of 1974), S.437BAIL - Bail - Grant of - Murder case – Different versions of dying declaration and investigation – Grant of bail and transfer of investigation - FIR and dying declaration of deceased showing names of actual culprits who participated in incident - However, later part of investigation showing different thing and turned narration of facts recorded in F.I.R. and dying declaration, resulting in making brother of deceased as an accused - Further though FIR and dying declaration are on record brother of deceased is arrested, challan is filled, charge is framed against him and he is detained in custody - Facts of case such as requiring investigation by C.B.I. - C.B.I. enquiry accordingly ordered - But since enquiry will take long time applicant (brother of deceased) ordered to be released on furnishing personal bond in sum of Rs. 50, 000/- and two solvent surities in like amount.

(Paras 12, 13, 14, 15, 16, 17)

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Rakesh Saxena, for Petitioner; Padam Singh, Addl. Govt. Advocate and Praveen Mishra, for Respondent.

Judgement

ORDER :- Shri Rakesh Saxena, Counsel for the applicant.

Shri Padam Singh, Addl. Govt. Advocate for the respondent No. 1/State.

Shri Praveen Mishra, Counsel for the respondents Nos. 2, 3 and 4.

With the consent of the parties, the revision is finally heard.

2. This revision petition is against the order dated 27-11-2000, passed by Fourth Additional Sessions Judge, Morena in Sessions Trial No. 256/2000, whereby the applicant/accused has been charged for the offence under Section 302 of I.P.C. read with Sections 27 and 25(i)(b) of the Arms Act.

3. The facts leading to filing this case are as under : The incident had occurred on 18-4-2000 at 8/8.30 a.m. in the morning while complainant Subedar Singh s/o Albelsingh accompanied by his brother Tehsildarsingh and sister Usha was going to the field on the tracter and when he was at some distance of his house, what he saw is that accused Tikamsingh, Prahladsingh and Ramraj came from the front side, accused Ramraj was armed with gun. It is stated that accused Tikamsingh and Prahlad Singh filthyly abused him and also threatened to kill him. Thereafter, it is alleged that accused Ramraj, with intention to kill, fired from his gun at the complanant, Subedar Singh which hit on his abdomen, causing injuries and the blood came out. The incident was witnessed by his brother Tehsildar Singh and sister Usha. The accused-persons thereafter ran away from the spot. The report of the incident was lodged by the complainant himself along with his brother and sister at the police station, which was registered by Shri Vipin Pathak, Head Constable of Police Station, Porsa, who referred the injured to the Primary Health Centre, Porsa. It is stated that during treatement, complainant died and therefore, the offence which was initially registered under Section 307/34, I.P.C. was converted into Section 302 of I.P.C. The dying declaration of complainant was also recorded. The F.I.R. and dying declaration recorded indicated that it was Ramraj s/o Bhagwansingh, Tikamsingh s/o Bhagwansingh and Prahladsing s/o Bhagwan Singh, who caused the death of Subedarsingh, Accused Ramraj was said to have fired, which hit Subedarsingh resulting in death.

4. In this case, as stated above, the F.I.R. was recorded by Shri Vipin Pathak and he also conducted some part of investigation. Shri S.R. Sankhediya, I.O. is the person, who took over the investigation later on and completed it. According to his investigation, it is Tehsildar, who is accused and he caused death of his brother. He stated that he recorded the statements of Tikamsingh and Prahlad Singh on 16-6-2000. As the dying declaration and the F.I.R. lodged show that it is accused Ramrajsingh, who is said to have fired, the I.O. present in Court, was question as to whether the statement of accuused Ramraj was recorded. After seeing the record/case diary, he stated that the statement of Ramraj was not recorded despite the fact that he was in village with his brothers namely Tikamsingh and Prahlad Singh. This fact as also mentioned in the statements of Tikamsingh and Prahlad Singh said to have been recorded on 16-6-2000 by the Investigating Officer.

5. On 1-5-2001, considering the seriousness of the matter, this Court had recorded a detailed order sheet and also directed for issuance of notice to Shri Vipin Pathak, Head Constable of P.S., Porsa, who registered the F.I.R. and conducted part of investigation and the Dr. D.C. Parashhar, who recorded the Dying declaration of Subedar Singh on 18-4-2000 and subsequently gave statement in writing on 18-6-2000, for their personal appearance before this Court on the next date of hearing, i.e. 3-5-2001. It was also left open to the discretion of the I.G., Chambal Division and the Supdt. of Police, Morena to address, if they so desired.

6. On 3-5-2001, Shri Surendra Singh, I.G., Chambal Division Bench and Shri Dr. Vijay Kumar, S.P., Morena both were present before this Court, and also addressed.

7. Learned counsel for the applicant submitted that the F.I.R. and dying declaration, which are on the record, prima facie, unless they are found to be incorrect, to show that applicant Tehsildarsingh is not at all the author of the crime. The I.O. Shri S.R. Sankhediya questioned by this Court, who on the other hand, stated that he came to know that the brother of deceased himself

@page-CriLJ167
was the assailant.
8. Learned Counsel for the applicant stated the F.I.R. was sent under Section 157, Cr.P.C. to a Magistrate and under Section 159, Cr.P.C. the accused was formally arrested on 18-6-2000, as he was already in custody in another case registered for the offence under Sections 399, 400, 402, I.P.C. and Section 25/27 of the Arms Act read with Section 11/13 of the M.P. Daketi Adhiniyam.
9. As stated by the counsel for the parties and noted above, the F.I.R. and the dying declaration recorded on 18-4-2000 clearly show that it was Ramraj, Tikamsingh and Prahlad Singh, who participated in the incident and accused Ramraj fired at the complainant, which he sustained on the stomach, resulting in death. It is however, noted that the later part of the investigation which was completed by another I.O. Shri Sankhediya, after taking it over, says different thing and turned the narration of facts recorded in the F.I.R. and the dying declaration to different way which has resulted in making the brother of deceased, who is applicant Tehsildar as an accused and not only that inspite of dying declaration and the F.I.R. naming others and the documents being on record, the accused Tehsildar is arrested, challan is filed and the charge has been framed against him by this Court for causing death of his real brother. The documents, i.e. F.I.R. dying declaration of the deceased, recorded by the doctor on 18-4-2000 and the subsequent statement of the same doctor dated 18-6-2000, are there on the record in original.
10. This Court heard all the parties including the Investigating Officers noticee as recorded in earlier order sheet doctor and Shri J.P. Gupta, Sr. Counsel appeared as Amicus Curiae, at length.
11. A perusal of the record and the documents, especially, the F.I.R. and the dying declaration, shows the involvment of accused Ramraj and the other two companions, who are his brothers. Subsequently, how the prosecution says that it is Tehsildar, who is an accused. Saying so is the statement of the doctor given on 18-6-2000.
12. Learned counsel for the applicant submits that unless the dying declaration recorded is proved to be false the same cannot be ignored. It is stated that ignoring the F.I.R. and the dying declaration, the applicant has been made an accused on the basis of investigetion and the statement of the doctor given subsequently on 18-6-2000.
13. Under the circumstances, counsel for the parties submitted and agreed that the matter is such one which requires fresh investigation by the Central Bureau of Investigation. In the opinion of this Court also, the facts which have emerged require due investigation by the C.B.I. It is not disputed that Subedar Singh had died. It is also not disputed that he died homicidal death. According to the prosecution, documents, i.e. F.I.R. daying declaration, which has recorded on 18-4-2000 shows the innocence of the accused Tehsildar Singh, who on investigation made subsequently and on the statement of the doctor recorded on 18-6-2000 and the investigation, has been made, an accused, as stated by the counsel representing him.
14. In view of the above, to avoid miscarriage of justice the matter needs thorough probe. Accordingly, it is directed that the matter shall be investigated by the C.B.I. afresh. All parties to render due co-operation to C.B.I.
15. Counsel for the applicant submits that the applicant Tehsildar Singh is in jail. It is stated that the inquiry by the C.B.I. will take a long time. Therefore, it is prayed that the applicant be released on bail.
16. Counsel for the parties heard on the application (M. Cri. P. No. 317/2000, for grant of bail.

17. Having heard counsel for the parties and after considering the facts and circumstances and the material on record, in the opinion of this Court, it is just and proper to release the applicant on bail, on furnishing a personal bond in the sum of Rs. 50,000/- with two solvent sureties in the like amount each to the satisfaction of the Chief Judicial Magistrate, Morena for his appearance before the Court on all the dates fixed by that Court unless otherwise ordered subject to the following conditions :-
(1) that the applicant shall attend the Court concerned on every fifteen days after his release on bail;
(2) that he shall submit his pass port size photograph and the requisite details of the movable immovable property belonging to him, at the time of furnishing a personal
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bond, before the C.J.M. concerned;
(3) that the applicant shall attend all the dates fixed or given by C.B.I. during investigation and shall not temper with the evidence in any manner and shall not misuse the liberty, failing which his bail is liable to be cancelled and the investigating Agency/Competent Court would be at liberty to take necessary steps for his arrest;
(4) that the bail bonds shall contain crime number of the police station and before accepting the bail bonds copies of the same shall be supplied to the ADP/APP, who shall forward the same to the P.S. concerned;
18. In view of what has been stated above, the impugned order framing charge is set aside as the entire matter is being handed over to the C.B.I. for fresh investigation. The C.B.I. if required, shall collect the relevant documents in original from the trial Court, which shall be supplied by Court concerned.
19. Let the record of the court-below be sent back along with the copy of this order.
20. Photocopy of this order to the concerned.

Application allowed.

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Cross Citation :AIR (36) 1949 Calcutta 582 [C.N.159]

HARRIES C.J. AND J.P. MITTER J.

(Division Bench)

Kamala Pandey Vs. The King

Criminal Revn. No. 534 of 1949, Decided on 3rd June 1949

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Criminal P.C. (1989), S. 499 – Imposing Condition in bail which keeps the accused away from his family and also keeping away from the means of livelihood is impossible to comply for any one and should never be imposed.

Held, such condition should never be imposed – How can a man in ordinary circumstances afford to live at place 'X' when his family lived at 'Y' and in all probability his sole means of livelihood was at 'Y' – The contention of sessions Judge that the petitioner will tamper with the witnesses at place 'Y' if he allowed to enter that place is not proper because it is common knowledge that in every bail case the police allege that there is danger of tampering with witnesses, if witnesses can be tampered in this way it shows inefficiency of police – The condition imposed is such that it is not possible for any person to comply with – it tantamount to refusing bail –

The order of Sessions Judge illegal and therefore set aside – Accused directed to be released on bail unconditionally.

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JUDGEMENT :-

Harries C.J. – This is a petition for revision of an order of a learned Sessions Judge canceling the petitioner's bail. The petitioner together with a man named Nageshwar were charged with stealing from a railway wagon. Negeshwar has been granted bail and he is still on bail, and at is to be observed that the allegation is that certain stolen property was found on a search of Nageshwar's house.

2] The petitioner was eventually granted bail by this learned Sessions Judge, but granted bail upon a condition, namely, that he did not leave the limits of the town of Midnapore. Had the petitioner been living in Midnapore no objection could be taken to this condition. But the petitioner is not an inhabitant of Midnapore, but lived with his family at Kharagpur. Imposing a condition that he should not leave Midnapore is practically tantamount to refusing bail. How can a man in ordinary circumstances afford to live at Midnapore when his family live at Kharagpur and in all probability his sole means of livelihood was at Kharagpur / it is Suggested that this petitioner has bronken this condition on two occasions, but it appears to me that it is a condition which should never be imposed. The learned Sessions Judge justifies the condition because it is alleged that the petitioner will tamper with the witnesses at Kharagpur. It is common knowledge that in every bail case the police allege that there is a danger of tampering with witnesses, and if witnesses can be tampered with in this way, it does not speak very highly of the efficiency of the police. I cannot see what real danger there is in granting this man bail when his co-accused has been granted bail. Why is not there a danger that Nageshwar will tamper with witnesses ?

3] As I have said, the condition imposed, though on the face of it an innocent one, really makes it impossible for the petitioner to comply with it. In cases of this sort the Sessions Judge should make up his mind whether he is going to grant bail or reject it. Granting bail with a condition such as this which no person can possibly comply with is, as I have said, tantamount to refusing the bail and in such cases the Sessions Judge should refuse the bail rather that impose this sort of condition.

4] In my view the petitioner should be released unconditionally on bail and I would, therefore, allow this petition, set aside the order of the learned Sessions Judge and grant the petitioner bail to the satisfaction of the District Magistrate of Midnapore.

5] The rule is accordingly made absolute.

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Cross Citation :2011 (2) SUPREME COURT CASES (CrI) 848,

2011 (6) SUPREME COURT CASES 189

SUPREME COURT OF INDIA

Coram : (MARKANDEY KATJU & GYAN SUDHA MISRA, JJ.)

PRAKASH KADAM & Others ….*VS…..* RAMPRASAD VISHWANATH GUPTA & ANR.

Criminal Appeal Nos.1174-1178 of 2011 *[Arising out of SLP((Criminal) Nos. 3865-69 of 2011]*-Decided on 13-05-2011.

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WHEN POLICE ARE ACCUSED :-

A. Criminal Procedure Code, 1973 — Ss. 439(2) and 437(5) Bail — Cancellation of —Police acting as contract killers — Accused policemen allegedly killed deceased in a false police encounter at behest of third person — Held, position and standing of accused, etc. are factors other than misuse of bail to be considered for bail cancellation — Witnesses can have no security to their life if policemen who are supposed to uphold and protect law become predators — In the circumstances of case, held, High Court rightly cancelled bail as there exists prima facie case against accused policemen which disentitles them to bail — Human and Civil Rights.

B. Constitution of India — Art. 21 — Fake encounter killing(s) by police — Death sentence warranted — Held, where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare.

c. Rule of Law – Anarchy – Matsyanayaya – larger fish devouring the smaller ones or the strong despoiling the weak – Observed, the country is heading towards such a state of lawlessness. [Paras 30 to 33]

31. Thus in the Shanti Parva of Mahabharat Vol. 1 it is stated:- "Raja chen-na bhavellokey Prithivyaam dandadharakah Shuley matsyanivapakshyan durbalaan balvattaraah"

32. This shloka means that when the King carrying the rod of punishment does not protect the earth then the strong persons destroy the weaker ones, just like in water the big fish eat the small fish. In the Shantiparva of Mahabharata Bheesma Pitamah tells Yudhishthir that there is nothing worse in the world than lawlessness, for in a state of Matsyayaya, nobody, not even the evil doers are safe, because even the evil doers will sooner or later be swallowed up by other evil doers.

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JUDGMENT

Markandey Katju, J.-A curse shall light upon the limbs of men; Domestic fury and fierce civil strife Shall cumber all the parts of Italy; Blood and destruction shall be so in use And dreadful objects so familiar That mothers shall but smile when they behold Their infants quarter'd with the hands of war; All pity choked with custom of fell deeds: And Caesar's spirit, ranging for revenge, With Ate by his side come hot from hell, Shall in these confines with a monarch's voice Cry "Havoc!" and let slip the dogs of war; That this foul deed shall smell above the earth With carrion mean, groaning for burial. -- (Shakespeare: Julius Caesar Act 3 Scene 1)

1. Leave granted. Heard learned counsel for the appellants and perused the record.

2. This case reveals to what grisly depths our society has descended.

3. This appeal has been filed against the impugned judgment and order dated 21.1.2011 passed by the High Court of Judicaure at Bombay in Criminal Application Nos. 5283-5285 and 5303-5304 of 2010 by which the High Court has cancelled the bail granted to the appellants by the Sessions Court.

4. The appellants are policemen accused of a contract killing in Sessions Case No. 317/2010 which is pending before the Sessions Judge, Greater Bombay. The appellants have been charge-sheeted for offences punishable under Sections 302/34,120-B, 364/34 IPC and other minor offences. The victim of the offence is deceased Ramnaryan Gupta @ Lakhanbhaiyya. The prosecution case is that the appellants were engaged as contract killers by a private person to eliminate the deceased.

5. The case of the prosecution in brief is that the deceased Ramnarayan Gupta and the accused No. 14, Janardan Bhange were, once upon a time, very close to each other. Both of them had been working as estate agents and, mainly their business was to purchase land from the farmers whose land has been acquired by the Government under the Land Acquisition Act and to whom 12 percent of the land was given by the Government. This 12 percent of the land was being purchased at meager price by the deceased and accused No. 14, Janardan Bhange and was being

Supreme Court Judgements @ www.stpl-india.in2011 STPL(Web) 498 SC 2 Prakash Kadam Vs. Ramprasad Vishwanath Gupta sold on premium at later stage. During the course of that business, both of them had been exchanging the files pending with them for disposal pertaining to the said land.

6. There were some differences between the deceased Ramnarayan Gupta and accused No. 14, Janardan and hence it is alleged that the accused Janardan decided to eliminate the deceased in a false police encounter. Hence, he hired the services of the accused, and in pursuance of the said conspiracy the deceased Ramnarayan Gupta and his friend Anil Bheda were abducted on 11.11.2006 from near a shop named Trisha Collections at Vashi, New Bombay by 4 or 5 well-built persons who appeared to be policemen and were forcibly bundled into a Qualis car. The complainant, brother of the deceased, sent telegrams and fax messages to different authorities complaining that the said two persons had been abducted by some persons who appeared to be policemen and were in danger of losing their lives.

7. It is alleged that at Bhandup Complex the deceased was shifted to an Innova vehicle. The deceased and witness Anil Bheda were taken to D.N. Nagar police station in two separate vehicles i.e. one Qualis and the other Innova. It is alleged that the deceased was killed and his dead body was thrown near Nana-Nani Park at Versova. The dead body, after some time, was collected from the said place by the police to create a false case of police encounter. A case vide C.R. No. 302/2006 was registered on 11.11.2006 at Versova Police Station against deceased Ramnarayan Gupta on the complaint made by accused No. 9. In the said FIR it was shown that accused No. 9 and other police officers had gone to Nana-Nani Park on the basis of certain information and that the deceased was asked to surrender before the police. Instead of surrendering before the police, the deceased had attempted to kill the police and in retaliation he was shot by them.

8. It is also alleged that witness Anil Bheda was initially detained at D.N. Nagar Police Station and thereafter he was taken to Kolhapur and he was further detained at Mid Town Hotel at Andheri. As such the witness Anil Bheda was in custody of the police for about one month from 11.11.2006. His wife had lodged a missing complaint at Vashi police station on the same day, but she was compelled to withdraw that complaint.

9. The complainant is the brother of the deceased and is a practicing advocate. He came to know within a few minutes of the incident of abduction of his brother. He, therefore,

along with advocate Mr. Ganesh Ayyer, started searching for his brother and in the meantime he had also sent telegrams to Police Commissioner of Thane, Mumbai and New Bombay of the alleged abduction of his brother and indicated apprehension that his brother would be eliminated in a false police encounter. On the same day it was flashed on T.V. channels that the deceased had been killed in a police encounter. The complainant, therefore, approached the High Court on 15.11.2006 by filing a writ petition (WP 2473/2006) to get directions from the High Court to the police to register a case in respect of death of his brother.

10. On the aforesaid writ petition the High Court on 13.2.2008 passed an order that the offence of murder be registered against the accused. During the investigation the statement of Anil Bheda and other witnesses were recorded. So far, the police have charge-sheeted 19 accused.

11. After the High Court by its order dated 13.2.2008 had directed the Metropolitan Magistrate, Railway Mobile Court, Andheri to make an inquiry under Section 176(1A) Cr.P.C., the Metropolitan Magistrate after holding the inquiry submitted a report dated 11.8.2008 that Ramnarayan Gupta was shot by the police when he was in police custody. The report also stated that the death had not taken place at the spot alleged by the police, and that the deceased had not disappeared from the police custody before he was done to death, but that the deceased was Supreme Court Judgements @ www.stpl-india.in2011 STPL(Web) 498 SC 3 Prakash Kadam Vs. Ramprasad Vishwanath Gupta abducted by the police. The report also held that a false FIR was lodged by accused No. 9 Police Inspector Pradip Suryavanshi of D.N. Nagar Police Sttion to show that Ramnarayan Gupta was killed in a police encounter at Nana-Nani Park, and this FIR was filed to cover up the murder of the deceased Ramnarayan Gupta.

12. After the inquiry report was submitted by the Metropolitan Magistrate, the Division Bench of the Bombay High Court by its order dated 13.8.2009 in the aforesaid criminal writ petition constituted a Special Investigation Team for investigation of this case. Mr. K.M.M. Prasanna, DCP, Mumbai City, was appointed as head of the investigation team, and he was directed to record the statement of the complainant and to treat that statement as the FIR. Copy of the order of the Bombay High Court dated 13.8.2009 is Annexure P-3 to this appeal. Accordingly, the statement of the complainant was recorded on 20.8.2009 which was treated as the FIR (Annexure P4 to this appeal) and investigation was carried out. The statement and supplementary statement of Anil Bheda, which corroborates the prosecution case, is Annexure P5 to this appeal.

13. During investigation, it was revealed that accused No.1 Police Inspector Pradip Sharma (who is described as an `encounter specialist'), accused No.9 - PI Pradip Suryawanshi and accused No. 14 - Janardan Bhanage, had entered into a conspiracy to eliminate Ramnarayan Gupta. It appears that accused No.14 Janardan Bhanage had some personal enmity with Ramnarayan Gupta. Thereafter other officers and some criminals were involved in the execution of the said conspiracy. Accused No.4 - Shailendra Pande ,

accused No.5 - Hitesh Solanki, accused N0.6 - Akil Khan, accused No.8 - Manoj Mohan Raj, accused No.12 - Mohd. Moiddin and accused No.21 - Suresh Shetty and accused No.7 police constable Vinayak Shinde had abducted Ramnarayan Gupta and Anil Bheda from Vashi, on 11.11.2006. Accused No.1 PI Pradip Sharma, accused No.2 Police Constable Tanaji Desai, accused No.9 P.I. Pradip Suryavanshi, accused No.15 API - Dilip Palande were the persons who actually fired and shot dead the deceased. Accused No.11 API Nitin Satape and accused no.22 PSI Arvind Sarvankar claimed to have fired during the encounter, though the bullets fired from their fire arms were not recovered. Accused Nos. 13,16, 17, 18 and 19, whose bail orders were cancelled by the High Court, are said to be the members of the team which shot him dead. Accused No.13 Devidas Sakpal had allegedly guarded Anil Bheda at Hotel Mid Town on certain occasions and accused No.16 Head Constable Prakash Kadam had joined the abductors at about 4.30 p.m. and since then he was with Anil Bheda. He was also with Anil Bheda when he was taken out from D.N.Nagar Police Station in the evening and also later on at Hotel Mid Town from time to time.

14. On behalf of the prosecution, it is pointed out that in the FIR lodged by P.I. Pradip Suryavanshi showing the killing of Ramnarayan Gupta in an encounter at Nana-Nani Park, he had given names of police officers and police staff, who were in that team. The names of accused Nos.13,16, 17, 18 and 19 are shown in the said FIR. On that basis an entry was made in the station diary, where also the names of these persons were shown. It is also pointed out that in the magisterial enquiry, which was initially directed by the Police Commissioner, these persons had claimed to be members of the encounter team. When the complainant filed the Writ Petition against the State for taking action against the culprits, some of these persons had appeared to contest the writ petition. After the writ petition was allowed and this Court directed investigation, accused Nos. 13, 16, 19 and 20 filed Special Leave Petition challenging that order, which was dismissed. Everywhere they had taken the plea that Ramnarayan Gupta was shot dead in an encounter and that they were members of the Police team involved in that encounter and were also present at the time of the alleged encounter. The learned Counsel also pointed out that there is sufficient material to show that these persons were involved in the commission of the crime.

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15. The Sessions Court granted bail to the appellants but that has been cancelled by the High Court by the impugned judgment.

16. It was contended by learned counsel for the appellants before us, and it was also contended before the High Court, that the considerations for cancellation of bail is different from the consideration of grant of bail vide **Bhagirathsinh s/o Mahipat Singh Judeja vs. State of Gujarat (1984) 1 SCC 284, Dolat Ram and others vs. State of Haryana (1995) 1 SCC 349 and Ramcharan vs. Sta te of M.P. (2004) 13 SCC 617.**

17. However, we are of the opinion that that is not an absolute rule, and it will depend on the facts and circumstances of the case. In considering whether to cancel the bail the Court has also to consider the gravity and nature of the offence, prima facie case against the accused, the position and standing of the accused, etc. If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him. Moreover, the above principle applies when the same Court which granted bail is approached for canceling the bail. It will not apply when the order granting bail is appealed against before an appellate/revisional Court.

18. In our opinion, there is no absolute rule that once bail is granted to the accused then it can only be cancelled if there is likelihood of misuse of the bail. That factor, though no doubt important, is not the only factor. There are several other factors also which may be seen while deciding to cancel the bail.

19. This is a very serious case and cannot be treated like an ordinary case. The accused who are policemen are supposed to uphold the law, but the allegation against them is that they functioned as contract killers. Their version that Ramnarayan Gupta was shot in a police encounter has been found to be false during the investigation. It is true that we are not deciding the case finally as that will be done by the trial court where the case is pending, but we can certainly examine the material on record in deciding whether there is a prima facie case against the accused which disentitles them to bail.

20. Accused No. 11 API Nitin Sartape, accused No.17 PSI Ganesh Harpude, and accused No.19 PSI Pandurang Kokam, who were attached to Versova Police Station, as per the station diary entry 33 of Versova Police Station left Versova Police Station to go to D.N.Nagar Police Station on a special assignment. That entry No.33 was taken in the station diary of Versova Police Station at 18.05 hours. Entry No.25 in the station diary of D.N.Nagar Police Station at 18.55 hrs. shows that Police Inspector Suryavanshi, API Dilip Palande (accused No.15), PSI Arvind Sarvankar (accused No.22), PSI Patade (accused No.18) and API Sartape (accused No.11), PSI Harpude (accused No.17) and Police Constable Batch No.26645 i.e. Pandurang Kokam (accused No.19) left the Police Station to go near Nani Nani Park to verify and to arrest a hardened criminal. It appears that 3 police officers i.e. AP Sartape, PSI Harpude and Constable Pandurang Kokam were specially called from the Versova Police Station and they were in the team of the police officers and staff who accompanied PI Suryavanshi. This team left the police station at 18.55 hrs. as per the said entry and it appears that at about 8 to 8.15 p.m. Ramnarayan was shot dead. At this stage, the defence of the accused need not be taken into consideration, because during the investigation, it has been found that there was no encounter and Ramnarayan Gupta was shot dead in a fake encounter. This station diary No.25 of 18.55 hrs. goes to show that accused No.17 PSI Hapude, accused No.18 PSI Patade and accused No.19 Constable Pandurang Kokam were the members of the team which killed Ramnarayan. Not only this, as per the record of D.N.Nagar Police station, on 11.11.2006, at 6 p.m. Police Inspector Suryavanshi, API Sartape and PSI Anand Patade had collected weapons and ammunition. Naturally, those weapons were collected by the Supreme Court Judgements

@ www.stpl-india.in2011 STPL(Web) 498 SC 5 Prakash Kadam Vs. Ramprasad Vishwanath Gupta said officers to go to some place for a mission. According to them, they went to at Nana Nani Park where Ramnarayan Gupta was killed. In view of this, the presence of PSI Patade in the team which executed the said plan and killed Ramnarayan does not appear to be in doubt. Merely because accused No.18 PSI Patade himself did not fire is not sufficient. Accused Nos. 17 Ganesh Harpude and accused No.19 Pandurang Kokam, as pointed out above, were also members of that team. It is also material to note that these accused persons had consistently taken a stand that they were present at the time of the said encounter and this is clear from their stand taken before the High Court as well as before the Supreme Court in Special Leave Petition filed by the accused Nos. 13, 16, 19 and 21. In that SLP also they had stated that accused Nos. 17 and 18 were also in the encounter team. Hence there is a prima facie case against them.

21. As far as accused Nos. 16, 17, 18 and 19 are concerned, there is sufficient material to prima facie establish their role in this conspiracy and the alleged execution of Ramnarayan Gupta. Accused No.13 was allegedly given duty of guarding Anil Bheda at Hotel Mid Town where he was being detained illegally. It is contended by the learned Counsel for the accused that if any duty of guarding or surveillance is given to a Police Constable by his superiors, he is bound to discharge that duty and merely because he was given the guarding duty, it cannot be said that he was party to the conspiracy. However, it cannot be forgotten that accused No.13 was one of the petitioners before the Supreme Court and had claimed that he was a member of the encounter team along with PI Suryavanshi and others, and this admission finds corroboration from the contents of the FIR registered by PI Suryavanshi himself.

22. In fact, the prosecution material collected during the investigation prima facie indicates that Ramnarayan Gupta was abducted during the day time and was taken to D.N.Nagar Police Station and from there he was taken to some unknown place where he was shot dead. At 9 p.m. some police officers came back to the police station and deposited their weapons and kept their blood stained clothes. 23. In our opinion this is a very serious case wherein prima facie some police officers and staff were engaged by some private persons to kill their opponent i.e. Ramnarayan Gupta and the police officers and the staff acted as contract killers for them. If such police officers and staff can be engaged as contract killers to finish some person, there may be very strong apprehension in the mind of the witnesses about their own safety. If the police officers and staff could kill a person at the behest of a third person, it cannot be ruled out that they may kill the important witnesses or their relatives or give threats to them at the time of trial of the case to save themselves. This aspect has been completely ignored by the learned Sessions Judge while granting bail to the accused persons.

24. In our opinion, the High Court was perfectly justified in canceling the bail to the accused-appellants. The accused/appellants are police personnel and it was their duty to uphold the law, but far from performing their duty, they appear to have operated as criminals. Thus, the protectors have become the predators. As the Bible says "If the salt

has lost its flavour, wherewith shall it be salted?", or as the ancient Romans used to say,"Who will guard the Praetorian guards?" (see in this connection the judgment of this Court in CBI vs. Kishore Singh, Criminal Appeal Nos.2047-2049 decided on 25.10.2010).

25. We are of the view that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake `encounters' are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law. In our opinion if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties.

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26. We warn policemen that they will not be excused for committing murder in the name of `encounter' on the pretext that they were carrying out the orders of their superior officers or politicians, however high. In the Nuremburg trials the Nazi war criminals took the plea that `orders are orders', nevertheless they were hanged. If a policeman is given an illegal order by any superior to do a fake `encounter', it is his duty to refuse to carry out such illegal order, otherwise he will be charged for murder, and if found guilty sentenced to death. The `encounter' philosophy is a criminal philosophy, and all policemen must know this. Trigger happy policemen who think they can kill people in the name of `encounter' and get away with it should know that the gallows await them.

27. For the above reasons, these appeals are dismissed.

28. Before parting with this case, it is imperative in our opinion to mention that our ancient thinkers were of the view that the worst state of affairs possible in society is a state of lawlessness. When the rule of law collapses it is replaced by Matsyanyaya, which means the law of the jungle. In Sanskrit the word `Matsya' means fish, and Matsyanyaya means a state of affairs where the big fish devours the smaller one. All our ancient thinkers have condemned Matsyanyaya vide `History of Dharmashastra' by P.V. Kane Vol. III p. 21. A glimpse of the situation which will prevail if matsyanyaya comes into existence is provided by Mark Antony's speech in Shakespeare's `Julius Caesar' quoted at the beginning of this judgment.

29. This idea of matsyanyaya (the maxim of the larger fish devouring the smaller ones or the strong despoiling the weak) is frequently dwelt upon by Kautilya, the Mahabharata and other works. It can be traced back to the Shatapatha Brahmana XI 1.6.24 where it is said "whenever there is drought, then the stronger seizes upon the weaker, for the waters are the law," which means that when there is no rain the reign of law comes to an end and matsyanyaya beings to operate.

30. Kautilya says, `if danda be not employed, it gives rise to the condition of matsyanyaya, since in the absence of a chastiser the strong devour the weak'. That in the absence of a king (arajaka) or when there is no fear of punishment, the condition of matsyanyaya follows is declared by several works such as the Ramayana II, CH. 67, Shantiparva of Mahabharat 15.30 and 67,16. Kamandaka II. 40, Matsyapurana 225.9, Manasollasa II. 20.1295 etc.

31. Thus in the Shanti Parva of Mahabharat Vol. 1 it is stated:- "Raja chen-na bhavellokey Prithivyaam dandadharakah Shuley matsyanivapakshyan durbalaan balvattaraah"

32. This shloka means that when the King carrying the rod of punishment does not protect the earth then the strong persons destroy the weaker ones, just like in water the big fish eat the small fish. In the Shantiparva of Mahabharata Bheesma Pitamah tells Yudhishthir that there is nothing worse in the world than lawlessness, for in a state of Matsyayaya, nobody, not even the evil doers are safe, because even the evil doers will sooner or later be swallowed up by other evil doers.

33. We have referred to this because behind the growing lawlessness in the country this Court can see the looming danger of matsyanyaya.

34. The appeals are dismissed, but it is made clear that the trial court will decide the criminal case against the appellants uninfluenced by any observations made in this judgment, or in the impugned judgment of the High Court.

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Cross Citation :2011 ALL MR (Cri) 1122

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Coram :- J. H. Bhatia, J.

Ramprasad Vishwanath Gupta Vs. Prakash Ganpat Kadam & Anr.

CRIMINAL APPLICATION NO. 5283 OF 2010 with criminal application Nos. 5284, 5285, 5303, 5304, of 2010 21st January, 2011.

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Criminal P.C. (1973), S.439 - Cancellation of bail - Police Officers and staff engaged by some private persons to kill their opponent - Police Officers and staff acting as contract killers - Strong apprehension in mind of witnesses about their own safety - Held, very strong reasons and circumstances exist in the present case for cancellation of bail.

In the present case, Sessions Judge either missed the important material or he misread the same while granting bail to these accused persons. It is a very serious case wherein prima facie, some police officers staff were engaged by some private persons to kill their opponent i.e. Ramnarayan Gupta; the police officers and the staff acted contract killers for them. If such police officer and staff can be engaged as contract killers to finish some person, there may be very strong apprehension in the mind of the witnesses about their own safety. If the police officers and staff could kill a person at the behest of .third person it will not be difficult for them to kill the important witnesses or their relatives to bring pressure on them at the time of trial of the a to save themselves. This aspect has been completely ignored by the learned Sessions Judge while granting bail to the accused persons. Very strong reasons and circumstances exist in the present case due to which cancellation of bail is absolutely necessary] the interest of justice. 2006 ALL MR (Cri): (S.C.) and (2004)13 SCC 617 - Re on.

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Shri R.V.Gupta, applicant in person present in Court.
Shri M.K.Kocharekar, i/b. Shri Rajiv Sawant, Advocates, for the respondent No.1 (except Appln. No.5285/2010).
Shri H.H.Nagi, i/b. H.H.Nagi & Associates, Advocates for respondent No.1 (in Appl. No.5285/2010)
Shri R.N.Misra, Spl. P.P. a/w Shri S.A. Shaikh, APP, for the Respondent No.2 - State.

CORAM: J.H.BHATIA,J.
DATE : 21st January, 2011.
P.C.

1. These five Applications are filed by the original complainant/first informant Ramprasad Vishwanath Gupta for cancellation of bail granted by the Sessions Court to accused No.13 Police Constable Devidas Sakpal, accused No. 16 - Head Constable Prakash Kadam, accused No.17 PSI Ganesh Harpude, accused No.18 - PSI Anand Patade and accused No.19 Constable Pandurang Kokam by orders passed on different dates in Sessions Case No.317/2010.

2. Prosecution case, in brief, is that deceased Ramnarayan Gupta was the brother of complainant Ramprasad Gupta. In the afternoon of 11.11.2006, Ramnarayan and his friend Anil Bheda were abducted by four or five well-built

3 Cri-A-5283-10-&-Ors.sxw persons, who appeared to be policemen, by forcibly loading him in a silver coloured Qualis Car. The complainant sent telegram and fax messages to different authorities in the name of wife of Anil Bheda or himself complaining that Anil Bheda and Ramnarayan Gupta were abducted by some persons, who appeared to be policemen and there was danger to life of both of them. In the evening at about 8.15 p.m. a breaking news was flashed on T.V. that Ramnarayan Gupta was killed in an encounter with the police at Nana-Nani Park near Versova. Anil Bheda was illegally detained at different places for about 30 days. After he was released, it was revealed that

Anil Bheda and Ramnarayan Gupta were initially taken to D.N.Nagar Police Station and at about 7 p.m. Anil Bheda was taken away from the police station by a vehicle by some policemen and was kept away from the police station for about 1-1/2 hour or 2 hours. In the evening at about 9 p.m., Anil Bheda was brought back to D.N.Nagar Police Station. At that time, he noticed that some police officers and staff were keeping their fire arms and blood stained clothes in a room. Later on, Anil Bheda was detained for about 30 days at different places including at Hotel Mid Town situated in Andheri. The complainant moved several authorities complaining that his brother was murdered, but no action was taken by the authorities concerned. He finally filed a
Writ Petition, being W.P. No.2473/2006 under Article 226 of the Constitution of
India and by an order dated 13.2.2008, the Division Bench of this Court directed 4 Cri-A-5283-10-&-Ors.sxw that enquiry be made by Metropolitan Magistrate as required under Section 176(1-A) of the Code of Criminal Procedure. The Metropolitan Magistrate, after holding the enquiry came to conclusion that Ramnarayan Gupta was shot dead by the police after he was abducted and when he was in police custody. He also held that the false FIR was lodged by accused No.9 Police Inspector Pradip Suryavanshi of D.N.Nagar Police Station to show that Ramnarayan Gupta was killed in an encounter with Police. when on being police asked to surrender, he fired against the police when he was in police custody, and that it was filed only o cover up the murder of Ramnarayan Gupta. After the enquiry report was submitted, the Division Bench of this Court by order dated 13.8.2009 in the aforesaid Writ petition constituted a special investigation team for investigation of this case. Mr. K.M.M.Prasanna, DCP, Mumbai City, was appointed as Investigating Officer and he was directed to record the statement of the complainant and to treat that statement as FIR. Accordingly, statement of the complainant was recorded on 20.8.2009 and investigation was carried out.

3. During investigation, it was revealed that accused No.1 Police Inspector Pradip Sharma, accused No.9 - PI Pradip Suryawanshi and accused No. 14 - Janardan Bhanage, had entered into conspiracy to eliminate Ramnarayan Gupta. It appears that accused No.14 Janardan Bhanage had some personal 5 Cri-A-5283-10-&-Ors.sxw enmity with Ramnarayan Gupta. Thereafter other officers and some criminals were involved in the execution of the said conspiracy. Accused No.4 – Shailendra Pande , accused No.5 - Hitesh Solanki, accused N0.6 - Akil Khan, accused No.8 - Manoj Mohan Raj, accused No.12 - Mohd. Moiddin and accused No.21 – Suresh Shetty and accused No.7 police constable Vinayak Shinde had abducted Ramnarayan Gupta and Anil Bheda from Vashi, on 11.11.2006. Accused No.1 PI Pradip Sharma, accused No.2 Police Constable Tanaji Desai, accused No.9 P.I. Pradip Suryavanshi, accused No.15 API - Dilip Palande were the persons who actually fired and shot dead. Accused No.11 API Nitin Satape and accused no.22 PSI Arvind Sarvankar claimed to have fire during the encounter though the bullets fired from their fire arms were not recovered. Accused Nos. 13,16, 17, 18 and 19, whose bail orders are sought to be cancelled, are said to be the members of the team which shot him dead. Accused No.13 Devidas Sakpal had allegedly guarded Anil Bheda at Hotel Mid Town on certain occasions and accused No.16 Head Constable Prakash Kadam had joined the abductors at about 4.30 p.m. and since then he was with Anil Bheda. He was also with Anil Bheda when he wastaken out from D.N.Nagar Police Station in the evening and also later on at Hotel Mid Town from time to time.

4. On behalf of prosecution, it is pointed out that in the FIR lodged by 6 Cri-A-5283-10-&-Ors.sxw P.I. Pradip Suryavanshi showing the killing of Ramnarayan Gupta in encounter at Nana-Nani Park, he had given names of police officers and police staff, who were in that team. Names of accused Nos.13,16, 17, 18 and 19 are shown in the said FIR. On the basis of that entry was taken in the station diary, where also names of these

persons were shown. It is also pointed out that in the Magisterial enquiry, which was initially directed by the Police Commissioner, these persons had claimed to be members of the encounter team. When the complainant filed the Writ Petition against the State for taking action against the culprits, some of these persons had appeared to contest the writ petition. After the writ petition was allowed and this Court directed investigation, accused Nos. 13, 16, 19 and 20 filed Special Leave Petition challenging that order. Everywhere they had taken the plea that Ramnarayan Gupta was shot dead in an encounter and that they were members of the Police team involved in that encounter and were also present at the time of encounter. The learned Counsel also pointed out that there is sufficient material to show that these persons were involved in the commission of crime.

5. On the other hand, the learned Counsel for the accused persons vehemently contended that once the Sessions Court had granted bail by giving plausible reasons, the bail cannot be cancelled unless there are very strong circumstances and reasons. According to them, it was always the plea of the 7 Cri-A-5283-10-&-Ors.sxw police officers and staff that Ramnarayan Gupta, who was the hardened criminal with number of cases against him, was absconding and on that day P.I. Suryavanshi got information from some informant that said Ramnarayan Gupta was likely to visit Nana Nani Park and therefore he formed a group of the police officers and went there to arrest him. However, when Ramnarayan Gupta was asked to surrender, he fired against the police officers and therefore it became necessary for the police party to fire at him and therefore it was a genuine encounter and that he was not killed while in police custody.

6. In **Bhagirathsinh s/o Mahipat Singh Judeja Vs. State of Gujarat (1984) 1 SCC 284** and **Dolat Ram and Ors. vs. State of Haryana (1995) 1 SCC 349** and **Ramcharan vs. State of M.P. (2004) 13 SCC 617,** the Supreme Court has from time to time held that the consideration of cancellation of bail is different from the consideration for grant of bail. It has been held that bail can be cancelled only on existence of cogent and overwhelming circumstances, but not on reappreciation of the facts of the case. It is also settled that cancellation of bail should not be by way of punishment even if prima facie case against the

accused is established. On the other hand, the prosecution contended that while granting bail, the Court has to look into the nature and gravity of charges, the character, behaviour, means, position and standing of the accused and reasonable 8 Cri-A-5283-10-&-Ors.sxw apprehension of the witnesses being tampered with. For this, the learned Counsel for the prosecution relied upon **Anil Kumar Tulsiyani vs. State of U.P. and Anr. (2006) 2 SCC (Cri) 565** wherein the Supreme Court observed thus in paras 10 and 11 :-

"10. By now it is well-settled principle of law that one of the considerations in granting bail in non-bailable offences is the gravity and the nature of the offence. The High Court has not at all addressed to this issue while granting bail to the respondent.

11. This Court in state of U.P. v. Amarmani Tripathi in which one of us (Raveendran,J) was a member has considered various decisions of this Court and observed that the circumstances to be considered in an application for bail are

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable 9 Cri-A-5283-10-&-Ors.sxw *apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail" (SCC p.31, para 18)"*

In that case, bail was granted to the accused, who was an Advocate and that order was challenged before the Supreme Court. The Supreme Court held that the respondent i.e.

accused being an advocate was in commanding position and had standing in the society. In this background, there was reasonable apprehension of the witnesses being tampered with, coerced, threatened or intimidated by using his influence. As these circumstances were not considered by the High Court while granting bail, the Supreme Court set aside that order and cancelled bail.

7. On behalf of the accused, it was argued that the deceased had criminal antecedents. However, the learned Counsel for the prosecution contended that even if it is assumed that he had criminal record, still after taking him in custody police had no authority to kill him and if the police officers and staff involved in unlawful elimination are granted bail, they, by virtue of their authority and power and most of them being members of encounter teams of the 10 Cri-A-5283-10-&-Ors.sxw police, may pressurise the witnesses and may cause danger to the life of the surviving witnesses.

8. In **Dinesh M.N. (S.P.) vs. State of Gujarat 2008 Cri.L.J.3008,** a police officer was granted bail in the case of fake encounter of Sohrabuddin, who had allegedly shady reputation and criminal antecedents. The High Court, after consideration of the material on record, cancelled the bail and that order was challenged before the Supreme Court. The Supreme Court dismissed the appeal and observed thus in para 14 :-

"14.... In the instant case, the trial Court seems to have been swayed by the fact that Sohrabuddin had shady reputation and criminal antecedents. That was not certainly a factor which was to be considered while granting bail. It was nature of the acts which ought to have been considered."

The Supreme Court also observed in para 12 that even though reappreciation of evidence as done by the Court granting bail is to be avoided, the Court dealing with application for cancellation of bail under Section 439(2) can consider whether irrelevant materials were taken into consideration. The relevant material, if not taken into 11 Cri-A-5283-10-&-Ors.sxw consideration, can also be looked into by the Court dealing with application for cancellation of bail.

9. The learned Sessions Judge, while granting bail to the accused persons, who are respondents in these applications, generally observed that the FIR was lodged by accused No.9 PI Pradip Suryavanshi and accordingly entry was taken in the station diary. According to the learned Sessions Judge, none of these accused persons had any control over lodging of that FIR by PI Suryavanshi or on taking entries in the station diary and none of them had personally taken any entry in the station diary about their presence.

In para 17 of the order dated 22.11.2010 granting bail to accused No. 16 Prakash Kadam, the learned Sessions Judge observed thus :-

"17. It may be noted here that this material may be sufficient to frame a charge u/s 120B of IPC against the applicant. However, it is also possible that this evidence may not be sufficient to prove the case against the applicant beyond all reasonable doubts. This being the nature of the evidence, I do not see any reason to keep the applicant as an under trial prisoner....." 12 Cri-A-5283-10-&-Ors.sxw

Even though these observations are not repeated in the orders granting bail to other accused persons, the learned Sessions Judge appears to have dealt with the bail applications with the above view in his mind.

While considering the application for bail, the Court has to consider the material only to find out whether any prima facie case is made out or not. Similarly, at the time of framing charge also the Court has to consider the material just to find out whether prima facie case is made out or not for framing the charge. At the time of considering the application for bail, the Court is not expected to consider the prosecution evidence minutely and particularly the defence of the accused, to come to conclusion whether the material is sufficient to prove guilt of the accused beyond reasonable doubt. From the above referred

observations, it appears that the Court came to conclusion that the material may be sufficient to frame a charge of conspiracy under Section 120B of IPC. In this case, charge is about murder of Ramnarayan Gupta as per conspiracy for that purpose. Therefore, the prosecution is for the offence under Section 302 read with Section 120B IPC. Having come to conclusion that the material may be sufficient to frame the charge, it was not only inappropriate but absolutely wrong on the part of the trial Court to say that evidence may not be sufficient to 13 Cri-A-5283-10-&-Ors.sxw prove the case against the accused beyond all reasonable doubt. That was not the stage to consider the material from the angle as to whether the accused could be convicted after applying the standard of proof required in the criminal case.

10. The learned Sessions Court observed that as far as accused No.16 - Prakash Kadm is concerned, only role attributed to him is that he had guarded the witness Anil Bheda in the vehicle for some time. The learned Sessions Judge appears to have ignored the fact that according to the prosecution, Head Constable Prakash Kadam had joined the abductors at about 4.30 p.m. and from that time he was guarding Anil Bheda in the vehicle. He had come to the police station and he was also with him when he was taken away from the police station, during the time from 7 p.m. to about 9 p.m., during which the police team appeared to have taken away Ramnarayan Gupta from the police station to some unknown place, where he was shot dead. Not only this, Prakash Kadam was also guarding Anil Bheda when he was confined at different place, including at Hotel Mid Town, for a period of about 30 days. Anil Bheda was illegally detained during that period by the police only because he was the eye-witness of abduction himself 14 Cri-A-5283-10-&-Ors.sxw and Ramnarayan Gupta from Vashi and this evidence of Anil Bheda would be very important for the prosecution, as according to prosecution, Ramnarayan Gupta was killed in a fake encounter while in police custody and not in a genuine encounter at Nani Nani Park as claimed in the FIR lodged by PI Suryavanshi. The accused No.16 Prakash Kadam must be a confidant of the officers who had hatched the conspiracy of murder and had executed. That is why he was given a very responsible duty of guarding Anil Bheda in keeping away from the police station when Ramnarayan Gupta was to be taken away for the purpose of elimination.

11. Accused No. 11 API Nitin Sartape, accused No.17 PSI Ganesh Harpude, and accused No.19 PSI Pandurang Kokam, who were attached to Versova Police Station, as per the station diary entry 33 of Versova Police Station left Versova Police Station to go to D.N.Nagar Police Station on a special assignment. That entry No.33 was taken in the station diary of Versova Police Station at 18.05 hours. Entry No.25 in the station diary of D.N.Nagar Police Station at 18.55 hrs. shows that Police Inspector Suryavanshi, API Dilip Palande (accused No.15), PSI Arvind Sarvankar (accused No.22), PSI Patade (accused No.18) and 15 Cri-A-5283-10-&-Ors.sxw API Sartape (accused No.11), PSI Harpude (accused No.17) and Police Constable Batch No.26645 i.e. Pandurang Kokam (accused No.19) left the Police Station to go near Nani Nani Park to verify and to arrest a hardened criminal. It appears that 3 police officers i.e. AP Sartape, PSI Harpude and Constable Pandurang Kokam were specially called from the Versova Police Station and they were in the team of the police officers and staff who accompanied PI Suryavanshi. This team left the police station at 18.55 hrs. as per the said entry and it appears that at about 8 to 8.15 p.m. Ramnarayan was shot dead. At this stage, the defence of the accused need not be taken into consideration, because during the investigation, it has been found that there was no encounter and Ramnarayan Gupta was shot dead in a fake encounter. This station diary No. 25 of 18.55 hrs. goes to show that accused No.17 PSI Hapude, accused No.18 PSI Patade and accused No.19 Constable Pandurang Kokam were the members of the team which killed Ramnarayan. Not only this, as per the record of D.N.Nagar Police

station, on 11.11.2006, at 6 p.m. Police Inspector Suryavanshi, API Sartape and PSI Anand Patade had collected weapons and ammunition. Naturally, those weapons were collected by the said officers to go to some place for a mission. According to them, they went to at Nana Nani Park where Ramnarayan Gupta was killed. In view of this, presence of PSI Patade in the team which executed the said plan and killed Ramnarayan cannot be in doubt. Merely because accused No.18 PSI Patade himself did not fire is not sufficient. Accused Nos. 17 Ganesh Harpude and accused No.19 Pandurang Kokam, as pointed out above, were also members of that team. It is also material to note that these accused persons had consistently taken a stand that they were present at the time of the said encounter and this is clear from their stand taken before the High Court as well as before the Supreme Court in Special Leave Petition filed by the accused Nos. 13, 16, 19 and 21. In that SLP also they had stated that accused Nos. 17 and 18 were also in encounter team.

12. The learned Counsel for the accused contended that these accused persons were not present at the time when Ramnarayan Gupta was shot dead. According to him, because the superior officer PI Suryavanshi had filed the FIR in a particular way, these officers and staff were obliged to take same stand in their various applications and petitions before the different Courts and the Supreme Court. I am unable to accept this contention. If these persons were not involved and were not present in the alleged encounter, they could have taken a plea that they were not present at the time of alleged encounter. The accused cannot claim to have taken false plea before the High Court or the Supreme Court at least at this stage. However, a the same time, it is to be noted that the story of encounter was prima facie, cooked to cover the murder and to defend the police officers and staff and the FIR was lodged by PI Suryavanshi, who himself was one of the police officers who had fired. In my opinion, though the story of encounter appears to be false, the FIR may be looked into after circumstance which may provide corroboration to prosecution story, while granting or refusing bail.

13. I have pointed out that as far as accused Nos. 16, 17, 18 and 19 are concerned, there is sufficient material to establish their role in this conspiracy and the alleged execution of Ramnarayan Gupta.

Accused No.13 was allegedly given duty of guarding Anil Bheda at Hotel Mid Town where he was being detained illegally. It is contended by the learned Counsel for the accused that if any duty of guarding or surveillance is given to a Police Constable by his superiors, he is bound to discharge that duty and merely because he was given the guarding duty, it cannot be said that he was party to the conspiracy. However, it cannot be forgotten that he was one of the petitioners before the Supreme Court who had claimed that he was a member of the encounter team along with PI Suryavanshi and others and this admission finds corroboration from the contents of the FIR registered by PI Suryavanshi himself.

14. Learned Counsel for accused No.18 - PSI Patade produced a statement about the calls from his mobile. According to him, he was given different duties on 11.11.2006 and he was located at different places as can be seen from the said record. He points out that he was at ESIC Nagar from 6.55 till 7.28 p.m. and at 9.03 p.m. he was near Nana Nani Park. According to him, this shows that PSI Patade was not present at the scene of offence at Nana Nani park between 7 p.m. to 8.15 p.m. when Ramnarayan Gupta was shot dead. The learned Counsel presums that Ramnarayan Gupta was killed at Nana Nani Park. In fact, that is the story created by PI Suryavanshi that Ramnarayan Gupta was shot dead in an encounter at Nana Nani Park.

In fact, the prosecution material collected during the investigation shows that Ramnarayan Gupta was abducted during the day time and was taken to D.N.Nagar Police Station and from there he was taken to some unknown place. At 9 p.m. some police officers came back to the police station and deposited their weapons and kept their blood stained

clothes. Prosecution is not in a position to establish wheel actually Ramnarayan Gupta was killed. As pointed out earlier, at 6 p.m. PSI Patade had collected weapon and ammunition at D.N.Nagar Police Station and as per Station Diary entry they left the police station at 18.55 hrs. During the period from 6.55 p.m. to 7.28 p.m. he was located in ESIC Nagar. It is important to note that there is no record of any call on his mobile between 7.28 p.m. to 9.03 p.m. and it is not known where he was located during that period. Therefore, on the basis of the above referred telephone record, it cannot be presumed that PSI Patade was not member of the police team which killed Ramnarayan Gupta. In any case, this defence of the accused cannot be looked into at this stage but may be considered at the time of trial.

15. After perusal of the record and the impugned orders passed by the Sessions Court, I find that the learned Sessions Judge had either missed the important material or had misread the same while granting bail to these accused persons. It is a very serious case, wherein prima facie, some police officers and staff were engaged by some private persons to kill their opponent i.e. Ramnarayan Gupta and the police officers and the staff acted as contract killers for them. If such police officers and staff can be engaged as contract killers to finish some person, there may be very strong apprehension in the mind of the witnesses about their own safety. If the police officers and staff could kill a person at the behest of third person, it will not be difficult for them to kill the important witnesses or their relatives to bring pressure on them at the time of trial of the case to save themselves. This aspect has been completely ignored by the learned Sessions Judge while granting bail to the accused persons. In my opinion, very strong reasons and circumstances exist in the present case due to which cancellation of bail is absolutely necessary in the interest of justice.

16. For the aforesaid reasons, these Applications are allowed and the orders passed by the Sessions Court granting bail to the accused Nos. 13, 16, 17, 18 and 19 are hereby quashed. Bail granted to them is cancelled and they are directed to surrender immediately.

17. At this stage, the learned Counsel for the accused persons make an oral request to stay this order for four weeks so that they may approach the Supreme Court. Request is rejected.

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Cross Citation :2012 CRI. L. J. 2101

SUPREME COURT

(From : Patna)

Coram : 2 Dr. B. S. CHAUHAN AND JAGDISH SINGH KHEHAR, JJ.

Criminal Appeal Nos. 525-526 of 2012 (arising out of S. L. P. (Cri.) Nos. 304-305 of 2012), D/- 14 -3 -2012.

Jai Prakash Singh v. State of Bihar and Anr

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Criminal P.C. (2 of 1974), S.438, S.439 - BAIL - ANTICIPATORY BAIL - Bail - Regular or anticipatory - Considerations for granting are substantionally same - Not substantially different- only difference is that the anticipatory bail is before arrest and regular bail is after arrest.
(Para 13)

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Judgement

Dr. B.S. CHAUHAN, J. :- Leave granted.
2. These criminal appeals have been preferred against the judgments and orders dated 19.9.2011 and 25.10.2011 passed by the High
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Court of Judicature at Patna in Crl. Misc. Nos. 28318 and 33546 of 2011, by which the High Court has enlarged the respondents Rajesh Kumar Singh alias Pappu Singh and Sanjay Kumar Singh alias Mintu Singh on anticipatory bail under Section 438 of Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C.')
3. Facts and circumstances giving rise to these appeals are that :
A. On 5.6.2011, the appellant Jai Prakash Singh lodged an FIR of Laheria Sarai Case No. 304 of 2011 under Sections 302/34 of Indian Penal Code, 1860 (hereinafter referred as 'I.P.C.'), alleging therein that the informant/complainant and his elder brother Shiv Prakash Singh were having a medicine shop for the last 2-3 years. On 5.6.2011 around 10.00 p.m., his brother closed the shop and proceeded towards his house on his motorcycle. He was chased by the aforesaid respondents on a motorcycle and stopped. They opened indiscriminate firing and thus, he died on the spot. In the FIR, it was also alleged that the said respondents had threatened the complainant to kill him and his brother 10-15 days ago as there had been some old dispute of accounts between the parties.
B. As per the post-mortem report, the deceased received 5 bullet injuries on his person and he died because of the same. The said respondents had applied for anticipatory bail, however, their applications stood rejected by the learned Sessions Judge vide order dated 11.8.2011 observing that in the investigation, a strong motive had been found against the said respondents and there were certain affidavits of eye-witnesses to the effect that the said respondents were the assailants.
C. Aggrieved, the said respondents filed Miscellaneous Criminal Petitions for grant of anticipatory bail under Section 438, Cr.P.C. before the Patna High Court. The said applications have been allowed passing the impugned orders granting them anticipatory bail on the grounds that the FIR itself made it evident that there was some previous dispute between the parties which led to a quarrel and the accused had fair antecedents.
Hence, these appeals.
4. Shri Dvijendra Kumar Pandey, learned counsel appearing for the appellant, has submitted that the High Court committed grave error while granting anticipatory bail to the said respondents without considering the gravity of the offence and the manner in which the offence had been committed and without realising that the FIR had been lodged promptly within a period of two hours of the incident and both the said accused persons had been named therein. Thus, the impugned judgments and orders are liable to be set aside.
5. On the contrary, Ms. Kavita Jha and Ms. Prerna Singh, learned counsel appearing for the said respondents and the State of Bihar, have opposed the appeals contending that the High Court has imposed very serious conditions while granting the anticipatory bail. The order does not require any interference at this stage. The appeals have no merit and are liable to be dismissed.

6. We have considered the rival submissions made by the learned counsel appearing for the parties and perused the record.
7. The provisions of Section 438, Cr.P.C. lay down guidelines for considering the anticipatory bail application, which read as under:
"438. Direction for grant of bail to person apprehending arrest.-(1) Where any person has reason to believe thathe may be arrested on an accusation of having committed a non-bailable offence, he may apply to theHigh Court or the Court of Session for a direction underthis section that in the event of such arrest, he shall be released on bail; and that court may, after taking into consideration, inter alia, the following factors, namely:
(i) The nature and gravity of the accusation;
(ii) The antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;
(iii) the possibility of the applicant to flee from justice; and
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(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him soarrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail."
8. In view of the above, it is mandatory on the part of the court to ensure the compliance of the pre-requisite conditions for grant of anticipatory bail including the nature and gravity of the accusation.
9. Admittedly, the deceased had received several gun shot injuries. According to the post-mortem report, the following injuries were found on the person of the deceased:
"A . Abrasions: (1) 1 1/4" x1/4" 1"-right and enter post of forehead (2) 1/4" x 1/4" 1/2" x 1/4" and 1/2" x 1/10" in the lower 1/2 of the left leg (3) 1/4" x l/4" right kneecap.
B. Fire Arm injuries (1) entry wound 1/4 dia with inverted contused margins and abrasions. Collar placed on the outer aspect of the right arm 2" proxical to elbow -passed thro' arms breaking the bone into pieces and lacerating the to come out thro' exit wound 1/3" x 1/9" with even in the middle and inner portion of arm. Another entry wound, 1/5" in dia with abrasion collar, inverted margin and tattooing around (1-1/2" x 1-1/2") was also present 1" distal to the preventing entry wound and come out through the same exit wound.
(2) Entry wound -1/4" dia with inverted contused margin an abrasion collar in right anterior axillary line 5" below nipple-right 8th intercortal space-right lobe of liver mes entry-small intestine at one place-came out through exit wound 1/3" in dia in lower left iliac fosa in the axilary line with inverted margin.
(3) Entry wound 1/4" dia with contused inverted margins and abrasion collar placed in the left iliac fosa-color at one place-small intestine at one place came out this exit wound -" x 1/2" on right abdominal flank with everted margin, in anterior oscillary line 9" below nipple.
(4) Entry wound 1/3" in dia with contused inverted margin and abrasion collar over upper and inner part of left and soft tissue of the arm to came out through the exit wound 1/3" in dia with everted margin on the back of left arm 3" above (proximal) elbow.
(5) Entry wound 1/4" in dia on the back of abdomen 4" outer to midline at T12 level, with inverted and contused margins and abrasions collar mesentry large intestine at one place exit through a wound 1/4" dia with inverted margin in the hand.
Along the tracks, the tissue were lacerated. Fluid blood red clots were seen inside abdominal cavity about 1000 cc in volume. Organs appeared pale. Both sides of the heart were partially full and the urinary bladder was found full. Stomach contained about 20 cc food without alcoholic smell. Skull and brain showed nothing particular.
Opinion Death resulted from hemorrhage and both due to fire arm injuries mentioned above."

10. The learned Sessions Judge did not consider it proper to grant anticipatory bail, rather rejected the same after considering the submissions made on behalf of the said accused persons observing that the court had perused the Case Diary, para 90 of which revealed a very strong motive. There was material against the said accused in the case diary. The deceased had received multiple abrasions and 5 gun shot injuries, thus, it was not a fit case to enlarge the accused on anticipatory bail.
11. Admittedly, the FIR had been lodged promptly within a period of two hours from the time of incident at midnight. Promptness in filing the FIR gives certain assurance of veracity of the version given by the informant/complainant.
12. The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps
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in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. (Vide: Thulia Kali v. The State of Tamil Nadu, AIR 1973 SC 501; State of Punjab v. Surja Ram, AIR 1995 SC 2413 : (1995 AIR SCW 3571); Girish Yadav and Ors. v. State of M.P., (1996) 8 SCC 186 : (AIR 1996 SC 3098 : 1996 AIR SCW 1557); and Takdir Samsuddin Sheikh v. State of Gujarat and Anr., AIR 2012 SC 37 : (2011 AIR SCW 6486)).
13. There is no substantial difference between Sections 438 and 439, Cr.P.C. so far as appreciation of the case as to whether or not a bail is to be granted, is concerned. However, neither anticipatory bail nor regular bail can be granted as a matter of rule. The anticipatory bail being an extraordinary privilege should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail.
14. In State of M.P. and Anr. v. Ram Kishna Balothia and Anr., AIR 1995 SC 1198 : (1995 AIR SCW 1267), this Court considered the nature of the right of anticipatory bail and observed as under:
"We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code….. Also anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21."
15. While deciding the aforesaid cases, this Court referred to the 41st Report of the Indian Law Commission dated 24th September, 1969 recommending the introduction of a provision for grant of anticipatory bail wherein it has been observed that "power to grant anticipatory bail should be exercised in very exceptional cases".
16. Ms. Kavita Jha, learned counsel appearing for the accused/respondents has vehemently advanced the arguments on the concept of life and liberty enshrined in Article 21 of the Constitution of India placing a very heavy reliance on the observations made by this Court in Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors., AIR 2011 SC 312 : (2012 AIR SCW 3813), and submitted that unless the custodial interrogation is

warranted in the facts and circumstances of the case, not granting anticipatory bail amounts to denial of the rights conferred upon a citizen/person under Article 21 of the Constitution. We are afraid the law as referred to hereinabove does not support the case as canvassed by learned counsel for the accused-respondents. More so, the Constitution Bench of this Court in Kartar Singh v. State of Punjab, (1994) 3 SCC 569 : (1994 Cri LJ 3139), while summing up the law in para 368, inter alia, held as under:

"Section 20(7) of the TADA Act excluding the application of Section 438 of the Code of Criminal Procedure in relation to any case under the Act and the Rules made thereunder, cannot be said to have deprived the personal liberty of a person as enshrined in Article 21 of the Constitution."

(See also: Narcotics Control Bureau v. Dilip Prahlad Namade (2004) 3 SCC 619) : (AIR 2004 SC 2950 : 2004 AIR SCW 1757).

Therefore, we are not impressed by the submissions so advanced by learned counsel for the accused-respondents.

17. This Court in Siddharam Satlingappa Mhetre (supra) after considering the earlier judgments of this Court laid down certain factors and parameters to be considered while considering application for anticipatory bail :

"122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail :

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i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over-implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

124. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record."

18. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefore. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See: D.K. Ganesh Babu v. P.T. Manokaran and Ors., (2007) 4 SCC 434 : (AIR 2007 SC 1450 : 2007 AIR SCW 1896); State of Maharashtra and Anr. v. Mohd. Sajid Husain Mohd. S. Husain and Ors., (2008) 1 SCC 213 : (AIR 2008 SC 155 : 2007 AIR SCW 6354); and Union of India v. Padam Narain Aggarwal and Ors., (2008) 13 SCC 305) : (AIR 2009 SC 254 : 2008 AIR SCW 7220).

19. The case at hand, if considered in the light of aforesaid settled legal proposition, we reach an inescapable conclusion that the High Court did not apply any of the aforesaid parameters, rather dealt with a very serious matter in a most casual and cavalier manner and showed undeserving and unwarranted sympathy towards the accused.

20. The High Court erred in not considering the case in correct perspective and allowed the said applications on the grounds that in the FIR some old disputes had been referred to and the accused had fair antecedents. The relevant part of the High Court judgment impugned before us reads as under:

"Considering that the only allegation in the First Information Report is that there was previously some dispute between the deceased and the petitioner and they had quarrelled on account of the same, let the petitioner above named, who has fair antecedents, be released on anticipatory bail……."

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21. In the facts and circumstances of this case, we are of the considered opinion that it was not a fit case for grant of anticipatory bail. The High Court ought to have exercised its extraordinary jurisdiction following the parameters laid down by this Court in above referred to judicial pronouncements, considering the nature and gravity of the offence and as the FIR had been lodged spontaneously, its veracity is reliable. The High Court has very lightly brushed aside the fact that FIR had been lodged spontaneously and further did not record any reason as how the pre-requisite conditions incorporated in the statutory provision itself stood fulfilled. Nor did the court consider as to whether custodial interrogation was required.

The court may not exercise its discretion in derogation of established principles of law, rather it has to be in strict adherence to them. Discretion has to be guided by law; duly governed by rule and cannot be arbitrary, fanciful or vague. The court must not yield to spasmodic sentiment to unregulated benevolence. The order dehors the grounds provided in Section 438, Cr.P.C. itself suffers from non-application of mind and therefore, cannot be sustained in the eyes of law.

22. The impugned judgments and orders dated 19.9.2011 and 25.10.2011 passed by the High Court of Judicature at Patna in Crl. Misc. Nos.28318 and 33546 of 2011 are, thus, set aside. The anticipatory bail granted to the said respondents is cancelled. Needless to say that in case the said respondents apply for regular bail, the same would be considered in accordance with law. With the aforesaid observations, appeals stand disposed of.

Appeals allowed.

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Cross Citation : 2008 CRI. L. J. 1083

ANDHRA PRADESH HIGH COURT

Coram : 1 P. SWAROOP REDDY, J. (Single Bench)

Cri. Petn. No. 6642 of 2007, D/- 22 -11 -2007.

Kamireddy Mangamma Reddy and Ors. v. State of A.P.

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Criminal P.C. (2 of 1974), S.438 - Penal Code (45 of 1860), S.498A - ANTICIPATORY BAIL - CRUELTY BY HUSBAND OR HIS RELATIVE - Anticipatory bail - Accused persons married sister-in-laws of complainant and their husbands alleged to have instigated other accused persons i.e., husband, father-in-law etc. to harass complainant - One sister-in-law and her husband were residing in U. S. A. - Held, it is very difficult to believe that accused used to harass complainant, all the way - Accused persons entitled to anticipatory bail.

Section 498-A, I. P. C. is incorporated by the Legislature basically in the interest of women and to safeguard them from harassment. But, it has become somewhat counter productive. In several cases, women are harassed, arrested and humiliated on the complaints given under Section 498-A, I. P. C. The truth or otherwise of the allegations is subject to proof. For giving complaint absolutely no authentic and prima facie material like medical evidence is required, but no such complaints, in several cases, number of women are being arrested. In cases of arrest of married young women, they might face problems from their husbands and in-laws; in case unmarried women are arrested their marriage prospects would be badly affected and if Government servants are arrested their service prospects are affected. In the present case, only one woman is the alleged victim; but at least four women might have to go to jail even before trial, affecting their reputation, subjecting them to rude treatment at Police Station etc. Only in cases where, strong and authentic evidence like letters written by the accused-husband to the spouses or their parents etc., are available and where there is sufferance of serious injuries or death of the victim

only, perhaps, it is desirable to refuse anticipatory bail, that, too, for the accused-husband. (Paras 6, 7)

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D. Bhaskar Reddy, for Petitioners; Public Prosecutor, for Respondent.

Judgement

ORDER :- This petition for granting anticipatory bail is filed by A-3 to A-7 in Cr. No. 251 of 2007 of P. S., Narsaraopet Town, Guntur District.

2. A-3 is the mother; A-4 is the elder sister; A-5 is the brother-in-law, being the husband of A-4; A-6 is the younger sister and A-7 is the brother-in-law, being the husband of A-6, of A-1, the husband of the de facto complainant.

3. According to the complainant at the time of marriage twelve cents of plot worth Rs. 6.00 lakhs; cash of Rs. 3.00 lakhs; gold ornaments of Rs. 1.00 lakh and household articles worth Rs. 50,000.00 were given to the husband (A-1) at the time of marriage, which was held on 19-5-2006. One month after the marriage, at the instance of A-2 to A-7, A-1 started harassing the complainant. A-3 went to USA some time after the marriage of the complainant and before her leaving for USA, A-3 subjected the complainant to harassment both, physically and mentally and A-5, who is residing in USA is behind the scene in subjecting the complainant to cruelty. He used to change the minds of all the accused to subject her to harassment for money. From USA he used to speak over telephone, everyday and direct the other accused to harass the complainant, as A-5 bore grudge against the complainant. At the instance of A-5 all the accused abused and beat her several times for no fault of her. A-1 became a puppet in the hands of other accused and finally on 30-9-2006 A-1 necked her out from the matrimonial house.

4. Thus most of the allegations in the complaint are vague and petitioner Nos. 2 to 5 are married sisters and their husbands, who are admittedly living elsewhere and out of them, A-5 is living in USA. It is very difficult to believe that from USA A-5 every day used to telephone and instigate the other accused to harass the complainant. As per the complaint, A-5 has grudge against the complainant, but it is not stated as to why A-5 should have grudge against the complainant.

5. The contention of the learned counsel for the petitioners is that A-1, husband of the complainant filed a petition for divorce and a copy of the same is enclosed with this petition. As per the divorce petition, the complainant, herself, has been harassing the petitioners/accused.

6. The nature of allegations referred to

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in the complaint, particularly against the present petitioners, particularly against petitioner Nos. 2 to 5, the married daughters and their husbands, would show that in all probability, the allegations are false and exaggerated. It is very difficult to believe that the third petitioner used to harass the complainant, all the way from USA by instigating the other accused, particularly when no reasons are shown for him to have any grievance against the complainant. The reference to A-5 in the complaint, might be A-3 and, in fact, even that also would not make any difference.

7. In these circumstances, I hold that it is a fit case for granting anticipatory bail to the petitioners. Accordingly the petition is allowed. All the petitioners, who are A-3 to A-7 in Cr. No. 251 of 2007 of P. S., Narsaraopet Town, on their surrender before the Station House Officer of the said police station, within ten days from today, shall be enlarged on bail, on each of them executing a personal bond for a sum of Rs. 10,000.00 with two sureties for the like sum each to the satisfaction of the Station House Officer of P. S.,

Narsaraopet Town, Guntur District. The petitioners shall abide by the conditions laid down in Section 438, Cr. P. C.

8. Before parting with the petition, I feel it desirable to observe that there is rampant misuse of S. 498-A, I. P. C. False complaints are given against kith-and-kin of the husband, including the married sisters and their husbands; unmarried sisters and brothers and married brothers and their wives. There are instances where even young children, aged below ten years, were also implicated in the offences of this nature. My experience, while sitting in matrimonial Bench revealed that several families are ruined; marriages have been irretrievably broken down and chances of reconciliation of spouses have been spoiled on account of unnecessary complaints and the consequent arrest and remand of the husbands and their kith-and-kin. To discourage this unhealthy practice, it is desirable that anticipatory bail is granted very liberally in all cases of S. 498-A, I. P. C., particularly when the petitioner/accused is not the husband of the complainant and when the allegations are not very specific and prima facie do not inspire confidence.

9. Section 498-A, IPC is incorporated by the Legislature basically in the interest of women and to safeguard them from harassment. But, it has become somewhat counter productive. In several cases, women are harassed, arrested and humiliated on the complaints given under Section 498-A, IPC. The truth or otherwise of the allegations is subject to proof. For giving complaint absolutely no authentic and prima facie material like medical evidence is required, but on such complaints, in several cases, number of women are being arrested. In cases of arrest of married young women, they might face problems from their husbands and in-laws; in case unmarried women are arrested their marriage prospects would be badly affected and if Government servants are arrested their service prospects are affected. In the present case, only one woman is the alleged victim; but at least four women might have to go to jail even before trial, affecting their reputation, subjecting them to rude treatment at Police Station etc.

10. Only in cases where, strong and authentic evidence like letters written by the accused-husband to the spouses or their parents etc. are available and where there is sufferance of serious injuries or death of the victim only, perhaps, it is desirable to refuse anticipatory bail, that, too, for the accused- husband. Another important aspect is in this type of cases; there is no chance of witnesses turning hostile or being influenced by the accused, as the witnesses would invariably be the kith-and-kin of the alleged victim like herself and her parents etc. These aspects have to be kept in view, while dealing with the cases of anticipatory bail/bail in cases of offences involving Section 498-A, IPC.

Petition allowed.

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Cross Citation :2010 ALL MR (Cri) 1466

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

D. G. KARNIK, J.
Rajdev Kumar Mathura Yadav @ Pappu Vs.State of Maharashtra
Mr. PRABHANJAY R. DAVE with SACHIN P. DALVI, for the Applicant.
Mr. D. N. SALVI with Mr. MANDAR GOSWAMI, for the CBI.
Mr. A. S. GADKARI, APP, for the State.

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Constitution of India, Art.21 - Criminal P.C. (1973), S.439 - Speedy trial - Accused charged under Ss.366-A, 372, 373 of I.P.C. r/w. Ss.3 to 6 of Immoral Traffic (Prevention) Act in custody for more than 18 months - Delay attributable to prosecution - This has resulted in infringement of fundamental right of applicant for speedy trial - In the circumstances, held, irrespective of other circumstances the applicant is entitled to be released on bail. (Para [7])

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JUDGMENT :- Heard.

2. By this application, applicant seeks bail in connection with C.R. No.RC 2/S/2008 registered by CBI Special Crime Branch, Mumbai for offence punishable u/ss.366-A, 372, 373 of IPC r/w. sections 3, 4, 5 and 6 of The Immoral Traffic (Prevention) Act, 1956.

3. The short question that arises for consideration in this matter is whether the constitutional right of a fair and expeditious trial on the applicant has been violated entitling him to be released on bail. One of the grievances of the applicant is that though applicant has been arrested nearly 18 months ago on 30th September, 2008, the trial is not being held and that too on account of the lapses solely attributable to the State. The applicant is languishing in jail without trial on account of neglect of the State.

4. Learned counsel for the CBI points out that the lapses, if any, are not attributable to the CBI but are attributable to the State police or the jail authorities. Applicant cannot therefore get the benefit of the lapses on behalf of the State

Government. Article 21 confers a right of a speedy trial. That right is not affected whether the prosecuting agency responsible for prosecution is Union or the State Government. Both must act in co-ordination with each other to ensure that the constitutional right of an accused for speedy trial is not violated.

5. By an order dated 8th February, 2010, a report was called from the learned District & Sessions Judge as to why the trial was delayed and even a charge had not been framed. The learned District Judge-4 and Addl. Sessions Judge before whom the case is pending has submitted his report vide letter dated 23rd February, 2010. He has attributed four causes for the delay. They are : -

(1) On some dates, charge could not be framed because the application for bail by some of the accused were pending.

(2) On some dates all the accused were not produced and in the absence of the accused charge could not be framed.

(3) On some dates advocate for the CBI - the prosecuting agency was absent.

(4) On some dates, advocates for some of the accused were absent and therefore charge could not be framed.

The first three causes are attributable to the State.

6. In this regard, a reference can be made to the following dates, mentioned in the report of the Sessions Judge.

(i) 17/4/2009 - Only accused nos.2, 3, 6 and 7 were produced and the other accused were not produced from the jail.

(ii) 15/5/2009 - None of the accused were produced from jail.

(iii) 29/5/2009 - Only accused nos.2, 4 and 5 were produced and the other accused were not produced from jail.

(iv) 3/8/2009 - Accused were produced, but Spl.P.P for CBI was absent.

(v) 29/8/2009 - Accused were not produced from jail.

(vi) 10/9/2009 - Accused were not produced from jail.

(vii) 7/10/2009 - Spl.P.P for the CBI as well as Officer of the CBI were absent.

(viii) 15/10/2009 - Spl.P.P for CBI was absent.

(ix) 5/11/2009 - Spl.P.P for CBI was absent.

(x) 11/11/2009 - Spl.P.P for CBI was absent.

(xi) 24/11/2009 - Accused were not produced from jail and the Spl.P.P for CBI was also absent.

(xii) 30/11/2009 - Spl. P.P for CBI was absent.

(xiii) 22/12/2009 - Accused were produced but the Spl.P.P for CBI was absent.

(xiv) 6/01/2010 - Spl.P.P for CBI was absent.

(xv) 20/2/2010 - Only accused nos.1, 4 and 5 were produced and other accused were not produced from jail.

7. The dates mentioned above are as reported by the learned Addl. Sessions Judge. They clearly demonstrate that the trial could not be proceeded and even a charge could not be framed against the applicant, though applicant is in custody for nearly 18 months. The report of the Sessions Judge discloses that the major, if not the sole, reason for the delay in the trial is attributable to the prosecution whether it be the CBI or State Government. This has resulted in infringement of the fundamental right of the applicant for the speedy trial. In the circumstances, irrespective of the merits of the case, the applicant is entitled to be released on bail. Hence, I pass the following order : -

O R D E R

Applicant be released on bail on his executing P.R. Bond of Rs.20,000 /- with two sureties for the like amount subject to the following conditions :

(i) Applicant shall not threaten the prosecution witness.

(ii) Applicant shall report his presence in the office of CBI, Special Crime Branch New Mumbai once a fortnight i.e to say on 1st or 2nd and 15th or 16th of every British Calendar Month.

(iii) Within 48 hours of his release, the applicant shall inform to the CBI, SCB his present residential address, residential telephone number and cell number and shall intimate any change therein within 48 hours of the change.

Any breach of the condition shall result in cancellation of the bail.

Application allowed.

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Cross Citation :2007 CRI. L. J. 2890

PATNA HIGH COURT

Coram : 1 DHARNIDHAR JHA, J. (Single Bench)

Cri. Misc. No. 50053 of 2006, D/- 26 -4 -2007.

"Dinesh Parwat v. State of Bihar"

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(A) Criminal P.C. (2 of 1974), S.437, S.438 - BAIL - ANTICIPATORY BAIL - Criminal Miscellaneous Application before High Court for anticipatory bail - Withdrawn - Regular bail application filed before lower Court - Can be allowed - It is true that a petition being dismissed as withdrawn is also a dismissal, but if no merit has been touched by the Court in passing such dismissal order on account of withdrawal of the petition then in that case it could never be creating a situation under which the lower Courts could be said to have acted against the rejection order passed by the superior Court so as to allowing or refusing it. Even if the superior Courts touched upon the merits of the case while dismissing a petition under S. 438, Cr. P.C. it could not create a bar for any of the lower Courts to proceed to hear a petition for bail and direct the release of the accused from custody after consideration of all the facts and circumstances. (Para 20)

(B) Criminal P.C. (2 of 1974), S.437(5) - BAIL – Accused an advocate - Application for bail - Rejected by Magistrate - Copies for rejection order made available within few hours - On same day application for release on bail filed before Sessions Court - Such fact could not disentitle Sessions Judge to pass order allowing bail application - More so when applicant was advocate and to avoid revolt by members of bar, the order could have been passed - Moreover as the accused-applicant was an advocate, to avoid situation like the members of the Bar going up in arms and rising in revolt against the Judicial Officers as soon as one of their colleagues is either remanded to custody or is refused the prayer

for bail the order for allowing bail could have been passed. It could have been one of the reasons for directing the release of the accused on the same day on which his prayer was rejected by the Chief Judicial Magistrate. (Para 17)

Where on the very date on which the prayer for bail was rejected by the Magistrate, the petition for bail was filed before the Sessions Court and the order for release the accused on bail was passed, the order was not liable to be set aside though this may not be a normal phenomenon obtained in all judgeships of the State that copies of rejection orders or petitions for bail were made available within a few hours and on the same day the orders were passed, but, that could hardly disentitle the Sessions Judge to entertain the petition and hear the same on the same day. There is no rule forbidding any Court to receive petitions on the very day on which a subordinate Court has passed an order. The practice might be otherwise only with a view not to causing discomfiture to the general litigants in presenting their petitions. The normal judicial behaviour do require uniformity and it was expected that the same uniformity would have been observed in the present case as well as the office of the Sessions Judge, but for that the Sessions Judge could not be faulted. Moreover as the accused-applicant was an advocate, to avoid situation like the members of the Bar going up in arms and rising in revolt against the Judicial Officers as soon as one of their colleagues is either remanded to custody or is refused the prayer for bail the order for allowing bail could have been passed. It could have been one of the reasons for directing the release of the accused on the same day on which his prayer was rejected by the Chief Judicial Magistrate. (Para 17)

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Cases Referred : Chronological Paras
Cross Citation :2004 Cri LJ 1359 : AIR 2004 SC 2890 : 2004 AIR SCW 527 : 2004 AIR - Jhar HCR 1060 16, 21
1980 Cri LJ 588 (AP) 13
1978 Cri LJ 129 : AIR 1978 SC 179 16, 21
Vitesh Kr. Singh, for Petitioner; Y. V. Giri, Sr. Advocate, for Opposite parties.

JUDGEMENT ORDER :- The Chief Judicial Magistrate, Gopalganj disposed of the prayer for bail of O.P. No. 2 Rajesh Giri who surrendered before him in connection with Keteya P.S. case No. 92 of 2006 under Sections 307 etc. of the Indian Penal Code by rejecting prayer for bail. The O.P. No. 2 filed B. P. No. 963 of 2006 on the same day of rejection of his prayer by the learned Chief Judicial Magistrate, i.e. on 20-9-2006. The learned Sessions Judge, Gopalganj directed the petition to be put up before him on the same day, i.e. 20-9-2006 and after hearing the learned counsel for the petitioner and the Public Prosecutor directed the release of O.P. No. 2 on bail. The informant of the case, i.e. the petitioner Dinesh Parwat felt aggrieved by the above order and filed the present criminal miscellaneous petition with a prayer to cancel the order of bail passed by the learned Sessions Judge, Gopalganj.

2. The fact of the case was that in an occurrence dated 31-5-2006 all the accused persons came into the orchard situated in front of the house of the informant-petitioner Dinesh Parwat and started abusing him. The accused persons surrounded the petitioner and accused Rajendra Giri ordered to kill him upon which O.P. No. 2 Rajesh Giri dealt a farsa blow on the head of the petitioner with an intention to kill him whereby bleeding injury was caused to the petitioner. Accused Rajesh Giri and Brijesh Giri dealt lathi blow to the petitioner informant on his left and right hands and both the above noted accused i.e. Rakesh and Brijesh also assaulted Sunil Parwat the full brother of the informant and injured him. When the uncle of the petitioner informant came to rescue. Suresh Parwat was also assaulted with lathi by the accused persons and was injured badly. Accused Rajdeo Parwat assaulted Suresh Parwat on his head causing a wound. One Surendra Singh friend of the informant was also assaulted by Birendra Parwat.

3. The case registered under Sections 323, 324, 325, 307 etc. of the Indian Penal Code on 31-5-2006 and the investigation was taken up. Injury report in respect of injury found on the person of petitioner Dinesh Parat indicated that there were as many as six injuries in the form of an incised wound, two swellings and two contusions. Injury No. 1 which may be the resultant injury of the assault allegedly given by O. P. No. 2 to the petitioner informant was an incised wound measuring 2.1/2" x 1/4" x scalp deep on left frontal and occipital region of head bleeding profusely. The doctor recorded that the bleeding may be dangerous to life. In his final opinion the doctor reported the above noted injury to be simple in nature. The two contusions and two swellings were on different parts of hand of the informant petitioner and were simple in nature. However, the doctor reserved the opinion in respect of injury No. 2 and 4 and subsequently sent his final opinion dated 1-6-2006 according to which injury No. 2 a swelling on right clavicular region measuring 2" x 1" with abrasion measuring 1/2" x 1/2" was found to be grievous on account of the fracture of the right clavicular bone. Injury No. 4 was finally reported to be simple. O.P. No. 2 Rajesh Giri filed an anticipatory bail petition which was heard by the learned Sessions Judge vide anticipatory bail petition No. 281/06 and was rejected by his order dated 22-8-2006. While passing the order the learned Sessions Judge considered the allegation against O.P. No. 2 of dealing farsa blow on the head of the petitioner informant and the resultant injury which was simple in nature and, as such, by the operative final paragraph of his order directed the lower Court (i.e. the Chief Judicial Magistrate,

Gopalganj) to "consider the nature of injury and the fact that the petitioner is a practising lawyer of this place while passing order of regular bail". Accordingly, O.P. No. 2 appeared, as indicated at the very outset, before the Chief Judicial Magistrate, Gopalganj on 20-9-2006 and made a prayer for being released on bail and that has rejected ultimately resulting into filing of B.P. No. 963 of 2006 on 20-9-2006 and as per order passed in that bail petition the O.P. No. 2 was released from custody. It may also be of some importance to note that after rejection order of the anticipatory bail petition No. 281 of 2006 O.P. No. 2 approached this Court through criminal miscellaneous petition No. 36949 of 2006 and that was withdrawn on 19-9-2006 whereafter the petitioner surrendered before the Chief Judicial Magistrate.

4. The learned counsel appearing for the petitioner informant submitted that it was true that there was no recognized ground for cancellation available in the present case but as regards application of discretionary power it has to be available equally to all persons to approach the Court of the Sessions Judge, Gopalganj under similar circumstances. It was contended that there was no practice prevailing in any judgeship specially in the judgeship of Gopalganj that on rejection of the prayer for bail by a Magistrate the Sessions Judge hears the petition on the same day and disposes it of. It was also contended that it appears that the Judgeship of Gopalganj exhibited some special interest in the case of O.P. No. 2 so as to issuing the certified copy of the rejection order which was made over to the accused and that the petition for bail was presented before the learned Sessions Judge while in other cases the matter would have been directed to be placed for hearing the next day, the learned Judge directed the same to be placed on the same day and accordingly released the petitioner. The other circumstance placed before this Court was that the order of bail passed by the learned Sessions Judge on 20-9-2006 was that after rejection of the anticipatory bail petition with some observation by the Sessions Judge. The O.P. No. 2 filed criminal miscellaneous petition No. 36949 of 2006 and withdrew it on 19-9-2006 to surrender in the Court below on the next day. The learned Sessions Judge ought to have waited for some times to ponder over the legal position as to whether under the above circumstances he could have passed the order releasing O.P. No. 2 from custody. Learned counsel very fairly conceded that besides the above, there was no legally recognised ground available to him for seeking the cancellation of the impugned order dated 20-9-2006, passed in B.P. No. 963 of 2006.

5. Shri Y. V. Giri, Senior Advocate appearing on behalf of O.P. No. 2 drew my attention to annexure-1 to his counter-affidavit which is the order passed in anticipatory bail petition No. 281/2006 in which certain observations were given as a matter of direction to the Chief Judicial Magistrate for his consideration as and when O.P. No. 2 appeared with the prayer for bail. Shri Giri also drew my attention towards the fact that there was a counter-case for the same incident in which the mother of O.P. No. 2 was the informant and the case was registered as Kateya P.S. case No. 93 of 2006 which was under different sections of the Indian Penal Code. It was further contended that the nature of injury was simple and there was a direction by way of observation of the Learned Sessions Judge to the Chief Judicial Magistrate, to consider the allegation in the light of the injuries and pass the order of bail as and when O.P. No. 2 appeared before him. It was further contended that

petition for bail of O.P. No. 2 was heard by A.C.J.M. Gopalganj who was not a regular Court for such matters and he hears and disposes criminal matters in the first half of the day so as to take up usual business of hearing civil matters in the later part of the day and accordingly as soon as the order was passed and signed the application for copy was made and the same being supplied, the application was filed on the same day before the learned Sessions Judge. As such, there was no question of the sanctity of the Courts and the order being doubted.

6. The relevant provision of the Cr. P.C. which was applicable in the present case is Section 437. The provision is as under :

437. "When bail may be taken in case of non-bailable offence (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but :-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence : Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm :Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason. Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of Section 446A and

pending such inquiry, be released on bail, or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860), or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court may impose any condition which the Court considers necessary -

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interest of justice.

(4) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2), shall record in writing his or its (reasons or special reasons) for so doing.

(5) Any Court which has released a person on bail under sub-section (1) of sub-section (2), may if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable ground for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered."

7. The question which has been raised in the present petition does not make it necessary to analyse the entire provision of the afore-noted section. It is sufficient to consider the provisions of sub-section (1) of the section which provides that if a person accused of committing any non-bailable offence appears before a Court other than High Court or the Court of Sessions, he may be released on bail. Thus the general rule laid down by the above provision is that an accused having committed any non-bailable offence has to be released on bail. If any hindrance or fetter appears created by the provision in acting according to the above general rule of releasing the accused on bail by a Magistrate, it is by virtue of clause (i) and (ii) of sub-section (1). According to clause (i) the accused shall not be released if there "appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life", clause (ii) of sub-section (i) forbids the release of the accused on bail if the offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, he had been previously convicted on two or more occasions of a cognizable offence. It may further appear after considering the first three provisos added to sub-section (1) that the bar created by clauses (i) and (ii) may not operate to obstruct the order directing the release of an accused under Section 437(1) if the accused is of 16 years of age or is a woman or is sick or infirm or for any special reason the Court found it necessary on being satisfied about the existence of such reasons, so to do. The third circumstance for releasing the accused may be that accused was to be put on T.I.P. for identification by the witnesses during investigation if the accused was otherwise entitled so to be released and was ready to give an undertaking of complying with the direction of the Court given to him.

8. On a careful consideration of the language of clause (i) what appears is that for releasing an accused on bail there could not be many considerations except the reasonable grounds for believing that the accused was guilty of an offence punishable with death or imprisonment for life. What appears to me is that the offence of the case in which release of the accused on bail is sought for should be punishable with death or imprisonment for life. That by itself may not be sufficient for refusing the prayer for bail. There must be reasonable grounds appearing from material placed before the Magistrate so as to forming an opinion of the level of 'belief' that the accused has indeed committed an offence punishable as indicated above. Mere commission of the offence, thus, may not be sufficient. The nature of the material creating 'belief' in the mind of the Court must be of such quality as to creating definite impression about the accused being guilty of committing such an offence. Mere allegation of dealing assault may not be sufficient in the light of the above discussion unless the grounds reasonably raise an inference regarding the ultimate guilt into the mind of the Court.

9. When the provision talks about the existence of 'reasonable grounds for believing' in the mind of the Court it definitely rules out 'suspicion' about the guilt of accused. This has always to be borne in mind that there is vast difference between the 'belief' and 'suspicion'. Belief to me is an opinion concrete and definite regarding the existence of a fact or a situation arising out of set of facts ruling out any other inference. Whereas 'suspicion' is simply a state of fearful apprehension not concretizing itself into an acceptable reasonable inference about the existence/non-existence of any reasonable grounds as to be treated in the realm of belief.

10. The other part of the Section 437(i) is not of that much importance as regards creating a bar of jurisdiction in releasing an accused as appears in clause (1) of the provision. It may be noted that there is no mention that the case should be triable exclusively by the Court of Sessions. It is true that the offence punishable with death or imprisonment for life may be triable by the Court of sessions. But, if one considers the schedule I to the Cr. P.C. one could find out that there are as many as 51 sections in the Indian Penal Code which provide for sentence of life imprisonment and majority of them are triable by the Courts of magistrate.

11. If one considers provision of Section 472 of the Indian Penal Code one could find that the punishment provided under that section is also imprisonment for life but the offence has been made bailable. This could be the case with many other provisions contained in the IPC. Could it then be proper for a Magistrate merely because the offence under Section 472 of the Indian Penal Code is punishable by imprisonment for life that he should refuse to release the accused from custody for such an offence? It could simply be misusing the provision of Section 437(i)(ii) Cr. P.C. Likewise, refusing to release the accused in an offence which may not be punishable with life imprisonment or with death or where there could be a doubt or there could be room clearly available for making further inquiry about the complicity of the accused in commission of such an offence would not then it be justified for the Magistrate to refer to the trial forum prescribed by the Cr. P.C. and release the accused on bail. In my considered view the section of an offence or the imprisonment prescribed or the special nature of enactment could never be the considerations if there is no reasonable ground appearing before the Magistrate to compel him to believe that the accused had committed such an offence punishable by sentences as stated by Section 437(i)(ii) Cr. P.C.

12. Under the above premise I could very well note that while considering the question of releasing accused on bail the Magistrate has to consider the allegation which might be appearing against a particular accused besides other materials, like, the injury report in a case of assault to assess the allegation. He should also consider the commission of offence in the light of the allegation enforced by other materials which might have been collected by the investigating agency during the course of investigation. Those materials could be the statement of witnesses or the victim of the offence. If the Court comes to a conclusion that there was doubt or there was still some room left for holding further inquiry by him

about the reasonableness of the material and that is insufficient, then in my view the case could be covered by Section 437(ii) Cr. P.C. and in that case also the Court should release the accused on bail.

13. It is not that I am all alone in holding the above view that the merit of the allegations could be considered. The High Court of Andhra Pradesh has done it in the case of K. Narayanaswamy v. The State of Andhra Pradesh in 1980 Cri LJ 588. In the above context I may add that it may not always be improper for the Court to consider the constitution of an offence on facts alleged. It could take a contrary view on that aspect too.

14. When a Court comes to a conclusion that there could be a case made out, after hearing the accused and the Public Prosecutor requiring a direction for the release of the accused, it may not be sufficient in itself for issuing such a direction. The Court has to assure itself from sufficient materials about the manner and circumstances of committing the offence, the position and the status of the accused with reference to those of the witnesses, the likelihood of the accused fleeing from justice or of repeating the same offence or of jeopardising his own life being faced with a grim prospect of conviction in the case or of tampering with the witnesses the history of the case as well as of its investigation. If there is prospect of the accused repeating the commission of the same or more serious nature of the offence then it could also be considered for not releasing the accused on bail. I, hasten to add that these considerations could not be on conjectures and surmises. If the prosecution wants a Court to consider all or any of the above circumstances for not releasing the accused from custody, there must be acceptable materials produced before the Court and the Court could consider it to its full satisfaction, then only the circumstances could be said to be existing, else not.

15. The above was not necessary for me to be dealt with. But considering the controversy which has been raised through the present petition regarding the jurisdiction of various Courts in issuing bail orders I thought it proper to properly place as to what could be the construction upon the provision of Section 437, Cr. P.C.

16. Cancellation of an order of bail could be a matter to be dealt with by the Court u/S. 437(5) Cr. P.C. which has released the accused on bail or by the Court of Sessions or the High Court by virtue of their powers under Section 439, Cr. P.C. but that could not be done as and when the Courts are approached with such a prayer. As was noted by the Apex Court in (2004) 2 SCC 362 : 2004 Cri LJ 1359, Mehboob Dawood Sheikh v. State of Maharashtra and in many other decisions that rejection of bail stands on one footing but cancellation of bail is a harsh order because it takes away the liberty of an individual granted and is not lightly to be resorted to. For cancelling the bail of an accused there must be grounds shown to the Court and not only shown, the Court has to be satisfied

about them that they existed on the basis of materials acceptable to it. These grounds are well recognised as may appear from the above noted decision of the Apex Court as also from the earlier decision of the Apex Court rendered in Gurucharan Singh v. State (Delhi Administration) reported in AIR 1978 SC 179 : 1978 Cri LJ 129. While dealing with the provision and the law of grant/cancellation of bail it was noted that if there was a chance of (i) jumping of bail, (ii) of interfering or influencing the witnesses, (iii) of interfering with the investigation or prosecution, or (iv) of obstructing the judicial process or (v) of misusing or abusing the bail, the order of bail could be cancelled and the accused could be committed to custody. To the above criteria I could add, if I am permitted to do so, that if the accused after being released on bail has committed graver offence or if he appears a threat to peace and tranquillity of the society or if there is danger to his own life, then under these circumstances as well the accused could be committed to custody after cancelling bail. The other category of case requiring interference by the Court of sessions or by the High Court could be the utterly wrong application of the discretionary jurisdiction and directing release of accused on bail. Such category of cases could not be exhaustive but, to illustrate, if the accused, who is an assailant of the deceased in a case and about whose complicity there is sufficient acceptable material is released on bail by the Magistrate or the Sessions Court, the High Court or the Supreme Court may interfere in such case of improper application of the discretionary power of granting bail and by directing the committal of the accused to custody.

17. Coming to the facts of the present case, it is true that on the very date on which the prayer for bail of O.P. No. 2 was rejected by the learned C.J.M. Gopalganj petition for bail was filed before the learned Sessions

Judge, Gopalganj and the order for release of O.P. No. 2 on bail was passed. This may not be a normal phenomenon obtained in all judgeships of the State and specially in the judgeship of Gopalganj that copies of rejection orders on petitions for bail are made available within a few hours and on the same day the orders are passed. But, that could hardly disentitle the sessions Judge to entertain the petition and hear the same on the same day. There is no rule forbidding any Court to receive petitions on the very day on which a subordinate Court has passed an order. The practice might be otherwise only with a view not to causing discomfiture to the general litigants in presenting their petitions. The normal judicial behaviour do require uniformity and it was expected that the same uniformity would have been observed in the present case as well by the office of the Sessions Judge, but for that the Sessions Judge could not be faulted. There are many considerations which out weigh judicial practice. One such consideration is avoiding unseemly situation like the members of the Bar going up in arms and rising in revolt against the judicial officers as soon as one of their colleagues is either remanded to custody or is refused the prayer for bail. We have many instances in our State being reported from different judgeships. Admittedly O.P. No. 2 was an advocate practising in Civil Court Gopalganj and might be that the learned Sessions Judge acted in the manner as is presently complained of, only to avoid such a situation. It is not that the judges are fearful of advocates, rather the judges avoid causing discomfort and harassment to the general litigant in whose interest the system of judiciary works. I believe that it could have

been one of the reasons for directing the release of the O.P. No. 2 on the same day on which his prayer was rejected by the Chief Judicial Magistrate.

18. Copies on urgent applications have to be supplied within 24 hours. An Additional Chief Judicial Magistrate handles the criminal matter only when the Chief Judicial Magistrate is either absent or is on leave or is not in a position to discharge his judicial functions. The primary functions of the Court of A.C.J.M. is that of the permanent subordinate Judge and it is a very heavy file on all stations on the civil side of original jurisdiction. This is a common phenomenon which could be observed in every Civil Court that Additional Chief Judicial Magistrates hear and dispose of criminal matters during the first few hours of their sitting so as to free themselves to devote the remaining time to their original side of jurisdiction. In view of the above prevailing practice in the Civil Court it could safely be assumed that the order refusing prayer for bail of O.P. No. 2 might have been passed before 12 a.m. in all possibilities making it not difficult for O.P. No. 2 to obtain the copies and file a petition.

19. As regards the use of discretionary powers by the learned Sessions Judge, it was not contended that it was wrongly applied in directing the release of O.P. No. 2. Even the injury which was corresponding to the allegation against O.P. No. 2 by dealing a farsa blow on the head of the petitioner Dinesh Parwat was simple, only scalp deep and was neither grievous nor dangerous to life. There was no opinion either coming from the doctor that the injury could have endangered the life of petitioner. This observation was made by the learned sessions judge earlier also while hearing and disposing of anticipatory bail petition No. 281 of 2006 in which the C.J.M. was directed to consider the nature of the allegation in the light of the injury. Unfortunately the A.C.J.M. did not pay proper heed to the observations of the learned Sessions Judge and went on to reject the prayer. Considering the nature of the injury, I feel that it would not have been the case in which the magistrate should have rejected the prayer for bail.

20. As regards the submission that O.P. No. 2 had withdrawn the criminal miscellaneous petition bearing No. 36949 of 2006 from this Court which was dismissed on that account and, as such, divested the Courts of powers to pass an order in the matter. I have some reservations about the submission. It is true that a petition being dismissed as withdrawn is also a dismissal, but if no merit has been touched by the Court in passing such dismissal order on account of withdrawal of the petition then in that case it could never be creating a situation under which the lower Courts could be said to have acted against the rejection order passed by the superior Court so as to allowing or refusing it. Even if this is my most humble consideration the superior Courts touched upon the merits of the case while dismissing a petition under Section 438, Cr. P.C., it could not create a bar for any of the lower Courts to proceed to hear a petition for bail and direct the release of the accused from custody after consideration of all the facts and circumstances. The considerations for granting or refusing bail under Sections 437 and 438 could not be said always to be similar and the same. The specific and detailed provisions of Section 437 could itself be sufficient

to support my view as to what could be the considerations while dealing with the prayer for regular bail on surrender of the accused before the Court or the accused being in custody. In that view of the matter the learned Sessions Judges' hands were not fettered by the order passed on 19-9-2006 by this Court in the above noted criminal miscellaneous petition on account of the same being dismissed as withdrawn.

21. It was fairly conceded by the learned counsel appearing for the petitioner that the present petition had not been filed on any of the grounds which could be pressed into service for seeking cancellation of an order of bail. Those grounds have been enumerated by me in the earlier part of the present order and which were indicated firstly in Gurucharan Singh v. State (Delhi Administration) (supra) and thereafter in many other decisions including (2004) 2 SCC 362 : 2004 Cri LJ 1359). There is no allegation that after being released O.P. No. 2 had threatened the witness or subverted the investigation or any judicial proceeding in respect of the case or that he was reported to have committed graver offences or that he was a threat to the society. If these conditions are not available then the present petition could be said to be meritless as regards the prayer for cancellation of bail. Granting of bail is a rule as appears flowing from Section 437, Cr. P.C. The exceptional order of rejecting or cancelling the same could not be resorted to merely for the asking. Having said the above, I find that the present petition is meritless and the same is hereby dismissed as such. Petition dismissed.

Cross Citation :2004 CRI. L. J. 1506

KARNATAKA HIGH COURT

Coram : 1 Mrs. MANJULA CHELLUR, J. (Single Bench)

Criminal Petn. No. 2892 of 2003, D/- 7 -1 -2004.

Devindrappa and another, Petitioners v. State of Karnataka, Respondent.

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Criminal P.C. (2 of 1974), S.309(2), S.167(2) - REMAND - Powers of remand - Exercise of - Remand of accused to custody on filing of chargesheet - Can only be under S. 309(2) and that too after cognizance is taken - Time lag between date of filing of charge sheet and date of cognizance of custody for intervening period - Is unauthorised - Same entitles him to bail, as the custody was neither under section 167, Cr.P.C. nor under Sec. 309 Cr.P.C.

The power of Magistrate to remand the accused to custody could be exercised either under Section 167 or under Section 309, Cr.P.C. once charge sheet is filed, period of remand under Section 167, Cr.P.C. comes to an end. If further custody is necessary, it can be done only under

Section 309, Cr.P.C. To remand the accused to custody under Section 309, Cr.P.C. Magistrate has to apply his mind to the facts and material available in the final report i.e. charge sheet and decide whether cognizance of the offence could be taken or not. If he takes cognizance of the offence, then, he can exercise his power under Section 309(2), Cr.P.C. to remand the accused. Accused were arrested on 6-2-2003 and the 90 days period would come to an end, at any cost by 6-5-2003 or 7-5-2003. The period for investigation allowed under the Act would come to an end at any cost before 7-5-2003. After 7-5-2003, no application under S. 167, Cr.P.C. came to be filed though such right was available to the accused. The charge sheet was filed on 10-6-2003 the detention from 7-5-2003 till 10-6-2003, did not become unauthorised. But after filing of the charge sheet on 10-6-2003; he could not have been detained in custody under - Section 167, Cr.P.C. The Magistrate ought to have exercised his mind to the material available on record to take cognizance. Unfortunately, he took cognizance on 27-6-2003. Subsequent to taking cognizance, the custody is under Section 309(2), Cr.P.C. and the same would be authorised. Therefore, the detention in the between 10-6-2003 to 27-6-2003 becomes illegal and they are entitled to be released on bail under Section 439, Cr.P.C. as the custody was neither under Section 167, Cr.P.C. nor under Section 309, Cr.P.C.

(Paras 13, 14)

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Cases Referred : Chronological Paras

State of Maharashtra v. Mrs. Bharati Chandmal Verma , 2002 Cri LJ 575 : AIR 2003 SC 285 : 2001 AIR SCW 5003 (Disting.) 10.1

Uday Mohanlal Acharya v. State of Maharashtra, 2001 Cri LJ 1832 : AIR 2001 SC 1910 : 2001 AIR SCW 1500 (Disting.) 10.2

Dharmanand alias Mahato v. State , 1994 Cri LJ 730 : 1994 All LJ 238 10.3

Umashanker v. State of M.P., 1982 Cri LJ 1186 (Madh Pra) 10.4

Gyanu Madhu Jamkhandi v. State of Karnataka, 1977 Cri LJ 632 (Kant) 10.5

Ravi B. Naik, for Petitioners; P.M. Nawaz, Govt. Pleader, for Respondent.

Judgement

ORDER :- Heard the learned counsel for the petitioners and the learned Govt. Pleader for the respondent State and perused the records.

2. These two petitioners are accused before the trial Court for offences punishable under Sections 143, 147, 148, 324, 307, 302 r/w 149, IPC. The petitioners had filed bail application under Section 439, Cr.P.C. before the I Addl. Sessions Court, Bangalore which was rejected on 6-8-2003. Therefore, they have come up before this Court under Section 439, Cr.P.C. for grant of bail.

3. The petitioners are accused Nos. 1 and 5. They have sought for bail on two grounds, one on the question of law and the other on merits.

4. Sri Ravi B. Naik, learned Counsel for the petitioners contended that on 6-2-2003, the petitioners were arrested and produced before JMFC and since then they are in judicial custody. The charge sheet came to be filed on 10-6-2003 which was beyond the period of 90 days. The learned Magistrate took cognizance of the offence on the basis of the charge sheet only on 27-6-2003. In between 12-6-2003 and 26-6-2003 they were remanded to judicial custody. Therefore, their custody from 10-6-2003 till 27-6-2003 is illegal and hence, petitioners are entitled for bail.
5. So far as 2nd ground i.e. on parity is concerned, it is argued that the other accused are granted bail against whom it is alleged that they also assaulted the deceased on the head with a stick and axe. Therefore, on these two grounds the petitioners are entitled for bail.
6. Heard both sides.
7. It is contended by the petitioners that on the basis of the two grounds mentioned above, the petition deserves to be allowed.
8. As against this, learned Govt. Pleader Sri P.N. Nawaz, contended that if the petitioners/accused have not filed an application under Section 167, Cr.P.C. seeking for bail before filing of charge sheet on 10-6-2003, the petitioners are not entitled to be released on bail.
9. On perusal of the lower Court records, it is seen, these two petitioners were produced before the Court on 6-2-2003. The entire order sheet is perused in order to ascertain when the charge sheet is filed. However, the order sheet dated 27-6-2003 shows on 10-6-2003, the PSI, Shahabad Rural Police Station, has submitted charge sheet against six accused persons including these two petitioners. It is also noted on 27-6-2003 that accused Nos. 1 and 5, the petitioners herein were in judicial custody. Section 167, Cr.P.C. reads as under :
Section 167, Cr.P.C. Procedure when investigation cannot be completed in twenty four hours -
1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well founded, the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of sub-Inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same
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time forward the accused to such Magistrate.
2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.
Provides that -
(a) The Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding -
i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years ;
ii) sixty days, where the investigation relates to any other offence, and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on

bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.
b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;
c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.
Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the Officer in charge of the police station or the police officer making the investigation, as the case may be.
3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.
4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making, it, to the Chief Judicial Magistrate.
5) If in any case triable by the Magistrate as summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation into the offence satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.
6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.
10. Learned counsel for the petitioners relied on the following decisions :
1. AIR 2002 SC 285 : (2002 Cri LJ 575) (State of Maharashtra v. Mrs. Bharati Chandmal Varma alias Ayesha Khan) :
This was a case where offences under Maharashtra Control of Organised Crime Act, 1999, was discovered apart from IPC offence. Originally, they were arrested for offences under the penal Code and they were in custody from 2-4-2001. During investigation of IPC offences, police discovered that crime under M.C.O.C. Act was also committed by the accused. Therefore, they commenced investigation under the Special Act from 21-4-2001 after obtaining sanction from the concerned authority under the said Act. The question which came up before their Lordships was whether 2-4-2001 should be the date for consideration of 90 days under Section 167, Cr.P.C. or 21-4-2001, the date on which permission was obtained for investigation under the Special enactment. In this regard, their Lordships held that though
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investigation under the Special Enactment commenced on 21-4-2001, to apply Section 167(2) proviso of the Code, there was no necessity to consider when actually the investigation had commenced. It was further held that said proviso was intended only for the purpose of keeping the arrested person under detention during investigation where a maximum period of such detention is envisaged. It was held that on expiry of period provided under Section 167, Cr.P.C. further custody becomes unauthorised and the person in custody shall be released on bail if he is prepared to and furnish bail. It was also held in this case that if accused is found to have committed more than one offence, distinct from each other, the period of custody or detention in one crime cannot be related to the distinct crime. But however, it was held if initially the detention in one crime is for an

offence and during investigation, some other crime is also revealed pertaining to the same cause of action, the period envisaged in the proviso to Section 167(2) does not get extended. It was held the respondent/accused would get a right to be released on bail on account of default, of investigating agency to complete the investigation without the period envisaged from the date of first remand of the accused.

2. AIR 2001 SC 1910 : (2001 Cri LJ 1832), (Uday Mohanlal Acharya v. State of Maharashtra):

Where after expiry of period of 60 days for filing challan the accused filed an application for being released on bail and was prepared to offer and furnish bail, however, the Magistrate rejects application on erroneous interpretation about non application of S. 167(2) to case pertaining to MPID Act of 1999 and accused approaches higher forum and in meanwhile, charge sheet is filed, the indefeasible right of accused of being released on bail does not get extinguished by subsequent filing of charge sheet. The accused can be said to have availed of his right to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge sheet being filed in accordance with S. 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail.

An accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of S. 167 of the Code of if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail, that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused . Such an interpretation would subserve the purpose and the object for which the provision in question was brought on to Statute Book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the Court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting formal order of being released on bail in enforcement of his indefeasible right then filing of challan at the stage will not take away right of the accused. This is the only way how a balance can be struck between the so called indefeasible right of the accused on failure on the part of the prosecution to file challan within the specified period and the interest of the society, at large in lawfully preventing an accused for being released on bail on account of inaction on the part of the prosecuting agency. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can be only in accordance with law and in conformity with the provisions, thereof, as stipulated under Art. 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of S. 167, any further detention beyond the period without filing of challan by the Investigating Agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Cr. P. C. and as such could be violative of Art. 21 of the Constitution.

3. 1994 Cri LJ 730 (All) (Dharmanand alias Mahato v. State).

The right of the accused to be released on bail if the charge-sheet is not filed within the period of 90/60 days, as the case may be, is absolute and cannot be defeated or taken away on subsequent filing of charge-sheet or by remand under S. 309(2) of the Code of Criminal Procedure. The right of bail

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in such a case continues till the accused is released on his furnishing bail bonds etc. In default of non-filing of charge-sheet by prosecution within the prescribed period the

Magistrate should pass an order enlarging the accused on bail, irrespective of the fact whether an application for bail is or is not moved by the accused and should call upon the accused to furnish bail bonds. If the accused is prepared and does furnish bail bonds, then he has to be released on bail. If the accused fails to furnish bail bonds, then only he should be remanded under the provisions of S. 309(2), Cr. P. C. But if after remand the accused furnishes bail bonds, even after receipt of charge-sheet, then he has to be released from the custody because the order of bail survives even after filing of charge-sheet. The Magistrate cannot detain an accused in custody on furnishing bail bonds. The Magistrate has to follow the provisions strictly if the accused furnishes bail bonds.

4. 1982 Cri LJ 1186 (MP) (Umashanker v. State of Madhya Pradesh).

A person accused under Sections 302, 364 and 365 of the Penal Code, after being under continuous detention for more than 90 days filed an application for release on bail under Sec. 167(2), Proviso (a). The challan was filed pending the application. On filing of the challan the Magistrate took cognizance of the offence and remanded the accused to custody under Sec. 309. Thereafter he disposed of the application, dismissing it on the ground that as the remand under Sec. 167(2) stood altered to one under Sec. 309 the Proviso to Section 167(2) was no more applicable and hence the applicant could not be released on bail.

Held: alteration of the remand u/S. 167(2) to one under Sec. 309 pending the application u/S. 167(2), Proviso (a) was illegal. Rejection of bail was also illegal.

If a challan is filed before the expiry of the maximum period for which an accused can be detained in custody u/S. 167, further remand to custody can be ordered u/S. 309. No maximum period of remand is provided for under S. 309. The Magistrate however cannot postpone the release of an accused on bail under Proviso (a) to S. 167(2) after the expiry of 90 days or 60 days as the case may be, just to enable the police to file the challan and to alter the detention u/S. 167 to one u/S. 309. It is the duty of the Magistrate soon after the expiry of the maximum period, to inform the accused of his right to be released on bail u/S. 167(2), Proviso (a). Once the accused of his own or on being told of his right by the Magistrate, is prepared to furnish bail the Magistrate must order the accused to be released on bail without waiting for the challan and must release him when bail is furnished.

5. 1977 Cri LJ 632 (Kant) (Gyanu Madhu Jamkhandi v. State of Karnataka).

If on he filing of the charge-sheet, a Magistrate does not, for a number of days proceed to apply his mind and take cognizance of the offence made out, he cannot for those number of days, exercise powers of remand to judicial custody either under S. 167 or under S. 309(2). The situation can be solved by a Magistrate applying his mind to the facts and material available in the final report and the documents produced along with it in no time after the filing of the final report and deciding whether cognizance of the offence made out should be taken or not; if he decides to take cognizance of the offence, then, he can under S. 309(2), proceed to exercise his power of remand.

11. From the reading of the above decisions, it is very clear that on the expiry of the period envisaged from the date of arrest, the accused gets a right to claim that he should be enlarged on bail provided he furnishes bail as ordered by the concerned Court but this does not mean the accused can just walk out of the custody on the expiry of such period. He must file an application expressing the willingness to exercise that right and also expressing his willingness to furnish bail. Such right would be available till filing of the charge-sheet. In other words, prompt action is required on the part of the learned Magistrate to dispose of the application filed by the accused for bail for enforcement of his indefeasible right alleged to have accrued in his favour on account of default on the part of the Investigating Agency to complete investigation within specified period. If no charge-

sheet has been filed by the Investigating Agency, if the accused is unable to furnish the bail, the further custody of the accused even beyond specified period in the said section, will not be unauthorised. If investigation is completed and charge-sheet is filed during that
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period, then, the so-called indefeasible right of the accused would stand extinguished.

12. As could be ascertained from the order sheet of the trial Court, the petitioners herein have not filed an application either u/S. 167(2), Cr. P. C. for bail or u/S. 439, Cr. P. C. after the expiry of 90 days and before the cognizance was taken on 27-6-03. Here, we have to see, before cognizance is taken for the offence, whether the order of custody by the learned Magistrate is in order or not. Sec. 309, Cr. P. C. has to be read here, which reads as under:

"Sec. 309, Cr. P. C.: Power to postpone or adjourn proceedings: (1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this Section for a term exceeding fifteen days at time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

13. The power of Magistrate to remand the accused to custody could be exercised either under Sec. 167 or u/S. 309, Cr. P. C. Once charge-sheet is filed, period of remand u/S. 167, Cr. P. C. comes to an end. If further custody is necessary, it can be done only u/S. 309, Cr. P. C. To remand the accused to custody u/S. 309, Cr. P. C., the learned Magistrate has to apply his mind to the facts and material available in the final report i.e. charge-sheet and decide whether cognizance of the offence could be taken or not. If he takes cognizance of the offence, then, he can exercise his power u/S. 309(2), Cr. P. C. to remand the accused.

14. In the present case, the two citations of the Apex Court are not applicable to the facts of the present case because it is not a case where an application u/S. 167(2), Cr. P. C. came to be filed by the accused after the expiry of the period envisaged therein and the same was kept pending for a long time beyond filing of charge-sheet. On the other hand, the charge-sheet came to be filed on 10-6-03 but till 27-6-03, no cognizance was taken. When once charge-sheet is filed on 10-6-03, the custody cannot be u/S. 167(2), Cr. P. C. In this case, they were arrested on 6-2-03 and the 90 days period would come to an end, at any cost by 6-5-03 or 7-5-03. The period for investigation allowed under the Act would come to an end at any cost before 7-5-03. After 7-5-03, no application u/S. 167, Cr. P. C. came to be filed though such right was available to the accused. In view of the Supreme Court decision in 2001, the detention from 7-5-03 till 10-6-03, did not become unauthorised. But however, after filing of the charge-sheet on 10-6-03, he could not have been detained in custody u/S. 167, Cr. P. C. The learned Magistrate ought to have

exercised his mind to the material available on record to take cognizance. But unfortunately, he took cognizance on 27-6-03. Subsequent to taking cognizance, the custody is u/S. 309(2), Cr. P. C. and the same would be authorised. Therefore, the detention in the present case between 10-6-03 to 27-6-03 becomes illegal and they are entitled to be released on bail u/S. 439, Cr. P. C. as the custody was neither u/S. 167, Cr. P. C. nor u/S. 309, Cr. P. C.

15. Having regard to above discussion, petition deserves to be allowed and it is accordingly allowed, subject to the following conditions:

(a) The petitioner shall be released on bail on their executing a bond for Rs. 25,000/- each along with two solvent sureties for the like sum to the satisfaction of the lower Court;

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(b) They shall not tamper the prosecution witnesses.

Petition allowed.

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Cross Citation :2005 ALL MR (Cri) 1020

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

(AURANGBAD BENCH)

NARESH H. PATIL, J.

Punjaram s/o Ashroba @ Asroba Kangne & Ors.

Vs.

State of Maharashtra

Shri. R. N. DHORDE, Advocate, instructed by Shri. R. L. KUTE, Advocate, for the Applicants.

Shri. R. P. PHATAKE, Additional Public Prosecutor, for Respondent.

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Criminal P.C. (1973), Ss.173(2), (5), 167(2) - Filing of incomplete charge-sheet - Such filing of a police report could not be termed as provisional charge-sheet - Such failure would entitle accused to claim his indefeasible right conferred under S.167(2). Bail granted - Submission of a proforma as envisaged in section 173(2) by the police without any accompaniments as envisaged in section 173(5) does not indicate completion of investigation in a criminal case. That would entitle an accused to claim his indefeasible right conferred under section 167(2). What is contemplated in section 173(8) is further investigation. (Para [16])

The police report submitted under section 173(2) of the Code in the present case, therefore, would amount to an incomplete report or charge-sheet for the purposes of consideration of the application of the provisions of Section 167(2) of the Code. Such a police report could not be termed as provisional charge-sheet and the accused be denied their indefeasible right conferred by the statutory provisions. The benefit accrued to an accused under the provisions of section 167 of the Code further relates to his personal liberty guaranteed under Article 21 of the Constitution of India. Therefore, the said right accrued to an accused is indefeasible one and the provisions of section 167(2) will have to be viewed from this angle too. (Para [17])

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CASES CITED :

Velinedipurnam Vs. State, 1994 Cri.L.J. 2579 [5 , 10]

Satya Narain Musadi Vs. State of Bihar , AIR 1980 SC 506 [7 , 15 , 19]

Sharadchandra Vinayak Dongre Vs. State of Maharashtra , 1991 Cri.L.J. 3329 [7 , 16 , 22]

Sunil Vasantrao Phulbande Vs. State of Maharashtra , 2002(3) Mh.L.J. 689 [7]

Balu Rakhmaji Khamkar Vs. State of Maharashtra , 1995(4) Bom.C.R. 335 [8 , 16]

Central Bureau of Investigation Vs. R. S. Pai, 2002 ALL MR (Cri) 1396 (S.C.) : 2002 Cri.L.J. 2029 [9 , 16]

M. C. Venkatareddy Vs. State of A. P. , 1994 Cri.L.J. 257 [20]

Uday Mohanlal Acharya Vs. State of Maharashtra , 2001 ALL MR (Cri) 713 (S.C.) : AIR 2001 SC 1910 [21]

JUDGMENT :- Heard learned counsel for the parties.

2. A question raised before this Court is as to whether a report filed under section 173(2) Code of Criminal Procedure, 1973 (hereinafter, referred to as "the Code" for the sake of brevity), without filing the investigation papers, as envisaged under section 173(5) of the Code, which is referred to as "charge sheet", defeats the indefeasible right of the accused conferred by the provisions of Section 167(2) of the Code.

3. On a complaint filed on 27-7-2004 by one-Radhabai Chate widow of the deceased, a Crime at No.116/2004 came to be registered with the Mantha Police Station, District Jalna, for an offence punishable under sections 302, 201 read with section 34 of the Indian Penal Code. In connection with the said offence the applicants along with three other accused persons were arrested by the police on different dates and after they were remanded for few days in the police custody, were remanded to Magisterial custody.

4. These applicants filed an application on 29-10-2004 in the Court of the Judicial Magistrate, First Class, Partur, District Jalna. According to the record and proceedings, which is placed before me, the endorsement of the Magistrate's Court shows that the said application was filed in R.C.C. No.312/2004 at 4.30 p.m. On29-10-2004 the further endorsement made by the learned Magistrate is to the effect that the said application was placed before the Court at 4.45 p.m. and the Assistant Superintendent of the Court was directed to submit a report as to whether a charge-sheet was filed in the said case. The Assistant Superintendent (Judicial) submitted a Say on 29-10-2004 itself that final charge-sheet is not submitted along with police papers on the said day but a provisional charge-sheet at 2.00 p.m. was filed. The matter was thereafter directed to be put up by the Court on the next day i.e. 30-10-2004. On the said date by an order the Judicial Magistrate dismissed the application as the period of 90 days was already completed and a report was filed in the prescribed proforma as mentioned under section 173 of the Code on 29-10-2004 at 2.00 p.m. which was placed before the Court at 2.45 p.m. and the application for claiming relief under section 167(2) was filed at 4.30 p.m. in the office of the Court and was placed before the Court at 4.45 p.m.

5. The applicants thereafter filed an application before the Sessions Court claiming benefit under section 167(2) of the Code as no charge-sheet was filed within the period prescribed by Section 167(2)(a)(i) of the Code. The said application was filed by the present applicants on 2-11-2004. By an order dated 6-11-2004 the learned 1st Ad-hoc Additional Sessions Judge rejected the said application. While rejecting the application reliance was placed on a judgment in the case of Velinedipurnam Vs. State reported in 1994 Cri.L.J. 2579 delivered by the Andhra Pradesh High Court.

6. The learned counsel appearing for the applicants contends that the report submitted in the proforma as provided under section 173(2) of the Code does not amount to filing of a charge-sheet indicating completion of investigation in a criminal case. Complete report as envisaged in Section 173(3) could be one which complies with the requirement under the provisions of section 173(2) and (5) of the Code. For the purposes of claiming benefit of indefeasible right of an accused conferred by the provisions of Section 167(2) the prosecution, according to the learned counsel, must indicate that the investigation in the case has been completed. In the present case the police filed a proforma as prescribed under section 173(2) of the Code and there was not a single piece of paper indicating the stage of investigation process undertaken by the police machinery. Therefore, filing of such a proforma shall not defeat the indefeasible right accrued to an accused disentitling him to claim the relief conferred by law.

7. The learned A.P.P. was of the opinion that keeping in view the judgment of Satya Narain Musadi Vs. State of Bihar reported in AIR 1980 SC 506 and the view adopted by our High Court in Sharadchandra Vinayak Dongre Vs. State of Maharashtra reported in 1991 Cri.L.J. 3329 the report to be filed under section 173(2) by the prosecution shall include the necessary investigation papers amounting it to be a charge-sheet indicating completion of investigation for the purposes of consideration of the issue as to whether benefit is to be granted to an accused under section 167(2). He places reliance in the case of Sunil Vasantrao Phulbande Vs. State of Maharashtra reported in

2002(3) Mh.L.J. 689 wherein identical question was considered by this Court by placing reliance on the judgment in Sharadchandra Vinayak Dongre (cited supra).

8. The learned A.P.P. in fairness submitted that some High Courts have taken a contrary view and have held that filing of report under section 173(2) without complying with the provisions of section 173(5) amounts to filing of report under section 173(2) disentitling the accused to claim relief under section 167(2). The learned A.P.P. even relied upon a case of Balu Rakhmaji Khamkar Vs. State of Maharashtra reported in 1995(4) Bom.C.R. 335.

9. In the case of Central Bureau of Investigation Vs. R. S. Pai reported in 2002 Cri.L.J. 2029 : [2002 ALL MR (Cri) 1396 (S.C.)] the Apex Court observed that, as there is no specific prohibition, it cannot be held that additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or charge-sheet, it is always open to the investigating officer to produce the same with the permission of the Court.

10. In the case of 1994 Cri.L.J. 2579 (cited supra) a Division Bench of the Andhra Pradesh High Court was of the view that if all the necessary details as contemplated under S.173(2), Cr.P.C. are not disclosed in the police report in the first instance, but they are furnished at a later date, perhaps it is for the Court to consider the probative value of those details furnished later during the trial of the case, but to say that the police report filed with certain omissions or gaps is not a valid report contemplated under S.173(2) is reading something more in the statute. It is further observed that non filing of all the enclosures under S.173(5) along with the report filed under S.173(2) is not a ground to release the accused on the premise that full charge-sheet is not filed within the stipulated time.

11. I have considered the rival submissions of the parties and perused the record of the trial Court.

"Investigation" is defined in clause (h) of Section 2 of the Code which reads :

"(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf."

"Police report" is defined in clause (r) of Section 2 which reads :

"(r) "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173."

12. The provisions of Section 167(2) of the Code indicate that whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, the officer in charge of the police station shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary and the Magistrate to whom an accused person is forwarded can authorise the detention of the accused in such custody for a term not exceeding fifteen days in the whole and he may further order detention for a period of ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years.

13. The provision of Section 57 of the Code reads :-

"57. Person arrested not to be detained more than twenty-four hours. - No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."

14. The plain reading of the provisions of section 167 would show that, it refers to making of investigation by police and in case the investigation is not completed within 24 hours the accused in certain circumstances gets a right to claim relief under different provisions of section 167 of the Code.

15. In the case of Satya Narain (cited supra) the Apex Court was considering the case of taking cognizance by the Magistrate and while considering the issue it was observed that even if a narrow construction is adopted that the police report can only be what is prescribed in S.173(2) there would be sufficient compliance if what is required to be mentioned by the statute has been set down in the report. The Apex Court in clear terms states that one cannot divorce the details which the report must contain as required by sub-section (2) from its accompaniments which are required to be submitted under sub-section (5) and a whole of it is submitted as report to the Court.

16. An accused can claim indefeasible right under section 167(2) in case the police fails to file a police report or charge-sheet within 90 days. Submission of a proforma as envisaged in section 173(2) by the police without any accompaniments as envisaged in section 173(5) does not indicate completion of investigation in a criminal case. Therefore, in my considered view filing of report under section 173(2) in the proforma as prescribed by the statute without there being any accompaniments or the investigation papers indicating completion of investigation would entitle an accused to claim his indefeasible right conferred under section 167(2). What is contemplated in section 173(8) is further investigation. I am supported in my view by the judgments reported in 1991 Cri.L.J. 3329 and 2002 Cri.L.J. 2029 (cited supra) and I hold that I am not convinced to take a different view. In the case of Balu Rakmaji Vs. State of Maharashtra reported in 1995(4) Bom.C.R. 335 (cited supra) the facts of the said case were that a charge-sheet was filed in the Court of the Special Judge but the same was not accepted by the concerned Clerk and Nazir on

the ground that, photographs of seized articles have not been supplied and unless those photographs were given, the charge-sheet could not be accepted. On the facts the judgment does not apply to the present set of facts and the issues raised before me. In the case of 2002 Cri.L.J. 2029 : [2002 ALL MR (Cri) 1396 (S.C.)] (cited supra) it was a case where the investigating machinery sought to produce additional documents which were gathered during investigation but were not produced before the Court. Such is not a situation here.

17. There is one distinguishing feature while considering the issue of grant of benefit of the provisions of Section 167 of the Code to an accused. The provisions of Section 167 refer to completion of investigation as contemplated under section 57 of the Code and not to taking cognizance of an offence. Therefore there shall be sufficient material placed before the Court in the shape of a report showing completion of the investigation of the offence. The police report submitted under section 173(2) of the Code in the present case, therefore, would amount to an incomplete report or charge-sheet for the purposes of consideration of the application of the provisions of Section 167(2) of the Code. Such a police report could not be termed as provisional charge-sheet and the accused be denied their indefeasible right conferred by the statutory provisions. The benefit accrued to an accused under the provisions of section 167 of the Code further relates to his personal liberty guaranteed under Article 21 of the Constitution of India. Therefore, the said right accrued to an accused is indefeasible one and the provisions of section 167(2) will have to be viewed from this angle too.

18. Learned counsel for the applicants places reliance on the following judgment.

19. In the case of Satya Narain Vs. State of Bihar reported in AIR 1980 SC 506 while dealing with the issue concerning cognizance of case to be taken by Magistrate and filing of the report under section 173(2), the Apex Court observed in para 10:-

"10. ..... The report as envisaged by S.173(2) has to be accompanied as required by sub-sec. (5) by all the documents and statements of the witnesses therein mentioned. One cannot divorce the details which the report must contain as required by sub sec.(2) from its accompaniments which are required to be submitted under sub-sec. (5). The whole of it is submitted as a report to the Court."

20. In the case of M. C. Venkatareddy Vs. State of A. P. reported in 1994 Cri.L.J. 257 (Andhra Pradesh High Court) while dealing with the identical issue, as is raised in the present case, it was observed :

"9. ..... If the police report is forwarded to the Magistrate for taking it on file, but if the Magistrate finds that the said report is not in consonance with S.173(2) read with S.173(5) Cr.P.C. he declines to take it on record and that act is only administrative and not judicial. The judicial act commences only when the charge-sheet is in order and the Magistrate proceeded further under Chapter XVI. Unless the charge-sheet is in the official custody of the court together with its accompaniments to be furnished to the accused, it cannot be construed that there is a filing of charge-sheet,"

21. In the case of Uday Mohanlal Acharya Vs. State of Maharashtra reported in AIR 2001 SC 1910 : [2001 ALL MR (Cri) 713 (S.C.)] it was observed by the Apex Court:

"An accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of S.167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail, that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. Such an interpretation would subserve the purpose and the object for which the proviso in question was brought on to Statute Book.'

22. In the case Sharadchandra Vinayak Dongre Vs. State of Maharashtra reported in 1991 Cri.L.J. 3329 this Court observed :

"25. The question thus emerges naturally is, whether the Magistrate can take cognizance on the admittedly "incomplete charge-sheet" forwarded by the police. The answer stubbornly and admittedly must be in the negative, because the investigation is yet incomplete and the "police report" yet remains to be filed. Thus, the filing of the incomplete charge-sheet cannot circumvent the provisions of sub-sec. (2) of S.173 of the Code and incomplete report or an incomplete charge-sheet with whatsoever expression it may be called does not meet the obligatory requirements of law. If the view as contended by the State is accepted, the provisions of S.167(2) or to say S.468 of the Criminal Procedure Code can always be circumvented by the prosecution and the apparent legislative intents under those provisions would not only be not effectuated but undoubtedly stultified."

23. For the reasons stated above I am not inclined to follow the contrary view adopted by the Division Bench of the Andhra Pradesh High Court.

24. Apart from the legal issues raised in this application, after perusal of the record and proceedings of the trial Court and after hearing the submissions of the learned A.P.P. I have found that the record relating to acceptance of the police report submitted under section 173(2) is not properly maintained. The initial endorsement on the police report made by the Assistant Superintendent (Judicial) of the court indicates that it was filed on 27-10-2004 at 2.00 p.m. but on 30-10-2004 the Assistant Superintendent submitted a report to the Court that inadvertently in stead of 29-10-2004 he had made endorsement on the report showing receipt of the same on 27-10-2004. He prayed for excusing him for this mistake. The learned Magistrate by his order made on 30-10-2004 warned the Assistant Superintendent that he should be careful in future and to avoid such mistakes. By a further application made to the Court on 1-11-2004 the Assistant Superintendent sought permission from the Court to correct the endorsement made on the charge-sheet and by an order dated 1-11-2004 the learned Magistrate permitted him to carry out the corrections. The learned counsel for the applicants submitted that these endorsements made by the Court officer are suspicious and such confusion ought to have been avoided.

25. An affidavit-in-reply was filed in this Court by Mr. Baburao Rathod, presently working as Police Sub-Inspector, Police Station, Mantha, District Jalna, who stated in para 2 of the reply that investigation was completed and charge-sheet was filed by the Police Inspector, Shri. S. S. Kamble on 29-10-2004. In spite of such an averment, the police preferred to file only the report in the shape of a proforma as envisaged under section 173(2) of the Code.

26. The Police Sub-Inspector filed an application on 29-10-2004 to the Court stating that 90 days' period is over and much of the investigation remains to be completed and therefore provisional charge-sheet is being filed. He prayed that provisional charge-sheet be accepted and 15 days time be granted for submitting the original charge-sheet. The learned Magistrate endorsed on the said application on 29-10-2004 to the effect that said report was placed before him at 2.45 p.m. and till that time no challan under section 167 Cr.P.C. was placed before the Court and the investigating officer shall show under which provision such report/request was made. Considering the record of the case and the submissions advanced by the learned counsel for the applicants, I am of the view that the trial Courts must be vigilant to avoid such situation which would create undesirable controversies concerning the record of the Court. Even this Court in the case reported in 1995(4) Bom.C.R. 335 had an occasion to observe :

"10. There are growing instances wherein the charge-sheet submitted is either refused or is not accepted and contentions are raised before the courts that the charge-sheet was submitted within time but it was not accepted. It is the duty of every Court before whom the charge-sheet is filed to examine it on the very day when it is submitted and make an endorsement by Presiding Officer himself about its acceptance. If the charge-sheet is incomplete in respect of any of the necessary contents as defined in section 173 (2), this can specifically be pointed out in the order passed by learned Magistrate or the Judge as the case may be. This would protect investigating agency as well as registry of Court against unsustainable allegations."

27. The learned counsel for the applicants had even argued the application for bail on merits. As the applicants deserve to be released on bail by granting benefit under section 167(2), I have not considered the bail application on factual merits of the case. The application, therefore, has to be allowed. The learned APP at this stage says that in view of the peculiar facts of the case, the applicants shall be ordered to stay away from the village till conclusion of the trial. The learned counsel for the applicants submits that, they are willing to abide by such a condition.

28. The applicants (1) Punjaram s/o Ashorba @ Asroba Kangne, (2) Vishnu s/o Ashorba Chate and (3) Pralhad s/o Haribhau Chate shall be released in the sum of Rs.20,000/- each with one surety in the like amount each and on conditions that, (1) they shall not enter village Takalkhopa, Taluka Mantha, till conclusion of the trial, (2) they shall report Mantha Police Station once in a month and shall not tamper with the prosecution evidence in any manner and (3) they shall not contact the prosecution witnesses directly or indirectly.

29. The Criminal Application stands disposed of.

Order accordingly.

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Cross Citation :2003 ALL MR (Cri) 1107

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

(NAGPUR BENCH)
D. D. SINHA & S. T. KHARCHE, JJ.

Mohammad Gausuddin s/o. Wali Mohammad Vs. State of Maharashtra
Criminal Appeal No.3 of 2003
Mr. S. V. MANOHAR, Advocate for Appellant.
Mrs. BHARTI DANGRE, Additional Public Prosecutor for Respondent.

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(A) Bail - Prevention of Terrorists Act (2002), S.50 - Sanction to take cognizance of offences - Failure to obtain sanction by prosecuting agency - Accused entitled to bail - Similarly, we cannot ignore the fact that Section 50 opens with the non-obstante clause and prohibits the Special Court from taking cognizance without valid sanction from the appropriate Govt. Prima facie taking into consideration the above referred factors, the appellant has made out a case for grant of bail. AIR 1996 SC 204 and AIR 1963 SC 765 - Followed. (Paras [91 , 92 and 93])

(B) Prevention of Terrorists Act (2002), Ss.30(1), 32(1) – Confession before specific Police Officer - Admissibility of in evidence - Confession shall be admissible in trial of such person only for an offence under this Act and Rules made thereunder - Confession made by accused, cannot be a substantive piece of evidence against co-accused, abettor or conspirator who is being tried jointly for the same offences - Such a confessional statement not a ground to refuse bail to accused.

(C) Prevention of Terrorists Act (2002), S.50 - Sanction to take cognizance of offences - Sanction by competent authority is condition precedent for taking cognizance of the offence - Court is forbidden from taking cognizance of the offence without such sanction - If Special Court takes cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will be without jurisdiction. (Paras 54 & 55)

As far as provisions of Sections 21(2) and 22(3) are concerned, the word 'knowledge' used in these provisions needs to be construed on the backdrop of the concept of mens rea. In case of other criminal offences, mens rea and intention are required. So far as the offences contemplated under sub-section (2) of Section 21 and sub-section (3) of Section 22 of POTA are concerned, the offender needs to have knowledge without which it will be difficult to fasten criminal liability on a person under these provisions of POTA. Absolute liability is not to be lightly presumed but has to be clearly established.

(D) Evidence Act (1872), S.34 - Prevention of Terrorists Act (2002), S.21(3) - Entry made in loose chit - Admissibility of, in evidence - Amount of Rs.36,60,000/- allegedly paid by accused to Naxalite group - Mere loose paper/chit and entries made thereunder – is not sufficient to connect accused with the crime in question.

(E) Prevention of Terrorists Act (2002), Ss.49(7), 50, 32(1) - Grant of bail – If any evidence is inadmissible then it is a ground to be considered while deciding the bail application - Charge under POTA - At the stage of grant or refusal of bail, evidence cannot be appreciated - However admissibility/inadmissibility of evidence will have a positive bearing in considering the aspect of grant or refusal of bail and therefore, this aspect cannot be ignored by the court - However, it cannot be ignored that what is inadmissible in law at this stage cannot become admissible at the later point of time unless it depends upon further evidence to be adduced by prosecution and, therefore, such issues and such legal aspects are prima facie required to be considered by the Judge of the Special Court, particularly keeping in view the mandate of Section 49(7) of the POTA. However, admissibility/inadmissibility of evidence will have a positive bearing in considering the aspect of grant or refusal of bail and, therefore, this aspect cannot be ignored by the court. While passing the impugned order, dated 16-11-2002, the Judge of the Special Court has not considered all these issues in the light of the law laid down by the Apex Court in this regard and, therefore, the order is unsustainable in law. (Para [93])

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(Paras [98 and 99])

CASES CITED :

Central Bureau of Investigation Vs. V.C. Shukla, AIR 1998 SC 1406 [9 , 59]

Kalpnath Rai Vs. State (through CBI), AIR 1998 SC 201 [10]

Param Hans Yadav and Sadanand Tripathi Vs. State of Bihar , AIR 1987 SC 955 [10]

Nathu Vs. State of Uttar Pradesh , AIR 1956 SC 56 [10]

Director of Enforcement Vs. M/s. MCTM Corporation Pvt. Ltd., AIR 1996 SC 1100 [11 , 62]

The State Vs. Laldas, AIR 1953 Bombay 177 [13]
Abdul Wahab Ansari Vs. State of Bihar , (2000)8 SCC 500 [13]
Ajit Kumar Palit Vs. State of West Bengal , AIR 1963 SC 765 [13 , 57]
Dr. Anand R. Nerkar Vs. Smt. Rahimbi Shaikh Madar, 1991 Cri.L.J. 557 [13]
Jamuna Singh Vs. Bhadai Shah, AIR 1964 SC 1541 [26]
Narsingh Das Tapadia Vs. Goverdhan Das Partani, (2000)7 SCC 183 [27]
Kishore Kumar Gyanchandani Vs. G.D. Mehrotra, AIR 2002 SC 483 [27]
Kartarsingh Vs. State of Punjab , 1994 SCC 569 [28]
State of Tamilnadu Vs. Nalini, 1999 ALL MR (Cri) 1273 (S.C.) : 1999 Cri.L.J. 3324 [47]
Anil Saran Vs. State of Bihar , AIR 1996 SC 204 [57]
State of West Bengal Vs. Mohammed Khalid, AIR 1995 SC 785 [58]
Nathulal Vs. State of Madhya Pradesh , AIR 1966 SC 43 [66]

D. D. SINHA, J.:- Heard Mr. Manohar, learned counsel for the appellant and Mrs. Dangre, learned Additional Public Prosecutor for the respondent.

2. The appellant has preferred Criminal Appeal No.679 of 2002 against the order, dated 16-11-2002, passed by Additional Sessions Judge, Gadchiroli, whereby the application moved by the petitioner for grant of bail in view of Section 167(2) of the Criminal Procedure Code/Section 439 of the Criminal Procedure Code came to be dismissed. The appellant filed another Criminal Appeal No.3 of 2003 against the order, dated 17-12-2002, whereby the applications made by the appellant below Exhs.11, 12 and 5 came to be dismissed. Since both these orders deal with rejection of the bail application of the appellant, both these appeals were heard together and disposed of by the common order.

3. Mr. Manohar, learned counsel for the petitioner, contended that the appellant is a reputed businessman and also a trustee of a Medical Trust and was also given an award by the Income Tax Department for being the highest tax payer of the circle and as such he is a respectable citizen. The appellant is a victim at the hands of the investigating agency apart from the fact that there is no evidence, whatsoever, to connect the appellant with the crime.

4. Mr. Manohar, learned counsel for the appellant, contended that a report was lodged by one Bapu Reddy on 21-6-2002 with the Police Authorities alleging that he along with one Narendra Reddy was abducted by the members of Bakanna group on the gun point from Kaleshwar Unit in the forest of Navegaon . Bapu Reddy, who was threatened by Bakanna, to collect an amount of Rs.9,84,000=00 from the Tendu Unit Contractors, was also compelled to write a chit/note. Narendra Reddy was sent with the said chit to the other Tendu Leaves Contractors. Bapu Reddy, however, in the meanwhile, managed to flee from the clutches of the Bakanna gang. In the said report, dated 2-6-2002, it was stated by Bapu Reddy that a truck of Tendu leaves was also burnt by a gang of Bakanna (Naxalite). On the basis of the said report, Police Station Officer, Sironcha, registered offences under Sections 363, 368 read with Sections 143, 147, 148, 149 and 325 of the Indian Penal Code, as well as Sections 3, 25 of the Arms Act vide Crime No.27/2002. Mr. Manohar, learned counsel, contended that at a later point of time, the Police Authorities applied provisions of Sections 3(3), (5), 21(2) and 22(3) of the Prevention of Terrorists Act, 2002 (hereinafter referred to as "The POTA" for brevity).

5. Mr. Manohar, learned counsel, contended that the appellant Gausuddin surrendered before the court on 6-11-2002. A charge-sheet in the case is filed on 2-12-2002.

6. Mr. Manohar, learned counsel for the appellant, contended that allegations against the appellant are that on 2-5-2002, the appellant attended a meeting with Bakanna (Naxalite) and as such he is guilty under Section 21(2) of the POTA. It is contended that Section 21(2) lays down that a person commits an offence if he arranges, manages, or assists in arranging or managing a meeting which he knows is to support terrorists organization, to further the activities of the terrorists organization, or to be addressed by a person who belongs or profess to belong to a terrorists organization. It is contended that in order to substantiate these allegations, the witnesses relied on by the prosecution are Tulsigiri and Pocham. It is contended that Tulsigiri's statement is recorded on 9-6-2002. Tulsigiri, at the relevant time, was working as a Police Patil of Chittoor and in his statement he has stated that on 2-5-2002, the appellant along with other contractors came to the village and went to the house of this witness Tulsigiri and the witness was informed that the appellant and other Tendu Patta contractors wanted to discuss about the rate of plucking of Tendu leaves with the villagers and, therefore, this witness - Police Patil convened a meeting of villagers wherein 32 to 35 villagers were present. Mr. Manohar, learned counsel, contended that the statement of Tulsigiri further reveals that when Tendu leaves contractors, including the appellant, were discussing with the villagers regarding rate for plucking of Tendu leaves, 20 to 25 Naxalites, armed with guns, arrived on the spot and Bakanna (Naxalite) thereafter discussed with the contractors and declared that the rate of Rs.147/- shall be paid to the villagers for plucking the Tendu leaves.

7. Mr. Manohar, learned counsel, contended that another witness Pocham also disclosed the similar story in his statement and from the statements of these two witnesses, it is clear that the appellant along with other Tendu leaves contractors had neither arranged, nor had managed or assisted in arranging or managing a meeting, but the Naxalites intruded in the meeting held by the appellant and other Tendu leaves contractors with the villagers and as such it cannot, by any stretch of imagination, be said that the appellant-accused is prima facie guilty for the offence punishable under Sub-section (2) of Section 21 of the POTA.

8. Mr. Manohar, learned counsel further contended that it is alleged by the prosecution that the appellant is responsible for funding the terrorists organization and, therefore, has committed an offence under Sub-section (3) of Section 22 of the POTA. It is contended that under Sub-Section (3) of Section 22, a person commits an offence is he provides money or other property, and knows or has reasonable cause to suspect that it will or may be used for the purpose of terrorism. It is contended that the prosecution, in order to substantiate this charge, placed reliance on a chit which, according to the prosecution, was seized at Perimili in the district of Andhra Pradesh. On the chit, there are certain calculations made which, according to the prosecution, reveal that an amount of Rs.36,60,000=00 was paid by the appellant to the Naxalite group. It is contended by Mr. Manohar that the said entry and/or chit is inadmissible in evidence as it could be seen that under Section 34 of the Evidence Act, it is only the entries in the books of accounts regularly kept in the course of business are admissible. It is submitted that the chit produced by the prosecution is an inadmissible piece of evidence. It could further be seen that the said chit is seized in a different offence, and neither from the appellant, nor from any individual, but is claimed to have been lying in the jungle. It is contended that the author of the said chit is also not known, nor the chit reveals that any amount is paid by

the present appellant to any Naxalite. It is contended that under Section 34 of the Evidence Act, only a Book of Accounts, which is regularly kept in the course of business is admissible and the loose sheets or loose papers cannot be termed as a book and as such the same is an inadmissible piece of evidence.

9. Mr. Manohar, learned counsel for the appellant, further submitted that apart from the said fact that the chit, which was produced by the prosecution, was not admissible, the prosecution has no evidence to show that the entries made in the said chit are trustworthy and the transaction has taken place in view of the recitals in the same chit and the appellant has parted with the amount as claimed by the prosecution and shown and described in the said chit. It is contended that the prosecution has not at all produced any evidence to show that any payment of an amount as represented by the entries in the chit was made by the appellant and the same was received by a Naxalite group of Bakanna. In order to support the contention, reliance is placed by the learned counsel on the judgment of the Apex Court in case of Central Bureau of Investigation Vs. V.C. Shukla and others (AIR 1998 SC 1406) which holds that loose sheets are not admissible in evidence and the entries in such sheets are not even a prima facie evidence.

10. Mr. Manohar, learned counsel, states that according to the prosecution there is a confessional statement recorded by one of the co-accused Mr. Kamlakar, according to whom, certain amount was paid by the appellant to Bakanna through another co-accused Alimuddin. It is contended that the said confessional statement of the co-accused is not a substantive piece of evidence against the present appellant. In order to substantiate this contention, reliance is placed by the learned counsel for the appellant on the judgments of the Apex Court in (1) Kalpnath Rai Vs. State (through CBI) (AIR 1998 SC 201), (2) Param Hans Yadav and Sadanand Tripathi Vs. State of Bihar and others (AIR 1987 SC 955), and (3) Nathu Vs. State of Uttar Pradesh (AIR 1956 SC 56). Mr. Manohar, learned counsel contended that in view of this legal position, there is no prima facie evidence to show that the present accused had provided any money or other property which he has reasonable belief or knowledge that the same would be used for any terrorists activities.

11. Mr. Manohar further states that mens rea is the important facet as far as the criminal law is concerned. It is submitted that mens rea is a state of mind and unless it is found that the accused has an intention to commit crime, he cannot beheld guilty of committing the crime. In other to substantiate the contention, reliance is placed on the decision of the Supreme Court in Director of Enforcement Vs. M/s. MCTM Corporation Pvt. Ltd. and others (AIR 1996 SC 1100). It is contended that it is not the case of the prosecution that the present appellant has intentionally aided or abetted the commission of any crime and as such the accused cannot be held responsible for any offence punishable under Sections 21(2), 22(3) or 3(3) of the POTA.

12. Mr. Manohar argued that other evidence relied upon by the prosecution is the telephone call made from the telephone which was in possession of Bakanna to the present appellant. It is submitted that the calls were alleged to have been made to the appellant on 4-5-2002, 6-5-2002, 9-5-2002, 18-5-2002 and 22-5-2002 and it could be seen that the duration of the calls is less than a minute, except the last call which was made on 22-5-2002. It is submitted that the calls, according to the prosecution, were made by Bakanna to the appellant. It is submitted that the appellant cannot have a control over the calls made on his telephone by any person. It is further submitted that on 25-5-2002, the

appellant lodged a report with the Superintendent of Police, Aheri, and stated therein that the appellant had received threats from Bakanna and requested for protection. It is contended that no protection was granted to the appellant in spite of his written complaint. On the other hand he is being falsely implicated in the crime in question and came to be arrested. It is contended that this is a case wherein a victim is being prosecuted as an accused and the accused are moving scot free. It is contended that the telephone number from where calls were received is in the name of another co-accused Kamlakar and, therefore, there is no evidence with the prosecution to show that the calls are made by Bakanna from the telephone number of Kamlakar. It is, therefore, contended that the evidence in respect of these calls alleged to have been made by Bakanna does not remotely connect the accused with the crime in question.

13. Mr. Manohar, learned counsel, contended that provisions of Section 50 of the POTA lay down that no court shall take cognizance of any offence under this Act without the previous sanction of the Central Government, or the State Government, as the case may be. It is submitted that in the present case, a charge-sheet has been filed by the prosecution on 2-12-2002 without there being any valid sanction from the appropriate Government. It could be further seen that the trial court, which is the Special Court under the POTA, has taken cognizance of the matter and it could be seen from Para 29 on internal page 26 of the trial court's order, wherein the Special Court has verified the charge-sheet and has registered a case as a special case under the provisions of POTA. It is submitted that the Court has to apply its mind before registering the case under the provisions of the POTA. The Court has taken cognizance of the matter having verified the charge-sheet and having registered the matter under the provisions of the POTA. It is submitted that in view of the express bar under Section 50, the trial court ought to have discharged the present appellant. It is contended that the question of sanction has to be raised at the earliest and the court has to decide the said question at the earlier juncture. In the present case after the Special Court took cognizance of the matter, the accused moved an application for discharge and raised an objection as to the validity of the prosecution in absence of a sanction from the competent authority, i.e., the State Government. The trial court ought to have considered the issue and in absence of a sanction, ought to have discharged the accused. It is contended that the question of sanction has to be raised at the earliest and it is held by the Bombay High Court in a decision in The State Vs. Laldas and others (AIR 1953 Bombay 177) as also by the Apex Court in a decision in Abdul Wahab Ansari Vs. State of Bihar and another ((2000)8 SCC 500). Mr. Manohar submits that it is categorically laid down in the judgment of the Apex Court in Ajit Kumar Palit Vs. State of West Bengal and another (AIR 1963 SC 765) that where a statute prescribes material on which alone a judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled. It is submitted that in the present case the court has taken a judicial notice of the charge-sheet filed by the prosecution and thereby had directed to register the case under the POTA. It is submitted that before registering the case under POTA, a Special Judge has to apply his mind as to whether the case falls under POTA or not and in a given situation, if the case does not fall under the provisions of POTA, the matter will have to be referred to the ordinary Criminal Court. It is submitted that the court having registered the matter under POTA, there was an application of mind by the Special Judge and the Court has taken a judicial notice of the charge-sheet filed by the prosecution and as such the Court has taken cognizance of the matter. It is submitted that in view of Section 50 of the POTA, the cognizance taken by the trial court is bad and no prosecution could have been launched against the present appellant in absence of a sanction from the State Government. In order to substantiate this aspect of the matter, reliance is placed on the judgments of the Apex Court reported

in AIR 1963 SC 765 (supra) and Dr. Anand R. Nerkar Vs. Smt. Rahimbi Shaikh Madar and others (1991 Cri.L.J. 557). Similarly, it is contended by the learned counsel for the appellant that so far as prosecution under sub-section (5) of Section 3 of the POTA is concerned, there is no evidence with the prosecution other than the evidence referred to hereinabove which is inadequate to connect the appellant with the offence contemplated under sub-section (5) of Section 3.

14. Mr. Manohar, learned counsel for the appellant, contended that as far as offences under Sections 363, 368, read with Sections 143, 147, 148, 149, 325 of the Indian Penal Code as well as Section 3/25 of the Arms Act are concerned, there is absolutely no evidence produced by the prosecution in order to connect the appellant with the crime in this regard. The report of Bapu Reddy, dated 2-6-2002, does not even remotely implicate the present appellant in any of the crimes under the provisions of the Indian Penal Code as well as Arms Act and, therefore, there is absolutely no evidence against the appellant produced by the prosecution in order to connect the appellant with the crimes alleged to have been committed by the appellant under the provisions of the Indian Penal Code and Arms Act.

15. Mrs. Dangre, learned Additional Public Prosecutor, on the other hand, contended that there is evidence available with the prosecution to establish a prima facie case against the appellant for the offences charged. It is contended that so far as Section 21(2) of the POTA is concerned, the prosecution is relying on the statements of Tulsigiri Somaiya (Police Patil), resident of Chittoor and Pocham Madavi, resident of Chittoor, Tq. Sironcha, as well as confessional statement of Kamlakar Olala.

16. The Additional Public Prosecutor stated that as far as statement of Tulsigiri is concerned, the same was recorded by the Investigating Officer on 9-6-2002. Recitals in the said statement reveal that on 2-5-2002, the present appellant along with his manager and two other Tendu Patta contractors along with their managers came to village Chittoor at about 8=00 p.m., in two jeeps. In the said statement, it is further stated that the present appellant asked the Police Patil, i.e., Tulsigiri, to collect the villagers for the purpose of discussion in relation to deciding the rate of plucking of Tendu leaves. Accordingly, Tulsigiri, Police Patil, called the villagers and about 30 to 32 villagers gathered at the place and engaged in discussion in respect of plucking of Tendu leaves (Pattas). In the meantime, one Kalim Sheikh, resident of Sironcha, came on the spot and informed that nobody should leave the place as Bakanna is going to visit the spot and fix the Tendu Pattas plucking rate. Thereafter, after a gap of about half an hour, 20 to 25 Naxalites with guns wearing bluish-green dresses arrived at the spot and the Head of the said group Bakanna introduced himself to the people gathered there. Bakanna took aside three Tendu Patta contractors including the present appellant and had a discussion with them for about half an hour and later on disclosed to the people of the villages who gathered there that the contractors will pay Rs.147/-. Thereafter the contractors also disclosed that they will pay the said amount and the people should start work of plucking of Tendu Pattas.

17. The Additional Public Prosecutor further contended that as far as the statement of Pocham Madavi is concerned, he has stated in his statement that the present appellant had reached village Chittoor by a jeep and had asked Police Patil to collect people for having discussion in respect of fixing of rate of plucking of Tendu leaves. Police Patil summoned the people of village Chittoor. This witness Pocham Madavi also participated in the said meeting. He has further stated in the said statement that when the meeting was in progress, Naxalites visited the spot and they took aside the contractors

and had a discussion with them for about half an hour. Thereafter the Naxalite leader Bakanna disclosed the rates fixed for plucking of Tendu Pattas.

18. Mrs. Dangre, learned Additional Public Prosecutor, contended that so far as the confessional statement of another co-accused Kamlakar Olala is concerned, the same was recorded by Additional Superintendent of Police on 10-6-2002 under Section 32 of the POTA, and has been forwarded to the Chief Judicial Magistrate, Gadchiroli. The person making confessional statement as well as original statement of confession was sent to the Chief Judicial Magistrate, Gadchiroli, within forty-eight hours as required under Section 32 of the POTA. The said statement was thereafter recorded by the Chief Judicial Magistrate as per the provisions of Section 32(3). Kamlakar Olala in his confessional statement had stated that around 1st May, 2002, Bakanna had called the present appellant and other Tendu Patta contractor Umesh Poreddiwar. Accordingly they had a meeting with Bakanna for about one hour and after fixing of Tendu Patta plucking rate, it was agreed at Rs.147/-. Kamlakar in his confessional statement further stated that Bakanna told the contractor Poreddiwar and the present appellant Gausuddin that they should pay a party fund which was agreed by the contractors. Kamlakar further stated that he visited Chittoor where present appellant also arrived by a jeep. Kamlakar further stated that he had gone to Hyderabad and had purchased one cordless phone which was connected to the telephone of his residence bearing no.33212 and he had handed over one handset of the said cordless connection to Bakanna and it was used by Bakanna. In his confessional statement, Kamlakar further stated that on a message from Krishna to collect amount of Rs.3,00,000=00 from the contractor - present appellant Gausuddin, he visited Alapalli and Gausuddin was not there. However, the amount of Rs.3,00,000=00 was kept ready and it was delivered to Kamlakar by one Alim.

19. Ms. Dangre, learned APP, contended that the above two circumstances, i.e., the statement of Tulsigiri Pocham and confessional statement of Kamlakar, would reveal that the present appellant Gausuddin had arranged for a meeting on 2-5-2002 and the meeting was to support the terrorists organization and further the activities of terrorists organization as it was in connivance with Bakanna which is clear from the confessional statement of Kamlakar. That, prior to the meeting at Chittoor, the present appellant Gausuddin had a meeting with Bakanna and the rate was already decided. Thus, there is a prima facie evidence available against the appellant for the offence punishable under Section 22(2) of the POTA.

20. The Additional Public Prosecutor contended that for implicating the appellant Gausuddin for an offence punishable under Section 22(3) of the POTA, the prosecution relies on the following material :-

a) Confessional statement of Kamlakar is recorded under Section 32 of the POTA. It is contended that Kamlakar in his confessional statement has stated that he had collected the amount of Rs.3 lakhs from the depot of appellant Gausuddin and the amount of Rs.3 lakhs was handed over to him by one Alim at the instance of appellant.
b) Recovery of chit from dumps. The APP states that during the course of investigation, it was found that Umesh Poreddiwar was working as a contractor for plucking of Tendu leaves and on his involvement in the said offences, the Superintendent of Police, Alapalli, wrote to the Police Station, Teremalli about any record in respect of Umesh Poreddiwar in a mission "Anand-II" operated against Naxalites in the month of May, 2001. One dump was found and the material found in it demonstrates that Tendu Patta contractors had

given financial assistance to the Naxalites. Therefore, in order to verify whether Umesh Poreddiwar or his relatives had entered into any transaction with Naxalites, the record of recovery of material from dump was called for by Additional Superintendent of Police, Aheri. The Recovery Panchanama, dated 29-7-2002 was perused which reveals a chit showing names of some Tendu Patta contractors and specifying the standard bag and the amount vide Document Nos.8M and 8Q. The said chit as well as writing in the form of 8M and 8Q showing the amount to be collected from Tendu Patta units operating in the region written in Telgu language demonstrate that Tendu Patta contractors operating unit-wise had supplied money to Naxalites. The said documents were taken into custody by the Additional Superintendent of Police, Aheri, from the Superintendent of Police, Perimalli. The Document 8M shows the name of present appellant Gausuddin, against whom the standard bags 36,000 and amount of Rs.36,06,000=00 are mentioned.

21. The Additional Public Prosecutor further contended that the present appellant was issued with the notice under Section 149 of the Criminal Procedure Code in the month of January, 2002 on allotment of a contract of plucking of Tendu Pattas, asking him to refrain from aiding any person who is associated with People's War Group (PWG), which was declared as a terrorists organization under the POTA. It was further informed that if he suspects any person indulging in such activity, he should immediately report the said matter to the police authorities.

22. Mrs. Dangre, learned APP, therefore, contended that recovery of a chit from dump as well as confessional statement of Kamlakar reveal that the present appellant had provided money to the terrorists organization which was used for the purpose of terrorizing, as the People's War Group is declared as a terrorists organization under the POTA. It is further contended that in spite of notice under Section 149 of the Criminal Procedure Code issued in the month of January, 2002, the appellant, for the first time, reported the matter about having threats on 25-5-2002, i.e., after a long gap between the meeting, dated 2-5-2002 and, therefore, it is an afterthought. It is contended that from the above material, it can be seen that there is a prima facie evidence available against the appellant for the offence under Section 22(3) of the POTA.

23. Mr. Dangre, learned APP, contended that so far as sub-section (3) of Section 3 of the POTA is concerned, the prosecution is relying on the following material:-

a) In the confessional statement of Kamlakar, it is stated that Telephone No.33212 was operated by Bakanna. In the list of telephone calls from this telephone number, calls have been detected to be made to Telephone No.66356, which was used by the present appellant who was residing in the house of Sampoorna Singh and who had stated in his statement that he had given the telephone number to be used by the present appellant Gausuddin. Thus, it can be seen that Bakanna had called the present appellant on several dates and the dates are very relevant as the phone calls have been detected from the months of March to May.

b) Mrs. Dangre further contended that Sampoorna Singh is the resident of Alapalli. He had given the house on rent to the present appellant Gausuddin and his Telephone bearing No.66356 was also given to the present appellant Gausuddin for his use. It is contended that all these facts are finding place in the statement of Sampoorna Singh.

c) It is further contended by learned APP that in the statement of Somaiya Lachchu, he had stated that he was working as a carrier of messages for Naxalite leader and on one occasion, he had taken a message from commander Nootan to the appellant Gausuddin and Gausuddin on the said letter had come to visit the said commander Nootan and had a discussion with him for about an hour. It is, therefore, contended that the above referred material does show that the present appellant was associated with the Naxalite movement of PWG, which is operating in Gadchiroli district and has been declared as a terrorists organization and the present appellant had voluntarily aided and promoted the objects of the terrorists organization and is, therefore, liable to be prosecuted under sub-section (3) of Section 3 of the POTA.

24. The Additional Public Prosecutor lastly contended that it is, no doubt, true that there is a bar in the form of Section 50 of the POTA, which prevents the court from taking cognizance of any offence without previous sanction of the Central Government or the State Govt., as the case may be. However, the question is what is the point of time when the court is said to have taken cognizance of offence. The word 'cognizance' means to become aware of the facts and to take notice judiciously. As per the scheme formulated in the Criminal Procedure Code, the initiation of proceedings against the person commences on the cognizance of the offence by the Magistrate in any of the following three categories contemplated in Section 190 of the Criminal Procedure Code, which deals with initiation of proceedings, and they are as follows :-

i) in respect of cognizable offence on a complaint by the aggrieved person;

ii) on the police report in cognizable offence when the police has completed their investigation and come to the Magistrate for issuance of process;

iii) when the Magistrate himself takes notice of the offence and issues process.

25. The act of cognizance requires an overt act on the part of the Magistrate, who is taking cognizance of the offence. The police machinery in the form of a final report files a charge-sheet under Section 173 of the Criminal Procedure Code and the said act is the end of initiation of proceedings at the instance of police machinery which are initiated pursuant to filing of First Information Report under Section 154 of the Criminal Procedure Code. On filing of charge-sheet, the police/investigating agency declares that its investigation is complete and whatever has been found in the form of investigation, is submitted before the competent court in the form of a final report which also is known as a charge-sheet. Therefore, mere filing of a charge-sheet could not be said to be a part of judicial act, but it is only when there is an application of mind on the part of judicial authority, it could be said that the cognizance is taken on the report of the investigating officer. Therefore, it is not mandatory for the Magistrate to approve the police report and the Magistrate may even disagree with the police report and direct further investigation under Section 156(3) of the Criminal Procedure Code by the police machinery before it can take cognizance of an offence.

26. It is further contended that before it can be said that the Magistrate has taken cognizance of any offence under Section 190 of the Criminal Procedure Code, he must not have only applied his mind, but he must have done so for the purpose of proceeding in a particular way as indicated in subsequent provisions of Chapter XIV of the

Criminal Procedure Code. This position of law is enumerated in the judgment of the Apex Court in Jamuna Singh and others Vs. Bhadai Shah (AIR 1964 SC 1541).

27. Mrs. Dangre, learned Additional Public Prosecutor, further contended that the act of taking cognizance is defined from filing of complaint, which can be seen from the judgment of the Apex Court in Narsingh Das Tapadia Vs. Goverdhan Das Partani and another ((2000)7 SCC 183), paras 8, 9 and 10. Similar is the another judgment of the Apex Court in Kishore Kumar Gyanchandani Vs. G.D. Mehrotra and another (AIR 2002 SC 483). It is contended that in the present case the act of registering the case under POTA is merely an administrative act committed by the Additional Sessions Judge and there is no application of mind to the final report submitted by the police and as such it could not be said that he has taken cognizance of the offence under the provisions of POTA. The requirement of Section 50 in obtaining sanction before cognizance is taken in the present case is not violated in absence of application of judicial mind by the Special Court and, therefore, the proceedings cannot be vitiated on this count.

28. Mrs. Dangre, learned Additional Public Prosecutor, contended that Section 32 of the POTA is analogous to Section 15 of the TADA and the validity of Section 15 of the TADA has been upheld by the Supreme Court in case of Kartarsingh Vs. State of Punjab reported in 1994 SCC 569. It is, therefore, contended that the confessional statement of Kamlakar is admissible and can be relied upon. It is contended that when the statement of Tulsigir Pocham coupled with confessional statement made by Kamlakar is considered, there is a prima facie case made out against the appellant for the offence under the provisions of the POTA.

29. Before we advert to the facts of the present case, we would like to express that necessity to evolve this legislation by the Central Government was felt because of the method of madness, which is adopted by the various terrorist Organizations to attack the symbol of power to destabilise sovereign nations. If it does not work, terrorists change strategy to attack religious symbols. Their sinister plan is to provoke the sectarian and communal violence. These are not fanatics on the loose, but pawns of mastermind bent upon to destabilise our country. Terrorists always have the advantage of surprise attack combined with suicidal zeal, which makes the job of security personnel extremely difficult, specially if the strategy is focussed to soft targets like helpless innocent children, women and citizens. To curb these terrorist violence, the new enactment Prevention of Terrorism Act, 2002 (POTA) has been enacted. The object of enacting this Act from the statements and objects and reasons appended to Prevention of Terrorism Bill, 2002 reads thus :

"The country faces multifarious challenges in the management of its internal security. There is an upsurge of terrorist activities, intensification of cross border terrorist activities and insurgent groups in different parts of the country. Very often, organized crime and terrorist activities are closely inter-linked. Terrorism has now acquired global dimensions and has become a challenge for the entire world. The reach and methods adopted by the terrorist groups and organizations take advantage of modern means of communication and technology using high-tech facilities available in the form of communication systems, transport, sophisticated arms and various other means. This has enabled them to strike and create terror among people at will. The existing criminal justice system is not designed to deal with the types of heinous crimes with which the proposed law deals with."

30. In view of the situation, as stated above, it was felt necessary to enact a legislation for prevention of, and for dealing with, terrorist activities. However, sufficient safeguards are sought to be provided in the proposed law to prevent the possibility of its misuse.

31. In the instant case, the prosecution has filed charge-sheet against appellant Gausuddin for the offence under Sections 3(3)(5), 21(2) and 22(3) of the Prevention of Terrorism Act in addition to the offences under the Indian Penal Code. Before we consider the material/evidence collected by the prosecution at this stage of proceedings whether adequate or inadequate for the purpose of holding prima facie case against appellant Gausuddin for the offences charged under POTA, it would be appropriate to consider the ingredients of these provisions.

32. The "terrorist act" is defined in clause (g) of Section 2 of the Prevention of Terrorism Act, which reads thus :

"terrorist act has the meaning assigned to it in sub-section (1) of Section 3, and the expression "terrorist" shall be construed accordingly."

Sub-section (1) of Section 3 of the Prevention of Terrorism Act reads thus :

"3) (1) Whoever -

(a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act;

(b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (3 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act.

Explanation - For the purposes of this sub-section, "a terrorist act" shall include the act of raising funds intended for the purpose of terrorism."

33. While considering the provisions of sub-section (1) of Section 3, the prosecution must have evidence to show that person has engaged himself in the following activities :

1) he intended to threaten the unity, integrity, security or sovereignty of India ,

2) he intended to strike terror in the people,

3) any section of people does any act or thing by using bombs, dynamites or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature,
4) similarly such person by any other means whatsoever in such a manner as to cause or likely to cause death of or injuries to any person or persons,

5) or such person causes loss or damage to or destruction of property or disruption of any supplies or services essential to the life of the community or cause damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their Agencies,

6) such person detains any person and threatens to kill or injure such person in order to compel Government or any other person to do or abstain from doing any act,

34. Clause (a) of sub-section (1) of Section 3, therefore, contemplates above referred situation and if there is evidence to show that the person is indulging in these activities, would be a person alleged to have committed a terrorist act.

35. Similarly clause (b) of sub-section (1) of Section 3 further provides that -

(1) person who is or continues to be a member of the Association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 or

(2) person voluntarily does an act aiding or promoting in any manner the objects of such Organization,

(3) and such person is in possession of unlicensed firearms, ammunition, explosives or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes a significant damage to any property, commits a terrorist act.

36. The above referred provision provides various contingencies and if prosecution has evidence to show that the person is involved in or carrying on one of the above referred activities, he can be said to commit a terrorist act. It is not necessary that person must be involved in or carrying on or used to carry on all the activities referred to hereinabove. However, the fact remains that prosecution must possess the evidence to show that the person is involved in or carrying on one of the activities referred to in clauses (a) and (b) of sub-section (1) of Section 3 or is involved in or carrying on more than one of these activities before person can be said to have committed a terrorist act.

Explanation to sub-section (1) of Section 3 reads thus :

"For the purposes of this Section, "a terrorist act" shall include the act of raising funds intended for the purpose of terrorism."

Plain reading of the explanation contemplates that raising of funds in India for the purpose of terrorism, is an act, which is included in the definition of a "terrorist act" and the person shall be committing a terrorist act contemplated in sub-section (1) of Section 3 irrespective of the fact that he is not involved in or carrying out any of the activities mentioned in clause (a) and (b) of sub-section (1) of Section 3 of the Prevention of Terrorism Act.

Sub-section (3) of Section 3 of the Prevention of Terrorism Act reads thus :

"3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years, but which may extend to imprisonment for life and shall also be liable to fine."

The ingredients of sub-section (3) of Section 3 of the Prevention of Terrorism Act will have to be considered on the backdrop of definition of terrorist act mentioned in sub-section (1) of Section 3 of the Prevention of Terrorism Act since all the circumstances and factors enumerated in sub-section (3) are ultimately related to the terrorist act and, therefore, under the scheme of sub-section (3) of Section 3, it needs to be considered accordingly.

While applying ingredients of sub-section (3) of Section 3, the prosecution must have evidence to show that person has conspired to commit a terrorist act, attempted to commit terrorist act, or advocated, abetted and advised to commit terrorist act and incited or knowingly facilitated commission of terrorist act. Even at the cost of repetition, we would like to mention here that terrorist act consists of factors and circumstances shown and described in clauses (a) and (b) of sub-section (1) of Section 3 of the Prevention of Terrorism Act. Therefore, in that context, each factor mentioned in sub-section (3) of Section 3 will have to be considered and prosecution has to show that the person has conspired to commit the terrorist act as defined in clauses (a) and (b) of Section 3 or attempted to commit or advocated, abetted, advised or incited or knowingly facilitated commission of a terrorist act. Even the preparatory aspect, which is likely to be culminated into a terrorist act is made punishable accordingly under the provisions of sub-section (3) of Section 3 of Prevention of Terrorism Act.

37. On the backdrop of these legal provisions, it will be proper to scrutinise the prosecution evidence in order to decide as to whether material/evidence produced by the prosecution is sufficient to deny or grant bail to the appellant.

38. Another provision, which is relevant and attracted according to prosecution is Section 21(2) of the Prevention of Terrorism Act. In order to understand the scheme of this Section, it will be proper to reproduce whole of Section 21, which reads thus :

"21) Offence relating to support given to a terrorist organization - (1) A person commits an offence if -

(a) he invites support for a terrorist organization, and

(b) the support is not, or is not restricted to, the provisions of money or other property within the meaning of Section 22.

(2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting, which he knows is -

(a) to support a terrorist organization, or

(b) to further the activities of a terrorist organization, or

(c) to be addressed by a person who belongs or professes to belong to a terrorist organization.

(3) A person commits an offence if he addresses a meeting for the purpose of encouraging support for a terrorist organization or to further its activities.

(4) A person guilty of an offence under this section shall be liable on conviction, to imprisonment for a term not exceeding ten years or with fine or with both.

Explanation - For the purpose of this section, the expression "meeting" means a meeting of three or more person whether or not the public are admitted."

In the present case we are concerned with sub-section (2) of Section 21 only.

The title of Section 21 clearly contemplates that this Section relates to offences pertaining to support given by the individual or anybody for that matter to the terrorist organization. What is meant by terrorist organization is defined in Chapter III of the Prevention of Terrorism Act. Sub-section (1) of Section 18 contemplates that for the purposes of this Act, an organization is a terrorist organization if -

(a) it is listed in the Schedule or,

(b) it operates under the same name as an organization listed in that Schedule.

Sub-section (2) of Section 18 contemplates that the Central Government is vested with the power, which may by order in the Official Gazette -

(a) add an organization to the Schedule,

(b) remove an organization from that Schedule,

(c) amend that Schedule in some other way.

As far as sub-sections (3) and (4) of Section 18 are concerned, we are not much concerned in the controversy in issue.

39. The purport of Section 21 of the Prevention of Terrorism Act needs to be construed on the backdrop of the provisions of Chapter III and Section 18. It must be

noted that Schedule contemplated under Section 18 gives names of various Organizations declared by the Central Government as terrorist Organizations and anybody giving support to such Organizations, will be a person or body of persons committing an offence under Section 21. With this background, let us analyse the provisions of sub-section (2) of Section 21 of the Prevention of Terrorism Act, which is applied by the prosecution on the appellant.

40. Plain reading of the said provision makes it clear that in order to attract this provision, prosecution needs to have an evidence to show that a person has arranged, managed or assisted in arranging or managing a meeting, which he knew is -

1) to support a terrorist organization, which means an organization or one of the organizations enlisted in Schedule contemplated under Section 18 of the Prevention of Terrorism Act,

2) to further the activities of a terrorist organization enlisted in the Schedule,

3) the said meeting is addressed by a person who belongs or profess to belong to a terrorist organization.

On the backdrop of above ingredients of sub-section (2) of Section 21, it will be proper to scrutinise the evidence available with prosecution.

41. Now let us analyse the ingredients of sub-section (3) of Section 22 of the Prevention of Terrorism Act. However, for better understanding of the provisions of this Section, entire Section is reproduced below, which reads thus :

"22) Fund raising for a terrorist organization to be an offence - 1) A person commits an offence if he -

(a) invites another to provide money or other property; and

(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.

(2) A person commits an offence if he -

(a) receives money or other property, and

(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purpose of terrorism,

(3) A person commits an offence if he -

(a) provides money or other property, and

(b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

(4) In this section, a reference to the provision of money or other property is a reference to its being given, lent or otherwise made available, whether or not for consideration.

(5) A person guilty of an offence under this section shall be liable on conviction, to imprisonment for a term not exceeding fourteen years, or with fine or with both."
The title of Section 22 is totally unambiguous and contemplates that fund raising for a terrorist organization is an offence under this Section. In the instant proceedings, we are only concerned with sub-section (3) of Section 22. Before we consider purport of sub-section (3) of Section 22, we feel it necessary to express that once again analogous situation to that of Section 21 is emerging from the provisions of Section 22 of Prevention of Terrorism Act, where raising fund for terrorist organization means organization, which is enlisted in Schedule of Section 18, is made an offence under this provision. Sub-section (3) of Section 22 contemplates that a person commits an offence if he -

(1) provides money or other property, and

(2) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

The word terrorism cannot be construed in isolation and will have to be considered as per scheme of Section 22 and, therefore, will have to be given a requisite meaning, i.e. terrorism created by such terrorist organizations, which are enlisted in Schedule of Section 18 of the Prevention of Terrorism Act.

42. On the backdrop of these provisions, prosecution must have evidence to show that a person has provided money or property or knows or has reasonable cause to suspect that such money or property will or may be used for the purposes of terrorism by such organization. The sum and substance of this provision is that prosecution must show in order to attract the provisions of sub-section (3) of Section 22 of the Prevention of Terrorism Act that the person has provided money or property to the terrorist organization and/or at least he knew or had reasonable cause to suspect that it may be used for terrorism either by the organization or by individual, who is member of such terrorist organization. It is no doubt true that explanation to sub-section (1) of Section 3 provides that raising fund intended for the purpose of terrorism either by the terrorist organization or by individual is a terrorist act and is punishable under Section 3 of the Prevention of Terrorism Act. However, offence under Section 22 is in respect of fund raising for the terrorist organization and, therefore, it will have to be viewed and construed accordingly. With these ingredients in mind, we will have to scrutinise the prosecution evidence brought on record by the prosecution.

43. Another provision, i.e., Sub-section (5) of Section 3 of the POTA needs consideration, since the appellant is also prosecuted under this Section. For our convenience and for ready reference, the same is reproduced below :-

"Any person who is a member of a terrorist gang or a terrorist organization, which is involved in terrorist acts, shall be punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.

Explanation - For the purposes of this sub-section, "terrorist organization" means an organization which is concerned with or involved in terrorism."

The plain reading of this Section contemplates that before imposing a criminal liability under this Section, the person has to be the member of a terrorist gang or a terrorist organization and that organization should be involved in terrorist act as contemplated under Clause (a) of Sub-section (1) of Section 3 of POTA. Therefore, the prosecution must possess evidence to show that the accused is a member of terrorist gang or organization which is involved in terrorist act. In absence of such evidence, no criminal liability can be fastened on a person prosecuted under this provision. It is, no doubt, true that explanation to Sub-section (5) of Section 3 of POTA carves out a different definition of terrorist organization distinct than what is contemplated under Section 18 of Chapter-III of POTA. In view of the explanation to Sub-section (5) of Section 3, terrorist organization means an organization which is concerned with or involved in terrorism. This terrorist organization need not necessarily be the one contemplated under Section 18 of POTA. For the purpose of Sub-section (5) of Section 3 of POTA, the definition of terrorist organization means any organization which is concerned with and involved in terrorism. The definition of terrorist organization contemplated in the explanation to Sub-section (5) of Section 3 has a restrictive meaning and is relevant only in the context of provision of Sub-section (5) of Section 3 of the POTA.

44. Similarly, important legal provision, which is of a vital importance, is Section 32 of the POTA. In order to appreciate the scheme of the Section, we have reproduced the whole Section, which reads thus :-

" 32. Certain confessions made to Police Officers to be taken into consideration .- (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of such sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or rules made thereunder.

(2) A police officer shall, before recording any confession made by a person under sub-section (1) explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him:

Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

(3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.

(4) The person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty eight hours.

(5) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, "such person shall be directed to be

produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody."

This provision is analogous to Section 15 of the TADA, 1987 as it stood before Amending Act 43 of 1993. For the convenience of considering the purport of these two Sections, we are reproducing the relevant provisions of Section 15 as it stood then, which reads thus :-

"Section 15 - Certain confessions made to Police Officers to be taken into consideration- (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this Section, a confession made by a person before a Police Officer not lower in rank than a Superintendent of Police and recorded by such Police Officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds of images can be reproduced, shall be admissible in the trial of such person for the offence under this Act or Rules made thereunder."

45. In the year 1993, by the Amending Act 43 of 1993, Section 15 is amended and the following words are inserted in the main Section 15 after the words "in the trial of such person; co-accused, abettor or conspirator". Similarly, by the same Amending Act, proviso is also added which reads thus :-

"Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused."

46. While considering the purport of Section 32 of the POTA, there are two vital aspects which need consideration - one is whether the regular Rules relating to confession under the Indian Evidence Act, 1872 vide Sections 24 to 27 as well as Sections 162, 164, 281 and 463 of the Criminal Procedure Code, which have a bearing on the question of recording of statement/confession of a person whether stands excluded, and second whether the confession under Section 32 of the POTA made by a person is admissible only against such person or is also admissible in the trial of such person, or co-accused, abettor, or conspirator for an offence under this Act and Rules framed thereunder: Provided that the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

47. The plain reading of provisions of Section 32 of the POTA makes it clear that Sections 162, 164, 281 and 463 of Criminal Procedure Code, which have a bearing on the question of recording statement/confession of a person and Sections 24 to 30 of the Evidence Act which deal with various aspects of confession of an accused stand excluded - vis-a-vis Sub-section (1) of Section 32 of the POTA, and cannot be called in aid to invalidate recording of confession of an accused by a Police Officer of the specified rank and/or its admissibility in the trial of such person. It must be made clear that non-obstante clause in Section 32(1) of the POTA does not exclude application of all the provisions of Criminal Procedure Code and the Indian Evidence Act in the trial of offences under POTA. A similar question fell for consideration before the Apex Court in respect of Section 15(1) in case of State of Tamilnadu Vs. Nalini (1999 Criminal Law Journal 3324) and in Para 680, Their Lordships of the Apex Court observed thus :-
"The difference between Section 30 of the Indian Evidence Act and Section 15(1) of the TADA Act may also be noticed here. Whereas the former provision requires that the maker of the confession and others should be tried jointly for the same offence, the latter provision does not require that joint trial should be for the same offence. Another point of

distinction is that under Section 30 of the Evidence Act, the Court is given discretion to take into consideration the confession against the maker as well as against those who are being tried jointly for the same offence, but Section 15(1) of TADA Act mandates that confession of an accused recorded thereunder shall be admissible in the trial of the maker of confession or co-accused, abettor or conspirator, provided the co-accused, abettor or conspirator is charged and tried with the accused in the same case. Both Section 30 of the Evidence Act as well as Section 15 of the TADA Act require joint trial of the accused making confession and co-accused, abettor or conspirator."

Similarly, another relevant observations of Their Lordships in case of Nalini are in Para 681 of the Judgment which read thus :-

"Having excluded the application of Sections 24 to 30 of the Evidence Act to a confession recorded under Section 15(1) of the TADA Act, a self-contained scheme is incorporated therein for recording confession of an accused and its admissibility in his trial with co-accused, abettor or conspirator for offences under the TADA Act or the rules made thereunder or any other offence under any other law which can jointly be tried with the offence with which he is charged at the same trial. There is thus no room to import the requirements of Section 30 of the Evidence Act in Section 15 of the TADA Act."

In the instant case, Section 32 also provides a self-contained scheme for recording of confession of an accused by the specific police officer and its admissibility in trial of such a person, i.e., the maker of the confession and, therefore, in view of above referred observations of the Apex Court, there is no room to import the requirements of Section 30 of the Evidence Act in Section 32 of the POTA.

48. Lastly, the observations made by the Apex Court in Para 694 of Nalini's case are also very relevant and read thus :-

"I have already pointed out the difference in the phraseology of S.15 of the TADA Act. The Parliament used the expression "shall be admissible in the trial of such person or co-accused, abettor or conspirator" in S.15 which is different from the language employed in S.30 of the Evidence Act which says that the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. It has to be presumed that the Parliament was aware of the interpretation placed by the Courts including Privy Council and Supreme Court on S.30 of the Evidence Act but chose to frame S.15 differently obviously intending to avoid the meaning given to the phrase 'the Court may take into consideration such confession as against such other person....' used in S.30 of the Evidence Act. On the language of S.15(1), it is clear that the intention of the Parliament is to make the confession of an accused substantive evidence both against the accused as well as the co-accused."

49. On the backdrop of the above referred law laid down by the Apex Court in Nalini's case in respect of the analogous provisions of the TADA Act, we can safely conclude that in the phraseology used in Section 32(1) of the POTA, the Parliament used the expression "shall be admissible in trial of such person" which is different from the language used in Section 30 of the Act. From the language of Section 32(1), it is clear that the intention of the Parliament is to make such confession of the accused substantive evidence in the trial of such accused only. This differentia in respect of admissibility of confession is based on the intention of the Parliament as well as the language used in Sub-

section (1) of Section 30 of the POTA, which clearly demonstrates that confession made by a person before the specific police officer shall be admissible in trial of such person for an offence under this Act and Rules made thereunder. While dealing with the case in hand, we will have to keep this aspect in mind while considering the grant or refusal of bail to the appellant.

50. Similarly, another important aspect, which we have to consider, is whether the confession under Section 32(1) is a substantive piece of evidence against the co-accused. This proposition of law necessarily would depend upon two things. Firstly whether under the scheme and in view of language of Section 32(1), keeping in view the legislative intent, such confession is admissible in trial of such person for the offence under this Act and Rules made thereunder, or the same is admissible against co-accused, abettor or conspirator as in the case of amended Section 15(1) of the TADA Act. Secondly, it will also have to be considered as to whether confession contemplated under Section 32(1) of POTA is a substantive evidence against co-accused, abettor and conspirator as in the case of amended Section 15(1) of the TADA Act.

51. In view of Nalini's case, we have already held keeping in view the phraseology used in Section 32(1) of the POTA, legislative intent of the Parliament in using the words "shall be admissible in trial of such person only". Therefore, it can safely be inferred that such confession made by a person contemplated under Section 32(1) of POTA is admissible in law in the trial of such person and, therefore, by necessary implication, it cannot be admissible against co-accused, abettor, conspirator, who is being tried jointly for the same offence.

52. In view of the above legal position, it further emerges that if the confession under Section 32(1) of POTA is admissible in law in the trial of such person, by necessary implication, it cannot be a substantive piece of evidence against the co-accused, abettor or conspirator, who is being tried jointly for the same offences.

53. Another important as well as relevant provision, which needs our consideration, is Section 50 of the POTA. For the purpose of convenience and ready reference, the same is incorporated below :-

"50. Cognizance of offences.- No Court shall take cognizance of any offence under this Act without the previous sanction of the Central Government or as the case be, the State Government."

This provision is analogous to provisions of Section 20-A of the TADA Act, 1987 with the only difference that under TADA Act, 1987, for taking cognizance, previous sanction of Inspector General of Police or as the case may be, the Commissioner of Police, was mandatory. However, in POTA, previous sanction of the Central Govt., or State Govt., is required.

54. The law is well settled when a statute requires a sanction of a competent authority as a pre-condition for taking cognizance by the Court and the relevant sanction order is produced which itself indicates that the material is considered and then after applying mind, the sanctioning authority accorded sanction, the same would be sufficient to hold that there is a valid sanction. Besides, when the sanction order itself is not sufficient to indicate that the sanctioning authority applied his mind, then the

prosecution is entitled to adduce evidence aliunde of the person who accorded sanction and that would be a sufficient compliance. After going through the said evidence, the court can come to the conclusion that the relevant materials were considered by the sanctioning authority and it is thereafter he accorded sanction in question.

55. So far as Section 50 is concerned, sanction is a condition precedent for taking cognizance, since the Section opens with the non-obstante clause. Taking cognizance is the act which the Special Court has to perform and granting sanction is an act which the sanctioning authority has to perform. Latter is a condition precedent for former. We must bear in mind that sanction is not granted to the Special Court to take cognizance of the offence, but it is granted to the prosecuting agency to approach the court concerned for enabling it to take cognizance of the offence and to proceeding to trial against the person arraigned in the report. Thus, a valid sanction is sine qua non for enabling the prosecuting agency to approach the court to enable the court to take cognizance of the offence under POTA as disclosed in the report. The corollary is that if there was no valid sanction, the designated court gets no jurisdiction to try a case against any person mentioned in the report, as the court is forbidden from taking cognizance of the offence without such sanction. If the Special Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will be without jurisdiction. This, in fact, is the legal position which emerges from the provisions of Section 50 of the POTA.

56. Now, another important aspect, which needs our consideration, is which act constitutes taking of cognizance by the Court. In order to consider this proposition, relevant observations in some of the judgments of the Apex Court are the guiding principles which would enable us to reach the conclusion in this regard.

57. In case of Anil Saran Vs. State of Bihar and another (AIR 1996 SC 204), in Para 4 the Apex Court has observed thus :-

"We find no force in the contention. Thus the Code defines "cognizable offence" and non-cognizable offence, the word 'cognizance' has not been defined in the Code. But it is now settled law that the Court takes cognizance of the offence and not the offender. As soon as the Magistrate applies his judicial mind to the offence stated in the complaint or the police report etc., cognizance is said to be taken. Cognizance of the offence takes place when the Magistrate takes judicial notice of the offence. Whether the Magistrate has taken cognizance of offence on a complaint or on a police report or upon information of a person other than the police officer, depends upon further (sic) taken pursuant thereto and the attending circumstances of the particular case including the mode in which case is sought to be dealt with or the nature of the action taken by the Magistrate. Under sub-section (1) of Section 190 of the Code, any Magistrate may take cognizance of an offence (a) upon receiving a complaint of facts which constitute such offence, (b) upon a police report of such facts, and (c) information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

Similarly, in case of Ajit Kumar Palit Vs. State of West Bengal and another (AIR 1963 SC 765) in Para 9 of the Judgment, Their Lordships of the Apex Court have observed thus :-

"The provisions of S.190(1) being obviously, and on its own terms, inapplicable, the next question to be considered is whether it is the requirement of any principle of general jurisprudence that there should be some additional material to entitle the Court to take

cognizance of the offence. The word "cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means - become aware of and when used with reference to a Court or Judge, to take notice of judicially. It was stated in Gopal Marwari Vs. Emperor, AIR 1943 Pat. 245 (SB) by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in R.R. Chari Vs. State of Uttar Pradesh, 1951 SCR 312 at p.320 : (AIR 1951 SC 207 at p.210) that the word 'cognizance' was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in Emperor Vs. Sourindra Mohan, ILR 37 Cal. 412 at p.416, "taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence." Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled. Thus, a sessions judge cannot exercise that original jurisdiction which magistrates specified in Section 190(1) can, but the material on which alone he can apply his judicial mind and proceed under the Code is an order of commitment. But statutory provision apart, there is no set material which must exist before the judicial mind can operate. It appears to us therefore that as soon as a special judge receives the orders of allotment of the case passed by the State Government it becomes vested with jurisdiction to try the case and when it receives the record from the Government it can apply its mind."

The law laid down by the Apex Court in the above referred judgments clearly demonstrates that taking of cognizance merely means, become aware of and when used with reference to a Court or Judge, to take notice of judicially. Similarly the word "cognizance" used in the Code indicates the point when the Magistrate or a Judge takes judicial notice of an offence.

58. The law laid down by the Apex Court in case of State of West Bengal and another Vs. Mohammed Khalid and others (AIR 1995 SC 785) also throws light on the issue in question. Their Lordships of the Supreme Court in Para 28 have observed thus:-

"A cognizance which is barred cannot be overcome by a sanction. The Court must look at the validity of sanction. In this case, the sanction was never produced before the Court. On the contrary, the Court took cognizance automatically. The specific case of these respondents before the High Court was, there was no such sanction. The burden that the sanction was granted in relation to the facts constituting the offence has not been discharged. While taking cognizance perusal of sanction is not mentioned. This order is conclusive."

The other relevant observations of the Apex Court are made by Their Lordships in Para 41 of the Judgment, which read thus :-

"Similarly, when Section 20A(2) of TADA makes sanction necessary for taking cognizance - is only to prevent abuse of power by authorities concerned. It requires to be noted that this provision of Section 20A came to be inserted by Act 43 of 1993. Then, the question is as to the meaning of taking cognizance. Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence of taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word "cognizance" indicates the point when a Magistrate or a judge first takes judicial

notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons."

In case of State of West Bengal Vs. Mohd. Khalid, the Apex Court has, in no uncertain terms, mandated that the word "cognizance" indicates the point when the Magistrate or a Judge takes judicial notice of an offence, and is different from initiation of proceedings. Order of sanction is the condition precedent to the initiation of proceedings by the Magistrate or the Judge and the cognizance is always taken of a case and not of a person. If on the backdrop of these legal propositions emerging from the Judgments of the Apex Court and in view of provisions of Section 50 of the POTA, it will be necessary for us to consider the material on record in order to see whether the Court in the instant case has taken cognizance of the offence or not under this Act without previous sanction of the appropriate Government.

59. In order to appreciate the case of the prosecution as well as the prosecution evidence in respect of chit/note seized at Perimili in Andhra Pradesh, wherein there are certain calculations made, is admissible in the evidence in view of the provisions of Section 34 of the Evidence Act. The observations of the Apex Court in case of Central Bureau of Investigation Vs. V.C. Shukla and others (AIR 1998 SC 1406) are very relevant. Their Lordships of the Apex Court in Para 17 observed thus :-

"17. From a plain reading of the Section it is manifest that to make an entry relevant thereunder it must be shown that it has been made in a book, that book is a book of account and that book of account has been regularly kept in the course of business. From the above Section it is also manifest that even if the above requirements are fulfilled and the entry becomes admissible as relevant evidence, still, the statement made therein shall not alone be sufficient evidence to charge any person with liability. It is thus seen that while the first part of the section speaks of the relevancy of the entry as evidence, the second part speaks, in a negative way, of its evidentiary value for charging a person with a liability."

It is thus seen that while the first part of the Section speaks of relevancy of entry as evidence, the second part speaks in a negative way of its evidentiary value for charging a person with liability. Similarly, Their Lordships in Para 34 have observed thus :-

"34. The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection given them in a sufficient degree a probability of trustworthiness (Wigmore on evidence $ 1546). Since, however, an element of self interest and partisanship of the entrant to make a person - behind whose back and without whose knowledge the entry is made liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in Section 34 by incorporating the words 'such statements shall not alone be sufficient to charge any person with liability'."

In para 35, Their Lordships have observed thus:-
"35. The probative value of the liability created by an entry in books of account came up for consideration in Chandradhar Vs. Gauhati Bank, (1967)1 SCR 898 : (AIR 1967 SC 1058). That case arose out of a suit filed by Gauhati Bank against Chandradhar (the

appellant therein) for recovery of a loan of Rs.40,000/-. In defence he contended, inter alia, that no loan was taken. To substantiate their claim the Bank solely relied upon certified copy of the accounts maintained by them under Section 4 of the Bankers' Books Evidence Act, 1891 and contended that certified copies became prima facie evidence of the existence of the original entries in the accounts and were admissible to prove the payment of loan given. The suit was decreed by the trial court and the appeal preferred against it was dismissed by the High Court. In setting aside the decree this Court observed that in the face of the positive case made out by Chandradhar that he did not ever borrow any sum from the Bank, the Bank had to prove the fact of such payment and could not rely on mere entries in the books of account even if they were regularly kept in the course of business in view of the clear language of Section 34 of the Act. This Court further observed that where the entries were not admitted it was the duty of the Bank, if it relied on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as indicated therein and thereafter the entries would be of use as corroborative evidence."

60. On the backdrop of the above referred proposition laid down by the Apex Court - vis-a-vis Section 34 of the Evidence Act, it will be necessary for us to first ascertain whether the entries in the document/chit with which we are concerned fulfil the requirements of Section 34 as laid down by the Apex Court and is admissible in evidence. The question of probative value of such document will come only after we prima facie reach the conclusion about admissibility of such document in evidence in view of the law laid down by the Apex Court - vis-a-vis Section 34 of the Evidence Act. We feel it necessary to express that while interpreting and construing the purport of the criminal statute, regard must be had to the fact that it must be interpreted strictly according to the language used in such statute, object and purpose for which the statute is evolved and the legislative intent for creating such statute. There is no scope for interpreting criminal statute broadly, liberally and progressively. The overriding principle must be an adherence to the specific object presented by such legislation, into which each individual provision must fit in order to maintain essential details which the framers would have intended, had they been faced with circumstances of today. To hold otherwise would stultify not only the object of such legislation, but also the legislative intent. What we feel is that a stultification of legislation must be prevented if this is possible without doing violence to the language of the statute and the criminal law needs to be interpreted strictly according to the object which it has to achieve as well as the purpose for which it is evolved, keeping in view the legislative intent. Keeping in view the above referred principles in mind, we have interpreted the above referred relevant provisions of the POTA and the fact of grant of refusal of bail will have to be considered on the basis of evidence which is available with the prosecution agency at this stage in the light of the interpretation arrived at by us of the relevant provisions of the POTA mentioned hereinabove.

61. Another important aspect which needs our consideration, before we consider the facts and circumstances of the present case, is to appreciate the concept of mens rea. It is one of the principles of English Criminal Law that a crime is not committed if the mind of the person doing the act in question be innocent. It is stated that actus non facit reum, nisi mens sit rea (the intent and act must both concur to constitute the crime). Although, prima facie, and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do a wrong or not. Mens rea of mind stigmatized

as wrongful by the criminal law which when compounded with relevant prohibited conduct constitutes a particular crime. Crimes involving mens rea are of two types, (i) crimes of basic intent and (ii) crimes of specific intent. In the former class of crimes, the mens rea does not go beyond the actus reus. In the second, it goes beyond the contemplation of prohibited act and foresight of its consequence has a purposive element.

62. As stated by Williams : What does legal mens rea mean? It refers to the mental element necessary for the particular crime, and this mental element may be either intention to do immediate act or bringing about the consequence or (in some crimes) recklessness as to such act or consequence. In a different and more precise language, the mens rea means intention or recklessness as to the element constituting actus reus . These two concepts, intention and recklessness, hold a key to the understanding of large part of criminal law, some crimes require intention and nothing else will do, but some can be committed either intentionally or recklessly. Some crimes require particular kind of intention or knowledge [Williams on Criminal Law (General/part page 30)]. Referring to the elements of mens rea , Glanville Williams states : the mere commission of a criminal act (or bringing about the state of affairs that the law provides against) is not enough to constitute a crime, at any rate in the case of more serious crime. This generally requires, in addition, some element of wrongful intent or other fault. The Apex Court in the case of Director of Enforcement Vs. M.C.T.M. Corporation Pvt. Ltd. - AIR 1996 SC 1100 has in para 7 observed thus :

" Mens rea " is a state of mind. Under the criminal law, mens rea is considered as the "guilty intention" and unless it is found that the 'accused' had the guilty intention to commit the 'crime' he cannot be held 'guilty' of committing the crime."

Their Lordships of the Apex Court in para 8 of the above referred judgment considered the breach of civil obligation by the accused which attract penalty under the FERA and observed thus :

"It is true the breach of "civil obligation" which attracts 'penalty' under Section 23(1)(a), FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 that would immediately attract the levy of 'penalty' under section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the 'accused' had the necessary "guilty intention" or in other words the requisite mens rea to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947."

The above referred observations of the Apex Court would demonstrate that under the criminal law unless it is found that the accused had guilty intention to commit the crime, he cannot be held guilty of committing the crime. Similarly even in case of breach of civil obligations, it is required to be proved before imposing penalty that the delinquent had wilfully contravened the provisions of the Act.

63. On the backdrop of the legal proposition vis-a-vis mens rea, the relevant provisions of POTA needs consideration. Clause (a) of Sub-section (1) of Section 3 of POTA starts with the following words -

"Whoever with intent to threaten the unity, integrity, security or sovereignty of India...."

would be a person committing terrorist act. Plain reading of clause (a) of sub-section (1) of Section 3 of POTA contemplates that whoever commits an offence in respect of the contingency enumerated in clause (a) of sub-section (1) of Section 3 of POTA needs to have intention (mens rea) to commit such offence mentioned therein.

64. So far as clause (b) is concerned, the situation is slightly different and contemplates that whoever voluntarily does an act of aiding or promoting in any manner the object of such association, would be a person committing a terrorist act. We are not concerned so far as other provisions of clause (b) are concerned in the present case. The act of aiding and promoting the object of such association must be a voluntary act and not under duress or threat.

65. Sub-section (3) of Section 3 of POTA also needs to be understood in its right perspective. The section contemplates that whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of a terrorist act or any act preparatory to a terrorist act, shall be punishable..... Under the scheme of the provision, conspiring, attempting, advocating, abating, advising and facilitating must be for commission of a terrorist act and, as we have observed hereinabove, clause (a) of sub-section (1) of Section 3 defines what is meant by terrorist act and requires intention to commit such acts and, therefore, by necessary implication the person who is charged with criminal liability under Sub-section (3) of Section 3 of POTA must possess requisite criminal intention in conspiring, attempting, advocating, abating, advising, facilitating and inciting to commit terrorist act. In absence thereof, the entire bearing of the criminal liability under these provisions would change.

66. So far as sub-section (2) of Section 21 of POTA is concerned, it is the knowledge which is requisite to commit an offence under this provision. Without such requisite knowledge mere arranging, managing or assisting in arranging or managing a meeting by itself is not enough to fasten the criminal liability as contemplated under this provision. As far as sub-section (3) of Section 22 of POTA is concerned, similar situation emerges from this section. The person must have a requisite knowledge or at least has reasonable cause to suspect that the money or property will be used for the purpose of terrorism, without such knowledge it will be difficult to fasten criminal liability under this Section. As far as provisions of Sections 21(2) and 22(3) are concerned, the word 'knowledge' used in these provisions needs to be construed on the backdrop of the concept of mens rea. In case of other criminal offences, mens rea and intention are required. So far as the offences contemplated under sub-section (2) of Section 21 and sub-section (3) of Section 22 of POTA are concerned, the offender needs to have knowledge without which it will be difficult to fasten criminal liability on a person under these provisions of POTA. Absolute liability is not to be lightly presumed but has to be clearly established. The concept of mens rea is aptly described by Their Lordships of Apex Court in the case of Nathulal Vs. State of Madhya Pradesh - AIR 1966 SC 43. In para no.4 of the judgment Their Lordships observed thus :

"The law on the subject is fairly well settled. It has come under judicial scrutiny of this Court on many occassions. It does not call for a detailed discussion. It is enough to restate the principles. Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in

England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the objection of the statute would otherwise be defeated."

The above referred observations of the Apex Court in no uncertain terms mandate that mens rea is an essential ingredient of a criminal offence unless the statute excludes the element of mens rea. Applying the principles to the relevant provisions of POTA with which we are concerned in the present case referred to hereinabove and under which the appellant is prosecuted, it is evident that for committing terrorist act, as contemplated in clause (a) of sub-section (1) of Section 3, mens rea is necessary to commit an offence mentioned therein. Insofar as sub-section (3) of Section 3 of POTA is concerned and as far as offences contemplated under sub-section (2) of Section 21 and sub-section (3) of Section 22 of POTA are concerned, it is knowledge which is requisite before committing the crime under these provisions.

67. We are well aware that at the stage of bail this Court examines the matter from the stand point of prima facie case and does not enter into threadbare analysis of the merits of the evidence. It is undoubtedly left to the trial Court to consider the same at the appropriate stage. However, in the present case, the appellant has filed an appeal under Section 34 of POTA against the order passed by the designated Court. It is the duty of the Appellate Court to look into the material/evidence collected by the prosecution at this stage of the trial and consider the same in order to arrive at a conclusion as to whether the said evidence is sufficient prima facie to connect the accused with the crime or not and is admissible one in evidence. We are also aware that judicial approach in dealing with the case where the accused is charged of an offence of serious nature should be cautious, circumspect and careful and this Court needs to consider the matter carefully and examine all the relevant and material circumstances before granting/refusing the bail to the accused.

68. At the same time, it must be borne in mind that while considering the statutory provisions and their effect, this Court is required to interprete them correctly keeping in view the object and intent of the legislature. It is the duty of the Court to apply the correct interpretation of the relevant provisions to the evidence collected by the prosecution and is further required to find out whether, in the circumstances, the accused had made out a case for grant of bail or not. In the instant case, since this Court is exercising appellate power under Section 34 of POTA, the Court is also required to consider the validity of the impugned orders passed by the designated Court whereby the bail has been refused, since this Court ultimately would be required to confirm or set aside the impugned orders passed by the designated Court. Similarly, sub-section (7) of Section 47 contemplates that where the Public Prosecutor opposes the application of the accused to release on bail, no person accused of an offence punishable under this Act or any Rule made thereunder, shall be released on bail unless the Court is satisfied that there are grounds for believing that he is guilty of committing such offence and in order to reach such satisfaction, though prima facie in nature, the Court is required to scrutinize the material/evidence available on record in the form of Charge-sheet.

69. On the backdrop of the above referred legal propositions propounded by the Apex Court, it is necessary for us to consider the material/evidence produced by the prosecution before the Special Court in the light of these propositions of law in order to conclude whether the appellant has made out a case for grant of bail, or the material is adequate to connect the accused with the crime in question justifying the impugned order of rejection of bail application of the appellant.

70. In the instant case, the appellant is charge-sheeted for the offences punishable under Sections 363, 368, 143, 147, 148, 149, 121, 364(A) read with Section 34 of the Indian Penal Code, under Section 3/25 of the Arms Act and under Sections 3(2), (3), (5), 21(2), 21(3) of the POTA, 2002. In order to connect the appellant with the crime in question and for the offences charged, the prosecution is relying on the following evidence :-

(a) Report, dated 26-6-2002, lodged by one Bapu Reddy in the Police Station, Sironcha;

(b) Statement of witness Tulsigir Samaiya (Police Patil) of Chittoor recorded on 9-6-2002;

(c) Statement of witness Pocham Madavi, resident of Chittoor;

(d) Confessional Statement of co-accused Kamlakar Olala under Section 32 of the POTA;

(e) Recovery of chit from the dump, on the basis of which the prosecution claims that the recitals in the chit reveal that the appellant has given financial assistance to the Naxalites.

(f) Statement of Sampoorna Singh in order to corroborate that the telephone no.66365, at the relevant time, was used by appellant Gausuddin, on which number the calls were received from telephone no.33212 alleged to have been made by Bakanna as per recitals in the confessional statement of Kamlakar.

The Additional Public Prosecutor categorized the above referred evidence in order to show availability of prima facie evidence against the appellant for the respective offences under POTA in the following manner :-

For Sub-section (3) of Section 3 of the POTA, the prosecution is relying on following evidence :-

(i) Phone calls/Telephone List.

In the confessional statement of Kamlakar, it is stated that Telephone No.33212 was operated by Bakanna (Naxalite). In the list of telephone calls from this telephone number, the calls have been detected to be made on telephone no.66356, which was used by present appellant who was residing in the house of Sampoorna Singh and who had stated in his statement that he had given the telephone to be used by the present appellant Gausuddin. The prosecution, therefore, alleged that Bakanna had called the present appellant on several dates and the dates are every relevant as the phone calls have been detected from the months of March to May.

(ii) Statement of Sampoorna Singh :

Sampoorna Singh is the resident of Alapalli. He had given the house on rent to the present appellant Gausuddin along with his telephone no.66356, which was, at the relevant time was under use of the appellant.

(iii) Statement of witness Somaiya Lachchu :

In his statement, Somaiya had stated that he was working as a carrier of message from a Naxalite leader and on one occasion, he had taken a message from Commander Nootan to the appellant Gausuddin and Gausuddin on the said letter had come to visit the Commander and had a discussion with him for about an hour.

71. So far as prosecution of the appellant for the offence under Section 21(2) of the POTA is concerned, the prosecution is relying on the following evidence :

a) Statement of Tulsigiri, which was recorded by the Investigating Officer on 19-6-2002,

b) Statement of witness Pocham Madavi, and

c) Confessional statement of Kamlakar Olala under Section 32 of the POTA.

72. So far as prosecution of the appellant under Section 22(3) of the POTA is concerned, the prosecution is relying on the following evidence :-

(1) Confessional statement of Kamlakar Olala recorded under Section 32 of the POTA.

(2) Recovery of a chit from dump.

(3) Notice under Section 149 of the Criminal Procedure Code.

73. Similarly, so far as Sub-section (5) of Section 3 of the POTA is concerned, there is no specific independent evidence available as such with the prosecution in this regard which has been fairly conceded by the Additional Public Prosecutor and the prosecution is relying on the above referred evidence only even for the offence under Sub-section (5) of Section 3 of the POTA.

74. It will be appropriate for us now to scrutinize the above referred material/evidence available with the prosecution in the form of a charge-sheet in order to find out whether a prima facie case is made out for connecting the appellant-accused with the crime in question. The said evidence needs to be considered in the light of interpretation arrived at by us of the provisions of POTA as well as law laid down by the Apex Court in this regard. So far as Sections 363, 368, 143, 147, 148, 149, 121, 368-A, read with Section 34 of the Indian Penal Code are concerned, the prosecution is relying on the statement/report, dated 26-6-2002, lodged by witness Bapu Reddy in the Police Station, Sironcha. The recitals in the report reveal that the author of the report, i.e., Bapu Reddy along with one Narendra Reddy was abducted by members of Bakanna group on the gunpoint from Kaleshwar unit in the forest of Navegaon . Bapu Reddy, who was threatened by Bakanna to collect an amount of Rs.9,84,000=00 from Tendu unit contractors, was also compelled to write a chit/note. Narendra was sent with the said chit to other Tendu leaves contractors, Bapu Reddy, however, in the meanwhile, managed to free himself from the clutches of Bakanna gang, and lodged a report, dated 2-6-2002. It is

also stated in the report that one truck of Tendu leave was also burnt by the gang of Bakanna.

75. So far as offences under the Indian Penal Code as well as under the Arms Act are concerned, for which the appellant is prosecuted, the above referred report of Bapu Reddy is the only piece of evidence available with the prosecution at this stage. This fact has not been disputed by Mrs. Dange, learned APP. The plain reading of the above referred report of Bapu Reddy does not implicate the present appellant for the offences alleged to have been committed by the appellant under the provisions of Indian Penal Code as well as Arms Act. The recitals in the said report reveal that Bapu Reddy was abducted by members of the gang of Bakanna, and he was made to write a note in order to collect the amount from the other Tendu leaves contractors, and one Narendra Reddy was sent with the said note to the other Tendu leaves contractors. Apart from these allegations, there is absolutely nothing in the said report in order to show the complicity of the appellant in the crime in question so far as it relates to the offences under the Indian Penal Code and the Arms Act.

76. Now it will be appropriate for us to consider the evidence/material available with the prosecution under the provisions of POTA.

77. So far as Section 3 of the POTA is concerned, the prosecution is relying on the confessional statement of another co-accused Kamlakar, wherein co-accused Kamlakar has stated that his telephone bearing no.33212 was operated by Bakanna (Naxalite) and the list of telephone calls reveals that the telephone calls were made from telephone no.33212 on telephone no.66356, which was used by the present appellant who was residing in the house of Sampoorna Singh. The prosecution, on the basis of the recitals in the confessional statement of co-accused Kamlakar, which was recorded on 10-6-2002 by the Additional Superintendent of Police under Section 32 of the POTA, wanted to connect the accused with the offence under Section 3(3) of POTA along with the statement of witness Sampoorna Singh.

78. For the purpose of prosecuting the appellant under Section 21(2) of the POTA, the prosecution has relied on the following material:-

1) Statement of Tulsigiri Somaiya, Police Patil of Chittoor recorded on 9-6-2002. Perusal of the statement of Tulsigiri would reveal that he is the Police Patil of village Chittoor and on 2-5-2002, the present appellant along with his manager and two other Tendu Patta contractors along with their managers came to village Chittoor at about 8=00 p.m., in two jeeps. In the said statement, he has further stated that the present appellant asked Tulsigiri Somaiya to gather villagers for discussion on plucking of Tendu Pattas. Accordingly Tulsigiri called the villagers for this purpose and within a short time about 30 to 32 people gathered and participated in the discussion on fixing of rate for plucking of Tendu Pattas. The statement further reveals that in the meantime one Kalim Sheikh, resident of Sironcha came on the spot and informed that nobody should leave the place as Bakanna is going to visit the spot and fix the Tendu Patta plucking rate. About half an hour thereafter 20 to 25 Naxalites with guns wearing bluish-green dresses arrived at the spot and the head of the said group Bakanna introduced himself to the people who gathered there. Bakanna took aside three Tendu Patta contractors and had a discussion with them for about half an hour and later on disclosed the people who had gathered there that the contractors will pay Rs.147/- (One Hundred and Forty Seven). Thereafter the contractor

also disclosed that they would pay the said amount and the people should start the work of plucking of Tendu leaves.

79. Another evidence in this regard is the statement of Pocham Madavi, who had stated the similar facts as stated by Tulsigiri in his statement. Pocham Madavi has stated that the appellant had reached village Chittoor in the evening hours by a jeep and he had asked the Police Patil to collect people for having a discussion in respect of rates. The Police Patil gathered some people. Pocham Madavi also participated in the said meeting. This witness further stated that when the meeting was in progress, Naxalites visited the spot and they took aside contractors and had a discussion with them for half an hour. Thereafter the Naxalite leader Bakanna disclosed the rates fixed for plucking of Tendu Pattas.

80. It is not disputed by learned APP that the appellant is prosecuted for the offence under Section 21(2) of the POTA on the basis of statements of Tulsigiri Samaiya and Pocham Madavi as well as confessional statement of co-accused Kamlakar Olala. So far as confessional statement of Kamlakar Olala is concerned, we will deal with this piece of evidence at a later point of time. However, it is necessary to consider the recitals in the statements of Tulsigiri as well as Pocham Madavi, and needs to find out whether it fulfils the requirement of Section 21(2) of the POTA, and connect the accused with the offence under this Section in the light of interpretation arrived at by us which is referred to hereinabove. The title of Section 21 of the Act clearly contemplates that this Section relates to the offences pertaining to support given by an individual or a body or anybody for that matter to the terrorist organisation. The purport of Section 21 has already been considered by us as referred to hereinabove. However, at the cost of repetition, we reiterate the same. The plain reading of the provisions of Section 21 makes it clear that in order to attract this provision, prosecution needs to have an evidence to show that (1) a person has arranged, managed or assisted in arranging or managing a meeting which he knows is to support a terrorists organisation which means an organisation or one of the organisations enlisted in the schedule contemplated under Section 18 of the POTA, (2) to further the activities of a terrorists organisation enlisted in the Schedule, and (3) the said meeting is addressed by a person who belongs to or professes to belong to terrorists organisation. The recitals in the above referred statements prima facie do not show that the meeting, which was arranged by Tulsigiri, was for the purpose of supporting the terrorists organisation or to further the activities of the terrorists organization in connivance with the appellant who was in the know of this aspect. Similarly, it will be difficult for us at this stage to conclude this issue one way or the other. However, in our considered view and in view of the interpretation arrived at by us of Sub-section (2) of Section 21 of the POTA as well as recitals in the statements of Tulsigiri and Pocham, we are prima facie of the view that the appellant has made out a case for grant of bail on this count.

81. The prosecution wants to take aid of confessional statement of co-accused Kamlakar Olala, which was recorded by the Additional Superintendent of Police on 10-6-2002 under Section 32(1) of the POTA in order to substantiate its charge against the appellant for an offence under Section 21(2) as a piece of evidence in addition to the statements of Tulsigiri and Pocham. Before we consider the recitals in the confessional statement, it will be appropriate for us to keep in mind the interpretation arrived at by us of Section 32 of the POTA referred to hereinabove. We are quite aware of the fact that since we are dealing with the issue of grant or refusal of bail to the appellant, it will not be possible for us a conclude this aspect one way or the other. However, in view of the

interpretation arrived at by us regarding Section 32 of the POTA and the legal propositions emerging in this regard on the basis of the law laid down by the Apex Court referred to hereinabove, in our considered view, bail cannot be refused to the appellant in view of the confessional statement of Kamlakar for the offence punishable under Section 21(2) of the POTA.

82. The appellant is prosecuted for an offence under Section 22(3) of the POTA and in order to sustain the charge under this Section, prosecution is relying on the following evidence:-

(a) Confessional statement of Kamlakar recorded under Section 32 of the POTA and recovery of a chit from dumps.

So far as confessional statement of Kamlakar under Section 32 of the POTA is concerned, we are faced with the similar situation in respect of admissibility of the said confessional statement against the appellant. However, at this stage of the proceedings, it will not be possible to conclude this issue one way or the other. However, in view of the interpretation arrived at by us regarding Section 34 of the POTA and the legal proposition emerging in this regard on the basis of the law laid down by the Apex Court referred to hereinabove, the recitals in the confessional statement against the appellant cannot be a ground to refuse bail to the appellant.

83. The evidence produced by the prosecution, i.e., recovery of a chit from dump which reveals that firstly the said chit or note is not seized or recovered during the course of investigation of the present crime, but was recovered during investigation of some other crime in Andhra Pradesh. On the said chit, there are certain calculations made, which, according to the prosecution, are that an amount of Rs.36,60,000=00 was paid by the appellant to the Naxalite group. It is not disputed that the chit is not seized during investigation of the present crime. Similarly, the same is also not seized from anybody, but from the dumps in Andhra Pradesh while conducting some other investigation. Similarly, the admissibility of this document will have to be considered in view of the provisions of Section 34 of the Evidence Act before we consider the question of probative value of such document. We have considered the purpose of Section 34 in detail and interpreted the same on the basis of the law laid down by the Apex Court in the above referred judgments and also recorded its interpretation of Section 34 hereinabove. From the plain reading of Section 34, it is manifest that to make an entry relevant thereunder, it must be shown that it has been made in a book. That book is a book of accounts and that book of accounts has been regularly kept in the course of business. In view of this interpretation, the loose paper/chit and the entries made thereunder, in our view, are insufficient to connect the accused with the crime in question keeping in view the admissibility of this document in evidence on the basis of interpretation arrived at by us of Section 34 of the Evidence Act.

84. Lastly the prosecution is relying on the notice issued under Section 149 of the Criminal Procedure Code in the month of January, 2002, which reveals that on allotment of a contract of plucking of Tendu Pattas, the appellant and other contractors were asked to refrain from aiding any person, who is associated with People's War Group (PWG), which was declared as a terrorists organization under POTA. It was further informed that if the appellant suspected any person, he should immediately report the said matter to the Police Authorities during the course of business activities. The contention of the prosecution is that in spite of the said notice issued to the appellant, the appellant, for

the first time, reported the matter to Police on 25-5-2002, i.e., after a long gap between the meeting, dated 2-5-2002, wherein Bakanna (Naxalite) came and declared the rates to be paid to the labourers for plucking Tendu Pattas and, therefore, this is a piece of evidence which connects the appellant with the offence punishable under Section 22(3) of the POTA. It is not disputed that the appellant has lodged a report dated 25-5-2002 with the Additional Superintendent of Police, Aheri, wherein he has stated that he had received threats from Bakanna to transfer Penti Paka and Wardham units or he would be killed. The appellant has expressed a strong apprehension about the safety of his collection centres and damage to his bags since he has received threats from the Naxalites. The report further reveals that earlier also when he had gone to Chittoor with his managers Umesh Poreddiwar and Kamlakar, Khaleel, he had seen some persons in "Khaki" dresses with weapons who threatened them to give rate of Rs.150/- for collection or face consequences. The appellant has expressed a threat to his life in the said report. Recitals in the said report, in no uncertain terms, reveal that the conduct of the appellant by lodging a report, dated 2-5-2002, would show that the appellant reported the matter to the police and, therefore, complied with the directions issued in the notice under Section 149 of the Criminal Procedure Code. The recitals in the report not only demonstrate that the appellant has received threats from the Naxalites, but has also made a reference to the threats given to the appellant by Naxalites at Chittoor where the meeting was arranged by Tulsigiri with the villagers for the purpose of discussing the rates for plucking the Tendu Pattas to be given to village labourers. The conduct of the appellant, therefore, does not prima facie reveal that he had voluntarily or otherwise provided money or property to the Naxalites which he new, will be used for the purpose of terrorism. On the other hand, recitals in the report are otherwise. In view of these aspects, we are of the view that the applicant has made out a case for grant of bail even in respect of offence under Section 22(3) of the POTA.

85. While considering this aspect, few other circumstances are necessary to consider. The prosecution case is that Bakanna made telephone calls to the appellant from 4-5-2002 to 22-5-2002. Similarly, the list of telephone bill shows that duration of each call is less than a minute, except the last call, which is alleged to have been made by Bakanna on 22-5-2002, is of two minutes and fifteen seconds. The prosecution has not undertaken a procedure contemplated under Chapter-IV of POTA which deals with interception of communications in certain cases. There is nothing on record to show that whether there was any conversation between the person calling from telephone on 33212 to telephone no.66356, except that the list of telephone bill which shows that the calls were made between 4-5-2002 to 22-5-2002 from phone bearing no.33212 to telephone no.66356. Phone no.33212, as per the prosecution, is in the name of Kamlakar, the other co-accused and in his confessional statement, he has stated that cordless handset of this telephone number was given to Bakanna at the relevant time and, therefore, the prosecution wants us to presume that the call must have been made by Bakanna to the appellant. The purport of Section 32(1) of the POTA has been considered by us as referred to hereinabove and on the backdrop of the legal proposition emerging from the same, it would be difficult for us to give any weightage to the recitals in the confessional statement of Kamlakar.

86. So far as Section 3, Sub-section (3) of POTA are concerned, the prosecution is relying on the confessional statement of co-accused Kamlakar in order to show that telephone no.33212, which was in his name at the relevant time, was operated by Bakanna. The list of telephone calls from his telephone number reveal that calls have been made from his telephone number to telephone no.66356, which was used by the

present appellant who was residing in the house of Sampoorna Singh and, therefore, this aspect is inadequate to connect the appellant with the offence under Section 3(3) of the POTA. Similarly, the statement of witness Sampoorna Singh only reveals that this witness is a resident of Alapalli and he had given his house on rent to the present appellant with telephone no.66356 and nothing more. If the recitals in the confessional statement in view of the interpretation arrived at by us in respect of Section 32(1) of the POTA cannot be called in aid to support the prosecution case, then the simplicitor statement of Sampoorna Singh is also prima facie difficult to connect the accused with the offence punishable under Section 3(3) of the POTA.

87. Another statement, which is relied on by the prosecution, is that of witness Samaiya Lachchu. However, recitals in the statement would show that he was working as a carrier of messages from Naxalite leader and on one occasion he had taken a message from Commander Nootan to the appellant and the appellant on the said letter had come to visit the Commander and had a discussion with him for about half an hour. It is pertinent to note that the so called commander Nootan is not the accused in the present case, nor the appellant is charged with aiding and abetting or giving financial aid to commander Nootan who is associated and related to Naxalite movement of People's War Group (PWG). Therefore, there is no prima facie evidence that the appellant in the present prosecution can be said to be connected with the offence punishable under Section 3(3) of the POTA.

88. Lastly, so far as provisions of Sub-section (5) of Section 3 of POTA are concerned, there is no other evidence available with the prosecution apart from the above referred evidence to connect the appellant with the offence under Sub-section (5) of Section 3 of the POTA. In view of the purport of Sub-section (5) of Section 3 of the POTA, the above referred evidence available with the prosecution, in our view, prima facie does not connect the appellant with the offence under Sub-section (5) of Section 3 of the POTA.

89. Another argument, which is advanced by learned counsel for the appellant in the present case is that the charge-sheet has been filed by the prosecution on 2-12-2002 without there being any valid sanction from the appropriate Govt., and the Special Court under POTA has taken cognizance of the matter, which could be seen from Para 29 of internal page 26 of the trial court's order, which reads thus :-

"ORDER

Chargesheet presented by Dy.S.P. Aheri (S.D.P.O.) through Shri. Dilip Zalake, S.D.P.O. Aheri.

It is verified.

Sd/-

Superintendent

Court of the Additional District Judge and Addl. Sessions Judge, Gadchiroli 443 605

Dt. 2-12-2002 at 12=00 p.m.

Special Case No.1 of 2002

Filed on 2-12-2002.

O

It be registered as Special Case under provisions of POTA 2002.

Sd/-

ASJ

2-12-2002".

It is, therefore, contended by Mr. Manohar that the above referred order-sheet reflects the application of mind by the Additional Sessions Judge and after due application of mind, the Judge of the said court has taken cognizance by ordering registration of case under the provisions of POTA. It is, therefore, contended that in the instant case the court has taken cognizance de hors of the provisions of Section 50 of the POTA and, therefore, the prosecution, which is launched against the appellant, is invalid in law.

90. It is, no doubt, true that it will not be possible for us to record our conclusive finding in this regard at this stage. However, since this issue has a positive bearing on the overall prosecution and the same needs to be prima facie considered by us at this stage, particularly keeping in view the provisions of Section 49 (7) of the POTA, whereby the court is required to reach the requisite satisfaction before releasing the accused on bail.

91. We have already discussed hereinabove in detail the legal proposition propounded by the Apex Court in respect of what is meant by taking cognizance by a Court or a Judge and the clear position, which emerges from the said scenario, is that taking of cognizance merely means to become aware and when used with reference to the Court or a Judge, to take notice of judicially. The word "cognizance" used in the Code indicates the point when the Magistrate or a Judge takes judicial notice of the offence. It is necessary to mention that this is a special legislation and, therefore, offences committed under this special legislation are to be tried by the Special Court. In other words, the Special Court gets jurisdiction to try the criminal case only when the Judge is of the view, after going through the charge-sheet or the papers of investigation which are filed in the court, that the provisions of POTA are attracted and the case against such offender can be registered under the provisions of POTA. That means the Judge is aware of and has taken the judicial notice of the offence and it is only thereafter he has ordered registration of the offence. In the context of the present case, in our view, the above referred factors prima facie would show that this is not the case where it can be said that the Judge has not taken a judicial notice of the offence.

92. It is undisputed fact that the prosecution has not obtained sanction for prosecution required under Section 50 of the POTA till this date. Similarly, we cannot ignore the fact that Section 50 opens with the non-obstante clause and prohibits the Special Court from taking cognizance without valid sanction from the appropriate Govt.. Prima facie taking into consideration the above referred factors, we are of the view that the appellant has made out a case for grant of bail.

93. Since we are dealing with the appeal filed by the appellant, it will be necessary for us to consider the validity of the impugned orders passed by the Special Court. In the instant appeals, we are not concerned with the provisions of Section 167(1) and (2) of the Criminal Procedure Code, since the appellant is seeking a bail on merits and challenged the impugned orders accordingly and, therefore, it is not necessary for us to adjudicate upon this aspect of the matter. We have perused the impugned order, dated 16-11-2002, which is the subject-matter of challenge in Criminal Appeal No.679 of 2002 as well as the order, dated 17-12-2002, which is the subject-matter of challenge in Criminal Appeal No.3 of 2002. Perusal of order, dated 16-11-2002, would show that in para 28 the Judge of the Special Court in view of Section 53(2) of the POTA, which reads thus :-

"53(2) - In a prosecution for an offence under sub-section (3) of Section 3, if it is proved that the accused rendered any financial assistance to a person, having knowledge that such person is accused of, or reasonably suspected of, an offence under that section, the Special Court shall draw adverse inference against the accused."

has held that there is a presumption available in favour of the prosecution and against the accused. The very finding of the Special Court is misconceived, since this presumption is only available when the prosecution first proves the offence under Sub-section (3) of Section 3 of the POTA, and not otherwise. The very approach of the trial court is misconceived and devoid of substance and, therefore, cannot be sustained in law. Similarly, the trial court did not take into consideration the legal requirements of Section 32(1) of the POTA as per the scheme of that provision as well as Section 50 of the POTA. It is, no doubt, true that at the time of grant or refusal of bail, the considerations are different and no decisive conclusion can be drawn at this stage. However, it cannot be ignored that what is inadmissible in law at this stage cannot become admissible at the later point of time unless it depends upon further evidence to be adduced by prosecution and, therefore, such issues and such legal aspects are prima facie required to be considered by the Judge of the Special Court, particularly keeping in view the mandate of Section 49(7) of the POTA. Similarly, at this stage evidence cannot be appreciated in that sense of the term. However, admissibility/inadmissibility of evidence will have a positive bearing in considering the aspect of grant or refusal of bail and, therefore, this aspect cannot be ignored by the court. While passing the impugned order, dated 16-11-2002, the Judge of the Special Court has not considered all these issues in the light of the law laid down by the Apex Court in this regard and, therefore, the order is unsustainable in law.

94. So far as another impugned order, dated 17-12-2002, is concerned, the said order also suffers from the same vice and in addition to that the observations made by the learned Judge of the Special Court in Para 27 while interpreting Section 50 of POTA are prima facie misconceived. Similarly, we are of the prima facie view that the approach of the trial court so far as aspect of taking cognizance is concerned is also not sustainable in law. Though the Special Court has passed very lengthy orders while refusing bail, however, the sum and substance of the observations and the findings recorded thereunder prima facie do not warrant rejection of bail application of the appellant.

95. We wish to record our concern regarding investigation and prosecution of the offenders under Special Acts by the prosecution. The special legislations are evolved by the Parliament in order to take care of extraordinary situation arising out of certain categories of extremely serious offences which cannot be taken care of and dealt with by

the general criminal law of the land, which is in force. We expect that prosecution agency should be extremely careful, vigilant and effective while conducting investigation in respect of such offences and the same should be strictly according to the requirements of provisions of such special legislations like POTA, TADA Act etc.; otherwise the very purpose and object of such legislations would be defeated.

96. Similarly, we expect the prosecuting agency to be aware of the law regarding recording of confession of the person as per the mandate of Section 32(1) of the POTA. We have interpreted this Section in our present judgment keeping in view the relevant law laid down by the Apex Court in this regard as well as language used in this provision, legislative intent and purpose of the Act. The situation is not new to the prosecuting agency as TADA Act was enacted by the Parliament in the year 1987 and the aspect of confession and its admissibility against co-accused jointly tried in the same trial was considered by the Parliament insufficient to deal with the extraordinary situation emerging from the offences under TADA. Therefore, the Parliament by Amending Act 43 of 1993 amended Section 15(1) of TADA Act and inserted certain provisions making confession of the co-accused recorded under the provisions of the TADA Act admissible in evidence against the co-accused, abettors, conspirators who are jointly tried in the same trial, and is treated as substantive evidence against the co-accused. On the backdrop of these facts, we expect prosecuting agency to be aware of these legal aspects of provisions of Section 32(1) of the POTA and should conduct investigation keeping in view all these vital aspects in respect of admissibility of confession recorded under Section 32(1) of the POTA, and not to repeat such mistake of solely relying on the confessional statement of the accused, time and again, to prove the offence/offences against the co-accused and regard must be had to the provisions of Section 32(1) of the POTA. Prosecuting agency is expected to collect independent evidence to connect the offender with the crime under the provisions of POTA and should not rely solely on confessional statement of co-accused for this purpose in order to bring home the guilt of the accused under the provisions of the Special Act.

97. Similarly, we fail to understand what prohibits the prosecuting agency to comply with the mandatory requirements of law as contemplated by Section 50 of POTA. The Special Courts are constituted to deal with these extraordinary situations. At the same time, the Legislature has provided certain safeguards in order to avoid misuse or abuse of the provisions of this Act, and made it mandatory for the prosecution to obtain previous sanction of the Central Govt., or the State Govt., as the case may be, and prohibited the Special Court from taking cognizance of any offence under this Act without previous sanction of the Central Government or State Government, as the case may be. The purport of Section 50 of POTA is two-fold. Firstly it casts a duty of obtaining sanction for prosecution of the offences under provisions of POTA by prosecution from the appropriate Government and secondly the Courts are debarred from taking cognizance of the offence under this Act without previous sanction of the appropriate Government. We have already interpreted this Section in the earlier paragraphs of this Judgment and, therefore, we do not wish to reiterate the same. However, we fail to understand as to why these mandatory requirements are not fulfilled by the prosecution in such cases. At the same time, we deprecate the approach of the Judge of Special Court to treat these proceedings under Special Act casually. The Judges of the Special Courts are expected to keep in mind the purport of the fact of taking cognizance of an offence under this Act and consequences thereof. If the Court as well as prosecuting agency fail to act according to the mandate of this Section, the whole object of the Act is likely to be frustrated and the purpose for which such Special Acts are enacted would be defeated. Similarly, we expect

the appropriate Government to complete procedural mandatory formality of granting sanction, if necessary, without wasting any time and fulfil the mandatory requirement of Section 50 of POTA. The appropriate Government is expected to keep in mind the far-reaching consequences in case the procedural requirement mandated by provisions of Section 50 is not fulfilled. Inaction or delay on the part of the appropriate Government in this regard shall, undoubtedly, not only frustrate the object of the Act, but also result in giving benefit to the unscrupulous elements.

98. We cannot turn the Nelson's eye to the fact that the necessity to evolve this legislation by the Central Govt., was felt because of the method of madness which is adopted by various terrorist organizations to attach the symbol of power to destabilize the sovereign nation and our nation faced multifarious challenges in the management of its internal security. Similarly, there was an upsurge in terrorists activities, insurgent groups in different parts of the country. In such situation, the prosecuting agency, while doing investigation of the offences under such special legislation, should strictly conduct the investigation according to the provisions of such legislation and are expected to conduct the investigation in a more responsible manner keeping in view the mandate of the provisions of POTA, since they are accountable to the country for their lapses.

99. Another aspect, which we feel, needs attention of the prosecuting agency is that there are broadly three categories of offences which can be dealt with by different criminal laws. The categories mentioned herein are illustrative in nature and not exhaustive in character. The first category of offences is those which can be adequately dealt with by general criminal laws of this nation which are in force. The second category of offences is those which cannot be dealt by general criminal laws and for which special legislations are evolved by the Parliament or State Legislatures, as the case may be and Special Acts are enacted to deal with such situation. These are the special legislations and, therefore, procedure evolved for investigation in respect of such offences in many ways is different than the regular/normal procedure of investigation in the regular criminal offences. The investigating agency, in our view, is duty bound to keep such procedure in mind and investigate the offences under the Special Acts strictly according to provisions of such Special Acts in order to achieve the object and purpose for which Special Acts are enacted by the Parliament. The third category of offenders is, who, in fact, are not criminals, but are common people consisting of professionals like doctors, chartered accountants, businessmen etc., who are under coercion, duress or threat from the criminals are required to part with monetary consideration. However, their such conduct is made punishable under the Special Act. In our view, in such situation, it is the duty of the investigating agency to find out whether raising of funds or providing monetary assistance to the criminals or criminal organizations is done by such persons voluntarily or with the knowledge that such money would be used for furthering the object of such criminal organization. If the prosecution agency fails to take into consideration these aspects while conducting investigation under the provisions of the special legislation, then there is a possibility that such investigation would invariably culminate into prosecuting the common man and the hard core criminals or terrorists would go scot free which will frustrate the very object and purpose of the Act. Similarly, there is a duty cast upon the citizens to approach police authorities as soon as they receive threats from such criminals for parting with monetary consideration, in order to help the police authorities to arrest and prosecute such unscrupulous elements. We cannot ignore the contemporary law and order situation in our country. However, we hope and trust that in future the prosecuting agency will keep in mind the interpretation arrived at by us in respect of certain important provisions of

POTA and the observations made by us in the present judgment in order to achieve the purpose for which the Parliament has evolved the special legislation to fulfil the object of the Special Act.

For the reasons stated hereinabove, we hereby quash and set aside the impugned order, dated 16-11-2002, passed by Additional Sessions Judge, Gadchiroli, in Misc. Criminal Application No.12 of 2002, and the order, dated 17-12-2002, passed in Special Case No.1 of 2002 by the Additional Sessions Judge, Gadchiroli, so far as it relates to rejection of grant of bail to the appellant, and release the appellant on bail on the following terms and conditions :-

The appellant be released on bail subject to furnishing a cash surety of Rs.5,00,000=00 (Rupees Five Lakhs Only) and one surety in the like manner. He shall not enter jurisdiction of Gadchiroli District till the trial is over, and shall stay at Warangal and report to Police Station, Mathwada (Warangal) three times a week, i.e. on every Monday, Wednesday and Sunday between 4.30 p.m. and 7.30 p.m..

Order accordingly.

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Cross Citation :2004 ALL MR (Cri) 2889

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

D. B. BHOSALE, J.

Mr. Bhaskar Sen Vs. State of Maharashtra & Ors.

Criminal Writ Petition No.1424 of 2003

WITH Criminal Writ Petition No.3191 of 2004

WITH Criminal Writ Petition No.3192 of 2004

WITH Criminal Writ Petition No.3129 of 2004, 1st September, 2004.

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Criminal P.C. (1973), Ss.205, 317 - Personal attendance of accused - Dispensing with - Magistrate should dispense with attendance in appropriate cases of accused- Ordinarily court should be generous and liberal in exercising powers under Ss.205 and 317 – The Court should avoid requiring the accused or his advocate to apply for exemption for every date – Only when the presence of accused is must and trial cannot proceed in absence of accused then only application for exemption is necessary - Court should avoid issuance of NBW in the first instance and it should be issued only as a last resort - Detailed instructions about procedure to be followed in the interest of speedy disposal of pending cases and undue harassment to accused laid down.

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Eq. Citation : 2013 CRI. L.J. 616

ORISSA HIGH COURT : CUTTACK

CORAM : MR. V.GOPALA GOWDA , CJ AND MR. JUSTICE S.K.MISHRA , J.

W.P.(Crl.) No. 1096 of 2011

on 5 October, 2012

Arun Kumar Budhia. ... Petitioner Versus

State of Orissa and another. ... Opposite parties For petitioner - M/s. Goutam K. Acharya, K.M.Patra, P.K.Das, S.K.Behera, K.G.Hadai,

J.K.Mohapatra and Miss R.Nayak.

For opposite parties - Government Advocate, (for opposite parties 1 and 2) and

Mr. S.D.Das, Asst. Solicitor General (for opposite party no.3).

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The accused is entitled to get a copy of the First Information Report Articles 21 and 22 provides that the liberty of a citizen cannot be interfered or curtailed lightly by the authorities. So it is to be determined, whether at the stage of initial investigation, the accused has a right of receiving information regarding the accusation or allegation made against - a person, who is in custody of the same, has the liability to give a copy thereof to the person who has interest in the same or whose interest is adversely affected by the same.

> Thus, we allow the writ application and direct that : (i) The accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C. (ii) An accused who has reason to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/ agent for

grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for 8

obtaining such a copy from the court. On such application being made, the copy shall be supplied within twenty-four hours. (iii) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Code.

(iv) The copies of the F.I.Rs., unless reasons recorded regard being had to the nature of the offence that the same is sensitive in nature, should be uploaded on the Odisha Police website or by the district police website, as the case may be, within twenty-four hours of lodging of the F.I.R. so that the accused or any person connected with the same can download the F.I.R and the appropriate application before the Court as per law for redressal of his grievances.

(v) The decision not to upload the copy of the F.I.R. on the website of Odisha police/District police office shall not be taken by an officer below the rank of Deputy Superintendent of Police or Assistant Commissioner of Police, as the case may be, and that too by way of a speaking order. A decision so taken by the DSP/ACP shall also be duly communicated to the Magistrate having jurisdiction.

(vi) The word 'sensitive' apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore 9

would also include concept of privacy regard being had to the nature of the F.I.R.

(vii) In case a copy of the F.I.R. is not provided on the ground of sensitive nature of the case, the person aggrieved by the said action, after disclosing his identity, can submit a representation with the Commissioner of Police/Superintendent of Police of the District, who shall constitute a committee of three high officers and the committee shall deal with the said grievance within three days from the date of receipt of the representation and communicate it to the aggrieved person.

(viii) The Superintendent of Police shall constitute the committee within eight weeks from today.

(ix) In cases wherein decisions have been taken not to give copies of the F.I.Rs. regard being had to the sensitive nature of the case, it will be open to the accused/his authorized representative to file an application for grant of certified copy before the court to which the F.I.R. has been sent and the same shall be provided in quite promptitude by the concerned court not beyond three days of the submission of the application.

(x) The directions for uploading the F.I.R. on the website of Odisha Police shall be given effect from 3Ist January, 2013.

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S.K.Mishra, J. - In this writ petition, the petitioner has prayed for issuance of a writ of mandamus to the State of Odisha to make provision for supply of copy of F.I.R. registered by the police to the accused persons and/or their relatives and to direct 2

the Odisha Police to upload the F.I.Rs. in their website within a reasonable time after registration.

2. The petitioner is an Advocate and has filed this writ petition in the nature of a public interest litigation to solve the difficulties faced by the accused persons, who were named in the F.I.R. registered against them in receiving copy of the F.I.R. for seeking appropriate relief for protecting their right to life and personal liberty. It is brought to the notice of the Court that most of the times the accused named in the F.I.R. is not aware of lodging an F.I.R. or contents thereof and, therefore, without an authenticated copy of the same, he faces handicap in moving appropriate applications before the Courts for protecting his liberty.

3. The State has filed a counter affidavit and in the said counter affidavit, the State has sought to bring to the notice of the Court that there is no provision in the Criminal Procedure Code or in the G.R. & C.O. (Crl.) to provide copies of the F.I.R. to the accused by the Police Officers.

4. In order to appreciate the contentions raised by the learned counsel for the petitioner, it is appropriate to take note of various provisions those are applicable. Section 154 of the Code of Criminal Procedure, 1973, hereinafter referred as the 'Code' for brevity, provides for information in cognizable cases. Section 154 of the Code is quoted below:

"154. Information in cognizable cases :- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such 3

officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant. (3) Any person aggrieved by a refusal on the part of the officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and

such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

5. Section 154 of the Code provides for information as to the cognizable cases and investigation of such cases, whereas Section 156 of the Code provides for police officer's power to investigate cognizable cases. After investigation, final report is submitted by the police to the Magistrate having territorial jurisdiction.

6. After completion of investigation and submission of charge-sheet, before trial, the accused is entitled to copies of the police report as provided in Section 207 of the Code. The said Section reads as follows: "207. Supply to the accused of copy of police report and other documents.- In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154; (iii) the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been 4

made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173;

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused: Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

7. Section 207 of the Code therefore mandates that after completion of investigation and submission of final form before the learned Magistrate, it is the duty of the learned Magistrate to furnish the accused a free copy of the documents, which includes police report, F.I.R., statements recorded under Sections 161 and 164 of the Code etc. However, this provision comes into play only after the investigation is over and after submission of the final form. Prior to that, there is no provision under the Code for an accused to be supplied with a copy of the F.I.R. It is argued at length that in absence of the copy of the

F.I.R., the very right of the accused to get himself defended cannot be fulfilled as he is not in a position to know the nature of the allegation, so that he will approach the appropriate forum for obtaining necessary relief for protecting his right and liberty. 5

8. Article 21 of the Constitution of India clearly provides for protection of life and personal liberty, which is quoted below:

"21. Protection of life and personal liberty.- No person shall be deprived of his life or personal liberty except according to procedure established by law."

Thus, it is luculent that Article 21 of the Constitution of India provides for protection of citizens' life and personal liberty and it can be only curtailed by due procedure established by law. Thus, if a person is accused of committing a crime and there is chance of being apprehended by the police, he has a right to have an information about the allegations against him even at the initial stage of investigation. The Constitution of India provides in Article 22 regarding protection against arrest and detention in certain cases, which is quoted below: "22. Protection against arrest and detention in certain cases.- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

4. No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of Clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

5. When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

6. Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

7. Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4); (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

PRINCIPLES OF NATURAL JUSTICE

It is not possible for the Court to decide an issue, not raised/agitated by the authority for the reason that other party did not have opportunity to meet it and such a course would violate the Municipal Council Vs. State of Punjab AIR 1997 SC 2841)

Similarly, in Vs.K. Majotra Vs. Union of India & Ors., (20(b) 8 SCC 40, the Apex Court held as under:-

"The Courts would be well advised to decide the petitions on the points raised in the petition and if in a rare case keeping in view the facts and circumstances of the case any additional points are to be raised then the concerned and affected parties should be put to notice on the additional points to satisfy the principles of natural justice. Parties cannot be taken by surprise."

IT is a setfled JegaJ proposition that no paity can be permitted to agitate an issue unless there are specific pleadings in this behalf.There can be no dispute to the settled iegaJ proposition that the Court or Tribunal is not permitted to decide a case going out of pleadings of the parties nor the evidence led on a non-existing plea is permitted to be taken into consideration, (Vide Sri Mahant Govind Rao Vs. Sita Ram Kesho, (1898) 25 IA 195 (PC); Messers Trojan *&* Co. Vs. RM. N.N. Nagappa Chettiar, AIR 1953 SC 235; Kishori Lai Vs. M/s. Chaltibai, AIR 1959 SC 504; Samant N. Balakrishan Vs. George Fernandez *&* Ors., AIR 1969 Sc 1201; Dalim Kumar Sain & Ors. Vs. Smt. Nand Rani Dassi & Anr., AIR 1970 Cal. 292; Rao Sahab Vs. Rangnath GopaJrao, AIR 1971 SC 2548; Bhoona Bi & Anr, Vs. Gujar Bi, AIR 1973 Mad 154; DR. R.K. S. Chauhan Vs. State of U.P. & Ors., 1995 Supp (3) SCC 688; Commissioner of Income Tax Vs. Park Hotel, (1996) 2 SCC 15; Syed Dastagir Vs. T. R. Gopalakrishna Setty, AIR 1999 SC 3029; Sankaran Pillai (Dead) by LRs Vs. Vs.P. Venuguduswami & Ors., AIR 1999 SC 1218; J. Jermons Vs. Aliammal, AIR 1999 SC 3041; Life Insurance corporation of India *&* Ors. Vs. Jyotish Chandra Biswas, (2000) 6 SCC 562; OM Prakash Gupta Vs. Ranbir B. Goyai, (2002) 2 SCC 256; and Ashutosh Gupta Vs. State of Rajasthan *&* Ors., (2002) 4 SCC 34).

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Cross Citation :1993 CRI. L. J. 2621

ALLAHABAD HIGH COURT

Coram : 1 B. P. SINGH, J. (Single Bench)

Cril. Misc. Bail Application No. 8157 of 1990,D/-4 -9 -1991.

Mohammad Mian, Petitioner v. State of U. P., Respondent.

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Criminal P.C. (2 of 1974), S.437 - BAIL - Bail - Delayed trial - Prosecution failing to produce some witnesses for two years, seeking eight adjournments - Accused not responsible for delay - Bail to be granted. (Para 4 ,5)

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Cases Referred : Chronological Paras
1979 Cri LJ 1036 : AIR 1979 SC 1360 (Explained) 3
AIR 1978 SC 597 3
Ravindra Sharma for Petitioner; A. G. A. for Respondent.
Judgement
ORDER :- The applicant, Mohammad Mian, is being prosecuted for committing the offence punishable under Section 302 I.P.C., P.S. Ojhani, District Budaun.
2 According to recital in the F.I.R., Budha was shot dead by the applicant, Mohammad Mian, on 20-6-1989 at 7.00 P.M. near the culvert of Bilsi Road, Ojhani. A charge sheet was submitted against the applicant under Section 302 I.P.C. and the case S.T. No. 240 of 1989 - is pending in the court of learned sessions Judge, Budaun.
@page-CriLJ2622
3 The main contention of the learned counsel for the applicant is that there has been inordinate delay in the trial of the case and as the applicant has been in jail for more than two years, he may be enlarged on bail. Reliance has been placed upon the case of Hussainara v. State of Bihar, AIR 1979 SC 1360 : (1979 Cri LJ 1036). In the case of Hussainara the Supreme Court has observed as follows at page 1041 (of Cri LJ) :-
"We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India, AIR 1978 SC 597. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be reasonable, fair

and just. If a person is deprived of his liberty under a procedure which is not reasonable, fair or just, such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21 ? That is a question we shall have to consider when we hear the writ petition on merits on the adjourned date. But one thing is certain and we cannot impress it too strongly on the State Government that it is high time that the State Government realised its responsibility to the people in the matter of administration of justice and set up more courts for the trial of cases. We may point out that it would not be enough merely to establish more courts but the State Government would also have to man them by competent judges and whatever is necessary for the purpose of recruiting competent judges such as improving their conditions of service, would have to be done by the State Government, if they want to improve the system of administration of justice and make it an effective instrument for reaching justice to the large masses of people for whom justice is today a meaningless and empty word."

While emphasising that a reasonable expeditious trial of a criminal case is an integral part of fundamental right to life and liberty as enshrined in Article 21 of the Constitution of India, the Supreme Court, in Hussainara's case, has intentionally refrained from answering the question as to what shall be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty of imprisonment as a result of abnormal delay in the conclusion of his trial. The Parliament was conscious of the delay in the investigation and trial of criminal cases. When the new Cr. P.C. was enacted in 1973 a new provision under Section 167(2)(a) was added in old Section 167 to cover the state of investigation of criminal cases, which provides, that no magistrate shall authorise the

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detention of an accused person in custody under Section 167 Cr. P.C. for a total period exceeding 90 days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years and 60 days, where the investigation relates to any other offence, and on the expiry of the said period of 90 days or 60 days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail.

4. Section 437(6) of the Code of Criminal Procedure deals with the trial of cases in the court of magistrate and provides that if in any case, triable by a magistrate, the trial of a person accused of any non-bailable offence is not concluded within the period of 60 days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail unless the magistrate for reasons to be recorded in writing directs otherwise. But no such provision was enacted. so far as the trial of criminal cases by the sessions Judge was concerned. The only relevant provision is to be found in Section 309 of the Code which provides that in any enquiry or

trial, proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. Thus there is no specific provision to grant bail to an accused facing trial in the court of a Sessions Judge if there has been inordinate delay in the trial of his case.

5 Sri Ravindra Sharma, learned counsel for the applicant, has argued that in the present case the applicant Mohammad Mian is languishing in jail for more than two years and he should be released on bail as it is not certain how much long the learned sessions Judge will take to conclude the trial. When there is no statutory provision under which an accused can claim his release on bail for there being inordinate delay in his trial before the sessions Judge, I am of the view that it would not be prudent to lay down that in every case the accused should be enlarged on bail if there has been a long and inordinate delay in his trial. The reason is very simple. If such a view is taken it will give a long handle to the accused and his pairokars and in some cases they may resort to delaying and dilatory tactics in order to bring their cases to a stage where it can be safely claimed that there has been long and inordinate delay in the trial of the case. The cases are not unknown where trials before the sessions Judges have been delayed due to the dilatory tactics adopted by the unscrupulous pairokars of the accused. There may also be cases where the delay may be caused due to other reasons for which the accused is not responsible. For example there can be a case where the delay has been caused due to inability on the part of the prosecution to bring its witnesses to the court. In such a case the court may, in appropriate cases, enlarge the accused on bail.

6. In the present case the case was committed to the court of Sessions on 6-11-1989 and the charge was framed on 11-4-1990. The statement of P.W. 1. Babu, commenced on 24-8-1990 and was concluded on 29-8-1990. On a perusal of copy of order sheet filed by the applicant it is quite clear that during the period 10-5-1990 to 15-3-1991 the prosecution was not in a position to bring its witnesses to court on eight dates. Some other dates were also fixed on which the case was not taken up due to one reason or the other. It is obvious that in this case the accused, Mohammad Mian cannot be saddled with the responsibility of delaying the trial. Considering all the circumstances of the case I am of the view that this is one of those cases where the applicant should be enlarged on bail for the reason that there has been inordinate and undue delay in the trial of the case.

7. Let the applicant, Mohammad Mian, be released on bail in Crime No. 258 of 1989, under Section 302 I.P.C., P.S. Ujahni, District Budaun, provided he furnishes two sureties and a personal bond to the satisfaction of C. J. M. Buduan

Application Allowed.

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Cross Citation :1991 CRI. L. J. 1176

RAJASTHAN HIGH COURT

(JAIPUR BENCH)

Coram : 1 I. S. ISRANI, J. (Single Bench)

Cri. Misc. Bail Appln. No.3661 of 1989 D/- 22 -1 -1990.

Gyan Prakash, Petitioner v. State of Rajasthan, Respondent.

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Criminal P.C. (2 of 1974), S.437, S.439, S.441 - BAIL - MURDER - Bail-Grant of-Accused charged for murder-Proceedings being conducted carelessly and slowly-Accused can be granted bail on personal bond and sureties - The right to life and liberty is guaranteed by Art.21 of the Constitution and the liberty of the person who even may be an accused person, cannot be curtailed unless the circumstances so require. When a person is an accused of a criminal offence and is behind bar, the least that is expected from a judicial Court is to see that the trial Court proceeds at a reasonable pace so that the liberty of the accused person is not curtailed unnecessarily for a long time. Where the accused charged for murder was behind the bars since 25 months and the prosecution had examined only 11 witnesses out of 22 and approach of the trial court was very careless and casual and prosecution was wasting time and prolonging the trial, the accused should be granted bail on furnishing personal bond and sureties to the satisfaction of the trial Court. (Paras 4, 5, 6)

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Narendra Jain, for Petitioner; L. K. Sharma, Public Prosecutor, for the State.

Judgement

ORDER : -This 4th bail application has been filed by the petitioner, who is charged to have committed offence u/S.302 IPC.

It is pointed out by Shri Jain, learned counsel for the petitioner that FIR was lodged on 10-7-1987 and the petitioner was arrested on 23-11-1987. His first bail application was dismissed while making observation that the eye-witnesses mentioned in the said order should be examined within a period of three months and that thereafter the petitioner shall be at liberty to approach this Court again.

The second bail application was dismissed on 4-5-1988. In this application it was observed by this Court that the trial court has not taken care to see that the witnesses are examined within time as directed by the Court. It was again directed that the eye-witnesses mentioned in the order be examined within three months and the petitioners were given

liberty to approach this Court thereafter. The third bail application was filed on 28-10-1988. In this application the evidence of the eye-witnesses was considered and the bail application was rejected without causing any prejudice to the case of either of the parties on merits.

2. It is submitted by the learned counsel that the trial is proceeding at a snail's pace @page-CriLJ1177 which is evident from the fact that the petitioner has been in custody since 25 months and out of 22 prosecution witnesses, only 11 have been examined so far. The learned counsel has filed certified copies of the order sheets of the trial court from 18-12-1988 to 18-12-89 when the case was adjourned to 5-2-1990. It is, therefore, submitted that keeping in view the protracted trial, the petitioner deserves to be released on bail.

3. It is submitted by Shri Sharma, learned Public Prosecutor that the direction of the Court given that at least one date should be fixed for every week was only regarding examining the eye witnesses, so far as the names had been mentioned while rejecting the second third bail application. Thereafter no specific direction was given. He prays that time of three months be granted to complete the prosecution evidence.

4. A bare perusal of the orders of the trial court produced, shows that the prosecution agency has been conducting the case carelessly and the trial is proceeding at snail's pace. On 16-1-1989, 17-1-1989, and 18-1-89, no witness of prosecution was present. Thereafter the case was posted for 8, 9 and 10th March, 1989. However, no summons were issued from office of the Court and, therefore, no witness was present on 8-3-89. Thereafter a case was posted for 19 to 22 April, 1989. On 19-4-1989, one witness P.W. 9 was examined and no other witness was present. On 20-4-1989, one witness Ram Narayan was present but was not examined. On 21-4-89, no witness was present and on 22-4-1989, Additional S. P. was present but he was given-up by the prosecution. Thereafter the case was posted to 15th to 17th June, 1989. No witness was present on 15th and 16th June, 1989. On 17th June 1989, one witness Nathu Singh was present but was not examined by the prosecution. Thereafter case was adjourned to 5th July, 1989, but no witness was present. Again the case was adjourned to 24th July, 1989, on which date also no witness was present. Thereafter the case was adjourned to 24th Aug. 1989, when P.W. 10 was examined but no other witness was present. The case was then adjourned to 26-9-1989 but no prosecution witness was present. Thereafter the case was adjourned to 20-11-1989, when no witness was present. Again the case was adjourned to 18-12-1989, when two witnesses were produced but the accused-persons could not be brought from the jail as no guards were available for bringing them. The case was thereafter adjourned to 5-2-1990. This clearly shows that the trial court also has no control over the proceedings of the case and no effort was made to secure the presence of the witnesses even though the petitioner is behind the bars. On several dates the prosecution failed to produce any witness. The trial court has been casually giving long dates even after the period of one month or even more. When the accused person is behind the bar, it is duty of the trial court to make all efforts to see that the trial proceeds at reasonable fast pace so that the accused-persons, who are considered to be innocent till proved guilty do not remain behind the bars for any time than absolutely necessary. The right to life and liberty is guaranteed by Art.21 of the Constitution and the liberty of the person, who even may be an accused person, cannot be curtailed unless the circumstances so require. When a person is an accused of a criminal offence and is behind bar, the least that is expected from a judicial Court is to see that the trial court proceeds at a reasonable pace so that the liberty of the accused person is not curtailed unnecessarily for a long time.

5. In this case the accused petitioner is behind bars since 25 months and still the prosecution has examined only 11 witnesses out of 22 witnesses, they want to produce.

Even when the witnesses are present in Court, have not been examined and one such witness who is to be given up has been unnecessarily summoned and thereafter given-up when appeared in Court, which shows the casual approach of the trial court and the prosecution agency in wasting the time and prolonging the trial.

6. In these circumstances, this bail application is allowed and the petitioner Gyan Prakash is granted bail provided he furnishes personal bond in the sum of Rs. 10,000/- and two sureties in the sum of Rs.5,000/- each to

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the satisfaction of the trial court with stipulation to appear in that Court on each and every date of hearing and whenever called upon to do so.

Application allowed.

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Cross Citation :1990 CRI. L. J. 2201

BOMBAY HIGH COURT

Coram : 1 G. H. GUTTAL, J. (Single Bench)

Criminal Appln. No. 2630 of 1989, D/- 9 -1 -1990.

Ashak Hussain Allah Detha alias Siddique and another, Applicants ….Vs….

Assistant Collector of Customs (P.), Bombay and another, Opposite Parties.

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(A) Constitution of India, Art.22(2) - Criminal P.C. (2 of 1974), S.57 - - Meaning of - Commencement of arrest - It starts with the arrester taking a person into his custody by action or words restraining him from moving anywhere beyond the arrester's control, and it continues until the person so restrained is either released from custody or, having been brought before a Magistrate, is remanded in custody by the Magistrate's Judicial Act - It stands to reason therefore, that what label the investigating officer affixes to his act of restraint is irrelevant. For the same reason, the record of the time of arrest is not an index to the actual time of arrest. The arrest commences with the restraint placed on the liberty of the accused and not with the time of "arrest" recorded by the Arresting Officers. (Para 7)

(B) Constitution of India, Art.22(2) - Criminal P.C. (2 of 1974), S.57 - DETENTION - Detention for interrogation - It is not authorised by law - There is no authority in the Investigating Officers to detain a person for the purpose of interrogation or helping them in the enquiry. (Para 8) - **Practice of procuring statement by coercive methods deprecated.**

. This manipulation and abuse of the legislative sanction for the use of statements of the accused requires to be censured in the strongest terms. (Para 9)

(D) Criminal P.C. (2 of 1974), S.439 - Narcotic Drugs and Psychotropic Substances Act (61 of 1985), S.37 - NARCOTIC DRUGS - Application for bail - Statements of accused during investigation obtained by coerceive and violent methods - Court will weigh this fact in considering application for bail.

It cannot be said that at the stage of considering application for bail, it is not open to the Court to examine whether the statements are voluntary or whether the accused were illegally detained and assaulted and that the statements as they are and the complaint as it is, is the ultimate truth for the purpose of the application for bail. Such a submission is without any merit. It ignores that grant or refusal to grant bail being a matter of discretion, every fact relevant to the exercise of such discretion has to be considered. However, well intended the action of the prosecution is, if the circumstances reveal that the statements on the basis of which the prosecution seeks to have the accused convicted, are not voluntary, the Court's discretion must naturally be influenced by the deplorable practices followed by the Investigating Officers for procurring the statements. The accused who are tried on the basis of such tainted evidence may well be acquited. But then the time spent in custody does not return to them after their acquittal. It is, therefore, necessary to consider whether the prosecution is in possession of credible evidence. (Para 14)

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Cases Referred : Chronological Paras

1990 Cri LJ 903 (Bom) 9

(1989) Criminal Appln. No. 2508 of 1989, D/-9-1-1989 (Bom), Arvind Mehram Patel v. Intelligence Officer, Narcotics Control Bureau, Bombay 9

(1989) Criminal Appln. No. 2677 of 1989, D/-6-12-1989 (Bom), Hamid Umar Patel v. Y.O. Shah 9

(1984) 1 All ER 1054 : (1984) 2 WLR 660, Holgate-Mohammed v. Duke 7

(1977) 2 All ER 835 : (1977) 1 WLR 812, R. v. Lemsatef 8

(1947) 1 All ER 567 : 176 LT 443 : 63 TLR 231, Christie v. Leachinsky 7

P.R. Vakil with R.G. Merchant and S. Ali Hasan, for Applicants; A.R. Gupte (for No. 1) and R.Y. Mirza, Public Prosecutor (for No. 2), for Opposite Parties.

Judgement

ORDER :- The five accused are alleged to have committed the offences punishable under S.21 r/w. S.29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as "the N.D.P.S. Act" and Ss. 135(1)(a) and 135(1)(b) both r/w. S.135(1)(ii) of the Customs Act, 1962. The Applicants herein Ashak Hussain Allah Detha alias Siddique

and Riyaz Ahmed Afzal are, respectively, accused Nos. 4 and 5. They are hereafter referred to as the applicants of Ashak and Riyaz. They apply for bail.

I. THE PROSECUTION CASE

2. The accused No. 1 Hamid Khan was residing in Room No. 301 and the applicants in Room of R.K. Hotel, Lamington Road Bombay Saidulla, who is in pakistan, despatched a large consignment of narcotic drugs on 19th July, 1989. A lorry, driven by Shersingh, carried the contraband. Accused No. 1 Hamid Khan met the Applicants in Room No. 201 and inquired of them whether the consignment had arrived. Meanwhile, Shersingh met the applicants and told them that he had brought the consignment from Pakistan. The applicants took Shersingh to the room of the accused No. 1. Accused No. 1 took Shersingh in a Maruti Car with him. These facts have been recorded in the statements of the applicants under S.108 of the Customs Act. According to these statements, the role of the applicants in the transaction ended with the introduction of Shersingh with the accused No. 1 Hamid Khan.

3. The consignment was unloaded under the supervision-of Hamid Khan - Accused No. 1, into two fiat cars driven by the accused. Nos. 2 and 3. The officers of the respondent No. 1 intercepted the cars and seized the contraband.

4. The statement of accused No. 1 Hamid Khan is also recorded under S.108 of the Customs Act. He claims to have handed over the keys of the cars to Afzal, accused No. 5, and returned to his room. After an hour or so, presumably after delivery or disposal of the contraband, Afzal handed over the keys back to him.

II. DETENTION AND ASSAULT BY THE INVESTIGATING OFFICERS :

5. Admittedly, the statements of all the accused were recorded by the same officers between the midnight of 19th July, 1989 when the former were detained and the midnight of 20th July, 1989. Thus, for 24 hours the accused were under detention by the respondents' officers. They were not allowed to leave the offices of the respondent No. 1 at any time. They were not produced before the Magistrate within 24 hours as required by law. They were produced before the Magistrate on 21st July, 1989, at 5.20 p.m. The applicants did not have legal assistance. The applicants contend that they complained to the learned Magistrate of assault by the officers who recorded the statements.

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However, the order of the learned Magistrate dated 21st July, 1989, remanding the accused to judicial custody records that the accused made no complaint of illtreatment. However, immediately on their admission in the jail, they made a complaint to the authority of the jail about the assault and pain in the bodies. On the application of the applicants, they were examined by the Chief Medical Officer, Bombay Central Prison. The applicants claim that there is record of injuries made by the Chief Medical Officer, Bombay Central Prison Hospital, Bombay. Therefore, the report of the Chief Medical Officer, Bombay Central Prison Hospital, Bombay, was called for. He has made two reports, the substance of which is as under :-

He examined Afzal, accused No. 5 on 22nd July, 1989. Afzal complained of assault by stick at 3.00 p.m. on 20th July, 1989. The report of the Chief Medical Officer is that Afzal had tenderness on (a) the left chondrial region (b) back (c) right scapular region and (d) right and left gluteal regions.

Similarly, he examined Ashak, accused No. 4 on the same day, who complained of assault by stick on chest at 4.00 p.m. on 20th July, 1989. The injuries were more severe than those on the body of Afzal. They are - (a) bruises on the interscapular region, size 2"x ½", 3"x ½" and 2"x ½"; (b) bruises on the left side of neck size 2"x1/2"; (c) tenderness on both soles of feet, left gluteal region and on the left cheek (d) bruses on right middle of lower leg.

III. THE POINTS URGED :

6. On these facts, Mr. Vakil urged these points :

(a) In view of the injuries found immediately upon their admission into the jail, the confessions must be held to have been extorted by physical assault and illegal detention. The time of the assault stated by the Applicants conforms to the period they were detained for interrogation. Therefore, the confessional statements are not voluntary and they should be rejected.

(b) Secondly, what are recorded as statements of the applicants are partial record of what they had stated. Hamid Khan has implicated the applicants because Hamid Khan says that he handed over the keys of the cars to the applicants who took them and returned them after an hour. The consistent practice of all the Investigating Officers is to confront the maker of the statement with the statements of other accused who implicate him. Either this was not done or if it was done, the denials of the applicants of the incriminating statement made by Hamid Khan have not been recorded. Thus, what have been produced before the Court as the statement the applicants are not a full record of what the applicants had stated.

Mr. Gupta urged that this is not a fit case for releasing the applicants on bail According to him, S.37 of the N.D.P.S. Act precludes every Court including the High Court and the Supreme Court from releasing the accused on bail except in the circumstances stated therein.

IV. "ARREST" - MEANING AND COMMENCEMENT OF :

7. Admittedly, the Applicants were detained without any authority from the midnight of 20th July, 1989 to 5.20 p.m. of 21st July, 1989 - for 17 hours. Their arrest has been so recorded that their production before the Magistrate falls within 24 hours stipulated by Art.22(2) of the Constitution of India and S.57 of the Code of Criminal Procedure. The Prosecution urges that after the "arrest" they were not detained beyond 24 hours. This submission is a distortion of the true meaning of the constitutional guarantee against detention without the sanction of judicial Tribunal. The word "arrest" has not been defined in the Code of Criminal Procedure or in any other law. The true meaning needs to be understood. The word "arrest" is a term of art. It starts with the arrester taking a person into his custody by action on or words restraining him from moving anywhere beyond the arrester's control, and it continues until the person so restrained is either released from custody or, having been brought before a Magistrate, is remanded in custody by the

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Magistrate's judicial act1. In substance "arrest" is the restraint on a man's personal liberty by the power or colour of lawful authority [The Law Lexicon - P. Ramanatha Aiyar Reprint Edition 1987, page 85]. In its natural sense also "arrest" means the restraint on or deprivation of one's personal liberty [The Law Lexicon - T.P. Mukherjee, (1989) page 177-178.].

1. Christie v. Leachinsky, (1947) 1 All ER 567; Holgate Mohammed v. Duke, (1984) 1 All ER 1054. Both quoted in WORDS AND PHRASES LEGALLY DEFINED Vol. 1, Third Edition - page 113.

It is thus clear that arrest being a restraint on the personal liberty, it is complete when such restraint by an authority, commences [The Law Lexican - P. Ramanatha Aiyar Reprint Edition 1987, page 85]. Whether a son is arrested or not does not depend on the legality of the Act. It is enough if an authority clothed with the power to arrest, actually imposes the restraint by physical act or words. Whether a person is arrested depends on whether he has been deprived of his personal liberty to go where he pleases [The Law Lexicon - T.P. Mukherjee (1989), Page 177-178]. It stands to reason, therefore, that what label the investigating officer affixes to his act of restraint is irrelevant. For the same reason, the

record of the time of arrest is not an index to the actual time of arrest. The arrest commences with the restraint placed on the liberty of the accused and not with the time of "arrest" recorded by the Arresting Officers.

The argument that the applicants were not arrested at the mid-night of 19th July, 1989 but were detained for interrogation is untenable. Since the offences under the N.D.P.S. Act are cognisable [Section 37(1) of the N.D.P.S. Act.], the Investigating Officers possess the authority to arrest without warrant. They arrest a suspect or do not arrest at all. The "detention in custody for interrogation known to law. Interrogation is known. A person may be lawfully interrogated. But during such interrogation he is a free man. If he is detained, not allowed to leave the office of the Respondent No. 1 and compelled the eat and sleep there, he is under detention. This restraint is in reality an arrest.

In this case, the applicants were not allowed to leave the Office of the Respondent No. 1 after the mid-night of 19th July, 1989. In the circumstances of this case, the applicants were arrested at the mid-night of 19th July, 1989.

8. The Investigating Officers may lawfully detain a suspect for an offence. But detention in custody for interrogation is not authorised by law. The Investigating Officers may detain for an offence only. In an English Case where the Customs Officers detained a person "for helping with their inquiries", it was held that there was no authority in the Customs Officers to detain a person except for an offence2. The principle that emerges is this : Any restraint on a person's liberty except for an offence is illegal. There is no authority in the Investigating Officers to detain a person for the purpose of interrogation or helping them in the enquiry.

2. R. v. Lemsatef - (1977) 2 A11 ER 835

"If the idea is getting around amongst either customs and excise officers or police officers that they can arrest or detain people, as the case may be, for this particular purpose, the sooner they disabuse themselves of that idea the better". .

On this principle it follows that the detention of the Applicants on the mid-night of 19th July, 1989 was illegal if it was not far having committed an offence under the N.D.P.S. Act. If it was for having committed an offence, the detention was "arrest" and it commenced at the mid-night of 19th July, 1989.

9. My experience of such illegal detention is not confined to this case. In Arvind Mehram Patel and another v. The Intelligence Officer, Narcotics Control Bureau, Bombay (Criminal Appln. No. 2508 of 1989, decided on 9th November, 1989.), the suspects were detained from 1.00 a.m. of 1st October, 1989 to 4.00 p.m. of 4th October, 1989 when they were produced before the Magistrate. During this period, they too were assaulted. In Prajesh Shantilal Vaghani v. The Intelligence Officer, Narcotics Control Bureau, Bombay (Cri. Appln. No. 2631 of 1989 decided on 6-12-1989 (reported in 1990 Cri LJ 903).), and Hamid Umar Patel v. Y.O. Shah, Intelligence Officer, Narcotics Control

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Bureau Bombay (Cri. Appln. No. 2677 of 1989 decided on 6-12-1989.), the accused were similarly detained from 6th September, 1989 to 10th September, 1989 and were assaulted. They were produced before the Magistrate an 10th September, 1989. The tendency to detain suspects for questioning and manipulate the record to show a later time of arrest is a reprehensible practice of recent origin followed only by the Officers of the Customs Department and the Narcotics Control Bureau. In cases under the N.D.P.S. Act and Customs Act, the prosecution is, no doubt, entitled to rely upon the statements of the accused recorded during investigation. But what the Investigating Officers do, in such cases, is to procure statements, by assault, illegal detention and fear of continued detention. Then they present these documents as "statements". That is not what the law permits them to do. They can certainly rely upon the statements made by the accused

voluntarily. But that is different from saying that the statements may be procured by any means and the accused be convicted on such statements. This manipulation and abuse of the legislative sanction for the use of statements of the accused requires to be censured in the strongest terms.

V. EFFECT OF ILLEGAL DETENTION AND ASSAULT :

10. The illegal detention is compounded by physical assault. No doubt, in the case of Afzal, there were no works of injuries such as bruises, haematoma and so on. But the medical evidence is that he had tenderness on six parts of his body. It is difficult to hold, as has been suggested by Mr. Gupte, that the pain and tenderness can be feigned. Doctors cannot make out tenderness without physical examination. Even if a patient feigns pain in the body, it is the response to physical examination that leads to the conclusion of tenderness.

In the case of Ashak, Accused No. 4, there are actual marks of injuries. There is no doubt therefore that Ashak too was assaulted. It is significant that the parts like interscapular region and gluteal region were chosen for the assault in the case of both the Applicants.

11. Mr. Gupte made a feeble suggestion unsubstantiated by facts that the reports of the Chief Medical Officer could be procured. No such accusation is made in the affidavits. Besides, no factual basis for such unjustified accusation is discernible from the circumstances of this case. The Chief Medical Officer a public servant, had no axe to grind by making false reports. In any case, the suggestion is unfounded.

12. The Investigating Officers, no doubt suffer from a disadvantage as such crimes are committed in secrecy and at odd hours of the night. The intelligence on the basis of which the Investigating Officers act may furnish accurate information and the interception of the contraband may have been honest. But the intelligence on the basis of which the Investigating Officers act, has to be transformed into legally valid statements of the accused. There is no substitute for this legal requirement. However, honestly the Intelligence Officers believe that the applicants are guilty of the crime, the subjective conviction of the Investigating Officers about the guilt of the Accused cannot be a substitute or legally admissible evidence. The statements of the applicants procured in their oppressed state of mind resulting from assault, fear, denial of access to the family, should be viewed with great caution. This is especially, so, at the stage of granting bail, for, the prospect of conviction on the basis of such material becomes poor.

13. Mr. Gupte has no explanation about the injuries nor has he any other alternative theory about how the applicants received injuries. Indeed, Mr. Gupte confessed that he was unable to explain how the injuries were caused. In the absence of any explanation, I hold that the injuries were caused by assault by the Investigating Officers.

A look at the affidavit made by S.K. Pandey, Intelligence Officer reveals that the prosecution has made no attempt to meet the case of the Accused. Mr. Pandey does not state that he was present when the applicants were produced before the Magistrate on 21st July, 1989. This is important because Magistrate records that no complaint was made by the applicants against the Investigating Officers and the applicants urge that they did. On the basis of the statement in the Order of the learned Magistrate, Mr. Gupte

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urged that the evidence of injuries is fabricated and false. According to the accused, the learned Magistrate, who hears application for remand, is burdened with scores of applications which he disposes off in short time. Therefore, they urge that there was no occasion to ask whether the accused had any complaint against the Intelligence Officers. In view of this controversy, it was necessary for the prosecution to assert through the statement of an Officer present in the Court that the learned Magistrate did ask the accused and the accused replied that they had no complaint Mr. Pandey does not say that

he was present in the Court. His affidavit is notable not for what it reveals but for what it conceals. There are no statements as to how the statements were recorded, who interpreted them when the applicants were detained and so on. All that he asserts that the accused were not assaulted and that there were no injuries on their body when they were produced before the learned Magistrate. The affidavit is a catalogue of arguments and not of facts.

14. Mr. Gupte also urged that at the stage of considering application for bail, it is not open to the Court to examine whether the statements are voluntary or whether the Accused were illegally detained and assaulted. According to him, the statements as they are and the complaint as it is, is the ultimate truth for the purpose of the application for bail. The submission is without any merit. It ignores that grant or refusal to grant bail being a matter of discretion, every fact relevant to the exercise of such discretion has to be considered. However, well intended the action of the prosecution is, if the circumstances that the statements on the basis of which the prosecution seeks to have the accused convicted, are not voluntary, the Court discretion must naturally be influenced by the deplorable practices followed by the Investigating Officers for procuring the statement. The accused who are tried on the basis of such tainted evidence may well be acquitted. But then the time spent in custody does not return to them after their acquittal. It is, therefore necessary to consider whether the prosecution is in possession of credible evidence.

15. To sum up, therefore, the statements of the Applicants were procured while they were in illegal detention and by physically assaulting them. The reports of the Chief Medical Officer reveal that the assault took place while they were in custody of the Investigating Officers. The statements of the Applicants which include confessions, are, therefore, tainted by violence and crime. These statements, though admissible in evidence, are tainted by illegality. They would need a very strong corroboration before they are acceptable. The statement of Hamid Khan, Accused No. 1, implicates the Applicants. But the attention of the Applicants was never drawn to those parts of the statement of Hamid Khan which implicate the Applicants. If the Applicants were confronted with those statements they must have denied the role ascribed to them. If they did deny, the Investigating Officers were in duty bound to record the denials too. If the Applicants were not confronted with the statement of Hamid Khan, or if the Applicants' denials are not recorded, the record of the statements cannot be said to be complete and faithful. Hamid Khan, being a co-accused, cannot corroborate the statements of the Applicants. The statements of the Applicants need to be kept out of view unless they receive corroboration from other sources. There is no such corroboration except from the statement of Hamid Khan who is a co-accused. In these circumstances, it cannot be said that the prosecution is in possession of evidence on the basis of which conviction is reasonably certain.

VI. HIGH COURT'S POWER TO RELEASE UNDER SECTION 439 OF THE CODE OF CRIMINAL PROCEDURE - IS IT LIMITED BY SECTION 37 OF THE N.D.P.S. ACT ?

16. Lastly, Mr. Gupte urged an important but untenable argument, the substance of which is this. Section 37 of the N.D.P.S. Act, inter alia provides that no person accused on an offence punishable for a term of imprisonment of five years or more under the Act shall be released on bail or on his own bond unless "the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail". According to Mr. Gupte, this limitation applies not only to the Court trying the offence but also to

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the High Court and the Supreme Court. "The Court" according to Mr. Gupte, is a generic expression including in its ambit every Court dealing with cases under the N.D.P.S. Act.

Therefore, the argument proceeds, notwithstanding the High Court's power to release accused on bail under Section 439 of the Code of Criminal Procedure, the High Court cannot release an accused suspected to have committed an offence under the N.D.P.S. Act unless it is satisfied that there are no reasonable grounds for believing that the accused is not guilty of such offence.

17. It is necessary to set out briefly the scheme of the constitution and the conception of the Special Court constituted by the N.D.P.S. Act. The word "Court" has not been defined in the Act. The N.D.P.S. Act was amended with effect from 6th January, 1989 by Act 2 of 1989. Section 36 of the N.D.P.S. Act before the amendment provided that, notwithstanding anything contained in the Code of Criminal Procedure, any offence punishable under Sections 26, 27 and 32 of the Act may be tried summarily by the Magistrate of the First Class. Section 37, as it stood before the N.D.P.S. (Amendment) Act, 1988, made every offence under the N.D.P.S. Act cognizable. These Sections were omitted by the N.D.P.S. (Amendment) Act No. 2 of 1989. In their place, Sections 36, 36A, 36B, 36C, 36D and 37 were introduced. Section 36 empowers the Government to constitute Special Courts for trying offences under the Act. The offences under the N.D.P.S. Act are exclusively triable by such Special Courts [Section 36A of the N.D.P.S. Act]. The Special Court shall consist of a single Judge who shall have held the office of the Sessions Judge or Additional Sessions Judge immediately before his appointment as a Special Judge. [Section 36 of the N.D.P.S. Act]. Under Section 36A, all the offences under the N.D.P.S. Act shall be triable only by the Special Court or until the Special Court is constituted, by the Sessions Judge. Since the Special Court is the trial Court, the Accused, upon his arrest, has to be produced before the Magistrate in accordance with Section 167 of the Code of Criminal Procedure. Upon such production, the Magistrate is empowered to authorise detention for a period not exceeding 15 days. The Magistrate is then required to forward the accused to the Special Court which possesses the same power which the Magistrate has under Section 167 of the Code of Criminal Procedure. The Special Court is empowered to take cognizance of a crime under the Act upon perusal of the police report or upon a complaint made by an Officer of the Central Government or State Government authorised in that behalf.

18. Section 36A(3) goes on to lay down that "Nothing contained "in this Section" shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973....."3. Clause (b) of Sub-Section (1) of Section 439 empowers the High Court to set aside or modify the condition imposed by Magistrate while releasing an accused on bail. The Special Court is empowered to take cognizance under Section 167 of the Code of Criminal Procedure. Section 36A(3) goes on to clarify that the powers of modification the conditions under Section 439(1)(b) may be exercised by the High Court as if the word "Magistrate" was substituted by the words "Special Court". For the purpose of bail and bail bond, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before such Court, a Public Prosecutor. [Section 36-C of the N.D.P.S. Act].

3. Section 36A(3) of the N.D.P.S. Act -

"Nothing contained in this Section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973, and the High Court may exercise such powers including the power under clause (b) of Sub-Section (1) of that Section as if the reference to "Magistrate" in that Section included also a reference to a "Special Court" constituted under Section 36".

The question is whether the words "the Court" in Section 37 of the N.D.P.S. Act mean only the Special Court constituted under that Act or includes every other Court including the High Court hearing cases under the N.D.P.S. Act. In order to understand this

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submission its effect must be borne in mind. The first effect is to impose a limitation on the wide powers of the High Court under Section 439 of the Code of Criminal Procedure, thereby taking away an established jurisdiction of the High Court. Secondly, in order to read "the Court" to include the High Court and the Supreme Court, the language used by the Parliament will have to be strained.

19. In Section 36 as it stood before the commencement of the N.D.P.S. (Amendment) Act, the word "Court" did not occur for the simple reason that the offences under the Act were triable by Magistrates of the First Class. In the place of a Magistrate, the Legislature has created a Special Court. In a sense, the words "the Court" used in Section 36A and Section 37 are substitute for "a Magistrate of the First Class". Thus, the Court which tried the offences before the commencement of Amendment Act No. 2 of 1989, was the Magistrate. No doubt Sections 36 and 37 which empowered the Magistrate to try the cases have been repealed by Act 2 of 1989 and substituted inter alia by Section 37. However, reference to the repealed provision for the purpose of ascertaining the meaning of the words that replaced the repealed words is a recognised rule of construction of statutes (Craies on Statute Law, 7th Edn., page 414).

The legislature which employed the words "the Court" in the place of "the Magistrate of the First Class", naturally conceived "the Court" as the substitute for "a Magistrate of the First Class". The substitution of "the Court" for "a Magistrate" establishes a functional identity between the two. It cannot therefore be said that the High Court falls within the meaning of "the Court" which in the historical context must mean the Court taking cognizance of the crime.

20. A comparative analysis of the restricted power of the Magistrate and the wide power of the High Court in the matter of bail furnishes another guiding principle. Section 437 empowers a Court "other than the High Court or Court of Session" to release the Accused on bail. In other words, Section 437 does not apply to the High Court or the Court of Session. Clauses (i) and (ii) of Sub-Section (1) of Section 437 impose restrictions on the power of the Magistrate to release the accused on bail. Section 437(1) precludes the Magistrate from releasing an accused on bail (i) "if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life" or (ii) "such person has been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more....." There are no such limitations on the power of the High Court or the Court of Session under Section 439 of the Code of Criminal Procedure. Therefore, the jurisdiction of the High Court or the Court of Session in the matter of granting bail in cognizable offences is unfettered and is not limited by the nature of the offence or the sentence prescribed therefor, The limitation imposed on "the Court" by Section 37(1)(ii) is that before releasing a person on bail, the Court must be satisfied that "there are reasonable grounds for believing that he is not guilty of such offence". An identical restriction is found in Section 37(1)(i) of the Code of Criminal Procedure which limits the Magistrate's power to release on bail so that he shall not release the accused if "there appear reasonable grounds for believing that he has been guilty of offence punishable with death or imprisonment for life". The Parliament which substituted the Special Court for the Magistrate as the Court of trial, was aware of this distinction and the unfettered authority of the High Court and the Court of Session to release accused on bail. The Parliament which created the Special Court conceived it as the Court of trial subject to the limitations on the power to grant bail which are similar to the restrictions on the Magistrate's power under Section 437 of the Code of Criminal Procedure. Thus the Special Court and the Magistrate's Court have an identity distinct from that of the High Court. Therefore the Parliament could not have intended to equate the

Court which is subject to restrictions similar to those in Section 437 of the Code of Criminal Procedure with the High Court whose power to release on bail is not so restricted.

21. Against the background of these

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provisions, consider certain rules of construction. The Parliament was aware of the distinction between the powers of the High Court and the trial Court. As already stated, Section 36A(3) expressly excludes the High Court from the operation of that Section "regarding bail under Section 439 of the Code of Criminal Procedure 1973". Since the Legislature was aware of the High Court's special power to grant bail, it is reasonable to hold that the Parliament which employed the words "the Court" designedly omitted the use of the words "the High Court or the Supreme Court". In order to know what a statute does mean, it is one important step to know what it does not mean; and if it be quite clear that there is something which it does not mean, then that which is suggested or supposed to be what it does mean must be in harmony and consistent with what it is clear that it does not mean (Craies on Statute Law, 7th Edition, page 108). It follows that what a statute forbids must be consistent with what it permits. Thus, if Section 37 forbids the High Court from granting bail except on the conditions stipulated therein, such prohibition must be consistent with the other provisions of the N.D.P.S. Act and the Code of Criminal Procedure.

The Parliament has used the words "High Court" in Section 36 of the N.D.P.S. Act whereunder the Special Court is constituted with the concurrence of the Chief Justice of the High Court. Section 36B of the Act invests the High Court with the Appellate and Revisional jurisdiction over the Special Court. The Parliament, aware of the special jurisdiction of the High Court, has designedly refrained from employing the words "High Court", or "Supreme Court" in Section 37. Therefore, the legislative intent clearly is to exclude the High Court from the ambit of "the Court" in Section 37 of the Act. The argument that "the Court" referred to in Section 37 of the Act, includes the High Court does not answer the legislative design in omitting the use of the words "High Court" in Section 37 of the N.D.P.S. Act.

22. Acceptance of the argument that the High Court's power to grant bail is limited by the circumstances set out in Section 37(1)(b) is to deprive the High Court of its jurisdiction established for over a century. A distinct and unequivocal enactment is required for the purpose of either adding to or taking from the jurisdiction of a superior Court of law (Craies on Statute Law, 7th Edn., page 122). A strong leaning exists against construing a statute so as to oust or restrict the jurisdiction of the superior Courts (Mexwell on the Interpretation of Statutes, 12th Edition, page 153). The jurisdiction of Superior Courts is not taken away except by express words or necessary implication (Craies on Statute Law, 7th Edition, page 123). It appears impossible to me to suppose that the Parliament can have intended under an enactment like this by the general words "the Court" to effect so material change in the jurisdiction of the High Court exercised for over a century. The rational of this rule of construction rests upon the reluctance of the Parliament to disturb the established state of law or to deny the subjects access to the seat of justice. Such a conclusion cannot be drawn in the absence of clear words.

23. There is another feature of this enactment which negatives the argument advanced by Mr. Gupte.

Section 37(2) goes on to explain that the two limits in S.37(1)(b) on the powers of "the Court" are "in addition to the limitations under the Code of Criminal Procedure, 1973 .... on granting of bail". Now, therefore, the Parliament had in mind the limitations on the power to grant bail under the Code of Criminal Procedure, 1973. Naturally, therefore, it had in its contemplation those Courts whose' authority under the Code of Criminal Procedure is

subject to limitations in regard to the grant of bail. When the Parliament thought of limitations under the Criminal Procedure Code it must be taken that the Parliament knew that there was only one Court whose authority to release accused on bail was fettered by limitations. It is the Magistrate's authority under Section 437 of the Code of Criminal Procedure that is subject to limitations and not the High Court's. This is simple because the Courts referred to in Section 439 do not suffer from any limitations on their power to release the

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accused on bail. In this context, it should be remembered that the N.D.P.S. Act by its amendment in 1989 has substituted the Special Court as the Court of Remand and the Court taking cognizance which power is, under the Code of Criminal Procedure exercised by the Magistrate of the First Class. It is clear to me, therefore, that Sections 37(1) and 37(2) refer to the Court which suffers from limitations on their power to release on bail, since the High Court's power under Section 439 of the Code of Criminal Procedure is not subject to any limitations, the words "the Court" do not include the High Court.

24. The Special Court exercises the power which the Magistrate under Section 167 of the Code of Criminal Procedure exercises in respect of the persons produced before it. A Special Court is not only a trial Court but also the Court which exercises the functions similar to those of the Magistrate, such as remand of the accused, granting of bail, taking cognizance of the crime and so on. The Legislature, aware of this special function which the Special Court performs, realised that the Special Court must also exercise the powers of granting bail in the manner a Magistrate does under Section 437 of the Code of Criminal Procedure. A logical step which the Legislature took was to enact Section 37 of the N.D.P.S. Act and curtail the powers of the Special Court in the matter of grant of bail. Although the Special Court generally exercises the powers of the Sessions Court, its power to grant bail has been so curtailed by Section 37(1)(b)(i) and (ii) that it no longer enjoys the power to grant bail under Section 439 of the Code of Criminal Procedure. Therefore in reading Section 439 of the Code of Criminal Procedure, so far as the N.D.P.S. Act is concerned, the words "or Court of Sessions" shall be deemed to have been omitted. Thus Section 439 retains the unfettered power of the High Court to grant bail in all cases including the cases under the N.D.P.S. Act. However, having regard to Section 37 and the constitution of the Special Court as the trial Court, the wide power possessed by a Court of Sessions under Section 439 of the Code of Criminal Procedure must be construed to have been taken away from that Court in cases arising out of the N.D.P.S. Act.

25. Section 36A of the N.D.P.S. Act makes it clear that "nothing contained in "this Section" shall affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973". This abundant caution exercised by the Parliament in saving the High Court's power under Section 439 of the Code of Criminal Procedure assures to the accused the continued access to the seat of Justice. But Section 36A(3) has employed the words "anything contained in this Section" and not "anything contained in this Act" or "anything contained in Section 37". It is, therefore urged on behalf of the Prosecution that application of Section 37 to the High Court is not excluded.

The argument stems from a misreading of the scope of Sections 36 and 36A of the N.D.P.S. Act. Section 36A, inter alia, empowers the Special Court to exercise. in relation to the person in custody forwarded to it by the Magistrate, the same powers which a Magistrate may exercise under Section 167 of the Code of Criminal Procedure. The Magistrate and therefore the Special Court has the power to authorise the detention of the accused in custody. The Special Court in exercise of its power under Section 167 of the Code of Criminal Procedure may authorise such detention in custody. The Parliament, thought it necessary to caution that such detention by the Special Court shall not be

construed as limiting the High Court's power under Section 439 of the Code of Criminal Procedure. It is in this context that the words "nothing in this Section" have been used in Section 36A(3) of the N.D.P.S. Act. The perspective of the words "in this Section" will be clear when one considers the exercise of the power of detention under Section 167 of the Code of Criminal Procedure. At the stage where the Special Court remands the accused into custody, the High Court may, in exercise of its power under Section 439 of the Code of Criminal Procedure, release the accused on bail. The question of releasing the accused on bail arises only when the Special Court authorises his detention before the trial.

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Therefore, it follows that Section 36A(3) deliberately, advisedly and rightly employs the words "nothing contained in this Section". Section 37 limits the powers of the Special Court to grant bail in the circumstances stated therein. The legislature by the very nature of its functions could not have foreseen all the cases which fall outside the categories stated in Section 31(1)(b) of the N.D.P.S. Act. The Special Court will naturally authorise the detention of the accused whose case falls outside the limits of Section 37(1)(b). If it releases the accused on bail on being satisfied that there are no reasonable grounds for believing that he is guilty, there is no question of exercising powers under Section 439 of the Code of Criminal Procedure. The only place where the Parliament could have enacted the saving of the High Court's power under Section 439 of the Code of Criminal Procedure is Section 36A. There is nothing in the words "in this Section" which limits the High Court's power under Section 439 of the Code of Criminal Procedure by the considerations specified in Section 37(b) of the N.D.P.S. Act.

26. My conclusion is that the High Court's power to release the accused suspected of having committed an offence under the N.D.P.S. Act is not limited by Section 37 of this Act but is governed by Section 439 of the Code of Criminal Procedure. The summary of the reasons for this conclusion is as under :-

"The Court" referred to in Section 37 of the N.D.P.S. Act, being a legislative substitute for the "Magistrate of the First Class" occurring in the repealed Section 36 is not intended to include the High Court. Secondly, the Parliament has identified the Special Court with the Court of the Magistrate whose power to grant bail is restricted under S.437 of the Code of Criminal Procedure. The restriction of the power of release on bail created by Sec. 37 of the N.D.P.S. Act being similar to that under Section 437 of the Code of Criminal Procedure, the Parliament did not intend to include High Court within the words "Special Court". Thirdly, S.37(2) of the N.D.P.S. Act has conceived the limitations on granting bail specified in Section 37(1)(b), as "in addition to the limitations under the Code of Criminal Procedure". Therefore, in the Parliament's conception. "the Court" is the Court whose power to grant bail is limited by the Code of Criminal Procedure. The High Court, not being a Court of such restricted power to grant bail, is not "the Court" conceived by Section 37 of the N.D.P.S. Act. Fourthly, the construction of the words "the Court" used in Section 37 of the N.D.P.S. Act deprives the High Court of its established jurisdiction. There are no words in the N.D.P.S. Act which bring out the intention to take away the jurisdiction of the High Court under Section 439 of the Code of Criminal Procedure.

VII. ORDER

17. (i) For all these reasons, the application is allowed. The Applicants shall be released on bail in the sum of Rs. 3,00,000/- each with one surety each. The Applicants are at liberty to deposit cash amount in lieu of surety bonds. They shall deposit their passports with the concerned officer.

(ii) The Applicants shall report at the Sessions Court of Bombay every Monday.

(iii) The application for stay of this Order and leave to the Supreme Court is rejected.

Ordered accordingly.

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Cross Citation :1984 CRI. L. J. 1277

KERALA HIGH COURT

Coram : 1 U. L. BHAT, J. (Single Bench)

Criminal Revn. Petn. No. 113 of 1984, D/- 9 -4 -1984.

P. V. Vijayaraghavan and others, Petitioners v. C. B. I. and another, Respondents.

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I.P.C. 302, 201 r/w 34 - Criminal P.C. (2 of 1974), S.167(2), S.173 and S.2(c) - CHARGE SHEET - INVESTIGATION - BAIL - Charge sheet under S.173 can be filed only after completion of investigation of case - Case involving several cognizable offences- I.P.C. 302, 201 r/w 34 - Investigator filing first charge-sheet relating to some of offences before expiry of 90 days with reference that opinion of expert is awaiting - Second charge-sheet relating to remaining offences filed after expiry of 90 days - Investigation of case must be taken as completed when second-charge-sheet was filed - Since it was completed after 90 days, accused were entitled to bail under S.167 (2) Proviso(a) (i). (Bail - Delay in investigation and filing charge-sheet).

The provisions in Chap. XII. relating to power of police to investigate indicate that the investigation is to be of a case which would mean all the offences involved therein. Therefore, when S.173, speaks of completion of investigation, it must ordinarily be taken to refer to completion of investigation of all the facts and circumstances relating to the case whether it involves one offence or plurality of offences. Therefore, a final report or charge-sheet under S.173, can be filed only after completion of investigation in the case relating to all the offences arising in the case. The investigation of the case does not end with the collection of evidence but includes the formation of opinion by the investigator as to whether on the evidence collected there is a case to place the accused before a Court for trial and if so taking the necessary steps for the same by filing a charge-sheet. Therefore, where in a case involving several cognizable offences the first charge-sheet against the accused persons in respect of some of the offences was filed by the investigator within the period of 90 days, referred to in S.167 (2) Proviso (a) (i) and the second charge-sheet relating to the remaining offences was filed after the expiry of 90 days on the ground that the investigator had been awaiting expert legal opinion as to whether a

charge would lie in respect of those offences, it must be taken that the investigation was not complete on the date of filing of the first charge-sheet and in was complete only when the second charge-sheet was filed. Thus, since the investigation was completed only after the expiry of 90 days, the accused were entitled to be released on bail under S.167 (2) Proviso (a) (i). The defective investigation and filing of the charge-sheet would not, however, vitiate the proceedings before the Magistrate. The proceedings would only be irregular and the irregularity was cured when the Magistrate acting on the second charge-sheet clubbed it with the first for the purpose of committal of the case to the Sessions Court. (Paras 10, 11, 16, 17, 18, 19)

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Cases Referred : Chronological Paras

1984 Cri LJ 324 : 1984 Ker LT 116 9

1955 Cri LJ 526 : AIR 1955 SC 196 14

M. K. Damodaran, P. V. Mohanan, J. Jose and V. K. Mohanan, for Petitioners; P. V. Madhavan Nambiar and P. Sankaran Nair, for Respondents.

Judgement

ORDER :- Revision petitioners are accused in R. C. 3 of 1982 of the CBI/SPE, New Delhi arising from the death, by gunshot wounds, of George Soman, Sub-Inspector of Police, Panur Police Station. They were arrested on 11-11-1983. Their request for bail was repeatedly turned down by various courts. Period of 90 days as contemplated in Proviso (a) (i) to S.167 (2) of the Cr. P. C. (for short 'the Code') was over on 9-2-1984. The investigator filed a Final Report or charge-sheet for offences under S.120B read with S.302 I. P. C. and S.302 I. P. C. read with S.34 I. P. C. on 7-2-1984 before the Chief Judicial Magistrate, Ernakulam. An additional charge-sheet for offences under S.120B read with S.201 I. P. C. and S.201 I. P. C. read with S.34 I. P. C. was filed on 15-2-1984. Meanwhile the accused filed Cri. M. P. 461 of 1984 seeking bail under Proviso (a) (i) to Sec. 167 (2) of the Code pleading that no valid charge-sheet had been filed within 90 days. This contention was overruled and the petition was dismissed by the learned Chief Judicial Magistrate. The legality and propriety of this order is challenged in this revision petition.

2. Learned counsel for the revision petitioners would contend that the Code does not contemplate piecemeal investigation and incomplete charge-sheet, that Sec. 173 contemplates only the filing of charge-sheet after completion of

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investigation of the case, and where several offences are involved in a case, a valid charge-sheet could be laid only after investigation and formation of opinion regarding all the offences is complete, that in the first charge-sheet the investigator stated that investigation was proceeding and an additional charge-sheet would be laid and this would clearly show that when the first charge-sheet was laid investigation was incomplete. Thus, learned counsel would contend that the first charge-sheet filed on 7-2-1984 was a charge-sheet filed without completing the investigation and was as such invalid and therefore detention after a period of 90 days would be illegal and accused are entitled to bail as a matter of right. Learned counsel drew a distinction between an "offence" and a "case". According to him, what is contemplated is completion of investigation of the "case" which may involve several offences and investigation of a case cannot be split up into several investigations or investigation in several stages each relating to one offence. Learned

Public Prosecutor would contend that there is practically no difference between an "offence" and a "case", that, as a matter of fact, investigation was complete before the first charge-sheet was laid, though an erroneous statement was made therein that investigation was proceeding, that the second charge-sheet and the accompanying memo would clearly show that investigation was over before the first charge-sheet was laid. According to learned Public Prosecutor, the investigator could very well have incorporated S.201 I.P.C. in the first charge-sheet but it was postponed awaiting legal opinion. In these circumstances, learned Public Prosecutor would contend that the charge-sheet was valid as investigation was complete before the first charge-sheet. Therefore, the period of detention prior to completion of investigation did not exceed the period of 90 days and as such bail could not be granted in terms of Proviso (a)(i) to S.167(2) of the Code.

3. Chapter V of the Code deals with arrest of persons. S.41(1)(a) authorises a police officer to arrest a person who has been concerned in any cognizable offence without an order from a Magistrate and without a warrant. The procedure for arrest and the steps to be taken are dealt with in Ss. 46 and 47 of the Code. S.56 requires that a police officer making arrest without warrant shall without unnecessary delay and subject to bail provisions take or send the arrested person before the appropriate Magistrate. S.57 states that no police officer shall detain in custody a person without warrant for any period beyond what is reasonable, not exceeding 24 hours in the absence of a special order from a Magistrate under S.167.

4. Chapter XII deals with information to the police and their power to investigate. S.154 requires that oral information relating to commission of a cognizable offence shall be reduced to writing by a police officer. How the information is to be dealt with in relation to "cognizable case" and "non-cognizable case" are dealt with in Ss. 155 and 156. The police officer has to take steps to investigate the facts and circumstances of the "case" and to take measures for the discovery and arrest of the offender. The powers of the police officer in the course of investigation are dealt with under Ss. 160 to 163, 165 and 166. Where any person is arrested and detained in custody and it appears that the investigation cannot be completed within a period of 24 hours fixed by S.57 and there are grounds for believing that the accusation or information is well founded. S.167(1) requires that the investigator shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary relating to the "case" and forward the accused to such Magistrate. Sub-sec. (2) requires that the Magistrate may from time to time authorise the detention of the accused in appropriate custody for a term not exceeding 15 days in the whole. The proviso authorises detention beyond the period of 15 days but up to a period of 90 days in the case of grave offences and 60 days in the case of other offences where the Magistrate is satisfied that adequate grounds exist for doing so. But under no circumstances shall the Magistrate authorise the detention of the accused in custody pending completion of investigation for a period exceeding 90 days or 60 days as the case may be. This is what the

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proviso to sub-sec.(2) lays down. It further states that on the expiry of 90 days or 60 days as the case may be, the accused shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII of the Code for the purposes of that Chapter. Release of the accused when evidence is deficient is contemplated in S.169. S.170 deals with cases where evidence is sufficient. If upon an investigation under this Chapter, it appears to the investigator that there is sufficient evidence or reasonable ground as aforesaid, he shall forward the accused under custody to the appropriate Magistrate or if the offence is bailable and the accused is able to give security, shall take

security from him to appear before the Magistrate. S.172 deals with diary of proceedings and investigation and uses the expression "Police diaries of a case".

5. S.173 deals with report of a police officer on completion of investigation. Sub-sec.(1) says that every investigation under the Chapter shall be completed without unnecessary delay. Sub-sec.(2) states that as soon as investigation is completed the investigator shall forward to the appropriate Magistrate a report in the prescribed form stating the names of parties, the nature of the information, the names of the persons who appear to be acquainted with the circumstances of the case, whether any offence appears to have been committed, and if so, by whom, whether any accused has been arrested, whether he has been released on his bond and, if so, whether with or without sureties and whether he has been forwarded in custody under S.170. Under sub-sec. (3), it is open to the appropriate superior police officer to direct the investigator to make further investigation. Sub-sec.(8) declares that nothing in the section shall preclude further investigation in respect of an offence after a report under sub-sec.(2) has been forwarded to the Magistrate. Where upon such investigation the investigator obtains further evidence, he shall forward to the Magistrate a further report or reports regarding such evidence in the prescribed form. The provisions of sub-secs.(2) to (6) shall as far as may be applied in relation to such report or reports as they apply in relation to a report forwarded under sub-sec.(2).

6. Chapter XIV deals with conditions requisite for initiation of proceedings. S.190 deals with cognizance of offences by Magistrate. Subject to the provisions of the Chapter, the appropriate Magistrate may take cognizance of any offences under any one of the three circumstances enumerated in cls. (a), (b) and (c) of sub-sec. (1). They are, receipt of a complaint of facts which constitutes such offence a police report of such facts and information received from any person other than a police officer or upon his own knowledge that such offence has been committed. One may notice in this connection, the altered definition of police report in the present Code. S.2(r) of the Code defines "police report" as a report forwarded by a police officer to a Magistrate under sub-s. (2) of S.173 of the Code.

7. Chapter XVI deals with commencement of proceedings before Magistrates. Sub-sec. (1) of S.204 states that if in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, he shall issue summons or warrant, as the case may be. Under S.207, the Magistrate shall, without delay, furnish to the accused free of cost copies of the records detailed therein.

8. There is a broad scheme and method underlying the provisions mentioned above. Investigation must commence immediately on receipt of information regarding commission of cognizable offence. A person suspected of or concerned in a cognizable offence can be arrested without warrant. Ordinarily, investigation should be over within 24 hours of the arrest before the expiry of which period the accused has to be produced before the nearest Magistrate. Where it appears that the investigation cannot be completed within this period and the information appears to be well founded, the entries in the case diary must be transmitted immediately to the nearest Magistrate along with the accused.

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Detention of the accused may, from time to time, be authorised by the Magistrate for a term not exceeding 15 days in the whole. This would indicate that where investigation cannot be completed within 24 hours of the arrest, the maximum period to be taken for completion of investigation would be 15 days. Of course, in appropriate cases, the period could be extended up to 90 days or 60 days depending on the gravity of the offence involved as contemplated in the proviso to S.167(2). Detention cannot be ordered beyond such extended period. If upon investigation, it appears that there is sufficient evidence, the accused must be forwarded under custody to the appropriate Magistrate in non-

bailable cases. Every investigation shall be completed without unnecessary delay and as soon as it is completed, a report in the prescribed form as contemplated in S.173(2) must be forwarded to the appropriate Magistrate. There may be further investigation on the direction of a superior police officer as envisaged in sub-sec. (3) or otherwise as envisaged in sub-sec. (8). In such cases there may be further report or reports, which have to be treated as police reports under S.173(2). Under S.190, a Magistrate can take cognizance upon a police report, that is a report under S.173(2). On taking cognizance the Magistrate can issue process and thereafter undertake certain preliminary functions and then conduct an enquiry or trial, as the case may be.

9. S.2(c) defines cognizable "offence" as an offence for which and cognizable "case" as a case in which, a police officer may, in accordance with the First Schedule or under any other law" for the time being in force, arrest without warrant. S.2(h) defines "investigation" as including all proceedings under the Code for the collection of evidence conducted by a police officer etc. Interpreting the expression "Committal of the Case", a Full Bench of this Court in Natesan v. Peethambharan 1984 Ker LT 116 : (1984 Cri LJ 324), observed "As we understand the expression, it only means 'Case presented to Court and taken to file' and nothing more. The expression 'Case' is not synonymous with occurrence or crime or transaction..... 'Case' only means the case taken on file by the Magistrate on taking cognizance .

So, there could be plurality of cases in regard to the same offence leading to plurality of committal proceedings and orders. The word 'Case' cannot be interpreted in a narrow and technical way. It has to be understood in the general sense of the term....."

10. The expression "case" used in the provisions under examination has to be understood in the general sense and not in a narrow or technical way. The words "offence" and "case" are not synonymous, though an offence always leads to a case and a case would always involve an offence or offences. An occurrence of transaction may involve commission of only one offence; or it may involve several offences. When a police officer receives; information about the commission of a cognizable offence, and records the same, he is said to register a case, sometimes called a Crime Case. "'Case", understood in this general sense means the case before the police officer arising from the information placed before him regarding an occurrence in which an offence or offences are committed. "Case" relates to the transaction of which information is given and not merely one of the offences committed during the course of the transaction.

11. The heading of S.154 is " Information in cognizable cases". The heading of S.155 is "Information as to non-cognizable cases and investigation of such cases." The heading of S.156 is "Police Officer's power to investigate cognizable case". Sub-sec. (3) of S.154, sub-secs. (2) and (4) of S.155, sub-secs. (1) and (2) of S.156, S.157, sub-sec. (1) of S.160, sub-secs. (1) and (2) of S.161 refer to investigation of a "case". S.167 refers to diary relating to the case. This would indicate that investigation is to be of a "case" and riot to be conducted piecemeal with reference to each offence committed in a transaction or occurrence. Investigation is to be of a case, that is, all the facts and circumstances of a case

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which would mean all the offences involved therein. Therefore, when S.173 speaks of completion of investigation, it must ordinarily be taken to refer to completion of investigation of all the facts and circumstances relating to the case, whether the transaction involves one offence or plurality of offences. I am therefore of opinion that a final report or charge-sheet under S.173 could be filed only after completion of the investigation in the case relating to all the offences arising in the case.

12. In the first charge-sheet filed in this case, the investigator mentioned offences under S.120B I.P.C. read with S.302 I.P.C. as well as S.302 I.P.C. read with S.34 I.P.C. and cited 98 witnesses, 94 documents and 26 material objects. The investigator also stated that additional charge-sheet for offence under S.201 would be laid in a short period as "investigation is proceeding" thereto. This would prima facie show that on the date when the first charge-sheet was laid the investigation in regard to offence under S.201 was not complete and therefore investigation in the case was not complete. About a week later, the additional charge-sheet was filed incorporating S.120B I.P.C. read with S.201 I.P.C. and S.201 I.P.C. read with S.34 I.P.C. No new witness or document or material object was cited along with the additional charge-sheet. On the same day, the investigator submitted a report stating that after submission of the first charge-sheet or final report, he did not conduct any investigation, that he was waiting for expert legal opinion in regard to the offence under S.201 I.P.C. as he surmised that such an offence was made out against the accused and that he was filing additional charge-sheet on the basis of the evidence and the investigation conducted by him prior to the filing of the first charge-sheet. According to the learned Public Prosecutor, the statement in the first charge-sheet that investigation was proceeding was erroneous and the error was corrected in the report presented on 15-2-1984. It is true that even after the additional charge-sheet, the investigator submitted additional list of witnesses. But those witnesses do not appear to have anything to do with the additional charge. Therefore, I am inclined to accept the statement in the report of 15-2-1984 to the effect that the additional charge-sheet was submitted on the basis of the evidence collected prior to the first charge-sheet and no further collection of evidence had been made.

13. Obviously when the investigator stated in the additional charge-sheet that he did not conduct any "investigation" he was referring only to collection of evidence. According to the revision petitioners, investigation does not end with the collection of evidence but would include the formation of opinion also.

14. In H.N. Rishbud v. State of Delhi (AIR 1955 SC 196) : (1955 Cri LJ 526), the Supreme Court was considering the question whether the requirement in the Prevention of Corruption Act that the investigation into offences under the Act shall not be investigated by a police officer below the rank of Deputy Superintendent of Police except with sanction of court was mandatory and the effect of violation of the provision if it was held to be mandatory. The court held that the requirement was mandatory. Investigation in that case was conducted by a police officer below the requisite rank. Sanction of the court was obtained only subsequently. That was after the investigation by the subordinate officer was entirely or mostly completed. Explaining the scope of the expression "investigation", Jagannadhadas, J., speaking for the court, observed :

"Thus, under the Code investigation consists generally of the following steps : (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of .evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation , and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to

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place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under S.173..... It is also clear that the final step in the investigation, viz., the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the police station. There

is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under S.551."
(Emphasis supplied)
15. It was argued before the Supreme Court that the legislative policy would be served if the charge-sheet was filed by the authorised officer after forming his own opinion as to whether or not there is a case to place the accused on trial before the court. Rebutting this plea, the court observed :
"There is, however, no reason to think that the policy comprehends within its scope only some and not all the steps involved in the process of investigation which, according to the scheme of the Act have to be conducted by the appropriate investigating officer either directly or when permissible through deputies, but on his responsibility....."
16. Formation of opinion as to whether on the evidence collected there is a case to place accused before a court for trial and if so, taking necessary steps for the same by filing a charge-sheet are part of the process of investigation.
17. On the date of filing the first charge-sheet the investigator was awaiting expert legal opinion on the question whether a charge would lie under S.201 I.P.C. In other words, he had not formed any definite opinion as to whether on the evidence collected there was a case to place the accused before a Magistrate for trial of the particular offence. In this view of the matter, it must follow that "investigation", as understood in law, was not complete on the date of filing of the first charge-sheet. The investigator had not formed any opinion in regard to S.201 I.P.C. and consequently, the "investigation" in the case was not complete when the first charge-sheet was filed. The investigator has no case that the formation of opinion was made in this regard on any particular day after 7-2-1984. It must be taken that "investigation" was complete only with the second charge-sheet. In this view, the original charge-sheet was not a charge-sheet laid after completing of investigation. It is a defective charge-sheet.
18. Remand in custody under S.167 of the Code is to be made before the completion of investigation for the purpose of enabling a proper investigation. Such remand could not be made beyond the period of 90 days as laid down in proviso (a)(i) to S.167(2) of the Code. The completion of the investigation was made only after the expiry of the period of 90 days. Therefore, the accused are entitled to be released on bail if they are prepared to and do furnish bail. Considering the peculiar facts and circumstances of the case, I am of opinion that strict conditions will have to be imposed on release of the accused on bail.
19. This is not to say that taking of cognizance by the learned Magistrate, or the proceedings initiated by him are vitiated or a nullity. The proceedings would only be irregular. The irregularity, if any, has been cured by the learned Magistrate acting on the additional charge-sheet filed after completion of investigation and later clubbing the two committal proceedings. In any event, there has been no prejudice to the accused.
The Supreme Court in H.N. Rishbud's case considered whether and to what extent the trial which follows defective investigation is vitiated. The court observed :
"Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. .....
A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police
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report which results from an investigation is provided in S.190 Cri. P. C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance.....

.... While no doubt in one sense, Cls. (a), (b) and (c) of S.190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. .....
If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice.....
(10) 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 re-investigation as the circumstances of an individual case may call for."
20. The case is now pending enquiry, preliminary to committal to Sessions Court. The occurrence took place within the jurisdiction of Tellicherry Sessions Court. According to the prosecution, CBI cases throughout the State have to be dealt with by Chief Judicial Magistrate, Ernakulam and tries by Sessions Court, Ernakulam. There is a controversy between the accused and the prosecution as to whether the Chief Judicial Magistrate, Ernakulam has jurisdiction in the matter or if committal is to be made to Sessions Court, at Ernakulam or at Tellicherry, the Sessions Case is to be tried in the Sessions Court, Ernakulam or Tellicherry. Counsel for the revision petitioners submitted before me that all the contentions challenging the jurisdiction of the courts at Ernakulam are withdrawn. This is a connected O. P. 933/84 filed under Art. 226 of the Constitution by the accused. The O. P. is also being withdrawn. In view of the submissions made, I do not see any difficulty for Chief Judicial Magistrate, Ernakulam to deal with the committal proceedings or to commit the case to Sessions Court at Ernakulam or for the latter to try the Sessions case.
In the result, the Cri. R. P. is disposed of in the following manner :
1. The order passed by the Chief Judicial Magistrate is set aside.
2. It is directed that the petitioners will be released on bail on each of them executing a bond for Rs. 5,000/- and furnishing two solvent sureties in the like amount to the satisfaction of the Chief Judicial Magistrate, Ernakulam.
3. Till the Sessions trial is over, the petitioners shall reside within the limits of Cochin Corporation and report their places of residence to the investigator.
4. They shall not enter the limits of the Cannanore District until trial of the Sessions case is over.
5. They shall not in any way attempt to meet or influence directly or indirectly any of the witnesses cited by the prosecution.
6. They shall report before the investigator or any person in charge of the C.B.I, office at Ernakulam every day at any time between 10 a.m. and 12 noon.

Order accordingly.

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Cross Citation :1982 CRI. L. J. 2319

RAJASTHAN HIGH COURT

(JAIPUR BENCH)

Coram : 1 K. D. SHARMA, C. J. (Single Bench)

Criminal Misc. Bail Applns. Nos. 556 and 800 of 1982, D/- 30 -7 -1982.

Narayan and others, Applicants v. The State of Rajasthan, Respondent.

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Criminal P.C. (2 of 1974), S.167, S.173, S.190, S.309(2), S.437 - BAIL - INVESTIGATION - REMAND - Murder case - Detention of accused. illegal - if the detention is illegal, it cannot be validated by order of remand subsequently made by the Judicial Magistrate or by Additional Sessions Judge under S.309(2) of the Cri. P.C. - In this view of the matter, the Additional Sessions Judge should have accepted the application for bail filed by the petitioners in both the cases and should have released them on bail- Accused must be released on bail. (Paras 6, 7)

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K.K. Mehrish and S.P. Tyagi, for Applicants; S.B. Mathur, Public Prosecutor, for the State.

JUDGEMENT

ORDER :- Heard Mr. K.K. Mehrish and Mr. S.P. Tyagi, for the petitioners and Mr. S.B. Mathur, Public Prosecutor and perused the relevant papers.

2. These are two bail applications - S.B. Criminal Misc. Bail Applications No. 556/1982 and No. 800/1982 filed by Narayan and 12 others, in which common questions of law and facts arises and so they are decided together by one order.

3. Before dealing with the questions of law involved in these two bail applications, I deem it necessary to state, in brief, the incident which gave rise to the applications. The facts thereof are as follows :-

On April 2, 1981, Suresh Chandra son of Phool Chand Brahmin, resident of Salrea Kalan made a first information report to the police at police station, Chechat. It was alleged in the report that at about 4 p.m. on April 2, 1981, Phool Chand, Narayan, Shri Ram, Badri, Ram Karan and Ram Ratan petitioners accompanied by 20 or 25 Dhakars residents of village Salrea Kalan went to the house of one Kanhaiya Lal having armed themselves with lathis, axes, Gandasis, and Jhapeta and started throwing stones in his house. Thereafter they set fire to his house. Out of fear Kanhaiya Lal and his companions, namely, Shanker, Anand and Kastura ran away from there. Kanhaiya Lal entered the quarter of one Hira Lal and bolted it from inside.

The aforesaid petitioners and their associates followed Kanhaiya Lal to the house of Hira Lal and after breaking the 'Pattis' of the roof of the quarter of Hira Lal, they inflicted several injuries on the bodies of Kanhaiya Lal with lathis, Gandasa and axes. As a result of the severe heating given to Kallhaiya Lal the hands and the feet of the latter were cut and he succumbed to his injuries. The other associates of Kanhaiya Lal, namely, Shanker, Anand and Kastura also were chased by the petitioners who succeeded in catching hold and beating Shri Anand Vallabh, as a result of which the latter died at the spot.

3A. The police registered a criminal case against the petitioners and took usual investigation into the matter. In the course of investigation, Narayan, Ram Ratan, Shri Ram, Phool Chand, Badri, Ram Karan, Kalu, Bhawani Ram, Ram Gopal, Bhawani Ram son of Kanwar Lal and Mangi Lal son of Kanwar Lal were arrested by the police on April 3, 1981, Gopal petitioner son of Mohan Lal was arrested on April 13, 1981. while Mangilal son of Nathu was arrested on May 1, 1981. Apart from these petitioners, 12 others also were taken into custody by the police but they were released on bail by the High Court vide its order dated Sept. 16, passed in S.B. Criminal Misc. Bail Application No. 720 of 1981.

4. The contention of the learned counsel for the petitioners before me is that cognizance of the offence was not taken by the Judicial Magistrate having jurisdiction to try the case or to commit them for trial before the expiry of 90 days and so the petitioners were entitled to be released on bail after the expiry of the said period. In support of their above contention, the learned counsel for the petitioners placed reliance on Khinvdan v. State of Rajasthan (1975 WLN 132), Babubhai Parshottamdas v. State of Gujarat (1982 Cri LJ 284) : (AIR 1982 NOC 72) (Guj) (FB), Beni Madhav v. State of Rajasthan (1982 Raj Cri C 145), Laxmi Brahman v. State (1976 Cri LJ 118), Shabhag v. State of Rajasthan (1982 Raj LR 358) and a few other rulings.

5. The learned Public Prosecutor, on the other hand, contended that the charge-sheet under S.173, Cr. P.C. was filed in the case in the court before the expiry of 90 days after completion of the investigation and so the power of the Judicial Magistrate to release the petitioners on bail under S.167(2A), Cr. P.C. came to an end.

6. I have considered the rival contentions mentioned above. At the outset I

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may observe that the cognizance was not taken by the Judicial Magistrate in these two cases prior to July 13, 1981, on which date the Judicial Magistrate passed an order that the charge-sheet filed by the police be registered and the case be fixed for further proceedings on July 27, 1981. Thereafter the case was again adjourned on July 27, 1981 to August 10, 1981. On August 10, 1981, the Judicial Magistrate committed the petitioners and other co-accused to the court or the Sessions Judge, Kota, for trial as it appeared to him that the case was exclusively triable by the Judicial Magistrate. The contention of the Public Prosecutor that the charge-sheet was filed in the court before the expiry of 90 days does not appear to be correct, because what the police did on June 30, 1981, was to file a charge-sheet in the court of the Chief Judicial Magistrate, Kota, who recorded the fact in the order-sheet that challan under Ss.302, 147, 148, 149, 436 and 336, I.P.C. was produced before him by Braham Dutta Tyagi, S. H. O. Chechat against the petitioners.

The Chief Judicial Magistrate after recording this fact ordered that the challan be sent to the Munsiff and Judicial Magistrate, Ramganj Mandi for orders on July 6, 1981. The Chief Judicial Magistrate therefore, could not be said to have taken cognizance of the offences upon police report on June 30, 1981. On July 6, 1981, the Judicial Magistrate, Ramganj Mandi, to whom the charge sheet was sent by the Chief Judicial Magistrate, Kota, did not take cognizance and adjourned the case for orders on July 13, 1981. It was only on July 13, 1981, that he passed an order that the challan be registered and thereafter, as stated earlier, he committed the petitioners to the court of the Sessions Judge, Kota, under the

aforesaid offences on Aug. 10, 1981, i.e. much beyond the expiry of 90 days. Consequently, I have no hesitation in holding that after the expiry of 90 days, an absolute right to be released on bail accrued to the petitioners, subject, of course, to the cancellation of the bail; if the requirements of S.437(5), Cr. P.C. were satisfied.

Under S.309(2), Cr. P.C. the Judicial Magistrate no doubt was empowered to remand the petitioners to custody by a warrant after taking cognizance of the offences, but in this case the petitioners were remanded to judicial custody by the Judicial Magistrate without taking cognizance of the offence as indicated above. The mandate of the Legislature as set out in S.167(2), Cr. P.C. could not be flouted or ignored on the ground that after filing of the charge-sheet by the police before the Chief Judicial Magistrate, upon completion of investigation, the power of the Judicial Magistrate to enlarge the accuse on bail under S.167(2A), Cr. P.C. came to an end. In my opinion, once the period of 90 days or 60 days, as the case may be mentioned in S.167(2A), Cr. P.C. expired before taking cognizance of the offences by the court, the petitioners obtained a valuable right to be released on bail and their detention in this case after the expiry of the period of 90 days was clearly illegal.

7. The next question that arises for determination is whether the petitioners are entitled to bail on the ground of their detention having become illegal after the expiry of the period of 90 days in spite of the fact that they have been committed by the Judicial Magistrate to the court of the Sessions Judge, Kota, for trial under the aforesaid Section of the I.P.C. and are in fact facing trial. The learned Public Prosecutor vehemently contended before me that even if defect or illegality has crept in the antecedent detention of the petitioners, it cannot contaminate the order of detention or remand subsequently made by the Additional Sessions Judge after commitment of the case, which is other wise legal and proper. In my opinion, under the New Criminal P.C. if the detention is illegal, it cannot be validated by order of remand subsequently made by the Judicial Magistrate or by Additional Sessions Judge under S.309(2) of the Cri. P.C. In this view of the matter, the Additional Sessions Judge should have accepted the application for bail filed by the petitioners in both the cases and should have released them on bail.

8. Consequently, I accept both the bail applications filed by Narayan, Ram Ratan, Shri Ram, Phool Chand, Badri, Ram Karan, Gopal, Kalu, Bhawani Ram son of Balaji, Ram Gopal, Bhawani Ram son of Shri Hira Lal, Mangi Lal son of Nathu and Mangi Lal son of Kanwar Lal and direct that they be released on bail provided each of them furnishes a

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personal bond in the amount of Rupees 10,000/-, together with two sureties in the amount of RS. 5000/-, to the satisfaction of the Additional Sessions Judge, Kota, for his appearance in the said court of the Additional Sessions Judge, Kota, on each and every date of hearing of whenever called upon to do so.

Applications allowed.

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Cross Citation :1976 CRI. L. J. 1247

ANDHRA PRADESH HIGH COURT

Coram : 1 GANGADHAR RAO, J. (Single Bench)

Crl. Misc. Petn. Nos. 958 and 986 of 1975, D/- 16 -6 -1975.

T. V. Sarma ….Vs…. Smt. Turgakamala Devi and others

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Criminal P.C. (2 of 1974), S.167(2), Proviso (a) and S.309 - ADJOURNMENTS - INVESTIGATION - BAIL - Accused in custody for sixty days – Police filed preliminary charge-sheet – Such a incomplete charge-sheet is not a police report within the meaning of Section 173(2) – Court cannot take the cognizance of offence on the basis of such charge-sheet - Investigation not complete - Accused has to be released on bail - Prosecution cannot invoke, S.309. 309 on the basis of a preliminary charge-sheet. Such a preliminary charge-sheet is not a police report within the meaning of Section 173(2) and hence the question of the Magistrate's taking cognizance of the offence and remanding the accused under Section 309 does not arise. 1975 Cri LJ 647 (Gauhati) and 1966 Cri LJ 1377 (Andh Pra), Relied on. (Paras 9, 14, 15)

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Cases Referred : Chronological Paras

1975 Cri LJ 647 (Gauhati) 18

1966 Cri LJ 1377 : AIR 1966 AP 377 16

Petitioner in person in Cri. M. P. No. 958 of 1975. Public Prosecutor, the Petitioner in Cri M. P. No. 986 of 1975 and respondent No. 5 in Cri M. P. No. 958 of 1975; P. Babul Reddy, for Respondents in Cri. M. P. No. 958 of 1975 and Respondents 1 to 4 in Cri. M. P. No. 986 of 1975.

Judgement

ORDER :- In these two petitions, an important question of law is raised with regard to remand and bail during the course of Police investigation. One petition is filed by the State and another by the father of the deceased to cancel the bail granted to A-1 to A-4 on 3-5-1975 by the Judicial Second Class Magistrate, Chirala.

2. The brief facts leading up to the filing of these two petitions may be stated : A-1 is the wife of the deceased. A-2 is the father of A-1 and A-3 and A-4 are the sons of A-2. A preliminary charge sheet under Section 302 read with Section 34 I.P.C. and 201 read with Section 34 I.P.C. was filed by the Inspector of Police, Crime Branch, C.I.D. Hyderabad on 3-5-1975 in the court of the Judicial Magistrate of Second Class, Chirala. In that charge sheet, it is stated that all the four accused caused the death of the deceased on the night of 5-1-1975 and in order to cause disappearance of the evidence, these four accused with the assistance of some other persons removed the dead body in a cart and threw it in a canal. The dead body was discovered at about 9 or 10 A.M. an the next day. In order to

cover up her guilt, A-1 invented a story that the deceased went out for answering calls of nature at about 5 A.M. on 6-1-1975 and thus all the accused put the relations of the deceased on a wrong scene. The then Inspector of Police, Chirala, and the then Sub-Inspector of Police, Inkollu Police Station, became parties to the offence of causing disappearance of evidence of murder by manipulating a false inquest report and registering a case on an incorrect report and they even tried to avoid post-mortem examination. In view of the involvement of the local police the investigation had become difficult and complicated and it could not be completed. Therefore, it was prayed that the accused may be further remanded under Section 309, Criminal Procedure Code pending completion of investigation and submission of the final charge-sheet. It was further stated that a comprehensive charge-sheet would be submitted against all the persons involved in the offences in question after the entire investigation was completed.

3. On the same day the learned Magistrate passed an order releasing A-1 to A-4 on bail. The Inspector, C.B. C.I.D. was directed to complete investigation expeditiously and file a charge-sheet.

4. In his order the learned Magistrate has stated that the preliminary charge-sheet filed on that date was only a simple remand report to secure further remand against A-1 to A-4 under Section 309, Criminal Procedure Code that A-1 to A-4 were in custody under Section 167(2), Criminal Procedure Code since 5-3-1975 till that date i.e., 3-5-1975, i.e., for a total period of 60 days, that under the proviso to Section 167, clause (2), Criminal Procedure Code it is mandatory that the accused should be released after completion of 60 days of detention if they are ready to furnish bail and that the accused were ready to furnish bail. He further held that Section 309 Criminal Procedure Code has no application for, that applies only to enquiry or trial but not to investigation. He also commented that the investigation was being done leisurely and according to the convenience of the investigating officers. Consequently he directed the release of A-1 to A-4 on bail. I am informed that on the same date the accused furnished securities and were released on bail.

5. The learned Public Prosecutor has contended that the order of the learned Magistrate is palpably wrong and he should not have released the accused on bail. According to him under Section 173, Sub-Section (8), Criminal Procedure Code more than one charge sheet could be filed and so under Section 309 read with Explanation (1), Criminal Procedure Code the Magistrate is competent to remand the accused even though they were in custody for more than 60 days under Section 167, Criminal Procedure Code.

6. The petitioner who is the father of the deceased has contended that it is immaterial whether the investigation was completed and a final charge sheet was filed or not under Section 173, Criminal Procedure Code and that Section 309, Criminal Procedure Code confers an independent power upon the Magistrate to remand the accused to the custody of police even though the period of 60 days have elapsed.

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7. The learned counsel for the accused has contended that until the investigation is completed, there is no question of filing a final charge sheet and until a final charge-sheet is filed, the Magistrate cannot take cognizance of the case and till then the Magistrate can remand the accused to custody only for a total period of 60 days and if it exceeds, he is bound to release them on bail if they are prepared to and do furnish bail under Section 167, Criminal Procedure Code. He further contended that the provisions of Section 309, Criminal Procedure Code are attracted only after the court has taken cognizance of the offence and in this case since the Magistrate has not taken cognizance of the case, there is no question of invoking the provisions of Section 309, Criminal Procedure Code.

8. In order to appreciate the rival contentions of both the parties it is necessary to briefly refer to the relevant provisions of the Code of Criminal Procedure, 1973. Here it must be borne in mind that the present proceedings are governed by the Code of Criminal Procedure 1973 Section 167, Criminal Procedure Code appears in Chapter XII which deals with information to Police and their powers to investigate. Section 167, Criminal Procedure Code in so far as it is relevant reads as follows :-

"Section 167(1) :- Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by Section 57 and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the Police Officer making the investigation, if he is not below the rank of Sub-Inspector, shall forthwith, transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this Section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole, and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that :

(a) The Magistrate may authorise detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this Section for a total period exceeding sixty days, and on expiry of the said period of sixty days, the accused person shall be released on bail if he is prepared to and does furnish bail and every person released on bail under this Section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that chapter."

9. A reading of this Section shows that when a person is arrested and if it appears that the investigation cannot be completed within a period of 24 hours and there are grounds for believing that the information is well founded, the officer-in-charge of the Police Station should send to the nearest Judicial Magistrate a copy of the entries in the diary and also the accused to such Magistrate. The Magistrate may authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days in the whole. But he can authorise detention of the accused otherwise than in custody of the Police, beyond the period of 15 days if he is satisfied that there are adequate grounds for doing so. But it should not exceed a total period of sixty days. On the expiry of that period of sixty days the accused shall be released on bail if he is prepared to and does furnish bail. Every person released on bail under this Section shall be deemed to be so released under the provisions of Chapter XXXIII for the purpose of that chapter. Chapter XXXIII deals with the provisions as to bail and bonds. Admittedly in this case the investigation is not yet completed. The accused have been in custody for a total period of 60 days. So they have to be released on bail if they are prepared to and do furnish bail.

10. The next question is whether under the provisions of Section 309, Cr. P.C. the Magistrate has the power to remand the accused to custody even though the investigation is not yet complete and the accused has been in custody for more than 60 days. Section 309, Cr. P.C. reads 8.5 follows :-

"Power to postpone or adjourn proceedings : (1) In every enquiry or trial,

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the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) If the court, after taking cognizance of an offence or commencement of trial finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody.

Provided that no Magistrate shall remand an accused person to custody under this Section for a term exceeding fifteen days at a time;

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing;

Explanation :- (1) If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation :- (2) The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

This provision occurs in Chapter XXIV relating to the general provisions as to enquiries and trials, Sub-Section (2) of Section 309, Cr. P.C. specifically states that after taking cognizance of an offence, or commencement of trial, if the court finds it necessary or advisable to postpone the commencement of, any inquiry or trial, it may do so for reasons to be recorded and may remand the accused if he is in custody provided that the remand does not exceed 15 days at a time. Explanation (1) says that if it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for remand, obviously the explanation has to be read as part of the Section. Explanation (1) explains one of the reasonable causes, for remand. But to invoke the provisions of Section 309, Cr. P.C. it is essential that the Court should have taken cognizance of an offence in view of the provisions of Sub-Section (2).

11. The court takes cognizance of a case under Section 190, Cr. P.C. which reads as follows :

"Section 190. Cognizance of offences by Magistrates : (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under Sub-Section (2) may take cognizance of any offence.

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts.

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

12. In the present case the court can take cognizance of the case upon a police report within the meaning of cl. (b) of Section 190, Cr. P.C. What is a Police report is the next question. It is defined under Section 2 clause (r), Cr. P.C. which says that a police report means a report forwarded by a Police Officer to a Magistrate under Sub-Section (2) of Section 173, Cr. P.C.

13. In so far as it is relevant, Section 173, Cr. P.C. reads as follows :-

"Section 173. Report of Police Officer on completion of investigation : (1) Every investigation under this Chapter shall be completed without unnecessary delay.

2(i) As soon as it is completed, the officer-in-charge of the Police Station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government stating;
(a) the names of the parties;
(b) the nature of the information.
(c) the names of the persons who appear to be acquainted with the circumstances of the case;
(d) whether any offence appears to have been committed and, if so by whom;
(e) whether the accused has been arrested
(f) whether he has been released on his bond and, if so, whether with or without sureties.
(g) whether he has been forwarded in custody under Section 170.
(Clause (ii) and Sub-Sections (3) to (7) omitted)
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8. Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub-Section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-Sections (2) to (6) as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-Section (2)."
14. A plain reading of Sec. 173, Cr. P.C. shows that every investigation must be completed without unnecessary delay and as soon as it is completed, the officer-in-charge of the Police Station shall forward a report to the Magistrate in the form prescribed. Therefore, there is no question of sending up of a police report within the meaning of Section 173, Cr. P.C. Sub-Section (2) until the investigation is completed. Any report sent before the investigation is completed will not be a police report within the meaning of Sub-Section (2) of Section 173, Cr. P.C. and there is no question of the Magistrate taking cognizance of the offence and consequently the provisions of Section 309, Cr. P.C. cannot be invoked.
15. In the case on hand only a preliminary charge-sheet has been filed and it is specifically stated therein that the investigation is not yet completed. Therefore, it cannot be treated as the police report within the meaning of Sub-Section (2) of Section 173, Cr. P.C. and so the Magistrate could not take cognizance of offence in the present case and remand the accused under Section 309, Cr. P.C.
16. The learned Public Prosecutor has argued that in this case there is a charge-sheet though styled preliminary and so the proviso to Section 167 Sub-Section (2) does not apply. I do not agree with him. The Code of Criminal Procedure does not contemplate a preliminary charge-sheet and a final charge-sheet. What is contemplated is only a police report within the meaning of Sub-Section (2) of Section 173, Cri. P.C. Admittedly in this case, there is no such report. The so-called preliminary charge-sheet filed in this case is not a police report because the investigation is not yet completed, and so the proviso to Section 167 Sub-Section (2) is attracted. In this connection the learned Public Prosecutor has relied upon Sub-S. (8) of Section 173, Cr. P.C. in order to contend that even a preliminary charge-sheet is a police report within the meaning of Sub-Section (2) of that Section. But a reading of Sub-Section (8) of Section 173, Cr. P.C. shows that after a police report under Sub-Section (2) is sent to the Magistrate, further investigation is not precluded and if upon such investigation further evidence is obtained a further report should be sent to a Magistrate. Therefore, Sub-Sec. (8) of Section 173, Cr. P.C. comes into play only after a report under Sub-Section (2) is sent but not before. In this case since no report under Sub-Section (2) is sent, Sub-Section (8) does not come into operation at all. Since the preliminary report is not the one sent to the court after a report under Sub-

Section (2) was sent, the learned Public Prosecutor cannot invoke the provisions of Sub-Section (8) of Section 173, Criminal Procedure Code. In this connection I may also refer to a Bench decision of our High Court reported in Bandi Kotayya v. State, AIR 1966 Andh Pra 377 : (1966 Cri LJ 1377) wherein it has been held by Basi Reddi and Anantanarayana Ayyar, JJ., as follows :

"It would follow as necessary consequence that until the Magistrate has before him a police report as envisaged by Section 173, Criminal Procedure Code, he cannot take cognizance of the offence in respect of which he is to hold an inquiry. This would be the true position notwithstanding that, as in the instant case, a preliminary charge-sheet had been presented to him earlier and he had taken the case on file and given it a number for statistical purposes; remanded the accused produced before him, and issued non-bailable warrants in respect of the absconding accused. All these steps should be regarded as having been taken not upon taking cognizance of the offence with a view to conduct a preliminary inquiry against the accused named in the preliminary charge-sheet, but only with a view to facilitate the completion of the investigation and the laying of the final charge-sheet which would be the report contemplated by Section 173, Criminal Procedure Code."

Their Lordships further held as follows :

"It is clear from the terms of Sub-Section (1) that the report under Section 173, Criminal Procedure Code, is submitted by the Police only after the investigation

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is completed and not before. Where in a given case, before the completion of the investigation, a report, which is styled a preliminary charge-sheet, is forwarded to a Magistrate, that report cannot be regarded as a report under Section 173, Criminal Procedure Code, upon the receipt of which alone a Magistrate, acting under Section 207-A, Criminal Procedure Code, can proceed to hold a preliminary inquiry."

17. Following that decision it follows that in the present case since the investigation is not complete there is no police report and consequently there is no question of the Magistrate taking cognizance of the case. So I do not agree with the contention of the learned Public Prosecutor.

18. I am also supported in the view I have taken by the Bench decision of the Assam High Court reported in Ved Kumar Seth v. State of Assam, 1975 Cri LJ 647 (Gauhati).

19. For the reasons stated supra, I hold that on the facts of this case the learned Magistrate was justified in releasing A-1 to A-4 on bail after the lapse of the 60 days period of detention under Section 167 Sub-Section (2), Criminal Procedure Code. Consequently both the petitions are dismissed.

Petitions dismissed.

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Cross Citation :1998 CRI. L. J. 2807

PATNA HIGH COURT

Coram : 1 Mrs. INDU PRABHA SINGH, J. (Single Bench)
Crl. Reven. No. 414 of 1991, D/- 11 -3 -1998.
Uma Shankar Sahay, Petitioner v. State of Bihar and another, Respondents.

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(A) Criminal P.C. (2 of 1974), S.57, S.151, S.154 - Accused - Person when becomes 'accused person' - Person does not become an accused simply on lodging of FIR or on being arrested or detained - Such person becomes an accused only after there are grounds of believing that information against him is well founded. (Para 13)

(B) Criminal P.C. (2 of 1974), S.319 - Addition of accused - Expression 'person not being accused' - Does not cover person figuring as accused in case at any stage - Three persons named as accused in complaint - Cognizance taken only against two of them and not the third accused i.e. the petitioner - Petitioner could not be described as 'any person not being an accused' - Cannot thus be added as an accused. (Paras 27, 28)

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Cases Referred :	Chronological Paras
1990 Cri LJ 2302 : AIR 1990 SC 2158	18
1983 Cri LJ 159 : AIR 1983 SC 67	20
1983 Cri LJ 1044 : AIR 1983 SC 595	20
1979 Cri LJ 333 : AIR 1979 SC 339	20
1966 Cri LJ 244 : AIR 1966 All 124	28
1964 (1) Cri LJ 161 : AIR 1964 SC 269	25
1963 (2) Cri LJ 397 : AIR 1963 SC 1430	20

R. Griyaghey, for Petitioner; Hare Krishan Kumar, Sr. Advocate and Sidhendra Narayan Singh, for Respondents.

Judgement

ORDER :- This application, under Section 397 of the Code of Criminal Procedure, 1973 (in short the 'Code') is directed against the order dated 27-5-1991 passed by Shri D. R. Roy, Judicial Magistrate Ist Class, Nawadah in Complaint Case No. 14/88/Tr. No. 554/91 by which the learned Judicial Magistrate; on a petition filed under Section 319 of the Code; ordered for the issue of process against the petitioner for the alleged offences under Sections 465, 467, 468 471 and 120 (B) of the Indian Penal Code.

2. It appears that the complainant, Janki Devi (O.P. No. 2) filed a complaint petition before the Chief Judicial Magistrate on 11-1-1988 alleging therein that the accused persons including the present petitioner entered into a criminal conspiracy and created a forged and fabricated document purported to be the certified copy of the order passed by the Settlement Officer under Section 106 of the Bihar Tenancy Act in T. S. Nos. 58/80 and 58(A)/80 to the effect that Khata Nos. 91 and 263 were entered into the Khatiyan of Kunti Devi who was also named as an accused in the complaint petition. The allegation against

the petitioner was that; he, in the capacity of Head Assistant in the record room of the Collectorate, Nawadah; issued the purported certified copy of the aforesaid forged order certifying it to be genuine. It was further alleged that the accused persons of the said case were using the aforesaid document as a genuine document. They produced it before Anchal Adhikari, Warsaliganj, who, on its basis, issued rent receipts for R. S. Khata Nos. 263 and 91 in the name of accused No. 2, Kunti Devi.

3. On the basis of this complaint petition (Annexure 1) Complaint Case No. 14/88 was instituted in which an enquiry under Section 202 of the Code was held by the learned Chief Judicial Magistrate. On the conclusion of the enquiry the learned Magistrate took cognizance of the offence against two of the accused, namely, Suresh Singh and Kunti Devi for the offences mentioned above but did not take cognizance against the present petitioner. He, thereafter, transferred the case to the file of Shri P. Kashyap, Judicial Magistrate, Nawadah for trial.

4. In this petition the petitioner has contended that by virtue of his post as the Head Assistant of the record room he was duty bound to sign on the certified copies prepared by the copyist and checked and compared by the comparing clerk as well as by the head comparing clerk who are required to properly check every certified copy with the original and also to certify that the certified copy is the true and correct copy of the original. The petitioner being an old man suffering from heart disease was required to sign a large number of certified copies every day and it was not physically possible for him to check and compare each and every copy with the original. He had to act on the certificate granted by the Head Comparing Clerk as well as the Comparing Clerk to the effect that the copy prepared was the true copy of the original. While issuing the certified copy, in course of his duty, it would be futile to say that the petitioner had obtained any gain in

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giving the certificate on the aforesaid document. Even the alleged certified copy was not annexed with the complaint petition and the Court below did not get an opportunity to scrutinise and to find out whether any fraud or fabrication was committed in the preparation of the aforesaid document. The learned Court below did not even call for the same. In its absence it was not fair and proper for the Court below to pass the impugned order against the petitioner under Section 319 of the Code, as no prima facie case was made out against him.

5. Under the aforesaid facts and circumstances the case of the petitioner will be out of reach of Section 319 of the Code since as per the complaint petition he figured as one of the accused in the case and also since by the order dated 27-5-1988 taking cognizance of the offence no cognizance was taken against the petitioner as will appear from the aforesaid order (Annexure 3). It is well settled that if a public servant is accused of an offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty no cognizance against him could have been taken except with the previous sanction of the State Government. Since no such sanction had been taken the impugned order issuing summons to him in this case to stand trial is also bad in law and hit by Section 197 of the Code. The impugned order will be an abuse of the process of Court and against the interest of justice. Moreover the alleged offences are said to have taken place between 22-12-1979 to 20-11-1987 in the course of which so many Head Assistants were posted in the Collectorate, Nawadah. On these grounds, amongst others, it has been contended that after hearing the parties the impugned order dated 27-5-1991 be quashed.

6. The parties have been heard at length on the questions of law raised in this petition. I will deal with the same in detail at the appropriate places. Firstly, however, I would like to briefly state the facts of the case.

7. From the record it appears that the complaint petition in Complaint Case No. 14/88 was filed on 11-1-1988 in the Court of Chief Judicial Magistrate, Nawadah. In this complaint petition the present petitioner was named as accused No. 3 and has been described as head clerk record room, Nawadah, Collectorate. Three persons have been named as witnesses. On the same day, the complainant Janki Devi (OP No. 2), was examined on solemn affirmation and the Chief Judicial Magistrate decided to hold an enquiry under Section 202 of the Code, in course of which he examined three witnesses, namely, Ram Shanker Singh, Shyam Singh and Subash Chandra. On the conclusion of the enquiry under Section 202 of the Code the learned Magistrate passed the order dated 27-5-1988 taking cognizance of the offence only against two of the accused persons, namely, Suresh Singh and Kunti Devi under various sections of the Indian Penal Code. Thereafter he transferred the case for disposal to the Court of Judicial Magistrate.

8. Before the trial Court a petition (Annexure 2) under Section 319 of the Code was filed on behalf of the complainant for issuing process against the present petitioner. From the impugned order it appears that the learned Judicial Magistrate was conscious of the fact that the learned Chief Judicial Magistrate had not taken cognizance against the present petitioner. It further appears that the learned Judicial Magistrate had examined three witnesses, namely, Subash Chandra, Shyam Singh and Janki Devi under Section 244 of the Code. Thereafter he perused the record of the case and concluded that there were sufficient materials against the present petitioner for proceeding against him. He, accordingly, passed the impugned order dated 27-5-91 under Section 319 of the Code for the issue of the process against the present petitioner. It is against this order that the present revision petition has been filed.

9. The impugned order appears to have been passed under the provision of Section 319 of the Code which runs as follows :-

"319. Power to proceed against other persons appearing to be guilty of offence -

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purposes aforesaid.,

(3) Any person attending the Court, although

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not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then -

(a) The proceedings in respect of such person shall be commenced afresh, and the witness re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced." (Emphasis supplied)

10. From perusal of this section it would appear that at the time when the Court decides to proceed against any other person under the provisions of this section he does not figure as an accused till the date of passing of the order under Section 319 of the Code. In sub-section (1) it has clearly been stated that "it appears from the evidence that any person not being the accused has committed any offence." From this it would become clear that till the date on which the order under Section 319 of the Code is passed the person to be proceeded against does not figure as an accused in the case. Again in sub-section (2) it has been stated that where "such person" is not attending the Court which will mean that

till then he does not figure as an accused and has been described as "such person". Sub-section (3) provides that "any such person" may be detained by the Court if he is attending the Court. Here also he has not been described as an accused. In sub-section (4) (a) that person has been described as "such person" against whom the proceeding is required to be commenced afresh. Sub-section (4) (b) also describes the person to be proceeded against under Section 319 of the Code as "such person". From all this it becomes clear that till the stage of passing of the order under Section 319 of the Code or even till his arrest the said person has not been described as an accused and is not treated as such.

11. The present case has been started on the basis of the cognizance taken in a complaint case. The procedure for taking of cognizance has been given in Section 190 of the Code. In Section 190 of the Code the word "accused" has not been used. However, this word has been mentioned in Section 191 of the Code which relates to a stage when the cognizance has already been taken by the Magistrate. Section 202 of the Code provides for the postponement of issue of process after taking the cognizance. In this section also the word "accused" has been used and it has been provided that the Magistrate on the receipt of the complaint; if he thinks fit; may postpone the issue of process against the "accused" and may enquire into the case himself or direct an investigation to be made. Similarly this word has been used in Section 204 of the Code which deals with the issue of the process. Section 204 (1) provides that if in the opinion of the Magistrate taking cognizance of the offence there is sufficient ground for proceeding and the case appears to be (a) a summons case he shall issue his summons for the attendance of the "accused", or (b) a warrant case, he may issue a warrant or, if he thinks fit, a summons, for causing the "accused" to be brought....." I have referred to the aforesaid sections to show that a person against whom a complaint petition is filed is stated to be an accused under the provisions pointed out above, namely, under Section 191, Section 202 and Section 204 of the Code.

12. As against it the position is somewhat different in the cases instituted on the basis of the First Information Report lodged before the police. In this connection I will firstly refer to Chapter V of the Code which deals with the arrest of a person. In Sections 41, 42 and 43 a reference has been made to "any person". In Section 44 a reference has been made to the arrest of the offender if the offence is committed in presence of the Magistrate. In Section 44 (2) again a reference is made to "any person". The same is case in Section 46. In Section 47 also there is a reference to "any person". In short in none of the sections of this Chapter any reference has been made to the "accused persons". Coming to Section 57 it clearly provides that no Police Officers shall detain in custody a person arrested without warrant for a longer period then under all the circumstances of the case is reasonable and such period shall not; in the absence of a special order of a Magistrate under Section 167; exceed twenty four hours. Here also the expression "a person" has been used and such person has not been described as an accused.

13. Coming to Section 167 in its sub-section (1)

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also it has been stated that whenever any person is arrested and detained in custody, and it appears that there are grounds for beliveing that the accusation or information is well founded, the Officer Incharge of the police station shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the "accused" to such Magistrate. It is only at this stage for the first time the word "accused" has been used for a person who has been arrested or detained by the police and produced before a Magistrate. From sub-section (2) of Section 167 onwards "such a person" has been described as the accused person. Now

where is the dividing line? When a person arrested and detained by the police becomes an accused person? As has been stated above, any person does not become an accused simply because an F.I.R. is lodged against him, or he is arrested and detained by the police. Nor he becomes an accused person even when he is produced before the Magistrate by the police under the provisions of Section 167 of the Code. For the first time such a person has been described as an accused person only after the officer-in-charge of a police station finds that there are ground for believing that the accusation or information against him is well founded. Thus, there is a clear line of demarcation in the stage in which any person arrested by the police becomes "an accused person". It may be, however, pointed out here that the discussion of this point namely when a person arrested by the police in a case instituted on F.I.R. becomes an accused person was not necessary under the facts and circumstances of the present case but simply for the purposes of comparison and contrast I have made the aforesaid discussions.

14. As far as the present case is concerned it is clear that the present petitioner was named as accused No. 3 in the complaint petition. He also figured as an accused in the enquiry under Section 202 of the Code. The evidence against him was adduced in the aforesaid enquiry on the conclusion of which the learned Chief Judicial Magistrate proceeded to take cognizance of the offence against two accused but not against the present petitioner. Under the aforesaid circumstances what would be the law on the subject.

15. As pointed out above, in a case instituted upon a complaint, a person becomes an accused even in the course of inquiry held against him under Section 202 of the Code. As a matter of fact he becomes an accused even at the stage of Section 191 before which the cognizance is already taken in a case. As against it in a case instituted on the basis of F.I.R. a person does not become an accused till the officer-incharge finds that there are grounds for believing that the accusation or information against him is well founded. It is in this background that the ratio of the various decisions of the Hon'ble Supreme Court has to be applied because the findings of the apex Court in cases instituted on police report will not apply to the cases instituted on complaint because in the former case the stage at which a person becomes an accused is differing from the stage as envisaged in the latter case and I have already noted this difference in the earlier part of this judgment. The determination of this question is vital in as much as; as per Section 319 of the Code a person can be proceeded against only when it appears from the evidence that any person not being the accused has committed any offence. From this it becomes clear that if a person had figured as an accused in the case at any stage he goes out of the reach of Section 319. (Emphasis supplied)

16. In the present case, however, three persons were named as accused in the case and enquiry under Section 202 of the Code was held by the learned Chief Judicial Magistrate in course of which three witnesses were examined. On the examination of the statements made by the three witnesses as also on the perusal of the necessary papers the learned Chief Judicial Magistrate was pleased to take cognizance of the offence only against two persons and not against the third accused, namely, the present petitioner. Now a question that may arise in this connection would be what would the effect of this order. It is not one of those cases in which it has been alleged that the offences were committed by some persons who were not known at the time of filing of the complaint petition. Here in the complaint petition three persons have been clearly named but cognizance was taken only against two persons and not against the third. In a situation like this what would be intention of the Magistrate taking cognizance of the offence? It would be clear from the aforesaid fact that the learned Chief Judicial Magistrate applied his judicial mind to the facts

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and circumstances of the case, to the facts alleged in the complaint petition, and also to statements made by the witnesses under Section 202 of the Code. On the strength of the aforesaid the learned Magistrate proceeded to take cognizance of offence only against two persons and not against the present petitioner. The question is what would be the effect of this order? Can the transferee Magistrate to whom the case has been sent for trial proceed to issue process against the present petitioner in exercise of powers vested in him under Section 319 of the Code?

17. I have already analysed above the provisions of Section 319 of the Code. A perusal of this section clearly shows that a person can be proceeded against under its provision if he figures as "any person not being an accused". If, however, the person concerned had figured as an accused from the very begining of the case on account of the fact that he was named as an accused in the complaint petition itself, can it be said that he fits in the description given in Section 319 of the Code namely "any person not being the accused"? Obviously he was an accused from the very begining of the institution of the case and as pointed out above the procedure for holding enquiry under Section 202 of the Code clearly describes the person being proceeded against as an accused since the cognizance against him had already been taken. As such under the facts and circumstances of this case it cannot be said that the present petitioner can be described as "any person not being an accused" so as to warrant to application of Section 319 of the Code.

18. In this connection a reference may be made to the case of Sohan Lal v. State of Rajasthan, AIR 1990 SC 2158 : (1990 Cri LJ 2302). In the said case the F.I.R. was lodged alleging that the appellants and two others were pelting stones on the informant's house causing damage to it, in course of which three persons were injured. The police submitted charge-sheet under Sections 147, 323, 325, 336 and 427 of the Indian Penal Code. After taking cognizance and after hearing the parties the Judicial Magistrate by his order discharged appellants 4 and 5, namely, Bijya Bai and Jiya Bai of all the charges levelled against them while appellants Nos. 1, 2 and 3, namely, Sohan Lal, Padam Chand and Vishu" were ordered to be charged only under Section 427 of the Indian Penal Code. As against this order the A.P.P. filed on application to the Magistrate under Section 216 of the Code in which a prayer was made that the accused may also be charged under Sections 147, 323 and 336 of the Indian Penal Code. In support of the petition four P.Ws. were examined by the learned Magistrate after which the learned Magistrate passed the order that if any accused was discharged of any charge under any section then there would be no bar for taking fresh cognizance on reconsideration against him according to Section 216 of the Code of Criminal Procedure and that the provision of Section 319 of the Code of Criminal Procedure was also clear in that connection. The following order was recorded by him.

"Hence cognizance for offences under Ss. 147, 427, 336, 323, 325, I.P.C. is taken against accused, Sohan Lal, Padam Chand, Smt. Vijya Bai, Jiya Bai, Vishu", Hanuman Chand and Uttam Chand. Orders for framing the charges against accused Sohan Lal, Padam Chand, Vishnu under the aforesaid sections are passed and accused Smt. Jiya Bai, Vijya Bai, Uttam Chand and Hanuman Chand be summoned through bailable warrants in the sum of Rs. 500/- each. File to come on 20-10-1982 for framing the amended charges against the accused present. Exemption from appearance of accused Vishnu Chand and Padam Chand is cancelled until further order. The Advocate for the accused shall present the said accused in the Court in future."

19. The aforesaid order was challenged in two criminal revision petitions before the High Court of Rajasthan but they were dismissed. Before the High Court in the two revision petitions the question that arose for consideration whether a Magistrate was competent to

take cognizance of the offence after recording some evidence against accused persons who had been earlier discharged of those offences. It was urged before the High Court by the revision petitioners that having once discharged them it was not open to the Magistrate to proceed against them and only remedy was to go in revision and the Magistrate can not review his own order. The learned Judge dismissed the petitions taking the view that it was not a case for reviewing the order of discharge passed by the Magistrate but was a case of taking the cognizance of the offence on the basis of the evidence recorded by the Magistrate himself which was not in any way prohibited in law and that under

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the provision of Section 319 of the Code the Magistrate was fully competent to take cognizance of the offence on the basis of the evidence recorded by him, though for the same offence order of discharge was passed by him earlier.

20. In this case the Hon'ble Supreme Court took into consideration the various submissions made before it from both sides. It also took into consideration the provisions of law as contained in Sections 216 and 319 of the Code. In paragraph 14 of the judgment the Hon'ble Supreme Court took notice of the crucial words in the Section 319 namely "any person not being the accused". The question that arose before their Lordships of the Supreme Court was whether appellant Nos. 4 and 5, namely, Vijya Bai and Jiya Bai who were discharged by the Magistrate of all the charges against them can be described as accused in the case so as to bring them within the sweep of Section 319 of the Code. After taking into consideration the ratio of the decisions in the cases of Joginder Singh v. State of Punjab, AIR 1979 SC 339 : (1979 Cri LJ 339), Chandra Deo Singh v. Prokash Chandra, AIR 1963 SC 1430 : (1963 (2) Cri LJ 397), Municipal Corpn. of Delhi v. Ram Kishan Rohtagi, AIR 1983 SC 67 : (1983 Cri LJ 159) and Dr. S. S. Khanna v. Chief Secretary, Patna, AIR 1983 SC 595 : (1983 Cri LJ 1044) the Hon'ble Supreme Court in paragraph 33 of the judgment has observed as follows :-

"33. The above views have to yield to what is laid down by this Court in the decisions above referred to. The provisions of Sec. 319 had to be read in consonance with the provisions of S. 398 of the Code. Once a person is found to have been the accused in the case he goes out of the reach of S. 319. Whether he can be dealt with under any other provisions of the Code is a different question. In the case of the accused who has been discharged under the relevant provisions of the Code, the nature of finality to such order and the resultant protection of the persons discharged subject to revision under S. 398 of the Code may not be lost sight of. This should be so because the complainant's desire for vengeance has to be tampered with though it may be, as Sir James Stephen says : "The Criminal Law stands to the passing of revenge in much the same relation as marriage to the sexual appetite....."

21. From the aforesaid authoritative pronouncement of the Hon'ble Supreme Court it becomes perfectly clear that once a person figured as an accused in a case and is discharged subsequently he cannot be proceeded against under Section 319 of the Code. In this decision the Hon'ble Supreme Court has also decided the stages at which any person becomes an accused in a complaint case and also in a case instituted on the basis of F.I.R.

22. The next ground taken on behalf of the petitioner is that he cannot be prosecuted for the offences under the various sections mentioned above in view of the fact he happens to be the Head Assistant serving the record room, Collectorate Nawadah and by virtue of this post he was duty bound to sign on the certified copies produced by the subordinate staff, namely copyset, comparing clerk or Head Comparing Clerk, of course after due comparison of the copies with the original. It has further been contended that the petitioner was duty

bound to sign a very large number of copies and it was in no way possible for him to check and compare each and every copy acting as the Head Assistant, also that function was to be performed by the Head Comparing Clerk who used to certify those copies as true copies prepared from the original. However, the main thrust of this argument was that since the petitioner was acting as a public servant acting or purporting to act in discharge of his official duty no Court could have taken cognizance of such an offence without the previous sanction of the State Government. In this way the learned counsel appearing on behalf of the petitioner has sought the protection of Sections 197 of the Code. In my considered view, however, this protection will not be available to the petitioner for the reasons mentioned below.

23. It is no denying the fact that at the relevant time the petitioner was acting as Head Assistant of the record room of the Collectorate, Nawadah. It is also clear that while acting as such he was duty bound to sign on the certified copies to be issued to various persons in proof of the fact that the same were true copies of the original. Under the aforesaid circumstances it cannot be denied that while discharging this duty the petitioner was acting or purporting to act in discharge of his official duty. Now the question that would arise for consideration is that whether under the aforesaid circumstances the petitioner can seek the

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protection of Section 197 of the Code. In this connection a reference may be made to Section 197 (1) (a) and Section 197 (1) (b) of the Code. It runs as follows :-

"197. Prosecution of Judges and public servants -

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction -

(a) In the case of a person who is employed or, as the case may be was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government.

(b) In the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government."

24. From the aforesaid provisions it becomes clear that in order to attract the provisions of this section the petitioner has to show that he is a public servant "not removable from his office save by or with the sanction of the Government." In the present case the petitioner at the relevant time was the Head Assistant in the Record Room of the Collectorate, Nawadah. In other words he was the staff of the Collectorate, Nawadah and not a public servant not removable from his office save by or with the sanction of the Government. It is not in dispute that the staff of the Collectorate are appointed by the District Magistrate and the Collector of the District. They are, therefore, removable from their office under the orders of the District Magistrate and the Collector. In a case of such public servant the State Government; not being the appointing authority; does (sic) come in the picture and the sanction of the State Government is not required for the removal of such an employee from his office. This position appears to be clear.

25. The learned counsel appearing on behalf of the State has submitted that in a situation like this the protection of Section 197 of the Code shall not be available to the petitioner. In this connection he has drawn my attention to the fact that the petitioner not being a public servant not removable from his office save by or with the sanction of the Government the protection of Section 197 cannot be made available to him. Under the

circumstances of the present case I find force in this contention of the learned counsel for the State. In a large number of cases it has been held that in the case of a public servant being a person who can be removed without the sanction of the Government the provision of this section will not apply. In this connection a reference may be made to the case of Nagraj v. State of Mysore, AIR 1964 SC 269 : (1964 (1) Cri LJ 161). This was a case of a Police Officer and a constable removable by the Inspector General of Police and by the Superintendent of Police respectively. In such a situation it was held that no sanction was necessary. In the present case also the District Magistrate and Collector happens to be the appointing authority of the petitioner could be removed from his office by them. As such it is clear that the protection of Section 197 shall not be available to him.

26. Before concluding I would like to briefly discuss a question of law raised in course of the argument on behalf of the petitioner relating to Section 195 of the Code though in the petition no such plea has been taken. Since, however, this is a question of law and since the determination of this question will have an impact on the final outcome of this revision application I would like to briefly discuss the same.

27. As stated above the petitioner was functioning as the Head Assistant of the record room of the Collectorate, Nawadah. In this capacity he was duty bound to sign the certified copies of the documents issued to the parties. In the present case it has been alleged that on the strength of the forged and fabricated copy of the order passed by the Settlement Officer under Section 106 of the Bihar Tenancy Act, accused No. 2, Kunti Devi, managed to get her name mutated in revenue records under the order of the Anchal Adhikari who also issued rent receipts in her for R. S. Khata Nos. 263 and 91. From this it would appear that on the strength of this alleged forgery the Anchal Adhikary who is a Revenue Officer not only mutated the name of accused No. 2 Kunti Devi in the revenue records over R. S. Khata Nos. 263 and 91 and also issued the rent receipts to her

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for the same. Under the aforesaid circumstances it has been contended that no cognizance could be taken against the petitioner for the offence described in Section 463 (forgery) or punishable under Section 471 and other sections of the Indian Penal Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court except on the complaint in writing of that Court. In other words, the protection of Section 195 of the Code has been pleaded on behalf of the petitioner. A perusal of Section 195 under its sub-section (1) (b) (ii) and (iii) show that no Court shall take cognizance of an offence described in Section 463 committed in respect of a document produced or given in evidence in any proceeding in any Court or (iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of commission of any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

28. In the present case, the allegation of the forgery and fabrication of false document has been made against the petitioner. He is said to have conspired in committing forgery of the orders passed by the Settlement Officer under Section 106 of the Bihar Tenancy Act to the effect that Khata Nos. 91 and 263 were entered in the Khatiyan of Kunti Devi (accused No. 2). From the facts of this case it appears that the aforesaid forged and fabricated Khatiyan was filed before the Anchal Adhikari who happens to be a Revenue Officer and on their basis rent receipts for those two Khata were issued in 'he name of accused No. 2, Kunti Devi after mutating her name in the revenue records. Under the aforesaid circumstances the question that would arise for consideration is whether the protection of Section 395 of the Code will be available to the petitioner or not? In this connection it may be stated here that sub-section (iii) of Section 195 provides that in clause (b) of sub-section (i) the term "Court" will also mean a revenue Court. From this it would appear that

the Court of the Anchal Adhikari while ordering for the mutation of the name of accused No. 2 and also for the issue of the rent receipts in her favour will obviously be described as a revenue Court as to attract the provision of this law. In the case of Har Prasad v. Hans Ram, AIR 1966 All 124 : (1966 Cri LJ 244), it has been held that a Tahsildar dealing with mutation proceeding is a revenue Court. Under the aforesaid circumstances there is no denying the fact that the Anchal Adhikari while mutating the name of accused No. 2 in the revenue records of two Khatas mentioned above was acting as a revenue Court within the meaning of Section 195 of the Code. From this it would become clear that the case of the present petitioner will clearly come within the mischief of Section 195 (1) (b) (ii) and (iii). As such no cognizance against him could have been taken without a complaint in writing of that revenue Court or of some other Court to which that Court is subordinate. In the present case no such thing has been done. From the prosecution case it appears that there is allegation of conspiracy under Section 120-B also against the present petitioner for committing the alleged offence. The criminal conspiracy is covered by clause (iii) of Section 195 (i) (b). From this it becomes obvious that the prosecution of the present petitioner is also hit by the provisions of Section 195 of the Code and since no complaint in writing of the Anchal Adhikari, being the revenue Court in question; has been produced the impugned order could not have been passed.

29. From the detailed discussions made above it becomes perfectly clear to me that the petition filed under Section 319 of the Code (Annexure 2) on 15-5-1991 by the complainant-opposite party No. 2 is devoid of any merit and the same could not have been allowed by passing of the impugned order which also has no merit and is liable to be quashed.

30. In the result, this application is allowed and the impugned order is quashed.

Application allowed.

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Cross Citation :1982 CRI. L. J. 1103

DELHI HIGH COURT

Coram : 2 D. K. KAPUR AND J. D. JAIN, JJ. (Division Bench)

Crl. Misc. (Main) No. 427 of 1981, D/- 4 -11 -1981.*

State (Delhi Administration) …. Vs …. Dharam Pal and others

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Criminal P.C. (2 of 1974), S.167(2) - CUSTODIAL REMAND - During 15 days mentioned in S.167(2) Magistrate can alter police custody to judicial custody and vice versa.- Means even if Police custody is granted it can be converted to Judicial custody meantime.

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Cases Referred : Chronological Paras

1981 Cri LJ 100 : (1981) 19 Delhi LT 168 3, 4, 11, 12, 21

1981 Cri LJ 1773 (Delhi) 4, 12
1975 Cri LJ 1212 : AIR 1975 SC 1465 14
(1969) 5 DLT 179 17
AIR 1937 Sind 251 14
D.C. Mathur, for Petitioner; Bawa Gurcharan Singh with Shiv Raj Singh, for Respondents.
* Against order of Balbir Singh, Metropolitan Magistrate, New Delhi, D/- 4-9-1981.
Judgement
KAPUR, J. :- The main question involved in this petition before the court relates to the nature of the custody that can be ordered by a Magistrate during the investigation of a serious offence. The provisions of the Constitution as well as the substantive provisions of the ordinary Municipal law of this country protect a person against unlawful arrest. A person who is arrested by the police can only be arrested in certain specified circumstances.
In the case of certain serious offences described as cognizable offences, the police can arrest without warrants. In other cases, the arrest has to be on the basis of a warrant issued by a Magistrate. The provisions of Art.22(2) of the Constn. require such an arrested person to be produced.
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before a Magistrate within a period of 24 hours. S.56 of the Cri. P.C. requires that the arrested person should be produced before a Magistrate having jurisdiction in the case or before an officer in-charge of a Police Station. If the offence is a bailable one, which is a categorisation made by the Cr. P.C., the police itself can grant bail and has to give bail. If the arrested person is charged with a non-bailable offence or is unable to furnish bail, then the police has no option but to produce the person concerned before a Magistrate within the period of 24 hours exclusive of the time necessary for the journey. This is provided by S.57 of the Cr. P.C. This provision is re-inforced as a fundamental right for every person whether a citizen or non-citizen, under Art.22(2) of the Constn. However, the provision does not apply in the case of an enemy, alien or a person detained under any law providing for preventive detention.
2. In the present case, the respondents were accused of very serious offences under Ss.392/397/302/34 Penal Code; they were arrested on 29th Aug., 1981, on the basis of a First Information Report recorded at Police Station, Nizammuddin on 1st Aug. 1981. It so happens that the respondents were earlier arrested on 28th Aug. 1981, by the Special Staff of West District on the basis of a F.I.R. dated 28th Aug. 1981, recorded at Police Station Nangloi. It was then found that they were also the accused in the F.I.R. recorded at Police Station Nizammuddin. The Station House Officer, Nizzammuddin Police Station moved the Magistrate for fixing a date for holding an identification parade. The Magistrate ordered on 29th Aug. 1981, that the identification parade should be held on Ist Sept. 1981, in the Jail and the Superintendent should be informed. On that very date, there was an application that the arrested persons be kept in judicial custody for the purpose of holding the identification parade and the request for an order for police custody should be kept pending. This resulted in the Metropolitan Magistrate directing the respondents to be kept in judicial custody up to 2nd Sept. 1981.
3. On the date fixed for the identification parade, the respondents refused to join the same and, on 2nd Sept. 1981, a prayer was made to the Magistrate to direct the respondents to be remanded to police custody for a Period of seven days to facilitate recovery of case property, etc. The Magistrate ordered that since the respondents' counsel wanted to argue this point the accused should be remanded to judicial custody till 4th Sept. 1981, on which date this question would be dealt with. On 4th Sept. 1981, the Magistrate passed an order to the effect that he could not remand the accused to police custody in view of the

judgement of this Court reported as Gian Singh v. State (Delhi Administration) (1981) 19 Delhi LT 168 : (1981 Cri LJ 100).

4. The State then moved the present petition to this Court. The learned single Judge made a reference to a Division Bench stating that a point of great importance was involved in this case and it was desirable that the matter be heard by a Division Bench in view of the two judgements of M.L. Jain J., in Gian Singh v. State (1981 Cri LJ 100) (supra) and Trilochan Singh v. State. Crl. Misc. (Main) No. 298 of 1981, decided on 17th July, 1981 (reported in 1981 Cri LJ 1773). That is how this petition has come to be placed before this Bench.

5. In these circumstances, the substantial point involved in this case is whether a person who is produced before a Magistrate and sent to judicial custody for a short period can later on be remanded to police custody.

6. Before dealing with the merits of the main point, it is necessary to deal with a preliminary objection which was taken regarding the filing of the present petition. It was urged that the petition was filed by Mr. I.U. Khan who was not the Additional Public Prosecutor of Delhi and it was also urged that he had not been authorised to move the petition by the Delhi Administration. The substance of the preliminary objection was that the police had moved the present petition without reference to the Delhi Administration. It was urged that Sodhi Teja Singh, Standing Counsel of the Delhi Administration had not been asked to move the present petition. In effect, this raised a question whether the petition had been filed before this Court by an authorised person. We adjourned this matter to enable the learned counsel appearing for the State, Mr. D.C.

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Mathur, to establish that he was authorised by the State. Learned counsel has produced a notification dated 22nd Sept. 1981, whereby the Administrator of the Union Territory of Delhi has appointed Shri D.C. Mathur as Special Public Prosecutor for conducting the present case. We have, therefore, not gone into the question whether the petition was moved wrongly initially because any defect or infirmity in instituting the petition that there may be has now been remedied by the fact that the Delhi Administration is supporting the petition and the Court has sufficient authority in such cases to use its inherent powers or revisional powers even suo motu. At the most, the present petition even if held to be incompentent could be reinstituted on the very next day. So, we have noted the objection and in view of the aforementioned notification overrule the objection.

7. Coming now to the substantive question, the provision that is applicable is S.167 of the Cr. P.C. The first subsection of this section states that if the investigation cannot be completed within the period of 24 hours fixed by Section 57 and there are grounds for believing that the accusation or information is well-founded, then the officer-in-charge of a police station shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary relating to the case and at the same time forward the accused to such Magistrate. This portion of the section deals with the necessity of producing the accused together with relevant documents before a Magistrate if the investigation cannot be completed within 24 hours.

8. The next Sub-Section i.e., Section 167(2) deals with the powers of the Magistrate to whom the accused may be forwarded. The entire Sub-Section reads as follows :-

"(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that -
(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,.....
(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
(ii) sixty days, where the investigation relates to any other offence, and on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this Sub-Section shall be deemed to be so released under the provisions of Chap. XXXIII for the purposes of that Chapter;
(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;
(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.
Explanation-I. For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period, specified in para (a), the accused shall be detained in custody so long as he does not furnish bail.
Explanation-II. If any question arises whether an accused person was produced before the Magistrate as required under para (b), the production of the accused person may be proved by his signature on the order authorising detention."
9. We are concerned with the first part of this Sub-Section which authorises the detention of the accused in such custody as such Magistrate thinks fit. The provision shows, as indeed it must, that the Magistrate has a choice for determining the type of custody in which the accused person should be detained. As already pointed out, this provision
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contains the procedure for depriving a person of his liberty. It is a protection for the citizen or the accused person. The rule of law requires that a person should not be detained by an executive fiat. After the first 24 hours he can only be detained or kept in custody under the orders of a Judicial Magistrate who is a person quite independent from the police. It is this Magistrate who has to determine the period of the custody and the nature of the custody. It is an important safeguard regarding the liberty of a person. The safeguard is further apparent from the fact that the whole period of detention cannot exceed 15 days on the whole and can be altered from time to time. There is no mention in the provision of either notice custody or judicial custody. Conceivably, the Magistrate would have to determine the nature of the custody according to the circumstances of the case. It might be the police or it might be the jail or it might be a mental asylum or it might be a children's home or the Nari Niketan or some other institution. The nature of the custody would vary according to the type of person that the accused might be. Different considerations would arise if the person is a child or a woman or a minor or an apparent lunatic. Therefore, a discretion is given to the Magistrate to determine the nature of the custody. The contention of the respondents is that police custody can be ordered, but if any other custody is ordered, then no fresh order for police custody can be passed. All further custody has to be judicial custody. In short, the contention is that you cannot change the nature of the custody once you have determined it. Does this meaning flow from the words used in the section ? We have first to construe the section without reference to any reported authority. The section says that the accused may be forwarded to a Magistrate who may or may not have jurisdiction to try the case. So, we may have a Magistrate dealing with the case who is not going to try it. He has only to determine the nature of the

custody. In fact, it can happen that the accused is arrested in quite a different place from where he has to be tried. For instance, if the accused has run away to another State, it is possible that the accused in Punjab, may eventually be arrested in Assam and produced before a Magistrate there. That Magistrate will be more concerned with sending the accused to the correct Magistrate and may order any type of custody that may be convenient at that time. Later, the accused may be produced before the proper Magistrate after being forwarded from the original Magistrate. The next part of the Sub-Section, namely, that from time to time the Magistrate may authorise such custody as he thinks fit for a term not exceeding 15 days shows that the Magistrate has to pass an order or may pass an order from time to time during the period of 15 days. There is nothing in the provision to show that he cannot change the nature of the custody by subsequent orders. If he orders notice custody or custody in an asylum for say two days, then he may order judicial custody or some other type of custody for a further period of some days and then again change the nature of the custody. It must be kept in view that almost everybody recognises that police custody has to be minimised as far as possible, and it is only when absolutely necessary that police custody has to be ordered. It is in the interest of the accused as well as the administration of justice generally, that the nature of the custody should be changed or be capable of being changed during the period of 15 days. In the present case, the first step that the police thought necessary was that an identification parade should be held. The accused also agreed to join the identification parade. For this purpose the proper course was to send the accused to judicial custody, which was done. After the time requisite for the identification parade was over, it would be necessary to order police custody if some further investigation, like recovery of the stolen property or weapon of offence and so on, was necessary. Therefore a necessary step in the investigation might be to remand the accused to police custody for such period as the Magistrate might think necessary.

10. After all, the purpose of the section is to facilitate investigation. The entire object of the section is investigation and not detention without trial. It was urged by learned counsel for the respondents that investigation could even be carried on if the accused were in judicial custody; that may be so, but it would certainly hamper investigation to quite a great extent. We have

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only to construe the section as it stands and it appears that the language used in the section allows the Magistrate from time to time to pass an order placing the accused in such custody as the Magistrate deems fit. There is nothing at all in the section to show that the nature of the custody cannot be changed from police custody to judicial custody or vice-versa during the first period of 15 days. After the first period of 15 days has expired, then the proviso comes into operation. At that stage the Magistrate cannot order police custody, but he can order any other type of custody.

11. Turning now to the judgements referred to in the reference order and to other judgements cited at the Bar, we have to examine whether the interpretation just set out has to be altered or is defective in any manner. In the reported judgement, Gian Singh v. State (Delhi Administration), (1981) 19 Delhi LT 168 : (1981 Cri LJ 100) the learned Judge after setting out the provisions of the section and the various stages set out therein stated as follows (at p. 101 of Cri LJ) :

"These provisions indicate one thing clearly more than anything else that once the accused is remanded to judicial custody, he cannot be sent back to police custody in connection with or in continuation of the same investigation."

The judgement then proceeds to hold that even after remand to judicial custody, the accused can be questioned by the police but only in such a manner which does not

amount to custody in the police. It would be observed that the judgement does not indicate why the nature of the custody cannot be altered, but assumes that the nature of the custody cannot be changed.

12. In the unreported judgement decided by the same Judge, Trilochan Singh v. State, Criminal Misc. (Main) No. 298 of 1981 (since reported in 1981 Cri LJ 1773 at pp. 1775, 76) there is a more elaborate discussion. In this judgement it was held as follows :-

"Section 167 Cr. P.C. does not confer Power on a Magistrate to dispense police custody but what it does is to empower him to extend such custody beyond what is permitted under S.57 thereof. Reading these two sections together one can safely conclude that S.167 comes into play only when, (1) the accused is arrested without warrant and is detained by a police officer, (2) it appears that more than twenty four hours will be needed for investigation, (3) there are grounds for believing that the accusation or information against him is well founded, and, (4) the officer in charge of the police station or the Investigating officer not below the rank of a sub-inspector forwards the accused before the Magistrate. When this happens, the Magistrate can refuse to detain him or direct his detention either in police custody or judicial custody. When once he directs judicial custody, there is no question of police remand for the simple reason that the conditions aforesaid are no more there.

"The learned Public Prosecutor maintains that S.167 does not expressly so provide nor does it envisage any such inflexible rule that once a man is sent to the judicial custody in particular for a limited purpose he cannot then be remanded again to police custody. He relied upon a practice where any person wanted by the police in some cognizable non-bailable offence, surrenders before the Magistrate, he is then taken into judicial custody and later on handed over to the police when it asks for it. But such a practice is against law. Under what provision of the Cr. P.C. does he surrender before the Magistrate ? Suppose, the police just does not care to ask for his custody, what will the Magistrate do ? or if the police delays its request by some days, how long is the Magistrate to wait ?

....

Though there is no ban in terms of police remand after judicial remand but that is the clear implication of S.167. The matter has to be governed by its provisions which I have already considered in Gian Singh (1981 Cri LJ 100) (Delhi) (supra) and I see no reason to reconsider or to depart from the conclusion which I had then arrived at."

Thus, the learned Judge concluded that there was no express bar in the section regarding police custody after judicial custody, this was the intendment of the provision.

13. With respect, we do not find any such inference to arise on a construction of the Section. The fact whether the police wants a remand to judicial custody or to police custody has nothing

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to do with the question nor does the expiry of 24 hours mentioned in S.57 or in the Constitutional Art.22 have anything to do with the question, S.57 only applies if the accused is arrested without a warrant. If the investigation cannot be completed within 24 hours, then the police is bound to produce the accused before a Magistrate. The object of this production before a Magistrate is to ensure the liberty of the citizen. Any further custody is to be under the rule of law and not on the dictates of the police. It is a part of the fundamental liberty of the citizen and other persons in a free democratic country that he should not be detained merely because the police wants it. Thereafter the repository of the rule of law is the Judicial Magistrate concerned. He has to ensure that the proper custody is given. He may refuse to give any custody on the ground that no case is made out, or he may authorise such custody as he deems fit. The words 'from time to time' occurring in the section show that several orders can be passed under S.167(2). There is

no question of continuation of police custody involved in S.167(2). The Magistrate is not a wing of the police but is part of the judicial set up of the country. The order has to be passed by a Judicial Magistrate acting judicially. It is, therefore, his duty to see that the custody is the right custody and the order has to be passed for the ultimate object of securing justice. There is, therefore, no rule to be found by inference, that the Magistrate has to continue police custody or to end it. He has to act independently to determine the nature of the custody. He can change his order from time to time. However, he cannot order police custody beyond the period of 15 days.

14. Turning now to another judgement cited at the bar; reliance was placed by learned counsel for the respondents on Dhaman Hiranand v. Emperor, AIR 1937 Sind 251, wherein the learned Judicial Commissioner held that once an accused person had been arrested and forwarded to another Magistrate then the first part of S.167 (2) did not apply. It may be mentioned that this was a case under the Criminal Procedure Code of 1898. At that time it had been held that S.344 permitting remand, was to be utilised also during the investigation proceedings. What had happened was that the accused was arrested in Bombay for an offence committed at Karachi. The opinion of the learned Judicial Commissioner was that once the person was arrested at Bombay, then the Magistrate at Bombay had exhausted the application of the first part of S.167 permitting remand to judicial or police custody and thereafter the remand had to be under S.344. It may be mentioned that this position no longer holds good because the re-enacted provision of the Cri. P.C. of 1973, viz., Sec. 309 which is in the same terms as Sec. 344 of the Act of 1898, has already been held by the Supreme Court in Natabar Parida v. State of Orissa, AIR 1975 SC 1465 : (1975 Cri LJ 1212) to be not applicable at the investigation stage.

15. It may be mentioned that the observations of the Supreme Court are quite the reverse of what was decided by the Sind Court. It was observed at page 1467 (Para 5) (of AIR) as follows :-

"The Magistrate to whom the accused was forwarded could remand him to police custody or jail custody for a term not exceeding 15 days in the whole under Sec. 167(2). Even the Magistrate who had jurisdiction to try the case could not remand the accused to any custody beyond the period of 15 days under Sec. 167(2)." (emphasis supplied).

The judgement then states (Para 5) :-

"Various High Courts had taken the view that a Magistrate having jurisdiction to try a case could remand an accused to jail custody from time to time during the pendency of the investigation in "exercise of the power under Sec. 344, (then a list of judgements is set out)."

Eventually the judgement came to the conclusion that there had been a departure from this and the new Code and Sec. 309 of the new Code applied in a different manner. We are not directly concerned with this point, but have only noted the observations of the Supreme Court to the effect that under the old Code the Magistrate having jurisdiction to whom the accused was forwarded did have power to remand the accused to police custody or to judicial custody, which is quite the opposite result from

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what was held by the Sind Court in the judgement previously mentioned.

16. In any event, the judgement of Sind Court has no application to the facts of this case because that Court was concerned with the powers of the Magistrate to whom the accused had been forwarded and not the original Magistrate. We are at present concerned with the powers of the Magistrate under Sec. 167 at a stage before the accused had been forwarded to any other Magistrate and we are clearly of the view that there is no bar to the change of the nature of the custody during the period of 15 days.

17. A more opposite judgement is State v. Mehar Chand (1969) 5 Delhi LT 179. In that case, the accused had been arrested for kidnapping one Hima Ram and after the period prescribed in Sec. 167 of the Cr. P.C. had run out, the accused was in judicial custody under Sec. 344, Cr. P.C. (old Code). At that stage, the police found on investigation that besides the offence under Sec. 364, Penal Code. Hima Ram had actually been murdered and, therefore, offences under Secs. 302 and 201, Penal Code had also been committed. The question arose whether the accused could be sent to police custody on the basis of the discovery that there was an aggravated offence. The Magistrate had refused to permit the accused to be put in police custody after he was in judicial custody. The observations of Hardy J., in this respect may be reproduced here with advantage. It was stated :-

"The investigation in both the cases is an investigation into crime which the police alone are authorised to carry out. The Magistrate's function is only to enquire into and try the offence after the police have completed their investigation and submitted a charge sheet against the accused. He cannot however hamper the police investigation by refusing to allow the police to perform their duties. The only object of restricting the power of the police to detain the accused in their custody to a total period of 15 days is to prevent the use of third degree methods by them. But when there is no such allegation there is no apparent reason why the police should not be able to obtain the custody of the accused in order that they may question him or obtain his assistance in investigation in some other lawful manner. I fail to understand why if an accused who is in magisterial custody in one case can be allowed to be remanded to police custody in another case then the same rule should not apply to the accused who is in magisterial custody and is sought to be turned over to notice custody at a subsequent stage of investigation in the same case when the information discloses his complicity in more serious offences. On principle, I can see no difference at all between the two types of cases."

Thus, this Judgement goes to the other extreme by holding that even after the period of 15 days was over and the accused was in judicial custody, he could still be made over to the custody of the police on account of the further facts which had come to light.

18. The judgement of Hardy J., then stated as follows :-

"I see no insuperable difficulty in the way of the police arresting the accused for the second time for the offence for which he is now wanted by them. The accused being already in magisterial custody it is open to the learned Magistrate under Sec. 167(2) to take the accused out of jail or judicial custody and hand him over to the police for the maximum period of 15 days provided in that section. All that he is required to do is to satisfy himself that a good case is made out for detaining the accused in police custody in connection with investigation of the case. It may be that the offences for which the accused is now wanted by the police relate to the same case but these are altogether different offences and in a way therefore it is quite legitimate to say that it is a different case in which the complicity of the accused has been discovered and police in order to complete their investigation of that case require that the accused should be associated with that investigation in some way."

This, therefore, is a case in which police custody was granted over and beyond the original period of 15 days fixed by S.167. The learned Judge found no difficulty in the judicial custody being converted into police custody.

19. We have already set out the provisions of the section and also the interpretation to be given to the Section. We must keep in view that the object

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of the section is to facilitate investigation into an offence. We completely agree with Hardy J., in coming to the conclusion that the Magistrate has to find out whether there is a good case for grant of police custody. There is no sign in the section that the nature of the

custody cannot be altered. In fact, experience would show that investigation would be hampered and made more difficult if the nature of the custody was not capable of alteration in the first 15 days. It might be necessary to send the accused to a hospital for examination, or to produce him before a Magistrate for recording a confession. In such cases, a useful precaution to take is to send the accused to judicial custody so that the confession might be free and without pressure. Another example is provided on the facts of this case for enabling an identification parade to be held in the jail. Another possibility is that the police may not require the prisoner immediately for lack of material which might be forthcoming later. In such a case the period of police custody might be shortened by remanding the prisoner to judicial custody while the police is collecting the necessary material for further investigation. There can be many examples of this type dependent on the circumstances of the case.

20. We are, therefore, of the view that the nature of the custody can be altered from judicial custody to police custody and vice versa during the first period of 15 days mentioned in S.167(2) of the Code. After 15 days, the accused can only be kept in judicial custody or any other custody as ordered by the Magistrate, but not the custody of the police.

21. In these circumstances, we have to accept this petition and set aside the order of the Magistrate. Now the question arises as to what further orders are necessary because the 15 days mentioned in Sec. 167(2) have already expired. We think the interests of justice demand that the Magistrate should take up this case and pass such order as he would have been able to pass on 4th Sept. 1981 if he had not been compelled to follow the judgement in Gian Singh's case (1981 Cri LJ 100) aforementioned. He will thus be able to pass an order directing custody of the police for the unexpired period out of 15 days as remained on 4th Sept. 1981. This order should be immediately conveyed to the Magistrate to pass such orders as he deems fit in accordance with the directions contained herein. Dasti.

Petition allowed.

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Cross Citation :AIR 1961 BOMBAY 42 (V 48 C 8)

BOMBAY HIGH COURT

Coram : SHAH, J.

Sharifbai Mehmoob, Petitioner v. Abdul Razak, Accused, Respondent.

Criminal Revn. Appln. No.2037 of 1959, D/- 30 -6 -1960,

against order of Addl. S.J. Poona.

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Criminal P.C. (5 of 1898), S.167 – ILLEGAL DETENTION- Detention by police in contravention of S.167 is illegal - it must be noted that although police had power under the Criminal Procedure Code to arrest any person suspected of having committed an offence without a warrant, he could not detain that person in police custody for more than 24 hours. The provisions of the Criminal Procedure Code, expressly require a police officer to produce the person arrested for commission of a cognizable offence before the Magistrate within 24 hours. If he fails to do it, he will be certainly guilty of wrongful detention. (Para 5)

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Sharad Manohar, for Petitioner; M.A. Rane, Asst. Govt. Pleader, for the State.

JUDGEMENT

ORDER :- This application has been filed by the complainant against the order passed by the learned Additional Sessions Judge, Poona, confirming the order passed by the learned Judicial Magistrate, Anti-corruption, Poona, dismissing the complaint under S. 203 read with S. 161 of the Bombay Police Act.

2. The case for the prosecution was that P.S.I. Khan of the Bund Garden Police Station received a complaint of theft on 9-7-1958 from one Mohamed Nathu Mistry. During the investigation of that offence P.S.I. Khan arrested the complainant on 2nd August, 1958, but she was ultimately released on 6th August, 1958, as there was no sufficient evidence against her. The complainant then filed a complaint in the Court of the Judicial Magistrate, Anti-corruption, at Poona, against P.S.I. Khan on 5-2-1959 alleging that her arrest and detention from 2-8-1958 upto 6-8-1958 was mala fide and unlawful. The learned Judicial Magistrate referred that complaint to the police under S. 202 of the Criminal Procedure Code. After receiving the police report, the learned Magistrate dismissed the complaint as it was not filed within six months of the act complained of, as required by S. 161 (1) of the Bombay Police Act.

3. Against that order the complainant filed a revision application in the Sessions Court at Poona. The learned Additional Sessions Judge, after hearing the arguments, agreed with the conclusion reached by the learned Magistrate that the complaint was barred under S. 161 of the Bombay Police Act, inasmuch as it was filed on 5-2-1959, i.e., more than six months after the alleged wrongful detention by P.S.I. Khan and dismissed the application. It is against this order of the learned Additional Sessions Judge, that the present revision application has been filed by the complainant.

4. It was contended by the learned advocate for the complainant that the wrongful detention in this case started on 2nd August, 1958, and continued upto 6th August, 1958, that the detention was wrongful at every moment of such detention, and that the complaint filed by his client on 5-2-1959, was, therefore, within six months of the date of the act complained of, that is to say, within six months from 6th of August, 1958 on which date

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she was last detained by P.S.I. Khan and released. Mr. Rane, the learned Assistant Government Pleader, on the other hand, contended that the detention by P.S.I. Khan, even if wrongful, as alleged by the complainant, started on the date of the arrest of the complainant, namely, 2nd August, 1958 and ended on the very next day when the complainant was produced before the Magistrate for remand. He urged that on 3rd August, 1958, P.S.I. Khan applied for remand before the learned Magistrate for seven days on the ground that the investigation of the offence had not been completed, that the learned Magistrate granted a remand only for one day and that, by reason of the order of the learned Magistrate granting the remand, the detention by P.S.I. Khan ceased and the complainant was further detained in the police custody under the order of the learned Magistrate. Accordingly, he submitted, the complaint filed by the complainant on 5-2-1959 was three days late and, therefore, it was barred by limitation under S. 161 of the Bombay Police Act.

5. In my opinion, the contention raised by Mr. Rane, should be accepted. It is true that P.S.I. Khan arrested the complainant on 2nd August, 1958 and continued to keep her in police custody upto 6th August, 1958, but it must be noted that although he had power under the Criminal Procedure Code to arrest any person suspected of having committed an offence without a warrant, he could not detain that person in police custody for more than 24 hours. The provisions of the Criminal Procedure Code, expressly require a police officer to produce the person whom he has arrested for commission of a cognizable offence before the Magistrate within 24 hours. If he fails to do it, he will be certainly guilty of wrongful detention of the person whom he has arrested. But once he produces the arrested person before the Magistrate within 24 hours as required by law and the Magistrate after applying his mind to the application for remand, made by the police officer grants the application and extends the period of detention either for the full period applied for, or for any lesser time, the detention of the arrested person after the order of the remand made by the Magistrate would in my opinion, no longer be the detention by the police officer himself on his own. He would be merely carrying out the orders of the Magistrate and the detention would be, in fact and in law, the detention under the orders of the Magistrate. In that view of the law, the complainant in this case could complain of a wrongful act on the part of P.S.I. Khan consisting of a wrongful arrest and detention as having occurred on 2nd August, 1958 and continued upto 3rd at the most. The complaint against him, therefore, should have been filed within six months of the latter date. In so far as, however, the complaint was filed in this case on 5-2-1959, a few days more than the period of six months allowed by S. 161 of the Bombay Police Act, the complaint was clearly barred. Accordingly, the view of the learned Magistrate as well as the learned Additional Sessions Judge, on this point seems to be right, and there is no reason for me to interfere with the orders that they have passed. The application is, therefore, dismissed and the Rule is discharged.

Rule discharged.

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Cross Citation :AIR 1964 MANIPUR 39

MANIPUR HIGH COURT

Coram : 1 T. N. R. TIRUMALPAD, J.C. (Single Bench)

R.K. Nabachandra Singh…. vs…. Manipur Administration

Criminal Revn. Case No. 8 of 1963, D/- 1 -8 -1963. from order of S.J., Manipur in Cri. Misc. Case No. 56 of 1963.

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(A) Criminal P.C. (5 of 1898), S.60, S.61 and S.167(1) - ARREST - INVESTIGATION - Duty of Police to produce arrested person before Magistrate forthwith - Unless a Police Officer considers that he can complete the investigation within a period of 24 hours, it is his duty to produce the accused forthwith before the Magistrate. (Para 19)

(B) Criminal P.C. (5 of 1898), S.497 - BAIL - Application for bail can be made orally - Section 497 does not contemplate any written application for bail at all. When a person accused of any non-bailable offence appears or is brought before a Court, he can either himself or through a lawyer apply even orally for bail.

There is nothing wrong or illegal in making successive applications for bail, when the accused person remains in custody. Such applications should be disposed of by the Court without any delay and it is the duty of the Police to co-operate with the Court in doing so. (Para 22)

(A)Criminal P.C. (5 of 1898), S.167 - INVESTIGATION - Provisions to be strictly complied - Magistrate can release accused by rejecting prayer for remand (P.C.R.)

If the police do not transmit to the Court a copy of the entries in the diary relating to the case, the Magistrate has no jurisdiction to direct the detention of the arrested person. It is toe duty of the police to comply with the provisions of Section 167(1) and the Magistrate should insist on such strict compliance and if the police do not satisfy the Magistrate with the documents that a remand was necessary, for the purpose of investigation, the Magistrate may release the accused. (Paras 25, 26)

(D) Previous involvement of accused in Criminal case and his desperate character are no grounds for refusing bail. (Para 30)

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Cases Referred : Courtwise Chronological Paras
('55) AIR 1955 All 138 (V 42) : 1955 Cri LJ 394, State v. Ram Autar Chaudhry 19
('63) AIR 1963 Mani 12 (V 50) : 1963 (I) Cri LJ 451, Gaibidingpao Kabui v. Union Territory of Manipur 25
T. Bhubon Sing and B.B. Sen, for Petitioner; N. Ibotombi Singh, Govt. Advocate, for Respondent.

Judgement

ORDER :- This is a revision petition directed against the order of the Sessions Judge, dated 25-5-1963, by which he cancelled the bail granted to the petitioner by the S. D. M., Imphal West, on 8-5-1963 and directed the bail petition to be heard afresh and to be disposed of by the Additional District Magistrate, instead of by the S. D. M., I. W.

2. The facts which relate to this revision petition are as follows :

On 6-5-1963, at about 10-30 a.m. a F.I.R. was lodged in the Imphal Police Station, by one Manglem Singh, a student in the D. M. College, stating that at about 10-00 a.m. when he was going to College, he saw one P. Sarojini, a student of the B. A. Class in the said College being forcibly taken near the new Radio Station and carried away in a Jeep towards the south by some unknown persons and that he suspected that the girl might have been kidnapped against her will. This girl happens to be the daughter of one P. Mani Singh, Inspector of Police, C. I. D.5 Imphal. On 7-5-1963, a S. L of Police, applied to the S. D. M., T. W. for the issue of a search warrant under S. 100 Cr. P.C. for the recovery of the girl from the house of one R.K. Mangisana Singh of Sagol-band. The Magistrate issued a search warrant immediately to the O/C., Imphal Police Station and the O/C directed S. I. Nandakishore Singh to execute it. A Police force then proceeded to the house of R.K. Mangisana Singh, to effect the recovery of the girl.

When the police force were at the said house, the petitioner herein, as well as the girl sent up a joint petition to the Additional District Magistrate stating that hearing that a case has been lodged against them, they were ready to surrender before the A. D. M.. but that they could not surrender as some Police officials with a great force had surrounded them and that they therefore prayed that proper facility may be given to them to surrender before the Court. They also added that they had eloped together on 6-5-1963 with mutual consent and agreement. On this petition, the A. D. M. issued an order to the O/C Imphal Police Station to produce the girl before the Magistrate concerned direct. But it would appear that in the meantime, the girl was taken into custody and the petitioner was arrested for an offence under Section 366 I.P.C. and both of them were taken to the Imphal Police Station, which was just across the road from the Court of the S. D. M., I. W. From there, the girl was produced before the S. D. M., I. W. who sent the girl before the S. D. M., Bishenpur, for recording her statement under S. 164 Cr. P. C. at the request of the Police. In the statement so recorded the girl who is admittedly 20 years of age stated that she was going to College on 6-5-1963 and that at about 10-15 a.m. she was carried away by force in a Jeep without her consent. She also said that for about 2 or 3 years, she had been in love with the petitioner and that about a month ago he had asked her to elope, but that she refused requesting him to wait for some

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time. After the statement was recorded, the S. D. M., I. W. I entrusted the girl to the custody of her father.

3. The petitioner, who was arrested at 3-00 P. M. on 7-5-1963, was not produced before the Magistrate on that date, but was kept in Police custody. One Joychandra Singh, on behalf of the petitioner, moved a bail petition through counsel before the S. D. M. stating that it was a case of pure elopement, that the petitioner was quite innocent of kidnapping

and that investigation of the case will not be hampered by his being enlarged on bail. The Magistrate forwarded this petition to the O/C Imphal Police Station immediately for report through the person, who moved for the bail. This action of the Magistrate in sending through the person who moved for the bail has been severely criticised by the Sessions Judge. It was received by the O/C on 7-5-1963 itself and he sent it to the I/O for a report, but no report was submitted to the Court on 7-5-1963 and the petitioner continued in Police custody.

It would appear that another bail application was thereupon prepared for the petitioner on the same day in which it was stated that the O/C has not submitted any report on the previous bail application, that in the meantime the statement of the girl, which was recorded under Section 164 Cr. P.C. supported the petitioner s case, though the statement was made under the influence of the guardian of the girl during her stay in Police custody before she was produced in Court and that the petitioner may be released on bail, his petition was moved in Court on 8-5-1963 at 11-00 A.M. and the Magistrate immediately issued an order to the O/C Imphal Police Station to submit a report along with the accused during Court hours and also directed that the statement of the girl under Section 164 Cr. P.C. and other relevant documents should also be produced. This order seemed to have been issued at 11 A.M. on 8-5-1963 through the normal official channel to the O/C whose Office was just across the road and it contains an endorsement by the O/C that it was received by him only on 9-5-1963 at, 11-00 a.m.

4. The petitioner was produced before the S. D. M., I. W. at 2-30 p.m. on 8-5-1963 with a report from the I/O stating that he was arrested at 3-00 p.m. on 7-5-1963, in connection with F.I.R. 386 (5) 63 dated 6-5-1963 under S. 366 I.P.C., that the investigation was going on and that he may be remanded to Jail custody for a period of 15 days to enable the completion of the investigation. It would appear that the statement of the girl recorded under Section 164 Cr. P.C., which was called for by the Magistrate in his order in the second bail petition moved on that day was also produced before the Magistrate. Rut the copy of the entries in the Police Diary relating to the case were not produced even though the Magistrate had personally asked the Prosecutor to produce them. The Magistrate waited till 5-30 p.m. but as the copy of the entries with diary were not produced till then, he passed an order granting bail to the petitioner. In the said order, he stated that the statement of the girl under S. 164 showed that she had prior relation with the petitioner, and that she had asked the petitioner to wait till she finished her education. The Magistrate criticised the Police for not producing the relevant papers under Section 167, Cri. P.C. and he further said that there was no report from the Police even opposing the bail, that the prosecution could not give any satisfactory reason why the petitioner should not be granted bail and that it was not the case of the prosecution that the petitioner would abscond or otherwise tamper with the Investigation and hence he did not see any reason why he should be remanded to Jail and why bail should be refused.

5. It would now appear that on 8-5-1963 itself the I/O had submitted a report to the Court through the O/C Imphal Police Station stating that the co-accused were absconding and if the petitioner was enlarged on bail at this initial stage of the investigation, it will be impossible to arrest the remaining accused as it would hamper further investigation and that therefore bail should be refused. This report contains on endorsement by the O/C on 8-5-1963 itself stating that the bail should be rejected as it would hamper the investigation if bail is granted. But this report was not submitted when the petitioner was produced in Court on 8-5-1963, but was sent to the Court only on 9-5-1963, the day after the bail as granted. With regard to the second bail petition, it was returned to the Court by the O/C Imphal Police Station on 13-5-1963, simply stating that as bail had already been granted, there was no necessity to submit the documents.

6. On the same day, namely, 13-5-1963, an application was moved before the Sessions Judge under Section 497(5), Cri. P.C. for cancelling the bail granted to the petitioner by the S. D. M. In this, it was mentioned that the petitioner was a desperate character already involved in a cheating case by false impersonation, that his conduct showed that there was strong apprehension that the crime would be repeated with the help of his associates, that his associates were still concealing themselves with the help of the petitioner and further that the petitioner was found to have contacted some of the important witnesses since his enlargement on bail in order to tamper with the prosecution evidence and that his remaining on bail would hamper investigation. It was further stated that the Magistrate did not give the prosecution a reasonable opportunity to place all the materials to oppose the bail petition. It was next elated that" though all the relevant and necessary materials were submitted to the Magistrate on 8-5-1963, with a prayer for remanding the petitioner to Jail custody, a copy of the entries in the Police Diary was not transmitted as that was the practice followed in that Court while forwarding an accused person to the said Court and that the order granting the bail was arbitrary and not warranted by law.

7. The learned Sessions Judge did not consider the question whether the Magistrate was justified on the material placed before him in granting the bail. Nor did he consider the reason mentioned in the petition for cancelling the bail. Instead, in his long order of 29 paragraphs.

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he went on to give a certificate to the Police that their action in this matter was quite correct. He said that the Police had obeyed the direction of the Additional District Magistrate by producing the girl before the Magistrate concerned at 3-30 P.M., after her recovery at 3-00 P.M. and that there was no unnecessary delay in the production of the girl. He further said that the petitioner was arrested at 3-00 P.M. on 7-5-1963 and produced before the Magistrate on 8-5-1963 at about 2-00 P.M., that is, within 24 hours and that there was no illegality in his detention at the Police Station for less than 24 hours. He further said that it cannot be said that the Police had acted negligently in submitting their report on the first bail petition on 8-5-1963, which appeared to have reached the Magistrate only on 9-5-1963.

8. After giving the certificate to the Police of correct conduct on their part, the Sessions Judge proceeded to criticise the Magistrate. He said that the Magistrate acted improperly in sending the first bail application in original through a private party to the O/C Imphal Police Station. He next criticised the Magistrate for not fixing any time either in the first bail application or in the second bail application for a report by the Police and he therefore said that the Police cannot be called negligent in having sent the first report on 8-5-1963 and the second report on 13-5-1963, as, according to him, it was expected to take some time for the O/C Imphal Police Station to contact the I/O and get the necessary report and papers from him and to forward the same to the Court concerned. He then criticised the Magistrate for having dealt with the bail application when both the original bail petitions were with the Police for reports as, according to him, this deprived the prosecution of the necessary opportunity to oppose the bail applications. So, he said that the proper procedure for the Magistrate would have been to remand the petitioner to Jail custody and afterwards dispose of the bail petition after fixing a date for its disposal and giving necessary opportunity to the prosecution to oppose the bail.

9. He next found fault with the Magistrate for entertaining a second bail petition when the first bail petition was pending before him. He said that the Magistrate should not have disposed of the bail petition on 8-5-1963, even without waiting for the return of the bail petitions and. the relevant reports and papers. When it was pointed out to the Sessions

Judge that it was the duty of the Police to have filed the necessary papers as required under Section 167(1), Cri. P.C. when requesting for the remand of the accused and that when the Police did not do so the Magistrate was justified in granting bail, the Sessions Judge said that there was no practice in Manipur to file the copy of the entries in the Police Diary when the accused was produced for remand, but only to submit a report praying for remand. He further said that the provision in Section 167(1), Cri. P.C. for submission of a copy in the Diary was mandatory and the sooner the bad practice of not sending it along with the accused is done away with the better it would be. But he paid that the report praying for remand was before the Magistrate and that it was only for judicial custody and not for Police custody and hence the Magistrate should have given due consideration to the request for remand even though, it was not supported by a copy of the Police Diary.

10. He then proceeded to set aside the order of the Magistrate dated 8-5-1963, granting bail to the petitioner as, in his opinion, the Magistrate should not have entertained the second bail petition when the first bail petition was before him and as the Magistrate granted the bail when neither of the bail petitions nor the reports of the-Police on the said petitions were before him. Then, he remanded the matter to the Additional District Magistrate for disposing of the bail application afresh and stated that he was refraining, from making any comment which might reflect as to whether it was a fit case for granting or refusing bail.

11. This order was passed on a Saturday. It would appear that the petitioner was present in the Sessions Court at the time and immediately on the pronouncement of the order of the Sessions Judge, the Police wanted to arrest him in the Court premises itself and there was a tussle going on between him and the Police., as he wanted to surrender to the Court instead of being arrested by the Police. It would look as if the Police were displaying such excessive zeal in this matter, because the girl involved in this case happened to be the daughter of a Police Inspector attached to the C.I.D. and the Police therefore wanted to see that the petitioner was in their custody. Thereupon, the petitioner filed an application before the Sessions Judge surrendering himself to the custody of the Sessions Court and praying for remanding him to Judicial Custody till the bail application was disposed of by the Additional District Magistrate. On that petition, the Sessions-Judge ordered that the petitioner was allowed to surrender to the Sessions Court, that he be taken into custody and remanded to Jail custody direct from the Court and that a Process Server should accompany the Police party taking the petitioner to Jail custody, along with the remand order.

12. Thus, the petitioner was lodged in Jail on that Saturday evening and he had to remain there on Sunday also and he could come to this Court only on Monday the 27th May in revision. This Court immediately directed the release of the petitioner on bail while admitting the revision petition.

13. I am afraid that the Sessions Judge's order will not stand a moment's scrutiny. It has to be remembered that the petition before him was under Section 497(5), Cri. P.C. and what he had to consider was whether the petitioner, who had been released under the Section had to be arrested and committed to custody. He was not sitting in appeal or revision against the S.D.M.'s order for bail. What he had the jurisdiction to decide under Section 497(5) was whether at the time when he was moved after the grant of the bail by the S.D.M., the circumstances were such that the person concerned cannot be allowed to continue on bail and should be taken into custody.

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14. A perusal of the Sessions Judge's order will, however, show that he did not consider this question. On the other hand, his order shows that he felt that he was sitting in revision over the Magistrate under Section 435(1) Cri. P.C. and his entire criticism of the

Magistrate was made on that basis. Under Section 435, the Magistrate will be deemed to be inferior to the Sessions Judge for the purpose of Section 435(1). Unless, therefore, he was dealing with a revision against the order of the Magistrate under Section 435(1), he cannot criticise the procedure adopted by the Magistrate. Nor can he go into the various other matters which he has dealt with in dealing with the question of cancellation of bail under S. 497(5), He cannot also remand the matter of bail to the Additional District Magistrate when acting under Section 497(5). In fact, he had no authority to transfer the case from the S.D.M. to the Additional District Magistrate as if he was acting under Section 528(1-C), Cri. P.C. He cannot transfer a case suo motu under Section 528(1-C), but only on an application made to him in that behalf. There was no such application before him.

15. We have to remember that on 8-5-1963, what the Magistrate had to consider was whether he should authorise the detention of the petitioner under Section 167(2) Cri. P.C. in custody as prayed by the prosecution or whether the petitioner should be released on bail under S. 497(1) or (2), Cri. P.C. as prayed by the petitioner. What the Magistrate did in fact, decide was that his detention in Jail custody was not necessary under Section 167(2) and secondly that he should be released on bail under Section 497(2) as the Magistrate was not satisfied that there was reasonable ground for believing that the petitioner had committed a con-bailable offence, but that there were sufficient grounds for further enquiry into the guilt. If the learned Sessions Judge thought that the said orders of the Magistrate should be set aside and that the matter should be remanded for fresh disposal regarding the bail, it is clear that he cannot do so acting under Section 497(5), Cri. P.C. So he must be deemed to have acted under Section 435, Cri. P.C. If he was acting under Section 435, he had no jurisdiction to set aside the order of the Magistrate granting bail or to remand the case or to transfer it to the Additional District Magistrate. What he can do at best was to report the matter under Section 438, Cri. P.C. for the orders of this Court recommending that the order should be set aside. Thus, in setting aside the order of the Magistrate and in remanding the case and in directing the transfer of the case, the Sessions Judge has acted illegally by assuming a jurisdiction, which he did not possess under Section 497(5), Cri. P.C.

16. Under that Section what the Seasons Judge had to decide was whether the person to whom bail was granted by the Magistrate under Section 497 should be arrested and committed to custody. It is exactly this which the Sessions Judge failed to do. The request to him by the prosecution was to cancel the bail on various grounds mentioned in the petition. The learned Judge had to consider whether any or all of those grounds were made out which should cause him to cancel the bail. But he did not consider any of those grounds and stated specifically that he was not considering them or even expressing his opinion, as he was sending the case to the Additional District Magistrate to consider the said question. This he cannot do acting under Section 497(5). His order has therefore to be set aside as one passed without any jurisdiction.

17. In a matter corning up before him under Section 497(5), Cri. P.C., the Sessions Judge is not sitting in revision over the Magistrate's order and so he should not indulge in any criticism of the Magistrate. Further, the remarks against the Magistrate were really not justified. His first remark was that the Magistrate should not have sent the first bail application made by the petitioner on 7-5-1963 through the applicant to the Police. We have to remember the circumstances under which the Magistrate had to send it through the applicant. The petitioner was arrested at 3-00 P.M. on 7-5-1963 and he was immediately brought to the Police Station which was just cross the, road from the Court where he had to be produced. When the petitioner was arrested the Police Officer knew that he cannot complete his investigation within 24 hours. In such a, case, S. 167(1), Cri. P.C. provides for the transmission forthwith of a copy of the entries in the Police. Diary

relating to the case and for the production of the accused before such Magistrate. Special emphasis has to be laid on the words "forthwith" in Section 167(1). The learned Sessions Judge seems to think that this would authorise the detention by the Police upto a period of 24 hours after the arrest. This is totally incorrect.

18. The Criminal Procedure Code does not authorise detention by the police for 24 hours after the arrest. Sections 60 and 61, Cri. P.C. make this quite clear. Section 60 provides that a Police Officer making an arrest without warrant shall, without unnecessary delay take or send the person arrested before a Magistrate. Section 61 repeats this by saying that no Police Officer shall detain in custody a person arrested without warrant for a longer period than under S. 11 the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. Thus, the twenty-four hours prescribed under Section 61 is the outermost limit beyond which a person cannot be detained in Police custody. It is certainly not an authorisation for the Police to detain him for twenty-four hours in their custody. It is only in a case where a Police Officer considers that the investigation can be completed within the period of twenty-four hours used by Section 61 that such detention for twenty-four hours is permitted. This is clear from S. 167(1), Cri. P.C. Thus, when the Police Officer know in this case that he cannot complete the investigation within twenty-four hours, the detention of the petitioner in custody in the Imphal Police Station which is just opposite the Court where the Magistrate sits was totally illegal.

19. The decision State v. Ram Autar Chaudhry, AIR 1955 All 138, in dealing with Sec. 61,
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Cri. P.C. states that Section 61 does not empower a Police Officer to keep an arrested person in custody a minute longer than is necessary for the purpose of investigation and it does not give him an absolute right to keep a person in custody till 24 hours. I would go even further and say on a construction of Sections 60, 61 and 167(1). Cri. P.C. that unless a Police Officer considers that he can complete the investigation within a period of 24 hours, it is his duty to produce the accused forthwith before the Magistrate. As in this case the Police Officer knew that he cannot complete the investigation within 24 hours and as he was detaining the accused in the Police Station, which is just opposite the Court house, it was his duty to have produced the petitioner before the Magistrate on 7-5-1963 itself instead of keeping him in Police custody.

It was not explained why his detention was necessary for 24 hours. It is particularly abhorrent in this case in view of the fact that the girl involved in the case was the daughter of a Police Officer and the Police appeared to be anxious to retain the custody of the petitioner as long as possible. It was for this reason that when bail was immediately moved on 7-5-1963 itself, the Magistrate sent the original application itself with his order through the applicant for immediate service on the O/C in charge of the Police Station, which was just across the road. No doubt, it would have been more proper if it had been sent through the usual official channel. But we know that service is bound to be delayed if sent through official channel. In this very case, the second bail petition moved at 11-00 A.M. on 8-5-1963 which was sent by the Magistrate through the official channel to the Police Station just across the road was shown as received in the Police Station only on 9-5-1963 at 11.00 a.m. Thus where expedition is required and such expedition can be achieved by the Magistrate only in this manner by sending it through the party concerned to the Police Station across the road, I am not prepared to blame the Magistrate. After all the purpose to be achieved was quick service and quick service was admittedly achieved and the bail petition was in the hands of the O/C on 7-5-1963 itself.

20. Much was made by the Sessions Judge of the fact that the Magistrate did not fix any time for Police report regarding the bail. One does not know why any time should have been fixed at al] as the Police had to produce the accused in Court for the purpose of remand and they knew full well that the report had to be submitted when they produced the accused- in Court, as the question of bail will have to be considered then. It was for the Police to explain why no report was submitted on the first bail petition, at least when the accused was produced in Court at 2.00 p.m. on 8-5-1963.

21. It is meaningless to say that because the Magistrate did not fix any time for the Police report, the Police thought that they could take their own time to make the report. This is a matter relating to the liberty of the citizen and if no time is fixed by the Magistrate for the report, it means that the report must be submitted
immediately. There seems to be a notion among the Police that it is their duty to prolong the detention of accused persons either in Police custody or in Jail custody and that in this matter the duty of the Police should always clash with the duty of the Court. It is better that they disabuse themselves of this notion. It is time that the Police understood that citizens in Independent India have a fundamental right of liberty and that it is as much the duty of the Police as that of the Courts to safeguard such right and that under no circumstances should the Police pray for detention of a person unless it is absolutely necessary for the purpose of the investigation of a case. If they understand this aspect of their duty, I think unnecessary opposition to bail applications and unnecessary applications for remand would cease.

22. It was because, the Police failed to produce the petitioner in Court on 7-5-1963 or to send any report on the first bail application that a second bail application was moved on 8-5-1963 at 11-00 a.m. The learned Sessions Judge seems-to think that a second bail application should net have been entertained by the Magistrate when, the first bail application had not been disposed of and was awaiting Police report. Here, he has blundered. Section 497, Cri. P.C. does not ton-template any written application for bail at all. When a person accused of any non-bailable offence is arrested or detained without warrant, by an Officer in charge of a Police Station, or appears or is brought before a Court, he can either himself or through a lawyer apply even orally for bail. Such being the case, any written application for bail is only intended to place on record that the accused has moved for bail. The Sessions Judge is wrong in thinking that there should be any such formality of a first application for bail being disposed of and then alone a second application for bail being entertained. It was because the first application could not be disposed of on account of the delay by the Police in submitting a report that the second application had to be filed. It was as the application itself would bow only a reminder to the Magistrate of the desire for bail and there is nothing wrong in making such an application. There is noting wrong or illegal in making successive applications for bail, when the accused person remains in custody Such application should be disposed of by the Court without any delay and it is the duty of the Police to co-operate with the Court in doing so.

23. I am unable to understand the Sessions Judge's observations that when a person, who has been arrested applied for bail and the petition was sent to the Police for report, the Magistrate should remand the person to Jail custody until the report of the Police was received and until the prosecution was given a proper opportunity, to oppose the bail. This observation seems to indicate that the Sessions' Judge has not understood the guarantee of liberty to a citizen under the Constitution and also under the Criminal Procedure Code. When an arrested person is brought before a Magistrate, he has to decide whether he should remand the person to Jail custody under Section 167(2) Cr. P.C. as requested by the Police

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and at the same time he has to decide whether the request of the person for bail should be granted. In order to decide the question of remand, he must be satisfied on a perusal of the entries in the Police Diary that there were grounds for believing that the accusation or information against the accused was well founded and that the Police have exercised their right of arresting without warrant legally and further that it was necessary for the purpose of investigation that the accused should be remanded to custody. Unless, the Magistrate is satisfied on all these points, he cannot remand the accused to Jail custody. It is for this purpose that Section 167(1) enjoins that a copy of the entries in the Police Diary should be transmitted to Court. But admittedly this was not transmitted in the present case when the petitioner was produced in Court. Instead, what is called a remand report requesting that the accused may be remanded to Jail Custody was sent.

24. What was stated in the petition to the Sessions Judge was that this was the practice followed in the said Court in forwarding the accused. Thus, the Police were not even accepting that they were at fault in not transmitting a copy of the Police Diary to Court, but were trying to throw the blame on the Magistrate for indulging in a wrong practice of accepting a remand report instead of a copy of the entries in the Police Diary. We know that in this case the Magistrate insisted on the copy of the Police Diary being produced in order to decide whether there should be a remand and his order shows that he asked the prosecution to produce all the relevant documents under Section 167 Cr. P.C., and that he waited till 5-30 p.m. on 8-5-1963 to enable the Police to produce the same. It was only when the Police failed to produce the said documents that he ordered the release of the petitioner on bail. Thus, it is clear that in order to cover up their failure to produce the necessary documents into Court, the Police were trying to throw the blame on the Magistrate. Such an argument cannot be countenanced even for a moment.

25. This Court has given instructions in many judgments to the Police and to the Magistrates that the provisions of Section 167 Cr. P.C. should be scrupulously observed, that the copy of the Police Diary should be produced when the accused is brought to Court, and that the Magistrate cannot remand the accused without satisfying himself that a remand was necessary on a perusal of the said diary. The learned Advocate, who appeared for the petitioner stated that the decision of this Court, Gaibidingpao Kabui v. Union Territory of Manipur, AIR 1963 Manipur 12 was brought to the notice of the Magistrate in the course of the arguments in this case, in which in paragraph 13, this Court had pointed out that if the Police do not transmit to the Court a copy of the entries in the diary relating to the case, to satisfy the Magistrate that there are grounds for believing that the accusation or information is well founded, and that a remand is absolutely necessary for the purpose of investigation, the Magistrate has no jurisdiction to direct the detention of the arrested person. This decision is dated 15-2-1962 and it has been communicated to all the Magistrates. Hence, there is no doubt that no Magistrate would remand an accused person in violation of Section 167 Cr. P.C. In this particular case, the Magistrate had directed the prosecution on 8-5-1963 to produce the documents referred to in Section 167(1) Cr. P.C. and waited for them till 5-30 P.M. and the Police had deliberately failed to produce the documents. Thus, the talk of the illegal practice of this Magistrate is totally unfounded.

26. Thus, when the copy of the entries in the diary were not transmitted to the Court as required under Section 167(1) Cr. P.C., in spite of the Court waiting till 5-30 P.M., the Magistrate had no other option but to release the petitioner. It was not even necessary that a bail bond should have been taken. Section 63 Cr. P.C. provides that no person who has been arrested by a Police Officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate. Thus, on failure to produce the copy of the

Police Diary as ordered, the Magistrate could have straightway released the arrested person even without taking any bond from him or even without bail. There is an impression among the Police in this Union Territory that the remand of an arrested person should be done by the Magistrate is a matter of course. The sooner this impression is got rid of, the better it will be. I wish to impress on all the Magistrates as well as on the Police that it is the duty of the Police to comply with the provisions of Section 167(1) Cr. P.C. and that the Magistrate should insist on such strict compliance and if the Police do not satisfy the Magistrate with the documents that a remand was necessary, for the purpose of investigation, the Magistrate may release the accused.

27. Thus, the position was that even without taking bail from the petitioner, the Magistrate would have been right in releasing him. It would have been wrong on the part of the Magistrate to have sent him to Jail custody until the Police chose to submit their reports on the bail applications, as the Sessions Judge would have it. When therefore instead of releasing the accused as the Magistrate could have done, the Magistrate only granted him bail, and that too when the prosecution did not show any grounds why bail should be refused, it is difficult to understand the observation of the Sessions Judge.

28. As I stated at the beginning what the Sessions Judge had to consider in the application before him was to see whether at the time when the application was made there was sufficient reason for cancellation of the bail and for remanding the petitioner to custody. I have said that in view of the failure of the Police to act in accordance with the provisions of Section 167(1) Cr. P.C., there was no cause to remand the petitioner. Hence, the question of cancellation of his bail does not arise. Even on the merits of the petition, I do not find any reader for cancellation of the bail. In the so-called remand report, sent to the Court on 8-5-1963, no reason was mentioned why the petitioner should be remanded to custody. All that was stated was that he may be remanded to Jail custody for 15 days so as to enable the Police to complete the investigation. It was not stated how or why it was necessary

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that he should be remanded in order to complete the investigation. The learned Sessions Judge seems to think that remand to Jail custody of an arrested person is the normal thing for the Magistrate to do and that it was for the accused to give reasons for his release on bail. This is a mistaken impression. The liberty of the citizen is sacred and if that liberty is to be interfered with, it is for the Police to show that unless that liberty is curtailed, there cannot be proper investigation of the case. Thus, when this was not shown in this case, the Magistrate was right in not remanding the petitioner to custody.

29. When we come to the next document, namely, the report of the Police dated 8-5-1963 on the first bail application, which was received by tile Court only on 9-5-7963 after granting the half we find it stated that the co-accused were absconding and that the Police were trying to arrest them and if the petitioner was enlarged or bail at that stage of the investigation, it would not be possible for the Police to arrest the remaining accused. Thus, this was an additional plea made for the first time in this report which was not mentioned in the original remand report and which evidently was not urged before the Magistrate when he granted bail. I find from the records, that 3 other accused were arrested by the Police on 9-5-1963, even though the petitioner was released on 8-5-1963. Thus, this vague allegation that it will not be possible for the Police to arrest the other accused if the petitioner was released on bail, cannot be taken seriously by a Court and it is not sufficient to deprive a person of his liberty.

30. When next we come to the petition filed before the Sessions Judge, we find that further reasons are mentioned for cancelling the bail. They are that the petitioner was involved in a cheating case previously, that he is a man of desperate character, that he

was likely to kidnap the girl with the help of other associates of similar desperate character and further that the accused was found to have contacted some of the important witnesses since he was enlarged on bail. No details are mentioned as to the important witnesses, the petitioner was said to have contacted. Such vague allegations are not sufficient to cancel the bail. The fact that the petitioner was involved in a cheating case previously is again no reason why bail should be refused in the present case. As I pointed out, the Police have been going on adding more and more reasons in their desperate attempt to see that the petitioner was deprived of his liberty.

We have to remember that this is a case of alleged abduction brought by the Police against the petitioner of a girl who is the daughter of a Police Officer. We cannot also forget the fact that admittedly the petitioner and the girl aged 20 have been in love for 2 or 3 years. We must further remember that it is a common feature in Manipur for a boy and girl who like each other to elope with a view to later marriage. In this state of affairs, to call the petitioner a desperate character shows only that the Police are taking an extra interest in this case, perhaps, on account of the fact that the girl's father happened to be a Police Officer. The learned Sessions Judge was fully aware of this, but still he has not referred to it at all in his order. There is no doubt in my mind that this is not a case where the bail should have been cancelled and the order of the Magistrate of using to remand the petitioner to Jail custody and granting him bail should have been set aside.

31. For the reasons mentioned above the order of the Sessions Judge is set aside and the order of the Magistrate dated 8-5-1963 is restored and it is confirmed.

Appeal allowed.

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Cross Citation :1992 CRI. L. J. 2873

RAJASTHAN HIGH COURT

Coram : 1 SH. N. L. TIBREWAL, J. (Single Bench)

S. B. Criminal Misc. IIIrd Bail Appl. No. 2353/ 1991, D/- 16 -8 -1991.

Jar Singh, Petitioner v. State of Rajasthan, Respondent.

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Criminal P.C. (2 of 1974), S.439 - BAIL - Constitution of India, Art.21- Bail – Bail can be granted when Sessions Judge completely forgotten their duties towards the accused who are in jail- Dowry death alleged - Non-recording of statements of witnesses though available, on lame excuse, by Sessions Court - Delay in trial by adjourning case for long periods - Violation of fundamental right of accused of speedy trial, especially when he is in jail - Delay in trial deprecated and bail granted though it was earlier refused - It is really disturbing that the trial courts are so unaware of liberties of the citizens - An expeditious criminal trial is a fundamental right of the accused, especially when he is in jail. No accused can be kept in jail for uncertain period, as a under-trial prisoner, especially when there is no fault on his part.

In Criminal cases in which the accused is in jail, it is the duty of the presiding Officer to complete the trial as expeditiously as possible and to record the statements of the prosecution witnesses

without any delay, rather day to day; and all efforts are to be made through the police agency to secure the attendance of the witnesses on the date fixed for recording their statements. It is also his duty not to grant adjournment unless it is found extremely necessary. Even if the case has to be adjourned, then the next date should not be after a long period

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Mr. I. R. Saini, for Petitioner; Mr. M. K. Kaushik, Public Prosecutor.

Judgement

ORDER :- Though this is a third bail application under Section 439, Cr. P. C., but it requires serious consideration due to circumstances developed later on.

The petitioner is facing trial in Sessions Case No. 53/90 in the court of Addl. Sessions Judge No. 1, Alwar under Sections 498-A and 304-B, I.P.C.

While rejecting the second bail application this Court had observed as under:--

"The contention of the learned counsel for the petitioner is that the petitioner is in jail since June, 1990 and not a single witness has been examined so far though the charges were framed on 23-10-1990. It is the duty of the trial Court to see that no undue delay is caused in the trial of a Sessions Case, and all efforts should be made that after framing of the charges, the trial is completed within two or three months, which had been the usual practice. I expect from the trial Court that all efforts shall be made to complete the trial expeditiously in Sessions Cases, not only in this case but in other cases also in which the accused persons are in jail."

2. There is no dispute that Smt. Sunita committed suicide by swallowing some poisonous pill. The report of the incident was made at Police Station Alwar on March, 31, 1990 by Sh. Roshanlal, the father of the deceased. In the report, an allegation was also made about the demand of dowry by the petitioner and the co-accused Smt. Sharda. The petitioner is the husband of the deceased.

3. The contention of the learned counsel for the petitioner is that in spite of the earlier order of this Court, no progress has been made in the trial of the case. He submits that

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the petitioner is in jail since June, 1990 and about fourteen months have passed since then, but practically no progress has been made in the trial. The learned counsel submits that the conduct of the petitioner indicates his innocence, in as much as, when he came to know about the illness of his wife he immediately provided her medical aid and when her condition deteriorated, she was shifted to the hospital by him. The learned counsel argues that a day prior to the incident, the petitioner had taken the deceased to her parent's house on the festival of 'Gangor' and they had gone on a bi-cycle. According to the learned counsel, in such cases it has become the fashion and practice to make false accusation of the demand of dowry, though in the community of the petitioner no such demand is made on the part of bridegroom. The learned counsel submits that in fact, in Mali-community, the bridegroom has to pay money to the bride's father for the marriage of his daughter.

4. I would not like to make any comment on the merits of the case, but there are some striking features which are alarming and I would like to highlight the same in this order. The manner in which the trial of the present case has proceeded is not only shocking and painful, but it also demonstrates slackness and indiffernce towards the duties by the Presiding Officers.

5. Some important dates relevant for the decision of this petition and various relevant order-sheets from the file of the trial court may be referred :

The case was registered at Police Station Alwar on March 31, 1990. The police, after completion of the investigation, submitted a charge-sheet in the month of July, 1990. Then, the case was committed by the Chief Judicial Magistrate and the record of the case was received in the court of Sessions Judge on Oct. 8, 1990. The learned Sessions Judge transferred the case to the court of Addl. Sessions Judge No. 1, Alwar and fixed the next date as 23rd Oct. 1990. On 23rd Oct. 1990, the trial Judge framed charges against the petitioner and the co-accused Smt.Sharda. Thereafter, he fixed the next date as January 9 and 10, 1991 for recording the statements of the prosecution witnesses. On Jan. 9, 1991 no prosecution witness was present, as such, the case was adjourned to Jan. 10, 1991. On Jan. 10, 1991 also no prosecution witness was present and the learned Judge fixed the next date as 12th and 13th March, 1991, for recording statement of the prosecution witnesses. On 12th and 13th March, 1991, it appears that some witnesses were present, but the Judge did not record their statements on a lame execuse that he was under transfer orders. The next date was fixed as April 30, 1991. On April 30, 1991, three prosecution witnesses were present, but their statements could not be recorded as the accused petitioner was not produced in court by the jail authorities on the ground of his being sent to hospital for treatment. Consequently, the next date was fixed as July 12, 1991. On July 12, 1991 statement of only one witness was recorded and the next date has been fixed as Aug. 22, 1991 for recording the statements of other witnesses.

6. It is really disturbing that the trial courts are so unaware of liberties of the citizens. Now, it is a settled proposition of law that expeditious criminal trial is a fundamental right of the accused, especially when he is in jail. No accused can be kept in jail for uncertain period, as an under-trial prisoner, especially when there is no fault on his part. In criminal cases in which the accused is in jail, it is the duty of the Presiding Officer to complete the trial as expeditiously as possible and to record the statements of the prosecution witnesses without any delay, rather day to day; and all efforts are to be made through the police agency to secure the attendance of the witnesses on the date fixed for recording their statements. It is also his duty not to grant adjournment unless it is found extremely necessary. Even if the case has to be adjourned, then the next date should not be after a long period.

7. In the instant case, I find that the case was committed to the Court of Sessions in the month of Oct. 1990. The charges were framed on Oct. 23, 1990. The trial Judge fixed Jan 9 and 10, 1991 as the next dates for recording the prosecution evidence i.e. after more than two and half months. On these two dates not a

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single prosecution witness was present and the trial Judge adjourned the case and fixed dates as March 12 and 13, 1991 without caring that the petitioner is in jail and the case should not have been adjourned for such a long period.

On March 12 and 13, 1991, some witnesses were present. The Presiding Officer was also there, but he did not choose to record their statements on a lame excuse of his being under transfer orders. Nothing can be more shocking and painful for me to notice that the statements of the witnesses could not be recorded though the Presiding Officer and the witnesses were available on the ground that the Presiding Officer was under transfer orders. Till a Presiding Officer does not give charge, he is expected to work and recording the statements of the witnesses can hardly be a matter of any grievance to anybody. It only shows that the Presiding Officer did not want to work on a lame excuse.

On April 30, 1991, the accused-petitioner was not produced in the Court by the police on the ground that he had been sent to a hospital for treatment. Though, the Court was bound to adjourn the case on this ground but the shocking fact is that the Presiding officer again gave the next date after two and half months.

8. It appears that in the instant case the Presiding Officers have completely forgotten their duties towards the poor accused who is in jell.

I would like to draw the attention of the subordinate courts towards the General Rules (Criminal) 1980.

Chapter (IV) in the General Rules (Criminal) 1980 provides the procedure and manner of 'trials in court of Sessions'.

Just for the guidance and to referesh the memory of the subordinate courts, I may refer some relevant Rules. Rule 39 provides that when an order of commitment for trial has been made, the Magistrate shall at once report the fact to the Court to which commitment is made by a letter in the prescribed form; and shall within eight days from making the said order, submit the entire record to the Court of Sessions and shall send material exhibits and articles within fornight thereof together with a calendar in the prescribed form. (Emphasis provided).

Then, Rule 42 provides that Sessions cases should be disposed of with the greatest possible expedition and that Sessions Judge should reserve particular number of days in a week for sessions work.

Rule 43 provides expeditious disposal of Sessions cases, which runs as under :-

"Rule 43 - Expeditious disposal of Sessions trials should ordinarily be held in order in which commitments are made. The Presiding Officer may however exercise his discretion in the matter of giving priority to certain cases particularly cases involving capital sentence subsequently received or where the accused is in jail. Once a sessions trial is opened the Sessions Judge shall see that it is disposed of in the same session and not adjourned to next session. The sessions cases shall be taken up day to day until all the witnesses in attendance have been examined and discharged. The sessions Judge shall take necessary steps to get the summons served on the witnesses in time and if necessary the Superintendent of Police of the district may be asked to make special efforts to secure the attendance of the witnesses. A sessions trial should not be adjounred or postponed except in exceptional circumstances for reasons to recorded in writing."

(Emphasis supplied)

The aforesaid Rules indicate that Session trials should be disposed of in a most expeditious manner and once a session trial is opened, it is the duty of the concerned Judge to see that it is disposed of in thesame session. The case has to be taken day do day until all the witnesses in the cases are examined. It is also the duty of the Presiding Officer to take necessary steps to get the summons served on the witnesses in time and, if necessary, the Superintendent of Police of the district may be asked to make special efforts to secure the attendance of the witnesses. Further, the trial shall not be adjourned or postponed except in

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exceptional circumstances for reasons to be recorded in writing.

9. In spite of the aforesaid, Rules, the present case has been dealt with in a most casual manner. Keeping utmost judicial restrain I can only express my displeasure about the manner in which the trial has proceeded in this case.

I can expect not only from the Presiding Officer of the Addl. Sessions Judge, Alwar, but from other Sessions Judges also not to forget and ignore the aforesaid Criminal Rules which are meant for their guidance. These rules are meant to be followed. These rules

assume importance when the accused is in jail and who can rightly claim an expeditious trial as his fundamental right provided by the Constitution of India.

10. Yet another shocking feature of this case is that in spite of the specific directions given by this Court by order dated April 15, 1991 to complete the trial expeditiously within two or three months, the same has been disobeyed. The manner in which adjournments have been granted and that too by giving long dates indisputedly establishes that the disobedience of the aforesaid order of this court is wilful and deliberate. Subordinate courts are bound to obey the orders of the higher courts. This is also a judicial propriety which is necessary to be strictly followed to maintain judicial system intact. If the orders of the higher courts are wilfully and deliberately disobeyed by the subordinate court it amounts to a contempt of the court.

In the course of arguments, at one time I had thought to issue a conempt notice to the concerned Presiding Officer/Officers, but having come to know that the earlier Presiding Officer has been transferred and the new Presiding Officer has taken the charge sometime in the month of March-April, 1991, it shall be suffice to record a warning against them to be vigilant and careful in following the directions of the superior courts.

In the aforesaid background, I have no option, but to release the petitioner on bail under S. 439, Cr. P.C.

Consequently, this petition is allowed and it is hereby directed that the petitioner Jai Singh S/o Pyarelal shall be released on bail provided he furnishes a personal bond in the sum of Rs. 10,000/- (ten thousand only) with two sureties in the sum of Rs. 5,000/- (five thousand only) each to the satisfaction of the trial court for his appearance in the said court or any other court on all the dates of hearing and as and when called upon to do so during the pendency of the trial in this case.

A copy of this order be kept in the personal file of the concerned Presiding Officer.

The Dy. Registrar (Judicial) is also directed to send cyclo-style copy of this order to all Sessions Judges/Addl. Sessions Judges for their guidance and to draw their attention towards Chapter (IV) 'trials in courts of Sessions' contained in General Rules (Criminal) 1980, which are meant to be strictly followed.

Petition allowed.

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Cross Citation :AIR 1956 PEPSU 30 (Vol. 43, C. 10 Mar.)

PEPSU HIGH COURT

Coram : 1 CHOPRA, J. (Single Bench)

Sita Ram Chandu Lall …. vs…. Malkiat Singh

Criminal Revn. No. 364 of 1954, D/- 7 -9 -1955,

against judgment of S.J., Sangrur, D/- 30 -10 -1954,

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Penal Code (45 of 1860), S.220 - WRONGFUL CONFINEMENT - Malicious confinement- Malkiat Singh respondent is in police service and at the particular time he was posted as an A.S.I, at police-station Sangrur - he arrested complainant with a view to put pressure on the person confined to come to terms with a certain person in whom the accused is interested - the offence for which Sita Ram was arrested was a bailable one - The bail, though offered, was not accepted - respondent in going to the mandi, arresting Sita Bam there and taking him hand-cuffed through the bazar was simply to put pressure upon him

to come to terms with one Bhagwati Prasad. It has also been found that the offence for which Sita Ram was arrested was a bailable one - The bail, though offered, was not accepted. The learned Sessions Judge concurred with these findings. Bhagwati Prashad was complainant in the case in which Sita Ram was arrested and Malkiat Singh was a tenant of Bhagwati Parshad. The unlawful commitment to confinement was wilful, without any excuse and with a view to put pressure on Sita Ram to come to terms with Bhagwati Parshad, in whom Malkiat Singh was interested. -where the unlawful commitment to confinement is wilful, without any excuse and with a view to put pressure on the person confined to come to terms with a certain person in whom the accused is interested, the accused can safely be said to have acted "maliciously." (Para 6)

To maintain law and order is the principal function of a police Officer. It is simply reprehensible if he himself takes the role of a lawbreaker and acts in flagrant disregard of his duties as a public servant. Malkiat Singh respondent did no less. He was actuated by youthful spirit and false notions of his newly gained authority. The high-handed manner in which he acted, leaves no doubt that he did not deserve to be given the benefit of S. 562(1), Cr. P.C. and the discretion was improperly exercised

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Om Prakash Singla and Ujjagar Singh, for Petitioner; Jagan Nath Kaushal, for Respondent.

Judgement

ORDER :- In this case the respondent Malkiat Singh was convicted by Magistrate I Class, Sangrur (with enhanced powers under S. 30, Cr. P.C.) under Ss. 220 and 342, IPC and was released under S. 562, Cr. P.C. on probation of good conduct on entering into a bond of Rs. 1000/- with one surety for one year. The order was maintained by Sessions Judge, Sangrur, in revision by Sita Ram complainant. Sita Ram now comes in revision to this Court.

2. When this revision was admitted Malkiat Singh respondent was directed "to show cause why he should not be sentenced to imprisonment or fine or both". In response to this notice, Shri Jagan Nath, learned counsel for the respondent has taken me through the facts of the case with a view to show that the conviction itself was not 'justified and is liable to be set aside.

His contention is that since a notice has been issued to the respondent under S. 439(2), Cr. P.C., the respondent is entitled "to show cause against his conviction" as well, as provided by Sub-S. (6) of the Section.

3. Section 439(2) says :

"No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence." and its Sub-S. (6) lays down :

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under Sub-S. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction".

4. Where a notice for enhancement of sentence is issued the accused is entitled to show cause against his conviction by attacking the findings of facts in the same manner and to

the same extent in which he could have done if he had appealed against his conviction. But Sub-S. (6) is confined to a particular notice issued to the accused under Sub-S. (2).

It does not apply to every kind of notice under Sub-S. (2). It presupposes that the accused has not only been convicted but has been sentenced as well, and notice for enhancement of sentence has been issued. Enhancement of sentence presumes that there is a sentence to be enhanced.

5. Where a person, though convicted, is directed to be released on probation of good conduct under S. 562, the Court does not pass a sentence. On the other hand, what S. 562, Cr. P.C. expressly provides is that

"the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond andc. andc." If in such a case a notice is issued calling upon, the accused to show cause why a sentence be not passed against him, as in the present case, it cannot be said that the Court is going to enhance the sentence already passed within the meaning of S. 439(6), so as to entitle the accused to be heard on merits of the case. The present is in fact a notice under S. 562(3) and hence would not be covered by S. 439(6) Malkiat Singh respondent cannot, therefore be allowed to reagitate the findings of fact arrived at by the courts below.

6. In spite of it, I have heard Shri Jagan Nath on facts as well. He raises the very same points which have been elaborately discussed and decided against him by the trial court as well as by the Sessions Judge. It would be an unnecessary repetition to deal with every one of them once again, since I am in full agreement with their findings. It is further contended that neither of the Courts below gave a clear finding that Malkiat. Singh accused kept Sita Ram complainant in illegal confinement "corruptly or maliciously", and this being a necessary ingredient is an offence under S. 220, IPC, conviction of the respondent for that offence is against law and liable to be set aside.

It is correct that the actual words of the section "corruptly or maliciously" have not been used, but, on a consideration of all the facts of the case, the learned trial Magistrate did express his view that the action of Malkiat Singh respondent in going to the mandi, arresting Sita Bam there and taking him hand-cuffed through the bazar was simply to put pressure upon him to come to terms with one Bhagwati Prasad. It has also been found that the offence for which Sita Ram was arrested was a bailable one. The bail, though offered, was not accepted. The learned Sessions Judge concurred with these findings. Bhagwati Prashad was complainant in the case in which Sita Ram was arrested and Malkiat Singh was a tenant of Bhagwati Parshad. The unlawful commitment to confinement was wilful, without any excuse and with a view to put pressure on Sita Ram to come to terms with Bhagwati Parshad, in whom Malkiat Singh was interested. In the circumstances, Malkiat Singh can safely be said to have acted "maliciously". The contention is consequently rejected.

7. Now, coming to the merits of this petition, Malkiat Singh respondent is in police service and at the particular time he was posted as an A.S.I, at police-station Sangrur. On 12-5-1953, Bhagwati Parshad lodged a report at the said police-station under S. 341, IPC complaining that Sita Ram and one Bhagwan Das did not allow him to enter a part of his own house and forcibly turned him out of the same. A portion of this house was leased to Sita Ram for some time but it was alleged that he had vacated it and passed on its possession to Bhagwati Parshad.

Sita Ram, on the other hand, asserted that he still continued to remain in possession of the house as tenant and that for some time past the landlord was depriving him of the usual amenities with a view to force him to vacate it. The dispute gave rise to cross-cases between Bhagwati Parshad and Sita Ram. The former brought a complaint under S. 145,

Cr. P.C. and the latter presented an application under S. 10, Rent Control Ordinance. And then, Bhagwati Parshad lodged the present report under S. 341, IPC on 12-5-53.

Malkiat Singh was deputed to investigate. On 14-5-53 he arrested Sita Ram and Bhagwan Dass, the two accused mentioned in the report. The offence was bailable and bail was actually offered. It was not accepted. Sita Ram and Bhagwan Das were hand-cuffed and paraded in that condition to the police-station through the mandi. There, they were not released on bail for about an hour.

8. Section 562(1), Cr. P.C. consists of two parts the first where the offender is above the age of twenty-one, and the second where the person is below that age or a woman. In the first case, the section applies if the offence for which the accused is convicted is punishable with imprisonment for not more than seven years; and the second, if the offence is not punishable with death or transportation for life.

Even where these conditions are fulfilled the person convicted cannot, as of right, claim the benefit of the provisions of this section. The fact that it is his first conviction would not alone be sufficient. The discretion is to be exercised having regard to the circumstances in which the crime was committed and the age, character and antecedents of the offender. It needs a considerable sense of responsibility. Misplaced leniency and sympathy for the accused are matters which should never be allowed to come in and influence the court's mind. Otherwise, the very object for which, punishments are provided would be defeated.

9. In the present case the grounds relied upon by the trial Magistrate are (1) that the accused is a young man of less than twenty years, and (2) that he "appears to have committed the offence due to his not being experienced". The learned Sessions Judge dismissed the complainant's, petition for revision with the following observations :

"M. Malkiat Singh is a young man of 20 years of age and an Assistant Sub Inspector of Police. It was not conducive in the interest of justice that a young man who probably had committed a lapse just due to inexperience, should be sent among, hardened criminals and jeopardize his career for all times to come."

10. There is nothing on the record regarding the actual age of the accused. If the remarks were based on observation, the age has surely been underestimated. On my inquiring the respondent, he gave his date of birth as 27-4-1927. He is thus above twenty-eight now and was more than twenty-six at the time of the incident. This is exactly what he appears to be.

His case, if other conditions are satisfied, would, therefore, fall under first part of S. 562(1), Cr. P.C. and not the second as contemplated by the courts below. That the offence was committed due to lack of experience is contrary to the learned Magistrate's own findings on the main features of the case, one of which is that there was a particular motive behind the respondent's action.

11. The additional ground taken into consideration by the learned Sessions Judge fails to impress me. The respondent is long past that age. He is well educated and sufficiently experienced to guard himself against the influence of "hardened criminals".

12. To maintain law and order is the principal function of a police Officer. It is simply reprehensible if he himself takes the role of a lawbreaker and acts in flagrant disregard of his duties as a public servant. Malkiat Singh respondent did no less. He was actuated by youthful spirit and false notions of his newly gained authority. The high-handed manner in which he acted, leaves no doubt that he did not deserve to be given the benefit of S. 562(1), Cr. P.C. and the discretion was improperly exercised.

13. The next question is whether it should be interfered with in revision and at this stage. The trial in this case was very much prolonged, it took almost one year. Six months more were taken in the appellate court. The period of probation has long expired. S. 562, Cr.

P.C. certainly applied in every respect, except the circumstances and the manner in which the offence was committed. It is only a case where, in my view, the discretion has been improperly exercised and where a sentence of imprisonment or fine or both might well have been awarded.

There are cases in which the High Court refused to interfere even though S. 562 did not apply and the discretion was illegally exercised. In - 'Emperor v. Partab Narain' AIR 1925 Oudh 673 (A), it was held that the fact that the person given the benefit of S. 562 was discovered later to be a previous convict, would not of itself be a sufficient ground for interference in revision.

14. In - 'Abdul v. Emperor', 11 Cri LJ 389 (Lah) (B), Johnstone, J., declined to interfere in revision with an order under Section 562, Cr. P.C. although the order had seen passed in a case to which the section was wholly inapplicable. In - 'Emperor v. Bhagat Singh', AIR 1933 Lah 393 (C), three persons were found guilty under S. 457, IPC for breaking into a house and stealing property and were dealt with under S. 502. On a reference by the Sessions Judge, Harrison, J., did not deem it necessary or advisable 10 interfere even though the order was illegal and the section had 110 application. In - 'Emperor v. Khairati Lal', AIR 1928 Lah 926 (D), an improper order under S. 562, Cr. P.C. was not set aside because of the lapse of time.

15. In view of these facts, I confine myself with the observations already made and decline to interfere. The petition for revision is dismissed.

Revision dismissed.

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Cross Citation :2012 ALL MR (Cri) 1624

BOMBAY HIGH COURT

Smt. R. P. Sondurbaldota, J.

Kishore Wadhwani *&* Anr….Vs…. The State of Maharashtra .

Criminal Writ Petition No.3438 of 2010.

13th February, 2012.

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Criminal P.C. (1973), Ss.239, 301, 302 - Application for assist to PP - First informant Opportunity of hearing cannot be refused to him ,his role will be limited and he cannot take place of Public Prosecutor - He, cannot be allowed to take over the control of prosecution by allowing to address the court directly.

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JUDGMENT : - The single question that arises for consideration in this writ petition is whether the first informant has a right of hearing at the time of

consideration of the application for discharge under Section 239 of Code of Criminal Procedure (hereinafter " Cr.P.C." for short). The brief facts of the case required to be stated for consideration of the question are that the petitioners are accused in Case No.927/PW/2007 pending in the Court of Additional Chief Metropolitan Magistrate, 8th Court, Mumbai. The case had been registered, pursuant to the order passed under Section 156(3) Cr.P.C. by the Court on the complaint filed by respondent no.2. The petitioners had filed Criminal Writ Petition No.93 of 2007 seeking quashing of MECR No. 16 of 2006 registered by the police. That writ petition was dismissed on 16th April 2007. The petitioners then approached the Hon'ble Supreme Court by filing S.L.P. (Cri.) No. 2414 of 2007, during the pendency of which, chargesheet came to be filed before the trial court. Therefore on 16th November 2009, the petitioners withdrew the S.L.P. and filed application for discharge under Section 239 Cr.P. C. In that application, respondent no.2 appeared before the trial Couit with a request to be heard in the matter. The request made was an oral request. The petitioners objected to the request. After hearing rival arguments, the oral request of respondent no.2 was allowed by the trial Court by it's order dtd. 30th August 2010, impugned in the present petition. The reasons set out in the short order read as follows:

> 3. Especially I have gone through the ratio laid down in the authorities of the Hon'ble Apex Court in the case of **Bhagwant Singh** vs. **Commissioner of Police, AIR 1985 SC page 1288** and the ratios down in other authorities mentioned supra.
>
> 4. The question that has been raised by Defence is as to whether, at this stage i.e. at the stage of discharge of accused, whether the original complainant could have a right to be heard. On this point, it was argued that the complainant can be heard at the initial stage, but ne has no right to be heard at this stage.
>
> 5. I have carefully gone through the submissions made at the bar as well as ratios laid down in reported authorities as discussed supra. It is pertinent to note that golden principle of law is that nobody should be condemned unheard. May it be any stage and the original complainant is not an alien to this proceeding. So as per the ratios laid down in the authorities relied upon by Ld. Counsel for the original complainant, the original complainant has a right to be heard even at this stage. Hence, as

there is no application filed on record by either of the parties and as everything went on orally, this order is passed below Exhibit No.l. The original complainant has got a right to be heard even at this stage. Hence, matter shall proceed further.'

6. The petitioners challenge the impugned order contending that Section 239 Cr.P.C., under which the application for discharge is made, in express terms, gives right of hearing only to the prosecution and the accused. The section does not contemplate hearing to the first informant either in person or through advocate. Secondly under the scheme of Cr.P.C, it is the public prosecutor who has to conduct the case and the first informant can only assist the public prosecutor and can address the court through the public prosecutor. Therefore according to the petitioners, the trial Court could not have passed the impugned order. In reply,.respondent no. 2 seeks to justify the impugned order contending that it is in keeping with the eyolvement of law in giving equal importance to the first informant and victim of the crime. Besides, participation by way of advancing arguments on law and facts would not bring any element of unfairness but would actually assist the court.

7. Undoubtedly the first informant and to some extent, the injured i.e. victim of crime or relatives of the deceased, if the incident has resulted into death have now been vested with better rights, with increased participation at different stages of criminal proceedings. Before going into the question arising for consideration in the petition, it will be convenient to take note of the rights conferred upon them by the statute as well as by judicial pronouncements. It will also be necessary to refer to few provisions of Cr.P.C. to appreciate the submissions advanced.

8. Section 154(1) Cr.P.C. requires that every information relating to the commission of a cognizable offence if given orally to an officen n charge of a police station shall be reduced in writing by him or under his direction and be read over to the informant and

every such information whether given in writing or reduced into writing shall be signed by the person giving it. Section 154(2) requires that a copy of such information shall be given forthwith, free of cost, to the first informant. Section 157(2) requires that if it appears to the officer incharge of the police station that there is no sufficient ^ground for entering on an investigation, he shall forthwith notify to the first informant the fact that he will not investigate into the complaint or cause it to be investigated. In case investigation is undertaken, Section 173(2)(ii) provides that on completion of investigation, the officer shall communicate, in such manner as may be prescribed by the State Government, the action taken by him to the first informant. It can be noted that all the above three provisions relate to the action to be taken by the police i.e. the officer-in-charge of the police station. The purpose and reasons of the three provisions have been stated by the Apex Court in it's decision in **Bhagwant Singh Ys. Commissioner of Police,** reported in **A.I.R. 1985 Supreme Court, page 1285** relied upon by respondent no.2 and also referred to in the impugned order. The reasons stated are as under :

> "3..... Obviously the reason is that the informant who sets the
>
> machinery of investigation into motion by filing the First Information Report must know what is the result of the investigation initiated on the basis of the First Information Report. The informant having taken the initiative in lodging the First Information Report with a view to initiating investigation by the police for the purpose of ascertaining whether any offence has been committed and, if so, by whom, is vitally interested in the result of the investigation and hence the law requires that the action taken by the officer in charge of a police station on the First Information Report should be communicated to mm and the report forwarded by such officer to the Magistrate under sub-section 2(i) of Section 173 should also be supplied to him."

5. Next are the provisions of Section 301 and 302 Cr.P.C

which allow participation of the first informant into the conduct of the trial to the extent permitted therein. Section 301 permits a first informant to instruct a pleader to prosecute any person in any court but limits participation of such pleader to assistance to the Public Prosecutor or Assistant Public Prosecutor. The pleader may, with the permission of the Court, submit written arguments after the evidence in the case is closed in the case. Section 302_ relates to the proceedings before a Magistrate. Any Magistrate enquiring into trying a case, may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector. No such permission is required for the prosecution to be conducted by Advocate General or Government Advocate or Public Prosecutor or Assistant Public Prosecutor. In other words, ordinarily the prosecutions are conducted by Public Prosecutor or Assistant Public Prosecutor. However, it is open for a private person to seek permission to conduct the prosecution by nimself. If the Court thinks that the cause of justice would be served better by granting such permission, the Court would grant such permission. The scope of Sections 301 and 302 Criminal Procedure Code has been commented upon by the Apex Court in its decision in **J.K. International V/s. State Govt of NCT of Delhi** & **Ors.** reported in **(2001) 3 SCC page 462.** The same reads as under :

"12. The private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needrul in the Court in his pehalf. It further amplifies the position that if a private person is aggrieved by the offence committed against him or against any one in whom he is interested he can approach tne Magistrate and seek permission - to conduct the prosecution by nimself. It is open to the Court to consider his request. If the court thinks that the cause of justice would be served better by granting such permission the Courts would generally grant such permission. Of course, this wider amplitude is limited to "Magistrate's Courts, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is veiy much restricted and is made subject to the control of the Public Prosecutor. The limited role which a private person can be permitted to play for prosecution in the Sessions Court has

been adverted to above. All these would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them."

of **Thakur Ram V/s. State of Bihar** reported in **A.I.R. 1966 SC page 9 11.** The Apex Court opined that reliance upon the decision in Thakur Ram's case by the High Court was not correct as the situations in the two cases were different. In Thakur Ram's case, the complainant had sought to challenge the order of the trial Court rejecting prosecution application for amending the charge and committing the case to the Court of Sessions. The Apex Court in that case, had disapproved a private person trying to interject in the case to rechannelise the course of the prosecution when the Public Prosecutor was in management of the prosecution case. The situation in J.K. International's case was found to be different, where the accused had approached the High Court for quashing of the criminal proceedings initiated by the appellant. The Apex Court held that in case of a petition for quashing of criminal proceedings, it would be a negation of justice to the complainant, if he is foreclosed from being heard.

9. The stage of hearing in the third case i.e. **Vinay Poddar** (supra) was completely different. The first informant had sought hearing in an application for anticipatory bail. While allowing the application, what had weighed with the Court was that when an application for anticipatory bail is considered, the police may not place all factual details before the Court as the investigation in most of such cases, is at a preliminary stage. Therefore, some role can be played by the complainant by pointing out the factual aspects. The other factor that had weighed with the Court was recognition of right of the first informant by the Apex Court to challenge the order granting bail.

10. Thus, it can be seen that the different stages of criminal proceedings in which participation of the first informant was

allowed by judicial pronouncements, in the absence of specific provision in Criminal Procedure Code are (i) dropping of the proceedings by the Magistrate on receiving report under Section 173 Criminal Procedure Code from police, (ii) quashing of the criminal proceedings on the petition made by the accused and (iii) hearing of an application for anticipatory bail. The third stage is an entirely different stage, unconnected to the first two stages where one of the outcome of the application was the criminal complaint initiated by the first informant coming to an end.

11. The above is the background against which the question arising in the present petition is required to be considered.

12. Mr. Mahesh Jethmalani, the learned Senior Counsel appearing for the petitioners submits that Sections 238 and 239 of Code of Criminal Procedure are a complete code in themselves in the matter of procedure to be followed for the purpose of discharging the accused or for framing of charge in any warrant case instituted on a police report. He points out that Section 239 makes provision for every aspect of hearing of the application for discharge. It provides for the parties to be heard, documents to be considered, the test to be applied and the order to be passed. He refers to the principle of " Expressio unis est exclusio alterius " in the matter of statutory construction to submit that express mention of one or more persons of a particular class has to be regarded as by implication exclusion of all others of that class. According to Mr. Jethmalani, since Section 239 enumerates class of persons to be heard i.e. Prosecutor and the accused, by implication, it would exclude any other person from the hearing. Mr. Jethmalani relies upon decision of Kerala High Court in **R. Balakrishna Pillai Vs. State of Kerala,** reported in **1995 Criminal Law Journal, 1244** in the connection. In the proceeding before the Kerala High Court, a third party i.e. the Leader of Opposition in Kerala Legislative Assembly had filed an objection to the discharge application filed by the accused. The Kerala High Court held that Sections " 238 and 239 being a complete code in the matter of procedure to be followed for the purpose of discharging the accused, a third party cannot have any say in the matter". In my opinion, the facts of the present case are different from the facts before the Kerala High Court. The person making an application before the Kerala High Court for hearing was an altogether a third person, whereas

the applicant herein is the first informant. He cannot be said to be a third person. As regards Section 239 of Cr.P.C. being a complete code by itself for the procedure to be followed for the purpose of discharging the accused, that by itself need not deter the court in considering the question in view of the expanded scope given to the first informant in the matter of hearing to him.

13. Mr. Jethmalani next emphasises the role of a public prosecutor. By referring to Sections 24 and 25 Cr.P.C, he submits that prosecutions in the Court of Magistrates and the Court of Sessions are conducted by the Assistant Public Prosecutor and Public Prosecutor/Additional Public Prosecutor respectively appointed by the State Government. An advocate privately engaged is not permitted to conduct prosecution. He submits that there is a sound reason for the criminal prosecutions to be conducted by public prosecutors appointed by the State Government. The State is the custodian of social interest of the community at large. Therefore though all the offences relate to public as well as the individual, in all the prosecutions, the State is the Prosecutor and the Public Prosecutor appointed by the State acts only in the interest of administration of justice. He is not a protagonist of any party. He stands for justice. Mr. Jetnmalani draws support for his submission from following observations of Sind High Court in the case of **Ahmed Mahomed Ismail vs. Emperor,** reported in **A.I.R. 1940 Sind 220.**

> "..... an advocate privately engaged " to represent the complainant should have no other place than that of one strictly subordinate to the officer who prosecutes on behalf of the Crown, for, as I have already said, the Crown stands not necessarily for a conviction but for justice. It also does not stand for the acquittal of one accused represented by a particular advocate at the cost of others and at the cost of justice"

14. Mr. Jethmalani submits that because the function of a Public Prosecutor relates to a public purpose, he is incharge of the prosecution all the time. For the very reason, the private counsel engaged by the first informant is given the limited role of assisting the Public Prosecutor under Section 301 and 302 Cr.P.C. Mr. Jethmalani relies upon decision of a Single Judge of this Court in **Anthony D'Souza** vs. **Mrs. Radhabai Brij Ratan Mohatta and Others,**

reported in **1984(1) Bombay C.R. page 157,** wherein Sections 301 and 302 of Cr.P.C. were interpreted. The decision holds that the first subsection of 301 gives absolute power to the Public Prosecutor or Assistant Public Prosecutor to appear ana plead without written authority before any court in any inquiry trial or appeal Sub-Section (2) provides that if in such a case any private person instructs a pleader to prosecute any person, the pleader so instructed shall act under the directions of the Public Prosecutor or Assistant Public Prosecutqr-in-charge of the case. This would mean that the Public Prosecutor or Assistant Public Prosecutor as the case may be, is the sole master of the prosecution and conduct of the prosecution is solely governed by his decision as to the policy to be adopted during the course of the trial and another pleader instructed has to act under the directions of the Public Prosecutor. No permission of the court is required for a private person to instruct a Pleader under Sub-section (2). Permission is required for submitting written arguments after the evidence is closed in the case. As regards Section 302(1), the court observed the power is undoubtedly vested " in the court to authorise conduct of prosecution by a private person. This power cannot be used by the court except on special grounds. It must not be the intention of the legislature that any other pleader or advocate be permitted to conduct the prosecution before a trying Magistrate", (emphasis supplied).

15. Mr. Amit Desai, the learned Senior Counsel appearing for respondent No. 2 seeks to distinguish Anthony D'Souza's case with the submission that it deals with a different stage of criminal proceedings and that the decision is of a period prior to Bhagwant's case. The submissions of Mr. Desai are self destructive. The fact that the decision is of a period prior to Bhagwant's case becomes irrelevant because the two cases deal with different situations. The stage in Bhagwant's case is a preliminary stage of consideration of Police report filed under Section 173(2) Cr.P.C. for wnich, there is no statutory provision for hearing to the first informant. The stage in Anthony D'Souza's case is of recording of evidence in the criminal trial for which there are specific provisions of

Sections 301 and 302 Cr.P.C. Therefore merely because the first informant is recognised at the preliminary stage of hearing, the decision cited does not lose it's significance.

16. Mr. Desai submits that the impugned order should be sustained since it is in keeping with the eyolvement of law in giving increased participation to the first informant in the matter of prosecution. Undoubtedly the first informant now enjoys a role higher than earlier as already seen in the preceding paragraphs. In fact perusal of the petition shows that the petitioners also not wish to deny participation of tne first informant altogether. They only want his role to be limited as under Section 301 Cr.P.C. An application for discharge can result into putting an end to the prosecution either partly or fully. This stage is in that respect similar to the stage of consideration of the police report by the Magistrate under Section 173(2) Cr.P.C and the proceedings for quashing of the complaint filed by the accused person. The first informant, trierefore, is likely to be interested in seeing that the matter reaches the stage of trial and is disposed off after recording of evidence. If by judicial pronouncements, he is now granted hearing at the earlier two stages, he can be granted hearing at the stage of discharge also, though the Criminal Procedure Code does not make provision for hearing to him at that stage. If the first informant appears before the Court and desires to participate in the application, opportunity cannot be refused to him. Now the next question would be about the nature of the hearing to be given to the first informant. Should the hearing be independent to the hearing to the Public Prosecutor or it be through the Public Prosecutor. In my opinion, his role will have to be limited as under Section 301 Cr.P.C. for the same reasons, as given in Anthony D'Souza's case and keeping in focus the role of the Public Prosecutor. He, cannot be allowed to take over the control of prosecution by allowing to address the court directly. In this connection, the decisions in Bhagwant Singh's case and J.K. International's case will have no bearing since the situations considered in the two proceedings

were different. In one case, it was a very preliminary stage and in the other, it was# invocation of inherent powers of the High Court. Therefore, the petition is partly allowed. The impugned order is modified to the extent that the Counsel engaged by respondent no. 2 shall act under the directions of the Assistant Public Prosecutor-in-charge of the case.

Order accordingly.

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INTERIM BAIL

1) Where the offences are neither punishable with death or life- The interim bail can be granted till filing of objection/say by the prosecution .

   2000(6) Kant .L.J.589

2) Interim bail can be granted without issuing notice to the public prosecutor/prosecution- However final order can be passed only after notice to the P.P.

   2005 (1) Gau LT 47

3) Where the accused is in custody of court- and the police diary was not produced by the prosecution though the case was adjourned thrice – Accused was enlarged on bail

   1958 Cri. L.J.(Raj) 715

4) Where the police authorities failed to send case diary in spite of requisition and the letters – Accused directed to be released on bail

   1989 EFR 626 (MP)

5) C.r.P.C. 439- Where despite of repeated opportunities prosecution did not produce documents before court and challan is also incomplete court was inclined to grant bail

1998 Cri. L.R. (MP) 175

6) The power to hear and to dispose of the bail application on the same day alternatively to enlarge accused on personal bond till disposal of bail application is implicit in language u.s. 437 Cr.P.C.

SOME IMPORTANT CASE LAWS FOR REFRENCE

1) **Anticipatory Bail** — Allegation of conspiracy to commit murder — No direct involvement of accused in complicity of crime — Accused suffering from diabetes, high blood pressure and heart disease for past three years — Accused an old person aged 55 years-

Bhavani Gopal vs State of Karnataka-2011 (4) AIR Kar R 337

2) **Anticipatory Bail** -Scope of mala fide intention to harass accused-

H. M. Chethan & Ors vs State of Karnataka-2011 (4) AIR Kar R 18 :: 2012 CRI. L. J. (NOC) 129 (KAR.).

3) **Cancellation** -Cancellation of Person arrested for Bailable offence and released on Bail by police Can be re-arrested without order passed by Sessions Court or High Court under S. 439(2) where investigation disclosing commission of non-Bailable offence in same crime. 2000 (2) Ker LT 495, Not good law in view of AIR 2001 SC 1444-Ahamed Basheer and another vs Sub-Inspector of Police, Kasaragod and another.

2014 CRI. L. J. 137 (KERALA HIGH COURT).

4) Cancellation-bail cancelled by Session court on this ground that the Magisrte has no jurisdiction to grant bail-no reason why bail should not be granted-cancellation of bail is not proper-bail resorted

K. Gopala kaliah & Ors. Vs. Karnataka-2012 (4) AIR Kar 238.

5) **Cancellation** - Cancellation of BAIL — Validity — BAIL GRANTED earlier cancelled on ground that complainants were obstructed to give evidence — No material or occasion that petitioners/accused were in a position to influence anyway or were to interfere with course of justice or were to threaten prosecution witnesses more specifically, complainants on date of cancellation of BAIL earlier GRANTED — Order of cancellation of BAIL, not proper.

Md. Mainul Haque & Anr. vs State of Tripura.- 2008 CRI. L. J. (NOC) 105 (GAU.) (AGARTALA BENCH)

6) **Cancellation of Bail** - S.439 — Bail — Cancellation — Accused charged under S. 324, Penal Code for attacking respondents — Bail

granted without attaching any condition — Cancellation — No reasons indicated — Observation that accused had violated conditions of Bail — Not supported by facts — Absence of accused at time of hearing of application for cancellation explained by accused — Cancellation of Bail liable to be set aside — Matter remanded. (Paras 8, 9)

Rizwan Akbar Hussain Syyed vs Mehmood Hussain and Anr. SC [Division Bench] -Crl. Appeal No. 768 of 2007-Decided on 18/05/2007- Criminal P. C. (2 of 1974)

7) Criminal P. C. (2 of 1974) S.437 — Bail — Unconditional Bail — Yet condition that accused should not tamper with evidence applies. (Para 8)-

Citations :: 2007 CRI. L. J. 3255 (SUPREME COURT) (From : Bombay)* .

8) Cancellation of Bail-Breach of condition –Whether the previous Testimony was corroborated -previous order resorted –

2013 ALLMR-1259-Praveen sheshrao Bhalerao vs. State of Maharashtra .

9) Cheating and dishonestly-financial fraudoffence not punishable for death-bail granted-Sessions Court cancelled without finding absconding and tempering-bail resorted.

2013 ALLMR- 2460- Lalit luxmandas Soni vs State of Maharashtra.

10) **Complainant right-**opportunity of hearing cannot be refused his role is will be limited and he cannot take place of Public Prosecutor.

2012 ALLMR (cri) 1624Kishore Wadhwani..Vs. The State of Mah

11) **Complainant right--**complainant/first informant is entitled to make oral submissions interest of justice would be served if he is called upon to file his say, in writing containing facts and legal submissions pointing out as to why anticipatory bail should not be granted . If such a course is adopted, it would save valuable time of Court. (Para 21)-

2013 (2) ABR 11 (Goa Bench) :: 2013 CRI. L. J. (NOC) 301(BOM.)

(Goa Bench) ::

12) **Condition** -Bank Fixed Deposit--set aside - Bail – Condition of depositing Rs one crore as Bank Fixed Deposit--set aside the direction relating to deposit of FDR in the name of the complainant

SUPREME COURT OF INDIA -SUMIT MEHTA VERSUS STATE OF N.C.T. OF DELHI-Criminal Appeal No.1436 of 2013 (Arising out of Special Leave Petition (Crl.) No. 2 of 2013)-Decided on13-9-2013-**.(2013 ALLSCR 3323)**

13) **Condition-**Apprehension of Misuse –accused directed to to give undertaking in writing-that he would not commit any breach of of condition and would not try to to influence any witness or temper.

2013 ALLSCR- 2992-CBI -vs- Amitabhai Anil Chandra Shah

14) Condition-Surety with Deposit cash amount-Erroneous –order modified.

Magrab Shaikh vs. State of Maharashtra 2013 ALLMR-1376

15) **Conduct of witness**-unnatural- Grant of — Petitioners accused charged for offences punishable under Sections 302/109/34, RPC — Case against petitioners is based on circumstantial evidence — Conduct of witness who had seen dead body of deceased being dragged by accused persons is unnatural — As said witness was closely related with deceased being his nephew — Material on record during this stage showing that complicity of accused in committing crime cannot be considered to be foolproof — Bail granted.-

Tirath Singh & Ors vs State & Anr-2010 CRI. L. J. 1336

16) **Confessional statement** -Name of accused came in confessional statement of co-accused- However, no cogent evidence collected by Investigating Officer against accused.

Babulal Ganjhu vs State of Jharkhand-2011 (4) AIR Jhar R 350.

17) **Contact with accused**-accused arrested on the basis of mobile call details-only evidence that he was in contact with the other accused by using mobile-reasonable ground exist to belive that the accused has not committed any offence-

Sk Ayyaz vs. State of Maharashtra -2013 ALLMR 678.

18) **Copy Right Act-** bailable offence-

Cri.L.J. 2007 2025 AP.

19) **Criminal antecedents** -**Fact** that accused had criminal antecedents — cannot be ground to deny Bail .

Maulana Mohd. Amir Rashadi vs State of U.P. & Anr.- Supreme Court of India [Division Bench]- 2012 AIR SCW 1048 (From : Allahabad) :: AIR 2012 SC (Criminal) 469 (From : Allahabad) :: 2012 CRI. L. J. 1444 (SUPREME COURT) (From : Allahabad).

20) **Expeditiously** -Has to be decided expeditiously-

Kashinath Jairam Shetye vs Ramakant Mahadev Sawant and Ors-Bombay High Court (Goa Bench) [DB]- 2013 (2) ABR 11 (Goa Bench) :: 2013 CRI. L. J. (NOC) 301 (BOM.) (Goa Bench) .

21) **Factors** -to be considered — Court not to undertake meticulous examination of evidence while granting or refusing Bail. Criminal P. C. (2 of 1974) S.439 — Bail — Grant of — Factors to be considered — Court not to undertake meticulous examination of evidence while granting or refusing Bail-Section 439 confers very wide powers on the High Court and the Court of Sessions regarding bail-But, while granting bail, the High Court and the Sessions Court are guided by the same considerations as other Courts. That is to say, the gravity of the crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds are required to be taken into consideration. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the Court. The Court has to only opine as to whether there is prima facie case against the accused. The Court must not undertake meticulous examination of the evidence collected by the police and comment on the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial. (Para 10)Section 439 confers very wide powers on the High Court and the Court of Sessions regarding bail. But, while granting bail, the High Court and the Sessions Court are guided by the same considerations as other Courts. That is to say, the gravity of the crime, the character of

the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds are required to be taken into consideration. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the Court. The Court has to only opine as to whether there is prima facie case against the accused. The Court must not undertake meticulous examination of the evidence collected by the police and comment on the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial-

Kanwar Singh Meena vs State of Rajasthan and Anr-Supreme Court of India [Division Bench]-2012 AIR SCW 5654 (From : Rajasthan) :: AIR 2013 SUPREME COURT 296 (From : Rajasthan) :: 2013 (1) AJR 82 (SUPREME COURT) (From : Rajasthan).

22) **Hearing**- of second application- Anticipatory bail- Bombay High Court- Hearing of second application . Each subsequent application be listed before same Judge of Court, who had decided earlier application, particularly when same Hon'ble Judge is available. AIR (1987) 1613, Rel. on. (Para 11)-

Digambar Manohar Satam vs State of Maharashtra-2013 (6) ABR (NOC) 276 (BOM).

23) **Illegal arrest –**compensation- departmental inquiryIllegal arrest of woman.

2013 ALLMR-662-Bharti Khandar vs. Maruti Govindal Jadav

24) **Juvenile Justice (Care And Protection Of Children) Act** (56 of 2000)- Bail to juvenile â€" Rejection â€" Ground that release of juvenile, involved in offence of abduction, was likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger, or his release would defeat ends of justice â€" No inquiry conducted before rejection â€" Criminal antecedents or family backgrounds not brought for consideration â€" Report of social investigation, conducted subsequently, indicated to special circumstance to decline Bail â€" Rejection not proper â€" Bail granted. Criminal P. C. (2 of 1974). Ss. 439, 448. (Paras 10, 11)-Criminal P. C. (2 of 1974) S.439, 441, 448 â€" Bail application for release of juvenile â€" Maintainability under S. 439 of Code â€"

Objection on premise that juvenile cannot be called upon to execute bond and hence his Bail application would not lie under S. 439 â€" Section 441 mandates execution of bond by accused â€" But where accused is minor, no bond need be executed by him and Court can accept bond executed by his sureties â€" Further, for release of juvenile provisions of Juvenile Justice (Care and Protection of Children) Act shall prevail over provisions of Code â€" Section 12 of Act provides for his release with or without surety â€" Bail application for release of juvenile under S. 439 of Code, maintainable. Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Ss. 1(4), 12. (Para 3) Hon'ble Judge(s): S. S. SATHEESACHANDRAN ::

Citations :: **Afsal Ibrahim vs State of Kerala.-Kerala High Court [Single Judge] Bail Appl. No. 6006 of 2013-Decided on 23/09/2013 S.12 â€" 2013 CRI. L. J. 4945 (KERALA HIGH COURT)**

25) **More crimes registered** -Mere more crimes registered cannot be ground for rejection of bail..

Maulana Mohammad Amir vs. State of UP-B.Cr.R. 36.

26) Murder-Trial Was Not Likely to take off**-**

Pradeep Shivraj Shinde-2013 ALLMR-1317.

27) **No direct evidence** - Grant of — Applicant accused charged under Ss. 306/498A and 34 of RPC — No direct evidence regarding abetment/instigation made by accused to commit suicide — Plea that accused persons tried to influence investigation at initial stage not supported by evidence — Mere allegation that accused persons are influential is not sufficient unless there is some material to that extent — Bail granted. Ranbir Penal Code-

Jagdish Kumar & Ors. vs State & Ors.-2011 CRI. L. J. (NOC) 242 (J. & K.).

28) **No local surety can be demanded when the Prisoner/convict from the other state.**

2010 ALLMR-3465 -Subhodh Prasad vs. State of Mah.

29) **No scientific formula** -The Apex Court in Dilip Shankar Koli and Ors. v. State of Maharashtra, 1981 Cri.L.J. 500 held that "there is no scientific formula in the matter of reconsideration of application for bail nor is there any rigid consideration as such.

30) **<u>No specific overt act</u>**-Santosh Rajak and Ors vs State of Jharkhand-2011 (4) AIR Jhar R 96.

31) **No specific Role**-2011 (2) ABR- NOC BOMBAY-129.

32) **Non-bailable warrant** -In absence of accused application for cancellation of Non-bailable warrant is maintainable –

Arunkumar N. Chaturvedi vs. Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra & Anr (Writ Petition No. 4429/2013; D/d-24/12/2013) Bombay- M.L. Tahaliyani J.)

33) **Non-bailable warrant** -Non-bailable warrant Should not be issued at first instance-without using other tools of summons and bailable warrant to secure the attendance of accused-2013 ALLSCR 3350-Vikas vs. State of Rajasthan.

34) **Non-bailable warrant**-Guidelines-Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra & Anr.-AIR 2011 SC 3393 : (2012) 9 SCC 791 : 2011 SCR 300 : JT 2011 (10) SC 253 : 2011 (10) SCALE 233 : 2011 ALLSCR 2706.

35) **Non-bailable warrant**-when issued-

State Of UP Vs. Possu and Anr, 1976-3- SCC-

36) **<u>Offence triable by Magistrate</u>** _and not by Court of Session--Hence Magistrate had jurisdiction to entertain bail applications — No complaint of misuse of liberty by accused persons lodged — Nor alleged that they were likely to abscond and would not face trial — Grant of bail proper-**2012 (2) AIR Bom R 666 (AURANGABAD BENCH). Balasaheb Satbhai Merchant Co-op. Bank Ltd., Kopargaon vs State of Maharashtra & Ors.Bombay High Court**

37) **Parity-** Anticipatory Bail -S. Ashwathappa & Anr vs State-**2011 (4) AIR Kar R 318.**

38) **parity-**Nadeem Shaikh vs State of Maharashtra-Bombay High Court [Division Bench] Crl. Appln No. 1425 of 2009Decided on 23/03/2010-S.389 — Bail pending appeal — Ground of parity —

Offence of murder — Charges levelled against all accused persons who were released on Bail were same — Also evidence against all accused was same except evidence of discovery of body pursuant to statement made by applicant — Parents of deceased did not identify clothes found on skeleton of deceased — Evidence of doctor on point of DNA test and digital Super imposition examination on skull not appearing to be accurate — Bail granted on ground of parity-

2010 (3) ABR (NOC) 308 (BOM.).

39) **Police remand** - not below the rank of Sub- Inspector -The provisions of Section 167(1) Cr.P.C. which provide that an application for police remand can be made only by an officer not below the rank of Sub- Inspector-**Supreme Court of India-Devender Kumar & Anr Etc. vs State Of Haryana & Ors. Etc. on 5 May, 2010-Author: A Kabir-Bench: Altamas Kabir, Cyriac Joseph-CRIMINAL APPELLATE JURISDICTION-CRIMINAL APPEAL NOS.988-989 OF 2010-(@S.L.P.(Crl.) Nos.2967-2968 of 2010)-Devender Kumar & Anr. etc. .. Appellants Vs.-State of Haryana & Ors. etc. .. Respondents**

40) **Police remand** -no court has jurisdiction to authorise police custody of an accused after first 15 days remand Supreme Court of India-Central Bureau Of Investigation, ... vs Anupam J. Kulkarni on 8 May, 1992-CENTRAL BUREAU OF INVESTIGATION, SPECIALINVESTIGATION CELL-I-Vs.-ANUPAM J. KULKARNI-DATE OF JUDGMENT08/05/1992-CITATION: 1992 AIR 1768 1992 SCR (3) 158-1992 SCC (3) 141 JT 1992 (3) 366-1992 SCALE (1)1024.

41) **Police remand** -The first period of fifteen days -Bottom of Form.

42) **Prima facie case-**Further detention not required from the point of view of investigation- in custody for long period-

Shshikant Goma patial vs. State of Maharshtra -2013 ALLMR-2112

43) **Provisional Bail** -Suffering from many diseases- Provisional Bail - Confirmation of â€" Prayer for -Applicant had been suffering from many diseases Appellant after having been released on provisional Bail immediately reported to Hospital, for further check up where he got

treatment â€" Prayer made to confirm provisional Bail on ground that his condition is not going to improve on account of having advanced age -In view of these facts and circumstances, direction issued to extend provisional Bail granted to the applicant.

Jagannath Mishra vs State of Jharkhand-2014 (1) AJR 572.

44) **Regular Bail** - - Regular Bail — Entitlement to — High Court granted anticipatory Bail to accused with conditions including to move for regular Bail within one month from date of arrest and release by police — However, Magistrate rejected application of Bail and issued non-Bailable warrant against accused applicants — Amounts to disregard to order of High Court by Subordinate Court — Order by Magistrate, set aside-

V. M. Ramakrishna & Ors. vs State2012 (2) AIR Kar R 180 :: 2012 CRI. L. J. (NOC) 357 (KAR.).

45) **Right of Silence** :-2013 ALLMR Jou. 308-M.P. Abdul Nazir.

46) S. 107,111,151,41B-Arrest-challenge-legality-2013ALLMR- Subhash Namdev desai vs. State of Maharashtra

48) S. 167 (2)-Computed-from the first day when the accused is brought before the court along with the remand-.
Shivaji vs. State of Mah. 2010 AllMR-3794

49) S. 209(b)- Powers of Magistrate — Scope of provision — Under S. 209(b), Magistrate has discretion to direct accused to appear before Sessions Court — And can take Bail bonds or surety bonds either for their appearance before Sessions Court or even until conclusion of trial — Provision thus grants discretion to Magistrate even to take Bail bonds and surety bonds from accused until conclusion of trial before Sessions Court- Bail — Grant of — Validity — Bail once granted by Court would be in force till conclusion of trial, unless it is cancelled — Thus Bail granted by Fast Track Court not being cancelled, would be valid till conclusion of trial.-A bail once granted by the Court would be in force till conclusion of the trial, unless, it is cancelled for any such reasons. In instant case, the bail, which was granted by the Fast Track Court was not cancelled and therefore, it would be valid till conclusion of the trial. Therefore, when either the Sessions Court or the High Court grants the bail under Section 438 or 439 Cr. P.C., the Order of bail would be in force till conclusion of the trial. Therefore, there was no necessity for the accused to submit a bail petition under Section 439, Cr. P.C. before the Sessions Judge, after committal of the trial. To mean, the Sessions Judge was not required to insist the accused to apply for bail as the bail which was granted to the

accused by the Fast Track Court was valid till conclusion of the trial. (Para 5)A bail once granted by the Court would be in force till conclusion of the trial, unless, it is cancelled for any such reasons. In instant case, the bail, which was granted by the Fast Track Court was not cancelled and therefore, it would be valid till conclusion of the trial. Therefore, when either the Sessions Court or the High Court grants the bail under Section 438 or 439 Cr. P.C., the Order of bail would be in force till conclusion of the trial. Therefore, there was no necessity for the accused to submit a bail petition under Section 439, Cr. P.C. before the Sessions Judge, after committal of the trial. To mean, the Sessions Judge was not required to insist the accused to apply for bail as the bail which was granted to the accused by the Fast Track Court was valid till conclusion of the trial.
NageshDevadiga&Ors. vs State-Karnataka High Court -Criminal Petition No. 6471 of 2009Decided on 04/06/2012-2012 (4) AIR Kar R 124.

50) S.167 (2)-Court not considered which section applicable-
2013 ALLMR-4169 -Deelip vs. State of Mah.

50) S.414-Purchasing stolen gold ornaments.
Bineesh vs State of Kerala-2012 CRI. L. J. (NOC) 472 (KER.) .

51) S.437(6)-no progress since expiry of 6 month-bail granted-
2013 ALLMR 661-Balya@ Bhalchandra Ananadrao madavi vs. State of Maharshtra.

52) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (1989 Bail granted on ground that incident not occurred in public view — F.I.R. and spot panchnama showing that alleged incident occurred in house of complainant — Satisfaction recorded by Court while granting Bail was not shown to be pervers — Conclusion reached was not without recording reasons — Bail not to be cancelled.- **2012 (3) AIR Bom R 235 (AURANGABAD BENCH).)- Sanjay Dattu Kamble vs State of Maharashtra & Ors-Bombay High Court (Aurangabad Bench) .**

53) Second or successive application -Second or successive application is maintainable if there is change in fact situation or in law or where earlier finding has become obsolete.
2005 Cr.L.J 944(SC) FB.

54) Substance of accusation -substance of accusation and belief of Magistrate and not the nomenclature under which case is registered-Consideration — It is substance of accusation and belief of Magistrate and not the nomenclature under which case is registered — Every person released on

Bail under S. 167(2) shall be deemed to be so released under provisions of Chapter XXXIII of Code — But, that does not ipso facto mean that Bail order assumes content and character of Bail order of the kind conceived under Ss. 437 and 439 — Bail granted for default cannot be put on a higher pedestal than Bail granted otherwise. 437(5), 439(2) — Bail — Cancellation — When Bail granted otherwise than under S. 167(2)(a) can be cancelled, if investigation discloses commission of graver offence, there is no justification to hold that an accused released on Bail on default, his Bail cannot be cancelled on submission of charge-sheet in case it discloses commission of graver offence — However, mere submission of charge-sheet for graver offence only shall by itself be not the ground for cancelling Bail — Before cancelling Bail, Court will have to be further satisfied that case is of such a nature in which no Court would have accepted plea of Bail-Earlier, case under Ss. 363 and 365 registered — Subsequent investigation revealed peitioner's dominant role in kidnapping of a child — Investigation disclosed graver offence of such nature that no Court would have granted Bail to her — As such, Sessions Judge rightly did not allow her to continue on Bail granted earlier for default.
Usha Devi vs State of Bihar & Ors.- 2007 (2) AIR Jhar R 270 (Patna High Court)-

55) Trial -Trial likely to take long time for completion - Applicant charged under Corruption Act and Karnataka Control of Organised Crimes Act — Trial likely to take long time for completion — Applicant had already been in jail for 3 years 9 months — Considering nature of involvement and time spent in jail BAIL GRANTED
Jaya Simha vs State of Karnataka. 2007 AIR SCW 7056 AIR 2008 SUPREME COURT 377 -Supreme Court of India [Full Bench]

1. **Anticipatory Bail – Murder case** – Thee is no allegation that the accused hit the deceased by any dangerous weapon – Accused deserve to be released on anticipatory bail.

   Suresh K. Pol. –Vs- State of Maharashtra 2009 All.M.R.(Cri.) 3289 (Bom)

2. Cr.P.C. 438, 439 – Murder case – Appellants not traced out at first stage of investigation but included among suspected pursuant to further investigation – Directions issued directing release of appellants on bail if appellants surrender before police within 2 weeks.

Abdul Hamit Ansari –Vs- State of Maharashtra 2000 Cri.L.J. 4660 (SC)

3. Cr.P.C. 438 – Anticipatory bail – Second application is not barred – Court may consider it on the subsequent events and developments.

Yuvraj Gaud –Vs- State of Madhya Pradesh, 2005 All.M.R.(Cri.) Journal 12.

4. Anticipatory Bail – Cr.P.C.438 – Bail is not to be withheld as a punishment – The requirements as to bail are to secure attendance of accused at trial.

2005 All.M.R.(Cri.) Journal 12

5. Anticipatory Bail after issuance of Summon Warrants :- I.P.C. 498-A, 306, 34 Cr. P.C. 438, 204 – Anticipatory bail can be granted even after summons or warrants are issued by the court taking cognizance.

- Accused in Government Service – No apprehension of his tampering with evidence or absconding – Accused entitled to be granted with Anticipatory bail.

Akhlaq Ahmad F. Patel –Vs- State of Maharashtra , 1998 Cr.L.J.3969

6. Anticipatory Bail – Cr.P.C. 438 – Accused a Patwari alleged to have entered in to Criminal conspiracy in granting a patta of certain land – Offences under Sec. 420, 467, 468, 471 and 120-B of I.P.C. – He was summoned by the court through bailable warrant and subsequently by a warrant of arrest Accused entitled to anticipatory bail.

2005 All.M.R.(Cri.) Journal 12.

7. Anticipatory Bail – Cr.P.C. 438 – Offence under 366 – A of I.P.C. – Applicants name does not appear in F.I.R. – Main accused already been granted bail by C.J.M. – Applicant belongs to respectable family has deep roots in the society – No chances of absconding or evading the process of law – Applicant entitled for anticipatory bail.

Arun Sharma –Vs- The State of Assam, 1986(2) Crimes 61 (Gau) (DB)

8) Bail – Acquired by High Court – Specail Leave against said order granted – Accused is a young man with a family to maintain – Any possibility of the absconsion or evasion or other abuse can be taken care by direction that the petitioner will report himself before police once every forthight.

The state of Rajasthan –Vs- Balchand AIR 1977 SC 2447

9) Anticipatory Bail – Interim Bail – Cr.P.C. 1973, S. 438(3)(4) – Inserted by Maharashtra Amendment Act (193) – Application by State for presence of applicant on date fixed for hearing – No such order can be passed without granting any interim protection to the accused.

Ashik Rameshchandra Shah –Vs- State of Maharashtra 2010 All.M.R.(Cri.) 2524 (Bom)

10) Anticipatory Bail – Offences under Section 420, 467, 468, 120-B of I.P.C. – Complainant agreement with accused for purchase of flats – Accused for purchase of flats – Accused after receipt of, consideration from complainant sold those flat to somebody else – Challan is filed – It is no ground to reject the anticipatory bail application – The dispute is purely of civil nature – Anticipatory bail granted to the appellant.

Ravindra Saxena –Vs- State of Raj. 2010 All.M.R.(Cri.) 619 (SC)

11) Anticipatory Bail - Cr. P.C. Sec.438 – Offences under Section 452, 323, 294 and 506 of I.P.C. – Plea that applicant had earlier lodged complaint against police and to take revenge police wanted to arrest applicant – Fit case for protection of anticipatory bail to accused.

Mohd. Amin Memon –Vs- State of Chattisgarh 2005(2) Crimes 299 (Chh)

12) Anticipatory Bail – Malafides of Police Illegal demand by police to accused to pay Rs.1,50,000/- - The case not only one of false implication but also discloses the high handed activities of the police officers – Accused entitled to get anticipatory bail – The entire investigation will have to be handed over to some independent agency such as Crime Branch C.I.D. for proceeding against the concerned police officers.

Sureshkumar Ishwarlal Chordiya –Vs- State of Maharashtra 2005 All.M.R.(Cri.) 1952

13) Anticipatory Bail – Offence under SC – St Act – Contents of F.I.R. recommendation of S.P. not prima facie disclosing commission of offence under SC & ST act – Anticipatory Bail application maintainable.

Bhupendra Das Vaishnava –Vs – State of Chhattisgarh 2006 Cr.L.J. 4346

14) Cr. P.C. 438 – SC & ST Act – Ss. 18, 3(1)(x) - Anticipatory Bail. If complaint is found to be false, anticipatory bail cannot be denied to accused.

Complaint lodged after 14 days of alleged incident – Further dispute was pending between complainant and accused – This raises a doubt about genuineness of complaint – Accused entitled to grant anticipatory bail.

Somesh Das –Vs- State of Chhattisgarh 2004 Cr.L.J. 680

15) Anticipatory Bail – SC & ST Act – There is delay of 1 day in lodging the complaint – Also there is political touch to the complaint – Ulterior motive of the complaint cannot be ruled out – Accused entitled to anticipatory bail – even though complaint disclose a commission of cognizable offence.

2010 All.M.R.(Cri.) Bom.

16) Anticipatory Bail – Cancellation of – No allegation of any attempt by accused persons to avoid their presence before investigating officer for investigation - Anticipatory bail granted cannot be cancelled

Madhu Garg –Vs- State 2009 Cr.L.J. 1067

17) Cr. P.C. 438 – Offence under SC & ST Act – with 323, 506, 353 and 186 – Complainant belonging to Scheduled Tribe working in offence of Janpad (Vikas Khand) was beaten and abused by applicants who had approached under Rojgar Guarantee Scheme – Counter case was registered between parties – Prosecution found not have collected any material against applicant disclosing prima facie case – Fit case for grant of anticipatory bail.

Sanjay Singh –Vs- State of Chhattisgarh 2009(1) Crime 232 (Chh.)

18) Anticipatory Bail - Duration – Cr.P.C. 438 – Anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire.

K.L. Verma –Vs- State 1997 All.M.R.(Cri.) 1385

19. Anticipatory Bail – Main accused already arrested and released on bail – Custodial interrogation of applicant is not necessary – Applicant entitled to get anticipatory bail.

Mohd. Yakubdin Khan –Vs- State of Maharashtra 2001 All. M.R. (Cri.) 1892

20) Anticipatory Bail – Dowry death – Offences under section 304-B, 406, 498-A r/w 34 of I.P.C. – Young wife committing suicide within two yeas of her marriage – Allegation of demand of dowry by her parents – Accused taking plea that she was suffering from mental illness – Both sides making attempt to create

documents to support their charges – The correctness and genuineness of the said documents could be gone during the trial and not at the stage of considering application for grant of anticipatory bail – Her husband and in laws entitled to anticipatory bail.

M.P. Lohia –Vs- State of West Bengal 2005 Cr.L.J. 1416

21) Refusal of Anticipatory bail is no ground to refuse regular bail to accused – Consideration for granting bail are different from that of anticipatory bail.

Rajeevan B. –Vs- State of Kerala 2009 Cr.L.J. 1031

22) Parity – In rejection of Bail.

There is no parity in matter of rejection of bail – Bail of similarly placed co-accused cannot be rejected merely because bail of other accused has been rejected by another Bench / Judge.

Satish –Vs- State of U.P. 2010 Cr.L.J.(NOC) 304 (All.)

23) Cr. P.C. - Anticipatory Bail – Offence U/s 294, 354, 500, 506, 509, 34 of I.P.C. – Petitioners were alleged to have subjected victim to sexual harassment and misbehaviour – Prosecution was launched after one year of incident – Petitioner deserved to be granted anticipatory bail.

Prof. D.N. Rao –Vs- State 2001(3) Crimes 409 (Ori)

24) Anticipatory Bail – Parity – Co-accused with similar allegations have been granted anticipatory bail – Held, Appellant entitled for anticipatory bail.

KamaL.J.eet Singh –Vs- State of Punjab 2005(7) SCC 226

25) Anticipatory Bail – Cr. P.C. 438 – Offence under Sec. 395, 397, 467, 468 and 471 of I.P.C. – Different versions given in three different complaints relating to same occurrence – Beside allegations with regard to offences are added at later stage – Held, no interference is called with order granting anticipatory bail.

Pravinbhai Kashirambhai Patel –Vs- State of Gujrat 2010(3) SCC (Cri.) 469

26) Anticipatory Bail – Can be granted by invoking writ jurisdiction under Art. 226 of the Constitution

Capt. Satish Sharma –Vs- Delhi Administration 1991 Cr.L.J. 950

27) Bail by invoking provisions of sec. 482 of Cri. P.C. and Art. 226 of the Constitution of India.

Penal code (1860), Ss. 498-A, 406 – F.I.R. against petitioner who is not relative of husband – S. 498-A does not get attracted – Allegations petitioner about not returning jwellery which belonged to the complainant Held, The allegations are extremely wild and disgusting – In such cases interests of accused required to be protected – The petitioner accused would not be required to attend the proceedings unless specifically directed by the court to do so and that too in the case of extreme necessity – Similarly no --- step shall be taken against her – She shall be granted bail by the court trying the case – The Trial Court shall be careful while considering the framing of charge – The appellant shall not be tried for offence u.s. 498 – A of I.P.C.

Vijeta Gajra –Vs- State of NCT Delhi 2010 ALL MR (Cri.0 2656 (SC)

28) Transit Bail – Cr.P.C. 438 Court within whose jurisdiction only arrest is apprehended but offence is not registered has jurisdiction to entertain and grant anticipatory bail to accused.

Meer Ahmad Ali Khan –Vs- State of Maharashtra 2001 All.M.R.(Cri.) 1696

(See also 1982 Cr.L.J. 61)

29) Bail – When accused appears in court who issued summons in the non bailable offence – If the accused is wiling to offer bail he should not be remanded to custody.

Offence U/s 326, 149 of I.P.C. and section 27 of the Arms Act – Final report is filed – The Magistrate issued summons U/s 204 Cr.P.C. – Having exercised the discretion U/s 204 Cr.P.C. to issue only a summons and having led the accused by such conduct to believe that he can safely appear before the court – It would be impermissible for any court thereafter to remanded the accused to custody.

Sreekumar –Vs- State of Kerala 2008(4) Crimes 327 (Ker.)

30) N.B.W. – Cr.P.C. Sec. 71 – Non Bailable Warrant and Exemption – When N.B.W. should be issued – Before issuing a non-bailable warrant Magistrate may issue a summons and then a bailable warrant and as a last resort N.B.W. be issued – Magistrate should not insist on presence of accused at all times unless it is absolutely necessary.

Ramesh Kotecha –Vs- State of Maharashtra 2010 All.M.R. (Cri.) 2368

31) N.B.W. – Cr.P.C. Ss. 70, 87 – Constitution of India Art. 21 – Arrest by non-bailable warrant in the first instance – reckless arrest of a citizen by a competent

court without first satisfying itself of such necessity and fulfillment of the requirement of law is actionable as it violates not only fundamental rights but such action deserves to be condemned being taken in utter disregard to human rights of an individual citizen.

Shri Walmik Deorao Bobde –Vs- State of Maharashtra 2001 All.M.R. (Cri.) 1731

31) Wrongful Arrest – Person who was acquitted 9 years back was arrested detained and wrongfully confined pursuant to non bailable warrant issued by the court – State is liable to pay compensation Rs.10,000/- to the petitioner – also cost of Rs.5000/- awarded to petitioner.

2001 All.M.R.(Cri.) 1731 (Bom.) (DB)

32. Cr.P.C. Ss. 70, 71 – Accused not attending court on date of hearing – Issuance of non-bailable warrant without looking into cause of absence – Not justified.

- Execution of arrest warrant after it was cancelled – after getting necessary documents confirming cancellation of warrant, it was duty of the concerned police officer to tender necessary apology to the petitioner for executing such warrant that too on holiday – failure to tender apology by police officer his duty in the manner he was required to perform as a responsible police officer – It is a clear case of unnecessary interference with the liberty of the citizen – Cos of Rs.2000/- imposed.

Mr. Raghuwansh Dewanchand Bhasin –Vs- State of Maharashtra 2008 All.M.R.(Cri.) 1684 (DB)

33) N.B.W. – Cancellation of – For deciding the application for cancellation on non-bailable warrants the presence of accused is not necessary – The court cannot insist for presence of the accused.

Prem Cashew Industries –Vs- Zen Pareo2001 All.MR (Cri.) 33

34) N.B.W. – Exemption from personal appearance – Cr.P.C. 205 -

A person against whom a warrant of arrest has been issued by a magistrate can appear through counsel and claim exemption under Sec.205 Cr.P.C.

Rohit S. Ved –Vs- State of Kerala 2009 Cr.L.J. (NOC) 284 (Ker)

35) Exemption during trial – N.B.W. – Cr.P.C., S. 317 Trial in absence of accused – Accused represented through pleader – The Magistrate rejecting the representing issued N.B.W. by canceling bail bonds – Held, if on preceding dates it

was not clearly directed that personal exemption of accused u/s 317 of Cr.P.C. will not be permitted on next date providing reasonable opportunity to the accused to appear in person the magistrate cannot cancel bail bond while rejecting his application U/s 317 of Cr.P.C.

Sandip Kumar Tekriwal –Vs- State of Bihar 2009 Cr.L.J. 523

36) Issuance of Non bailable warrants without service report of summons is illegal.

Cri. P.C. (2, 1974) Ss. 82, 83, 482 – Summons were issued against petitioner in first instance but no service report was received – Yet court proceeded to issue bailable warrants followed by non-bailable warrants and process of proclamation – Such procedure is contrary to procedural law – Warrants of arrests and processes issued against accused are liable to be quashed.

M/s Kamla Construction Co. & Ors – Vs- State 2011 Cri. L. J. (NOC) 233 (Jhar)

37) For the purpose of search accused need not be in custody and hence entitled to bail ;-

Courts do not think that the appellant has to be taken in to custody for making a search of premises in her presence this can be done without her being taken in to custody the other ground that is put forward is the appellants presence as required by the police for interrogation in connection with investigation courts make it clear that the appellant shall appear for interrogation by the police whenever reasonably required subject to her right under article 20(3) of the constitution.

Miss Harsh Sawhney –Vs- Union Territory Chandigarh 1978 Cr.L.J.774 (SC)

38) Reasons should be mentioned while refusing bail – The learned session judge has not mentioned as to what were the consideration on which he was inclined to refuse bail to the applicant – The applicant was entitled to bail.

1999 L.J. 1531

39) The offence under which the crime is registered is not so much important –

The case of each accused has to be considered on its own merit –

Merely because it is stated by the police that the person before the court is an accused in a case failing under section 302 IPC the court will not be justified in at once refusing bail to that person. The court has both a right and a duty to satisfy itself whether there are reasonable grounds for believing that the accused has involved himself in an offence punishable with death or imprisonment for life – It the court chooses to accept the police report without applying its mind and examining the materials placed before it the court will be failing to discharge its statutory duty under the code – Though the sections under which the case is registered may have some bearing that cannot certifiably be the dominant consideration whether there are reasonable ground or not for believing that the accused has been guilty of an offence punished with death or imprisonment for life is a matter to decided judiciously by the court.

State of Kerla –Vs- M.K. Pyloth 1973 Cr.L.J.869

40) Accused is innocent unless proved guilty hence elaborate reasoning in the order for bail should be avoided.

As embedded in the criminal jurisprudence obtaining in this country courts exercising bail jurisdiction should refrain from indulging in elaborate reasoning in their order – In that matter the principle of not guilty till proved guilty by competent court gets destroyed even though such views are tentative and not final.

1996 Cr.L.J. 2469 SC

41) Refusal of bail indirectly amounts to punishment to accused before his conviction -

Refusal of bail is an indirect process of punishing an accused person before he is convicted. This is a confusing regarding rational of bail.

This court has explained the real basis of bail law in **Gurucharan Singh – Vs- State Appellant was allowed to continue on bail.**

1978 Cri.L.J. 844

42) If evidence leads to two interpretations the interpretation in favour of the accused must be adopted

The evidence must point out only to the guilt of accused and exclude all reasonable hypothesis of the innocence of the accused. When two interpretation available one in favour of accused must be adopted.

1996 Cri.L.J. 257

43) Unlawful Activities Prevention Act :

The allegation are neither punishable with death or imprisonment for life. Paper report does not contain any element of offence under the said act. **State has not filed any counter**. The accused – petitioner be released on bail.

1981 Cri.L.J. 1736

44) Bail can be granted at any stage of investigation – even during PCR.

As soon as a person is suspected or accused of an offence application for bail would lie and must be heard no matter whether investigation is completed or not. The learned session judge is in manifest error when he thinks that during the investigation it is not possible for him to grant bail. According to clause (2) of Section 437, Cr.P.C. an accused person can be released on bail at any stage of investigation in proper cases.

1963(2) Cri.L.J. 97

45) Bail during Police Remand – Cri. P.C. (2 of 1974), S. 439 – Bail – Even if the Magistrate Court granted Police remand (PCR) the accused can file bail application before session Court – Such bail application should be considered on merits should be considered on merits, even if there is order of Police Remand.

Krushana Guruswami Naidu – Vs- The State of Maharashtra 2011 Cri. L. J. 2065 (Bom)

46) Merely because investigation agency would like to interrogate the accused bail cannot be refused.

It cannot be said that granting of bail would hamper the investigation of the case.

1966 Cri.L.J. 863

47) Accused not connected with the offence of the rape -

The case is not committed to court of session from there and half years – The applicant is entitled to bail.

1991 Cri.L.J. 1662

48) Position held by prosecution agency without looking in to other material is illegal

It was necessary for the court to consider the further materials collected by the investigation agency – the court below misdirected itself in refusing to look in to such statements and concluding that it is not a case for granting bail.

1990 Cri.L.J. 788 SC

49) The general law is to allow the bail rather than to refuse it

The principle to guide court is the probability of the accused appearing to take the trial and not his supposed guilt or innocence – The law presumes that an accused person to be innocent till his guilt is proved and that he should be allowed opportunity to look after his own case unless the circumstance are such that he should not be released on bail.

1969 Cri.L.J. 128

50) SC & ST Act – Bail could be granted by Magistrate even if it is secession tribal case.

2005 Cri.L.J. 2984

51) SC & St Act 3 (1) (X) Anticipatory Bail :-

The contents of FIR even if treated to be correct does not make out any case under SC & St Act, the accused entitled to anticipatory bail.

2009 All M.R. CRJ 2984

52) When Report lodged after delay fit case for anticipatory bail

2002(6) C.R.J. 65

53) When case is us 420 I.P.C. Investigation is pending purely inability to make payment Bail application allowed with conditions.

Pankaj Mittal –Vs- State 2002(5) CRJ 411

54) When FIR was lodged after 5 days of incident– Bail granted

Mohar Singh –Vs- State 2002(4) Cri.J.J. 640

55) When allegation against the accused are general and not substantiated bail should be granted.

AIR 1930 Bom. 484

56) No suggestion that the accused was likely to flee from justice or tamper with the prosecution evidence anticipatory bail could be granted.

Where in a case no suggestion was made that the accused was likely to flee from justice or tamper with the prosecution evidence it was held that in the aforesaid facts and circumstance the anticipatory bail could be granted.

K.K. Joidia –Vs- State AIR 1980 SC 1632

57) The mere fact that the bail applications of some of the appellants had been rejected is no ground for their immediate arrest-

Investigation officer did not consider it necessary having regard to all the facts and circumstance of the case to arrest the accused in such a case – there was no justification for the High Court to direct the State to arrest the appellants against whom the first information report was lodged as it amounted to unjustified interference in the investigation of the case. The mere fact that the bail applications of some of the appellants had been rejected is no ground for directing their immediate arrest. In the very nature of things a person may move the court on mere apprehension that he may be arrested. The court may or may not grant anticipatory bail depending upon the facts and circumstances of the case of the case and the material placed before the court, there may however be cases where the application for grant of anticipatory bail may be rejected and ultimately after investigation, the said person may not be put up for trial as no material is disclosed against him in the course of investigation - The High Court proceeded on the assumption that since petitions for anticipatory bail had been rejected there was no option open for the State but to arrest those persons. This assumption is erroneous A persons whose petition for grant of Anticipatory bail has been rejected may or may not be arrested by the investigating officer depending upon the facts and circumstances of the case, nature of the offence, the back ground of the accused, the facts disclosed in the course of investigation and other relevant consideration.

M.C. Abraham –Vs- State of Maharashtra

(2003) 2 SCC 694 : 2003 SCC (Cri.) 628

58) SC and ST Act S. 18 – Anticipatory bail – offence under Ss. 323, 294 506, 34 of penal code and S.3(1) of Atrocities Act – No ingredients found in FIR about offence under Atrocities Act – offence under penal code being bailable incident happened because of earlier political enmity Bar under S.18 of Atrocities Act – Does not apply – accused entitled to grant of anticipatory bail.

2006 Cr.L.J.(NOC) 371 (MP) : 2006 1 MPL.J. 439

59) Where it was alleged against complainants that he lodged an FIR of such criminal case which was never committed it was held that in order to be acquainted with veracity of the case it must be investigated by C.B.I.

Uma Shankar –Vs- Commissioner of Police

1995 Cri.L.J. 3612 : 1996(11) SCC 714

60) IPC 498 A, 406 – Anticipatory Bail

Petitioners are father in law and mother in law and devar of complaint no report lodged by complaint during nine years although alleged demand of dowry soon after marriage fit case for anticipatory bail.

2002 (6) CRJ 65 Rajsthan High Court

61) Anticipatory Bail – Consideration of material – Plea of alibi and defence version can be Taken in to consideration.

To arrive at a prima facie conclusion whether a case is made out against the accused and whether a plausible defence and allegations made against the accused in mechanical manner. **Therefore it cannot be contended by public prosecutor that the learned session court had jurisdiction to take in to account the plea of alibi or defence version of the accused.**

State of Gujrat –Vs- Dipak Jaswantal Seth 1999 Cri.L.J. 1621

62) Anticipatory Bail cannot be denied on ground of better qualitative elicitation of custodial interrogation.

(1999 Cri.L.J. 162)

63) Plea of separate living – Marriage took place 2-2 years ago – Bail granted.

There are general allegations of the demand of dowry it has been argued on behalf of the applicants that he is living separately the marriage took place 2 ½ years ago.

The accused applicant charged under Section 304,, B 20, 498A, 302 IPC and 34 Act shall be admitted to bail on his furnishing a personal bond and two sureties each in the like amounted to the satisfaction of the CJM concerned.

Lal Singh –Vs- State of U.P. 1999 Cr.L.J. 3705

64) Delay in recording statement by police – Accused be release on bail

Where statement of complainant and witness have been recorded by police after an in ordinate and unexplained delay Accused can be release on bail.

Ravindra Pratap Sahi –Vs- State of UP 1988(1) Crimes 575 All

65) **Principles regarding 438 are also attracted to application U/s 439 1988 Cri.L.J. 252 (Bom.)**

66) Report lodged after delay fit case for Anticipatory Bail

2002(6) CRJ 65

67) IPC S.420 - Anticipatory Bail – investigation is pending – Purely inability to make payment – Bail application allowed with conditions.

Pankaj Mittal & ors. –Vs- State of Raj 2002(5)CRJ 411 2002(2) R Cr.D.307

68) When FIR was lodged after five days of incident – exaggerated version of establishment – Bail granted.

Motor Singh & Anr. –Vs- State 2002(4) CRJ 646

69) When allegation against the accused are general and not substantiated bail should be granted.

AIR 1930 Bom. 484

70) Anticipatory Bail – Where FIR is vegue and there is no statement to substantiate allegations - Anticipatory Bail should be granted.

The mere mention of a name in FIR or complaint petition directed to be treated as FIR is not sufficient for refusal of Anticipatory Bail.

1975 Cr.L.J. 1815

71) Co-accused similarly placed were granted bail – Third accused entitled to Anticipatory Bail.

Where two co-accused similarly placed were granted bail the third accused is also entitled to anticipatory bail.

1989 Cri.L.J.512 1988(3) Crimes 472

72) SC & ST Act 3(1)(x) :- The contenpt's of FIR even if treated to be correct does not make out offence under Atrocities Act - Anticipatory Bail granted.

2007 ALL MR (Cri)

73) Complaint filed after 9 months of alleged incident Prosecutrix aged 27 years having degree in law – to is a fit case to grant Anticipatory Bail

2007 All M.R.(Cri.) 1693

74) Cr. P.C. – Penal Code 363, 366 and 376 – Prosecutrix aged 17 years moved with applicant from 30-6-2002 to 07-09-2002 from place to place – Fit case to allow bail to applicant.

Prosecutrix aged 17 years was alleged to induced by applicant to go with him promising to marry with her – prosecutrix moved with applicant from 30-6-2002 to 7-9-2002 from place to place fit case to allow bail to applicant.

2003 Crimes 558 (HC)

75) Failure to produce accused within 24 hours – The police officer is guilty of wrongful detention.

AIR 1961 Bom. 42

76) If the case diary is not sent Magistrate has no jurisdiction to direct the detention of the arrested person in police custody– He may release him.

The Police Officer must produce a copy of the entries in the casse diary along with the accused when produced before Magistrate U/s 167(1). If the case diary is not sent Magistrate has no jurisdiction to direct the detention of the arrested person. He may release him.

AIR 1964 Manipur 39 1997 Cri.L.J. 1086

77) If the police does not produce its diary to justify remand the Magistrate would be exceeding his authority in ordering further remand.

AIR 1961 Tri. 4

78) Right of relatives of accused to supply food and clothing in PCR

The Police have not right to refuse to allow the relative of the accused person remanded to police custody to supply him with food and clothing so long as they satisfy themselves that no objectionable articles are supplied.

AIR 1931 Lah. 476

79) When the accused himself surrender before the police – custody could not be granted after expiry of first fifteen days.

When the accused himself surrender before the police then police custody could not be granted after expiry of first fifteen days.

Magistrate must apply his mind before granting PCR – The Magistrate is expected to apply his mind before passing the order since he performs the judicial function under which the accused is to be detained in jail.

1990 Cri.L.J. 2685

80) Magistrate to go through the contents and form an opinion in regard to the section under which the accused is to be detained in jail.

The Magistrate is within his right to go through the contents of the complaint and form an opinion in regard to the section under which the accused is to be detained in jail.

1990 Cril.L.J.2082

81) (PCR) S.167-A of Cri. P.C. Magistrate acting under this section exercise judicial function requiring application of a judicial mind.

1984 Cri.L.J. (P&H)

82) Delay in investigation by the police in utter disregard of the fact that a citizen has been deprived of his freedom on the ground that he is accused of an offence is condemned.

It is unfortunate indeed pathetic that there should have been considerable delay in investigation by the police in utter disregard of the fact that a citizen has been deprived of his freedom on the ground that he is accused of an offence.

AIR 1979 SC 1518

83) Illegal arrest and duty of Magistrate – accused can not be detained further or should not be asked to give bail.

When a person is brought before a Magistrate under arrest it is the duty of the Magistrate to see that the arrest was legally made and if the finds that he arrest was illegal it is his duty to direct the release of the person immediately. The S.167 is provided as a check to prevent the abuse of the wide powers given to the police for arrest without warrant. It will be wrong for a magistrate either to

order detention of the accused U/s 167 or to call upon him to produce sureties under section 436(1) or 437.

1962(1) Cri.L.J. 673

84) While granting PCR the judge has to apply his mind - When judge himself is a witness he cannot decide it - He is disqualified to decide it

In coming to conclusion the Magistrate has to exercise his mind – his judicial mind and only when the Magistrate does apply that mind then it can be said that the order made by the Magistrate for the detention in prison of a person was a valid order.

A Magistrate who had himself been a witness of the incident cannot bring to bear an impartial and judicial mind to decide whether or not the accused is to be remanded to custody the Magistrate in such case almost acts as a judge in his own cause **the Law never countenances a judge who is a judge in his own cause.**

AIR 1959 ALL 384

85) Where there is information laid against the person and is suspected only and remotely by the complainant – a remand would not be justified.

AIR 1930 ALL 259

86) Magistrate has no powers as a police officer to investigate and keep an accused person in custody for the purpose of investigation on a complaint case.

AIR 1930 ALL 259

87) Order of detention must be in prescribed form -

When Magistrate makes orders of remand U/s 167 they should make the order in prescribed form and not on mere chits of paper.

AIR 1959 ALL 384

88) Illegality committed by Addl. District Judge -

The actions of the Additional District Judge in passing the order remanding the accused to army custody is highly improper illegal and ultra vires of the Constitution

1992 Cri.L.J. 2147

89) Compulsive Bail S. 167(2) Right to get bail accrues on expiry of 60 or 90 days from the date of first remand depending on the nature of the offence and continues till the charge sheet is filled.

90) Charge sheet filed without papers accused will have a right to be released on bail.

If a charge sheet is filed without filling the papers mentioned in Sub-section (5) of 173 it is not complete and if complete charge sheet is not filled within 60 or 90 days the accused will have a right to be released on bail.

1993(2) Crimes 438

91) Incomplete charge sheet filed with incomplete investigation to frustrate right of the accused u.s. 167 (2) of Cri. P.C. - Indefeasible right had been accrued to accused to be released on bail. As a matter of right the accused entitled t get bail.

2002 Cri.L.J. (NOC) 282 (A.P.)

2001 (2) Andh. LT (Cri) 329 Jalakanti Brahma Reddy –Vs- State.

92) The charge sheet filed without statement of witness was no charge sheet in the eyes of law and cannot defeat the right of accused to get bail under this provision.

1998(1) Crimes 409(Cal)

93) A preliminary charge sheet is not a police report and submission of that report will not affect the right of the accused to get compulsory Bail.

Under the proviso to subs (2) of S. 167 any report submitted by the police without completion of the investigation is no report at all under S. 173(2) and the accused in such a case is entitled for bail.

1976 Cr. L. J. 1247

94) Mechanical Act by Magistrate

The detention of an accused for 6 years is indefensible and shows that the Magistrate concerned has been mechanically authorizing repeated

detention unconscious of the provisions of law that on expiry of 60 or 90 days accused is entitled to bail if charge sheet has not been filed within that period.

1980 Cri.L.J. 546 (SC)

95) Magistrate cannot direct detention when the arrested person informs the Magistrate that he has not been told of the reason of his detention.

AIR 1963 MANI 12

96) If a person is detained in police custody beyond 24 hours and if he escapes from custody then no offence under Section 225-B will be made out.

1955 NUC 2355 (HYD)

97) I.P.C. 224 – When arrest and detention of accused is illegal, unlawful and unauthorized then escape by accused from such custody would not make him liable for proceeding u.s. 224 of I.P.C. **Prakash –Vs- State 2007 ALL MR (Cri) 371.**

98) When Police Officer had filed affidavit stating therein that further action against petitioner would be taken only if fresh complaint is filed – causing arrest in breach of said undertaking was improper.

2004 .L.J. 2278

99) The arrest of a proclaimed offender said to be illegal if it is not proved that the proclamation is duly published.

100) It is not sufficient for a Sub-Inspector to say or write that he is a proclaimed offender.

AIR 1937 Sindh 254 1977 Cri.L.J. 984 (Del)

101) Where a person is arrested on suspicion it is the duty of the police to carry out prompt investigation.

AIR 1956 Tri. 27

102) Cr.P.C. 110 – In absence of any fear of creation of problem for security of community arresting an applicant on basis of chapter proceedings illegal cost of Rs.25000/- imposed.

1999 Cri.L.J. 2676 (Bom.)

103) Cr.P.C. 41 – On mere suspension police must not arrest unless the suspicion is well founded.

1989 Cri.L.J. 1209 1989 Crimes 746

104) Malafides by investigating agency High Court may extend its relief in view of article 21.

If the police is found from beginning to be harsh and unfair to accused High Court may extend its relief in view of article 21 of the Constitution. In case the facts were suggesting the dubious conduct of the investigating agency.

1989 Cr.L.J.580

105) Cruel torture by police the author of torture sought to be punished

Cruel torture by police on lady rendering her permanently crippled the author of torture and inhuman assault sought to be punished.

1990 Cri.L.J. 2010

106) Cr. P.C. 44 – Arrest by Magistrate – when an officer not a Magistrate and also no offence is committed in his presence he can not arrest.

1968 Pat.L.J.R. 600

107) When person submit to custody no use of force is permissible

Confinement and rough handling are not permissible and are contrary to law when the person to be arrested submits to custody.

AIR 1948 Sind 67

108) The use of force must not exceed what is necessary for the arrest.

AIR 1935 Pesh. 83

109) When arrest is illegal – its resistance to an illegal arrest the accused is rescued and the arresting party is asauted no offence is committed.

AIR 1960 Cri. 23 AIR 1968 All. 132

110) The investigation officer ought to give full detail as to in what manner the appellant was arrested. A single sentence of I.O. even not sufficient to prove arrest.

1992 Cri.L.J. 3819

111) ground of arrest Cr.P.C. 50 – It is necessary that the grounds of arrest and full particulars of offence must be informed to the arrested.

1996 Cri.L.J. 1536

112) An arrestee must be communicated the ground of his arrest is a constitutional safeguard provided under part III of the constitution he ill be within his rights to point out that the said provisions have not been followed before the Magistrate.

1996 Cri.L.J. 1536

113) An arrested person must know the grounds and reasons and the facts that in respect of whom and by whom the offence is said to be committed as well as the date time and place of the offence etc.

1996 Cri.L.J. 1539

114) Discretion of police office to arrest is not arbitrary but must be guided by the principles laid down by the Supreme Court.

Arrest is not a must in every cognizance of case it is the discretion of the police officer to arrest or not to arrest, and the discretion cannot be on arbitrary one but must be guided by the principles laid down by the Supreme Court in a case **Joginder Kumar –Vs- UP 1994(4) SCC 260** Very often there is no necessity to arrest at all.

1996 Cri.L.J. 1347

115) Wrongful arrest & detention in police custody – IPC Ss. 420 & 471 Cr.P.C. S.41

Police Officer is not expected to act in a mechanical manner and in all case to arrest accused as soon as report of cognizable offence is lodged – Existence of power to arrest is thing & justification for exercise of it is another thing there must be some reasonable justification in opinion officer effecting arrest that it was necessary and justified – Except in heinous offences arrest should be avoided – If Police Officer issue notice to a person to attend the Police Station and not leave

the station without permission would do – offence u.s. 420, 471, 468 of IPC are not herious offence – Arrest illegal.

2004 (1) Crimes 1 (Bom)

116) Petitioner was arrested by respondent Police Officer in case registered U/s 420, 468, 471. If IPC – Offences are not heinous offences - Arrest found malafide and mischievous & not protected by element of good faith – Infringement of fundamental right of a citizen cannot stop by giving a mere declaration – Compensatory relief is to be provided under – Cost of Rs. 25,000/- imposed on Police Officer who arrested the petitioner.

Dinkar –Vs- State 2004 Crimies 1 (Bom) (DB)

117) a) Bail – Murder Case – Malafides of I.O. to falsely implicate the accused in serious charge of Murederer – I.P.C. 109, 147, 148, 149, 302 – Accused earlier made complaint against I.O. therefore I.O. tried to implicated accused – Statement of eye witness was recorded after delay of more than one and half month – Malafides of I.O. cannot be ruled out – Accused entitled to be released on bail.

b) Bail – Murder Case – Involvement of accused in other criminal cases – If prosecution is wanting in bonafides – long Criminal history of accused in absence of conviction is no ground to refuse bail-

Anil Thakur – Vs – State of Maharashtra Cri. Application No. 2183 of 2009 Decided on 22 July 2009.

118) Bail – Murder Case – Prima facie inconsistency in evidence – One set of evidence incriminating the applicant while the other showing absence of accused at relevant time on the spot – Accused serves to be granted bail.

Rohidas Jadhao –Vs- State 2002 ALL MR (Cri) 573.

119) Bail – Cri. P.C. 437 – Offence under of SC & ST Act – offence does not fall within exception (i) of S. 437 (i) of Cri. P.C. – Magistrate can entertain application for bail and decide it according to law.

2005 ALL MR (Cri) 1927 (Bom)

120) A) Anticipatory Bail – Cr. P.C. SS. 438 – 173 – Grant of anticipatory bail after charge – sheet is filed – Anticipatory bail can be granted at any time so long the applicant has not been arrested.

B) The defence put forward by accused cannot be ignored – The plea of accused that the dispute between him and complainant is purely of a Civil nature – Anticipatory bail is therefore granted to the petitioner.

Ravindra Saxena – Vs- State 2010 (1) SCC (Cri) 884.

121) Bail – Murder Case – No role attributed to accused applicant in administering poison to deceased – Only allegations against all applicants are that they had prevented complainant from going to the deceased – Bail is liable to be granted to accused applicants.

Kalawantibai N. Tidke –Vs- State of Maharashtra 2007 ALL MR (Cri) 2746.

122) Bail – Delay in trial – Charges framed – 256 witnessess cited by prosecution – Trial likely to prolong – Bail granted.

Jaya Simha – Vs- State 2007 ALL MR (Cri) 2960 (S.C.)

123) Bail – Delay in deciding bail application – Accused in Judicial costudy – Bail application kept pending for two weeks – Procedure highly illegal – Bail application has to be considered expeditiously.

Deepak G. Bajaj –Vs- State of Maharashtra 2007 ALL MR (Cri) NOC 46.

124) Anticipatory Bail – Dispute essentially of Civil nature relating to control over management rights – Applicant entitled to grant of anticipatory bail.

2009 ALL MR (Cri) 1711.

125) **No arrest during pendency of petition under S. 438 of Cr. P.C**. – Held, the Police cannot arrest the accused before the disposal of the petition under S. 438 of Cr. P.C.

Basudev Ray –Vs- State of west Bangal 1993 (2) Crimes 21 (Cal) (DB)

126) Complainant or the counsel for the complainant has no right of oral arguments on application for grant of anticipatory bail – He can assist only to public prosecutor.

2006 Cri. L.J. 2866

127) Delay in trial and appeal for no fault of accused confers right upon accused for bail.

2001 Cri. L.J. 1727 (SC)

128) Earlier bail rejected during investigation – Charge Sheet filed – Held, is a Substantive change in circumstances.

2004 Cri. L.J. 3802 (BOM)

129) Bail – Case not falling under clause (1) of S. 437 of Cr. P.C. – Accussed is entitled to be released on bail.

1997 Cri. L.J. SC 3124.

130) Condition to deposit the passport and visa is illegal – only Passport authority having right of such order.

2009 Cri. L.J. 1062.

131) Pre trial detention may only be for the Purpose to help investigation but not to punish accused.

2004 Cri. L. J. 4485

132) Forfeiture of bail bond – opportunity of hearing should be given to bailers – Not giving opportunity renders order of forfeiture of Bail bond illegal.

2003 Cri. L. J. 2148.

133) Anticipatory bail – Second or further successive application is maintainable if there is change in fact situation or in law or where earlier finding has become absolute

2005 Cri. L. J. 2086.

134) Forfeiture of bail bond – Imposition of penalty by sureties – No allegation that surety has connived with accused jumping out of bail – Order of penalty of Rs. 25,000/- reduced to Rs. 5,000/-. Remission granted.

2000 Cri. L. J. 165 (SC)

135) Forfeiture of bail bond – Penalty reduced to Rs. 500 instead of 5000/-

1988 Mh. L.J. 500

136) There is no difference in bail granted in default and bail granted on merits.

2005 ALL MR 1857.

137) Cash security is equal efficacious as that of solvent surety – On the event of failure to appear, the Court has to realize the Cash deposit amount which is already in its custody – On the other hand in case of bail on personnel bond the court has to recover the amount from surety - There is nothing to Prevent Court from cash surety.

1981 Cri. L.J. 229, 1981 Cri. L.J. 232

138) Local Surety – Order to file local Surety is illegal.

AIR 1978 SC 1594, 1978 Cri. L.J. 1703

139) Surrender Bail – Cr. P.C. 439 – Accused can surrender before sessions court.

2005 ALL MR (Cri) 2193

140) Bail cannot be refused in view of confessional statement of Co-accused.

2003 Cri. L. J. 2994 Bom.

141) The statement given by Co-accused may be used to hold that accused is not guilty of the said offence – Accused entitled to bail.

2003 Cri. L. J. 2353

142) Bail in baillable offence – There is no question of discretion – The accused should be released on bail.

2009 Cri. L.J. 1887.

143) Accused released on bail by police need not to give bail again before the court – Magistrate have no jurisdiction to order the furnishing of fresh bail bonds.

Mohit Malhotra –Vs- State 1981 Cri. L.J. 806.

144) Interim Bail – Pending disposal of bail application – Normally woman, children, minors, aged persons of 70 years or more, student whose examination are to be commence should be invariably be released on interim bail. The same principle applied to the cases in which accusation appears to be frivolous or malafide.

1993 Cri. L. J. 3574.

145) Bail cancellation of – Principles for cancellation of bail and refusing bail not noticed – The bail was cancelled in a Mechanical Manner – Order cancelling bail set aside.

1992 Cri. L. J. 516.

146) Cr. P.C. 436, 439, - Accused appearing and submitting to the jurisdiction of court is under judicial custody – Magistrate cannot reject bail application.

1982 Cri. L. J. 1334

147) Bombay prevention of Gambling Act (4 of 1887) – Offences under S. 4 and 5 are congnizable and bailable – Officer directed to effecting search and arrest is durty bound to release the arrested person on bail – The executive instructions or administrative rules which run counter to the statutory provisions of the code are ultra vires and bad in law – High Court rightly quashed such orders.

1980 Cri. L. J. 1413.

148) Cancellation of bail by another bench of same High court who earlier granted bail – Not justified – Held, no Bench can comment on functioning of a co-ordinate Bench of the same court, much less sit in judgement as an appleate court over its decision – the thing which could not be done directly could not also be done indirectly otherwise a party aggrieved by an order passed by one Bench of

the High Court would be tempted to attempt to get the matter reopened before another Bench, and there would not be any end to such attempts – Besides it is not consistant with the judicial discipline, which must be maintained by courts both in the interest of administration of justice by assuring the binding nature of an order which becomes final and the faith of the people in judiciary.

1990 Cri. L. J. 516

149) Bail – Granted on account of non – filling of charge – Sheet by Police – Cancellation of bail after filling of charge sheet is not permissible - The mere fact that subsequent to his release a challan has been filed is not sufficient to commit him to custody.

AIR 1978 SC 55

150) Bail – Case traible by Session's Court – The Magistrate should require execution of bond to appear before Sessions Court so as to avoid re-arrest of the accused for appearance before Session Court – The accused granted bail by Magistrate could not be re-arrested while committing case to the court of session – Section 441 (3) of Cr. P.C. States that bail can be granted to an accused so as to bind him to appear before the court of session.

Free Legal Aid Committee –Vs- State of Bihar 1982 Cri. L.J. 1943, AIR 1982 SC 1463.

State of Maharashtra V. Anand Chintaman Dighe, 1990 Cri.L.J. 788 : 1990 AIR (SC) 625 : 1990 SCC (Cr) 142 :1990 CAR 125 :1990 CrLR (SC) 176:1990(1) Crimes

151) Bail – Consideration for - Presence of accused claimed to be necessary for making search - Participation of accused possible without arrest - Bail granted. We do not think that the appellant has to be taken into custody for making a search of premises in her presence. This can be done without her being taken into custody. The other ground that is put forward is the appellant's presence as required by the police for interrogation in connection with investigation. We make it clear that the appellant shall appear for interrogation by the police whenever reasonably required, subject to her right under Article 20(3).

Miss Harsh Sawahney V. Union Territory (Chandigarh Admn.), 1978 Cri.L.J. 744 : 1978 AIR (SC) 1016 : 1978 SCC (Cr) 189:

152) Bail - Considerations for - The designated Court should carefully examine every case to satisfy itself that accused is innocent before granting bail - Rejection of prayer for bail in mechanical manner is not proper. Under Section 20(8), no person accused of an offence punishable under the Act or any rule made thereunder shall, if in custody be released on bail or on his own bond unless the two conditions specified in Causes (a) and (b) are satisfied. In view of these more stringent conditions a Designated Court should carefully examine every case coming before it for finding out whether the provisions of the Act apply or not. Since before granting bail the Court is called upon to satisfy itself that there are reasonable grounds for believing that the accused is innocent of the offence the statements in the case diary and other available materials should be closely examined. A prayer for bail ought not to be rejected in a mechanical manner.

Usmanbahi Dawwodbhai Memon and others etc. V. state of Gujarat, 1988 Cri. L.J. 938 : 1988 AIR (SC) 922 : 1988 SCC (Cr) 318 :

153) Bail – Considerations for grant of - **Application of principles of bail and jail.**"Bail or jail?" - at the pre-trial or post- conviction stage - belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process.

154) Bail – Conditions – Imposition of excessively onerous conditions – Heavy conditions of furnishing security of Rs. 1 Lac in cash – It virtually amounts to denial of bail – Order modified as directing release of accused on furnishing bail bond of Rs. 25,000/-

AIR 1985 SC 1666

155) Bail – conditions For – Release on Personal bond Insistance on surety – The Court can release under trial prisoners without insisting on surety – If the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non appearance – The accused may be released on personal bond.

Hussainara khatoon – Vs- Home Secretary 1979 Cri. L.J. 1036.

156) Cancellation of bail – Should not be done in a routine manner.

2007 ALL MR (Cri) 1764 (SC)

157) Bail – Conditions for – Insistance on Surety of Specific district is illegal and violative of constitutional mandate – Article 350 of constitution sanctions representation to any authority, including a court for redress of greviences in any language used in the Union of India – Equality before the law implies that even a Vakalat or affirmation made in any state language must be accepted everywhere in the territory of India – Otherwise, an Adivasi will be unfree in free Indidia, and like wise many other minorities. This divagation has become necessary to still the judicial beginning, and to inhibit the process of making Indians alience in their own homeland. Swaraj is made of United Stuff.

Moti Ram –Vs- State 1978 (4) SCC 47, AIR 1978 SC 1594.

158) Bail – can be granted in writ petition – Held, the High Court while hearing habeus corpus petition has the jurisdiction to grant bail to the the detenue.

State of Bihar – Vs- Rambulak Singh – AIR 1966 SC 1441.

159) Bail – Appeal against acquittal admitted – Cr. P.C. 390 – The accused who is brought before the court subordinate to High Court should be enlarged on bail unless there is direction of the High Court to that effect - Subordinate Court before which accused produced must keep in mind that the accused is already acquitted.

2009 ALL MR (Cri) 2075.

160) Bail – Statement of witnesses are proto type repeating contents of F.I.R. and not disclosing any circumstances in immediate proximity of the incident – A case for releasing accused on bail is made out – Bail granted.

Karbhari – Vs – State 2009 ALL MR (Cri) 2253.

161) Ground of Parity in rejecting bail – Not applicable – Each case has to be decided on its own merit.

Nawal – Vs – State 2009 ALL MR (Cri) Journal 191.

162) Conditions – Bail – direction for depositing title deeds of property worth Rs. 20,00,000/- as a condition precedent for granting anticipatory bail – Not reasonable – Matter remitted back to High Court for considering the matter afresh in accordance with the law.

2009 ALL MR (Cri) 2115

163) Bail – Grant of – I.P.C. 324, 427, 452 and 506 (ii) – Business rivalary between accused and complainant – several complaints lodged between them – Custodial interrogation of accused not necessary – Accused entitled to be granted bail.

2009 ALL MR (Cri) 1018.

164) Cr. P.C. 438 – Anticipatory bail – It may be granted for period to give the accused sufficient time to move the regular court – In other words the court may allow the accused to remain on anticipatory bail – It may be granted for a duration even a few days thereafter to enable the accused persons to move the higher courts if they so desire.

K. L. Verma –Vs- State 1997 ALL MR (Cri) 1385.

165) Release of accused on cash bail – The Magistrate have power to release the accused on bail initially on furnishing cash bail and, thereafter, asking him to furnish solvent sureties in appropriate cases.

Mr. Sajal Kumar Mitra –Vs- 2011 ALL MR (Cri) 1129 (Bom)

166) Summons Case – When accused appears pursuant to summons issued in summons case – There is no need for him to move bail application or furnish personal bond – Order calling accused to furnish security for his enlargement was illegal and liable to be set a side.

K. Pandarinathan –Vs- V. Raju 1998 DCR 249.

GENERAL

IMPORTANT CASE LAWS

1. **Copy of F.I.R. –** It is a public document within meaning of section 76 of the Evidence Act – An accused or any other person is entitled to get a copy of F.I.R. from Police station – Fair and impartial investigation is a facet of Art 21 of the constitution – Person booked under criminal law has right to know the nature of allegations, so that he can take necessary steps to safeguard his liberty.

2011 Cri. L.J. 1347.

2. Administraion of justice – If any party wants any order from Court it is by way of an application copy of which is made available to the otherside

2009 ALL MR (Cri) 2423

3. Copy of F.I.R. – Accused is entitled to a copy of F.I.R. free of cost at the time of arrest.

Selvenathan –Vs- State 1988 Mad LW (Cri) 503 FB

4. Certified copy of Court proceedings to third party – Can be gratned to third party – the Right to Information Act, 2005, created a dent in the So-called "Privacy" – The courts also will have to be alive to the intendment of the Right to Information Act to share Vital information to the parties concerned – Any narrower interpretation of the law and imposition of any restriction on the right of the third party to know what is actually going on at the portals of the Criminal justice system will not advance the interest of justice.

J. M. Arumugham –Vs- State Crl. O.P. No. 18533/2007 Decided on 227/02/2008 (Madras High Court)

5. Cr. P.C. – Section 110, 111, 116 – Mandatory Procedure – It is Mandatory on the part of the Magistrate for passing of a preliminary order stating the substance of the information which will be served as notice – Final order without show cause notice is illegal – Detention illegal – Compensation of Rs. 25,000/- granted. m

Surendra R. Taori –Vs- State 2001 ALL MR (Cri) 2079.

6. Criminal P.C. – Section 108, 110 – Vesting powers of Executive Magistrate in Police Inspectors is improper – Power may be vested to Judicial Magistrates – The vesting of powers in Police officers of whatever rank they may, has resulted in blatant misuse of such powers the detriment of fundamental right of a citizen as enshrined in Article 21 of the constitution of India – High court has not come across any case in which the detention of a person was found to be justifiable – Therefore it is a high time that the state should resoret to section 478 of Cr. P.C. which vests in the state powers to order functions allocated to Executive Magistrate u.s. 108 to 110 as well as section 145 and 147 of Cr. P.C. to be made over to Judicial Magistrate of the First Class or Metropolitan Magistrate

2001 ALL MR (Cri) 2079

7. Cr. P.C. – Section 111, 117 – Magistrate has no power to arrest and detain a person – His power is to require to show cause and if necessary start enquiry – Powers are often misused by untrained Magistrates – Directions issued for safety of citizens – Sufficient time shall be given to arrange for surety – If any person is sent to Jail then the Executive Magistrate shall sent a copy of the order to the Principal District Judge, Who shall go through the order and if finds case of revision shall intervence suomotu u.s. 397 of Cr.P.C. – The copy of order must be sent to superior officers also.

Pravin Vijay Kumar Taware –Vs- The Special Executive Magistrate, 2009 ALL MR (Cri) 2093.

8. Cr. P.C. – Section 111 – Issuance of show cause notice is a judicial act it requires a judicial performance – It cannot be achieved by mechanical process of utilizing a cyclostyled form.
(B) use of printed proforma of notice is illegal – The Magistrate has to apply his mind and has to write the Judicail order himself or has to got typewritten under his Supervision – The said order should show that it has been so typewritten at his dictation – The order which is lacking in above judicial discipline is illegal – The bond which has been furnished as a result of said illegal order has to be quashed , because, nothing illegal can be permitted to survive even for a moment.

Jitendra V. Mahadik –Vs- Mr. K.G. Patil, 2003 ALL MR (Cri) 1895.

9. Cr. P.C. – Section 107 – Petty matters – Domestic quarrels – Quarrels between neighbouring persons are not affecting public peace – No actions can be taken under section 107.

Perswami. K. Devendra –Vs- Sr. Inspection of Police 2003 ALL MR (Cri) 1732.

10. Cr. P.C. – Section 116 (4) – I.P.C., Section 342 petitioner a educated person was put to jail for five days by Asst. Commissioner of Police, acting as Executive Magistrate – Held, act of asking interim bond and sending Jail to petitioner is highly illegal – Wrongful and illegal confinement of petitioner amounted to offence under section 342 of I.P.C. – State directed to take appropriate action against Assistant Commissioner of Police – Plea that ACP is entitled to protection under Judges (Protection) Act is negativated owing to powers conferred on respective Government or the Supreme Court or the High Court or any other authority under S. 3 (2) of Judges protection Act, 1985.

Dilip Bhikaji Sonawane – Vs- State of Maharashtra, 2003 (1) B. Cr. C. 727.

11. Cr. P.C. – Section 111 – Show cause notice not disclosing the details of litigation and in which court said litigation was pending – Notice is vague – It does not satisfy requirements of section 111 – Liable to be quashed.

Baleshwar –Vs- State 2009 Cr. L.J. 627

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ANTICIPATORY BAIL WHERE GRANTED

1. The accused petitioner had no knowledge of the proceedings as he was a driver who had to remain mostly out of the village. In view of the fact thatthree accused persons have already been acquitted in the case, if was deemed proper to grant interim bail to the accused-petitioner as well, on furnishing a personal bond for a sum of Rs. 15,000/- with one surety for the like amount to the satisfaction of the SHO/arresting officer/investigating officer, on the following conditions:

(a) That the petitioner shall make himself available for interrogation by a police officer as and when required;

(b) That the petitioner shall not directly or indirectly make any inducement, threat or primise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court, or to any police officer; and

(c) That the petitioner shall not leave India without the previous permission of the court.

Mam Raj v. State of Rajasthan 1988 (3) Crimes 74-75 (Raj).

2. An FIR was registered against the petitioners alleging commission of offences under sec 406 and 420 of the IPC. The case was at the investigation stage. The transaction in question was primarily civil. Besides, over eight months have passed but nothing incriminating had so far been discovered. The grant of pre-arrest bail to the petitioners on the condition that they make themselves available for investigation as and when required will, in the peculiar facts and circumstances of the case, amply serve the purpose.

3. The petitioneris a young boy of 17 years and is a student. In the FIR no overt act has been assigned to the accused. The only allegation against him is that he gave first blows and slaps with his hand. In these circumstances, it does not appear unreasonable to issue directions under s 438 of the Cr. P.C. that in the event of arrest the accused petitioner may be released on bail.

Anil Dutt v. State of Rajasthan 1978 Cr. L.R. 436-37 (Raj).

4. An interim order was passed in favour of the petitioner becausehe happened to be a government employee. The contention for the petitioner Remeshwar was that the incident took place between the two neighbours on a petty matter and he also sustained an injury on his head. Further, if he were

arrested, he was likely to be suspended, being a government employee. Anticipatory bail was therefore allowed.

5. The public prosecutor has basically opposed the issue of the direction on the ground that the recovery of the registered sale-deed said to be in the possession of the accused applicant would be defeated if a direction under s 438 of the Cr. PC is issued. At this stage, it is difficult to express any opinion regarding the merits and demerits of the case, but only for the limited purpose of s 438 of the Code the document does not appear to be in possession of the applicant. It cannot also be ruled out at the moment that a serious dispute has arised between the parties, which is already sub judice before a competent civil Court. Looking to these facts and circumstances of the case it does not appear unreasonable to issue a direction that in the event of arrest the accusedmay be enlarged on bail.

6. The offences which prima facie are disclosed in the facts of the present case in the FIR did not fall under ss 467 or 477 of the IPC. The petitioners are entitled to an order for anticipatory bail under s 438 of the Cr. PC.

Shrimant Appaji Patil v. State of Maharashtra (Bom), 1978 Mah. LR. 146.

7. The medical officer had stated that the injuries caused by a sharp object were not sufficient to cause death looking to the improved condition of the injured. He further stated that the general condition of the injured was satisfactory. Looking to the entire facts and circumstances of the case it does not appear unreasonable to enlarge the accused on bail.

8. The allegation against the petitioner in the FIR was that he had collected eight to ten lakh rupees from the transporters. The FIR had been lodged by the superintendent of the flying squad of the Punjab government as such and not on the basis of statements of any person who may have made any allegation regarding collection of money by illegal means or misuse of the official position. The applicant was a former transport minister, Punjab. No statement of any person has been recorded during the investigation so far. Thus the allegations in the FIR continue to remain vague and unsubstantiated upto the date of hearing of this petition. In view of these circumstances, this is a fit case for grant of anticipatory bail.

9. A perusal of the FIR in the case goes to show that during the alleged incident an unknown person fired two shots in the air with the gun. There was no

specific over act attributed to the petitioners except that the petsons who were armed had come at the instance of the petitioner. It was nobody's case that anyone was hurt by those shots. Even in the statements of as many as 15 witnesses there was no indication of who had fired the shots in the air. In these circumstances, it is a fit case for the issue of a direction for anticipatory bail.

10. The allegations in the FIR ARE ABSOLUTELY VAGUE AND INCORRECT. Name of these allegations come within the ambit of the provisions of rr 33 and 46 of the Defence of India Rules. The allegations against the petitioner are vague and these is reasonable ground for believing that he is not guilty of contravention of such Rules. It does not appear that are evidence of what is stated in the FIR is in the possession of the police. Therefore, it is a fit case to grant anticipatory bail to the petitioner.

11. So far as the antecedents of the petitioner were concerned, there were no other criminal cases said to be pending against the petitioner. The offence under ss 276C, and 276CC of the Income Tax act, 1961 is such that its cognizance can be taken by the magistrate only when a complaint is filed by the department. Therefore, it cannot be said that this is cognizable offence. The search was conducted as far back as in 1981 and the complaint was filed on 12th September, 1985 and the arrest was sought to be made in December 1986. The petitioner was a citizen of Jaipur and was available all the while for any inquiry by the department. Therefore, there was nothing further to be enquired from him as the complaint has already been filed. He had also filed objections against the summary order under s 311 of the Act, which had not ben decided even till date. An appeal had also been filed against the summary order which was still pending. The second appeal was also provided under the Act which can be filed before the Income-tax Appellate Tribunal. Therefore, the whole matter is sub judice. Apart from this, the total amount of tax as required by the department had also been deposited by the petitioner. Anticipatory bail was granted to the accused.

12. Since the petitioners were already on bail on the basis of the first challan filed and there was an apprehension that if cognizance is taken on the basis of the subsequent challan they may be arrested, an anticipatory bail was granted to the petitioners.

13. Two injuries by a sharp weapon received by R were on the arms and not on the vital part. Other injuries were abrasions, bruises and one lacerated wound on the parietal region. Three persons on the side of the accused had received injuries, out of which some were grievous. According to the submission for the

accused petitioners the incident had occurred because some of the petitioners, belonging to a particular caste, did not supportthe candidate who stood for the post of sarpanch and was of the same caste. It had also been pointed out that two petitioners, D and B, were government servants, and for this reason they were involved in the case. Considering the nature of the injuries to R and the other circumstances the petitioners were released on anticipatory bail with appropriate conditions.

14. When the police of Kota is actively interested in this case, it does not appear to be proper that the investigation should be conducted by it. This case should be investigated by an independent agency and therefore it was directed that the CBI should take up such investigation. On the bail application it was ordered that the petitioner shall not be arrested until the CBI has made some progress in its investigation and taken permission of this court.

15. In this case, the investigation had been pending for more than four years. There was no allegation against the accused petitioner for tampering with the evidenceand he was not absconding. Under these circumstances, the petitioner was enlarged on anticipatory bail.

16. If tacties are indulged by the state government bynot producing the case diary, what justice can be imparted to the accused person? Both the parties are equal for the court. Therefore, the way of working of the government advocate office by not producing case diaries before the court, even after directions of the High Court, cannot be appreciated. Since there was nothing before the court to oppose the bail application on behalf of the state government, anticipatory bail was granted.

17. **Cr.P.C.** – Section 151(3), 110(e), (g) – Chapter proceedings – Necesity of Arrest – The petitioner was arrested in July on the basis of statements recorded in the month of April. Held there was no urgency for arrest, - Arrest illegal and unwarranted – Proceedings against petitioner quashed – Compenstion of Rs. 3000/- for illegal detention and mental agony and rs. 1000/- as the costs of the petitioner.

18. In this case a forged certificate had been produced by the accused for obtaining employment as a conductor. It was prayed that the petitioners stand on some footing inasmuch as they wanted to seek employment and hence had produced this certificate to get admission to the training which entitled them to get the employment. It was also given out that one of the petitioners was 18

years of age and other two accused petitioners were 23 years old and they belonged to lower middle class families. Keeping in view the young age of the petitioners and the circumstances in which they lived, anticipatory bail was granted.

19. There was absolutely no evidence to connect the accused with the crime. From whatever evidence had been collected, it could be said that from an open Bara, said to be of the accused-petitioner, the other accused recovered some property which belonged to the Railways and the accused G was suspected of having committed the offence under s 3 of the Railway Property (Unlawful Possession) Act 1966. There was sufficient evidence or reasonable ground of suspicion against the other accused so far as the offence under s 3 of the said Act was concerned, but from the material on record, it could not be said that there was sufficient evidence or reasonable ground for suspicion against the petitioner for the offence under the said section. Anticipatory bail was allowed to the petitioner.

20. Injuries were sustained by M AND r. According to the injury report, M had an incised wound on his right shoulder. The injury was simple made by a sharp-edged weapon. R had a lacerated wound on his right parietal region. This injury was simple and by a blunt weapon. The accused was granted anticipatory bail.

21. The petitioner was charged with attempted rape of a child of 10 years. However the petitioner himself was also a child of 14 years of age. If he were arrested and allowed to remain in the company of criminals he will himself turn out to be a person of criminal tendencies. Insuch circumstances it is better to take a reformative rather than punitive view. Anticipatory bail was allowed to the petitioner.

22. The amount said to have bene embezzled by the petitioner has been deposited by him. The original four receipts in this respect for Rs. 18,151 have been shown to the court. Out of this some money was recovered from his pay. Considering the fact that the amount has ben recovered and the petitioner shall face the trial when it comes up, he can be released on anticipatory bail.

Rajendra Kumar Sharma v. State of Rajasthan 1988 (3) Crimes 887 (Raj).

23. There was no apprehension that all the petitioners were likely to abscond. They had firm roots in the country and they had permanent residences where they

were residing with their families. Some of the petitioners were employees while others were executives of the concern. The chairman and the vice-chairman had been already enlarged on bail even by the magistrate and that decision was apparently accepted by the department. The seizure of the documents was either complete or in progress and it was not even suggested that the petitioners were indulging in any act to tamper with the evidence. The bulk of the evidence was mainly reflected through the documents which were already in the possession of the department. It was an accepted position that the petitioners had been regularly presenting themselves before the concerned officials for being subjected to interrogation and have been co-operating with them. Anticipatory bail was granted to the petitioners.

Prabhakar Dattatraya Gurve v. Union of India (1986) 2 Bom Cr. 30, 32.

Admittedly, the logs had been already seized by the police and it appeared that there was noneed whatsoever to arrest the applicant for the purposes ofinvestigation. The same can be conducted without his arrest provided the applicant appears before the police as and when necessary. Anticipatory biail was granted to the petitioners.

Devi Das v. State 1987 (3) Crimes 363, 366 (Bom), (1988) 1 Bom Cr. 22.

24. The role attributed to the present petitioner was to the effect that he was alleged to have purchased some gold ornaments from the principal accused and hence obviously there was a likelihood that he was being involved in an offence of receiving stolen property as sought to the spelt out. This was obviously a vague allegation. The police had already visited the shop and attached relevant documents and they can conduct further searchs of the residence and shop as advised. In respect of the complaint of 1984 it would not be proper to deny bial to the petitioner at the end of the year 1985. Interest of prosecution can be safeguarded if the petitioner was directed to appear before the investigating officer and the public prosecutor on instructions submitted that this should be done for seven days.

Pusushottam Lal Bannarial Agrawal v. State of Maharashtra 1986 (1) Crimes 207-08 (Bom).

25. The petitioner was an employee of Indian Overseas Bank and while carrying out the investigation the police had so far, not recorded the statement of the returning officer, who could be the best witness of the incident which occurred

in the polling booth. Other voters and polling agents have been examined but independent person was not before the court. In these circumstances the anticipatory bail was granted.

Amar Singh v. State 1988 (3) Crimes 82 (Raj).

26. Out of the seven acused petitioner M was aged about 70 years while petitioner MR was aged about 73 years and it does not stand to reason that these old and respectable persons would have accompanied the other petitioners who are their young sons and other near relations, particularly when, according to the complainant, many other persons were also taken to the factory for allegedly dispossessing that party. It was contended that the implication of these two persons cannot be ruled out. In the circumstances of the case these two petitioners were granted anticipatory bial.

27. The petitioner was not required to be arrested in connection with the raid of residential and business premises where nothing incriminating was recovered. Moreover the question of arrest did not arise because for the time being, only summons was handed over to the wife of the petitioner on 18th February 1986, calling upon the petitioner to attend the office of respondent 2 at Jullunder on 20 February 1986, and to produce certain documents mentioned in the summons. The petitioners were granted anticipatory bail.

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Power of convictant Court to grant Interim Bail.

The conditions as laid down in sub-s (3) of x 389 of the Cr. PC, are that-

(a) The accused being on bail, is sentenced to imprisonment for a term not exceeding three years or he is convicted of a bailable offence and is on bail.

(b) An appeal lies from that conviction or sentence, and

(c) He satisfies the court that he intends to file an appeal.

(d) There was no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances, the applicants were released on bail.

1. The appellant was convicted under s 302/34 of the IPC and had been sentenced for life. He was more than 70 years' old and he was already in custody for more then seven and a half years. In the High Court, a prayer for suspension of sentence was made but the learned judges examining the gravity of the offence and prima facie merit of the case, were not inclined to suspend the sentence by their order dated 20 January 1998 and on the other hand granted liberty to the accused for praying for early hearing of the appeal. Though six months have expired since then, it ws not possible to visualize that the appeal would be heard in the near future, the appeal being of 1997. Taking into account the age of the appellant and that he was in custody for more than seven and a half years, in the interest of justice, an order to release the appellant on bail was made by the court.

Prithpal Singh Singhal v. State of Delhi 1999 Cr. L.J.. 3698.

2. The rationale of the practice not to release, on bail, a person who has been sentenced to life-imprisonment lies in this that once a person has been found guilty and sentenced to life-imprisonment he should not be let loose so long as his conviction and sentence are not set aside but the underlying postulate of this practice was that the appeal of such person would be disposed of within a reasonable period, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the court is not in a position to dispose of the appeal for five or six years. It would be, indeed, a travesty of justice to keep a person in

jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. It is, therefore, absolutely essential that the practice which the Supreme Court has been following in the past must be reconsidered and so long as the Supreme Court is not in a position to hear the appeal of an accused within a reasonable period of time, the court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in case whose special leave has been granted to the accused to appeal against his conviction and sentence.

Kashmnira Singh v. State of Punjab AIR 1977 SC 2147, 1977 SCC (Cr) 559, 1977 Cr. L.J. 1746 (every practice of the court must find its ultimate justification in the interest of justice).

3. The Supreme Court has further observed that it is not only traditional but rational in this context, to inquire into the antecedents of a man who is applying for bail to find whether he has a bad record, particularly a record which suggests that he is likely to comit serious offences while on bail or otherwise polluting the process of justice. It is to be remembered that deprivation of freedom by refusal of bail is not for punitive purpose but for the bifocal interests of justice to the individual involved and society affected. Along with these, contrary factors have also to be weighted, namely, that it makes sense to assume that a man on bail has better chance to prepare or present his case than one remanded in custody.

Babu Singh v. State of Uttar Pradesh AIR 1978 SC 527.

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POWER OF SESSIONS JUDGE TO GRANT BAIL IN REVISION

1 Section 397 of the Cr. P.C. 1973, confers on the sessions judge, while calling for, with a view to examine the record of any proceeding before calling for, with a view to examine the record of any proceeding before any inferior criminal court within his local jurisdiction, the power of directing that the execution of any sentence or order be suspended and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record. The case of Bansi v Hari Singh, decided under the old Code, is no longer good in law.

1956 All L.J. 735, AIR 1956 All 297, 1957 Cr. L.J. 561; and Panch Mohammad v Hashanu Khan AIR 1956 Bhopal 17, 1956 Cr. L.J. 561.

2 Where some new facts have been brought on record including the affidavit, further delay in commencement of the trial is also relevant consideration for granting bail in such matter. On such basis the applicant was granted bail.

Malti Singh v. State of Uttar Pradesh All Cr. Cas 246.

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BAIL BY THE POLICE

1. An arrest need not be attended with any ritual or even that it should be ostentatious. It is not necessary that man in order to get arrested should be taken prisoner, nor does the law regard an arrest only the ceremonial or hand-cuff or manacle. An authority is said to arrest another man if it prevents the latter from willing his movement and moving according to his will. Under enlightened modern conditions, it seldom becomes necessary for any police officer or other authority empowered to make arrest to actually seize or even touch a person's body with a view to his restraint, uttrerace of a gultural word or sound, a gesture of an index finger or hand, sway of the head or even the flicker of an eye are enough to convey the meaning to the person concerned that he has lost his liberty.

Kaiser Otmar v. State of Tamil Nadu, 1981 Cr. L.J. (NOC) 218 (Mad).

2. The police officer can use all means necessary to effect the arrest if the person to be arrested forcibly resists such arrest or attempts to evade it, but the police officer shall not use such force as may cause death of a person who is not accused of an offence punishable with death or with imprisonment for life. Section 46 of the code applies to all arrests irrespective of whether it is made under a warrant or without a warrant.

KN Cheriyan v. D. Johnson 1969 Mad. L.J. (Cr) 765;

HANDCUFFING OF ACCUSED ARRESTED IN CRIMINAL CASES.

In the case of Prem Shankar Shukla v. delhi administration", it was held that handcuffing is inhuman, overharsh and arbitrary. Absent fair procedure and objection monitoring to inflict 'irons' is to resort to zoological strategies repugnant to art 21. The Attorney General of The Supreme Court directed the Union of India to frame rules or guidelines as regards the circumstances in which handcuffing of the accused could be resorted to in conformity with the said judgment and to circulate them amongst all the state governments and the governments of union territories.

POLICE OFFICER'S DUTY TO INFORM PERSON ARRESTED OF HIS RIGHT TO BAIL ETC (SECTION 50 OF THE Cr. PC).

Sub-section (1) of s 50 of the Cr. PC provides that any police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars the of the offence for which he is arrested or other grounds for such arrest.

(ii) Sub-section (2) of s 50 provides that where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf The provision of s 50 of the said code are mandatory and must be strictly complied with. A citizen's liberty cannot be curtailed except in accordance with law. In Ajit Kumar Sharma v. State of Assam, **[1976 Cr. L.J. 1303 (Gau).]** it was not clear as to what sort of communication was made. **In such a situation, the court observed that even if any communication about the offence was orally made by the officer-in-charge of the police station to the petitioner, one canot know what kind of communication was made, whether the communication was of the full particulars or of the mere section of the offence. In the said circumstances, the court held that the arrest and detention of the petitioner was in violation of s 50 of the Cr. PC and hence illegal. Similarly, if the offence, for which he has been arrested, is bailable, the accused has also to be informed that he is entitled to be released on bail and that he may arrange for sureties on his behalf for such release. If the police officer omits to do so, it would also be in violation of s 50 of the code and his arrest would be vitiated being illegal.**

Additional Case Law.

1. Bail by police – Magistrate does not have jurisdiction to order furnishing of fresh bail bonds. There is no provision in the code of Criminal Procedure for asking an accused already released on bail by police officer to furnish fresh bil bonds. The bail bonds submitted before the police officer are for the purpose of appearing before the Court ans when this undertaking has already been given, fresh undertaking for the same effect is not to be asked for. Such a bond should ordinarily be for appearance before the Court of Magistrate but also if the case is triable before the Court of Sessions before the Court of Session unless there are particular reasons for not doing so.

Monit Molhotra –Vs- State of Rajasthan 1991 Cr. L.J. 806 (Raj.)

2. Simultaneous police case and complaint case : The accused has been released on bail in connection with a police case. But a complainant files a complaint case before the Court with additional charges and the cognizance has

been taken by the Magistrate. The question acrose before the Allahabad High Court as to whether the accused shall be permitted to condinue on the same bail or not. The High court has held that the proper procedure is to direct the accused to surrender and to apply for bail for the additional charges.

Kalyan –Vs- State of U.P. 1999 Cr. L.J. 1658 (All); 1990 All Cr C 247

3. **Bail petition during remand-not to be adjoured.** When the application on behalf of the accused was moved on the date in which the Magistrate was considering the application for remand, the Magistrate has to dispose of such application along with the prayer of remand and can release the accused on bail. He has no obligation to adjourn it to a future date to give opportunity to the prosecution to oppose it.

K.K. Girdhar -Vs- M. S. Kathuria, 1989 Cr. L.J. 1094 (Del).

4. When after police remand, the accused persons have prayed for bail, the Magistrate cannot postpone the hearing of such bail application till Narco test and brain mapping test was performed on the petition. The Magistrate has to take an appropriate decision one way or other. He may refuse bail. But the order deferring the bail application not being proper is liable to be set aside.

S. S. Jadeja – Vs - State of Gujarat, 2007 Cr. L.J. 4566 (Guj).

5. Right not be defeated by keeping application pending. But the Supreme Court has cautioned that the right of the accused to be released on bail should not be defeated by keeping the applications pending till the charge-sheet is submitted.

Mohd. Iqbal Madar Sheikh -Vs.- State of Maharashtra 1996 (1) SCC 722; 1996 SCC (Cri) 202

6. Illegal arrest and detention under s. 167, Cr PC. When the arrest by the police is illegal and that is brought to the notiec of the Magistrate, then the accused cannot be detained under the authority of" s. 167(2), Cr PC.

In re, Madhu Limaye -Vs.- State of Maharashtra AIR 1969 SC 1014

7. Detention by police for more than 24 hours—if affects the power of Magistrate to order detention under s. 167(2). Ordinarily the Magisirale can order detention of an accused under s. 167, Cr PC when produced before him by the police and if the Magistrate on applying his judicial mind is satisfied thai fmdici remand to custody is necessary for the purpose of investigation of the case, the

fact kept in police custody for more than 24 hours would not be the sole ground to hold that the Magistrate cannot remand him to custody. But if it is found that the accused was detained in police custody for 36 hours without any interrogation even for once and then forwarded to the Magistrate and the Magistrate Ordered further remand to the police without applying his mind to the accusation against the accused, the order of remand by the Magistrate is not justified and liable to be set aside and the accused should be ordered to be released on bail.

Hidayat Begum -Vs.- State AIR 1951 MB 70; 52 Cr L.J. 233

8. The Rajasthan High Court has expressed the view that under the New Criminal Procedure Code if the detention is illegal it cannot validate the order of remand subsequently made by Judicial Magistrate or by the Additional Sessions Judge under s. 309 (2), Cr PC.

Narayan -Vs.- State of Rajasthan, 1982 Cr. L.J. 2319

9. The full Bench of Rajasthan High Court has overruled those decisions in Mahesh Chand V. State of Rajasthan, by taking the view that the illegality of an order remanding a person accused of a non-bailable offence to custody under s. 167 (2) or s. 309 (2) does not per se entitle the accused to be released on bail.

Mahesh Chand -Vs.- State of Rajasthan 1985 Cr. L.J. 301 (FB), Rajasthan High Court

10. Appearance of accused before the Magistrate during investigation after bail not necessary. Once the accused is released on bail during investigation he has no obligation to appear before the Magistrate before the charge-sheet is filed and process issued against him. Therefore, because of non-appearance of the accused in Court on any date fixed by the Magistrate to submit the police report as envisaged in s. 173, Cr. PC, his bail cannot be cancelled and warrant of arrest cannot be issued against him.

Committee -Vs.- State of Bihar AIR 1982 SC 1463; (1982) 3 SCC 378. Bihar High Court Free Legal Aid

11. Even if the Magistrate refuses bail at the initial stage yet on further materials being produced by the police during investigation, he can at a subsequent stage during investigation, inquiry or trial may grant bail.

Champala -Vs.- State AIR 1956 MB 103, 1956 Cr L.J. 404.

12. The Magistrate can excise this power under sub-sec. (2) of s. 437, Cr PC even though the bail has BEEN refused at an earlier stage of inquiry by the Sessions Judge.

Bohre Singh -Vs.- State, AIR 1956 ALL 671; 1956 Cr L.J. 1275

13. Even though nit sec. (2) of s. 437 empowers the Magistrate to grant bail, when he is of opinion li.ii there are no reasonable grounds for believing that the accused has committed i li.iilable offence but there are sufficient grounds for further inquiry into his guilt, yt'l such an accused may again be committed to custody by a Court which released In in on bail after the inquiry is completed, when after the completion of such inquiry tin- Magistrate is satisfied that there are sufficient grounds for committing him to.

Bashir –Vs- State of Haryana, AIR 1978 SC 55;

14. Condition of surrendering passport. When the Trial Court on admitting the accused to bail directed him to surrender his passport with the Court and not to go abroad without the permission of the Court. The said condition has been challenged by the accused before the High Court in revision. It is submitted that the petitioner has travelled abroad with the permission of the Court on as many as eight occasions and on each occasion the Court directed him to furnish bank guarantee for a substantial amount and that as he frequently had to go abroad for his medical treatment surrendering his passport before the Court and the permission of the Court again takes considerable time. The CBI does not have any objection if the passport of the petitioner is returned but insists that he should submit his itinerary for every visit to the Court and furnishes his contact address while in abroad. Delhi High Court in view of the above position agrees to delete the conditions of surrendering the passport and to seek prior permission before every visit abroad t m directing him to furnish bail of two lakhs with two sureties of rupees one lakh in the satisfaction of the Court. The High Court has directed the petitioner to fui nr.li his itinerary'and contact address to the Court on each occasion of foreign visil ami inform the Court on his return. It is also ordered that his travels to abroad would not interfere with the proceedings in the Court and no delay is occasioned for In visit abroad.

Manmohan Singh -Vs.- C.B.I. 2004 Cr L.J. 2919 (Del).

15. Imposition of conditions—held bad. Where the applicants were asked to furnish security for Rupees one lakh in cash or Nationalised Bank fixed dcpn.ii

receipt in Bihar with two sureties residing in Bihar State each fora like amount, iln Supreme Court has observed that such a condition of bail appears to be excessm and onerous and virtually amount to denial of bail itself. The Supreme Court h.i therefore, reduced the bail amount to Rupees twenty-five thousand with I\M« sureties.

Keshab Narayan Banerjee -Vs.- State of Bihar AIR 1985 SC 1666; 1985 Cr L.J. 1857

16. An accused charged with an offence of cheating has been released on bail on his assurance that he would pay to the complainant the amount which he h.id obtained as a result of cheating. On his failure to deposit the amount in full, pray was made before the court for cancelling the bail. The Bombay High Court expressed the view that it was improper on the part of the Court to impose iln condition that he would pay the complainant the amount obtained by him as a ir .uli of the cheating and again to cancel the bail on his inability to return the amoimi m full.

1981 Bom Cr. R. 142

17. When the accused has been ordered to be released on bail with surety oncondition that surety must possess not less than six hectares of land, it has been held court that such a condition violates Art. 21 of the constitution and if void.

State of M.P. v Savji 1987 Cr U 1353; 1987(3) Crimes 49;

18. In a case where a criminal proceeding under s. 14A of U.P. Panchayat Raj Act Ittth s. 353, IPC has been started against the Pradhan of a Goon Sabha whose election was set aside and who after such election was set aside refused to make »vri the charge to the other candidate, the accused was directed to be released on bail on condition of his making over the charge within ten days. It has been held that the Magistrate while releasing the accused on bail cannot impose such a condition. An accused cannot be directed to deposit in cash one-fourth of the security amount and personal bond as a condition of the bail.

Ramnath Sharma v Khaltl Prodhan 1987(3) Crimes 706.

19. The accused persons five in number are charged with offences under ss. 363 and 392, IPC. The Magistrate granted bail to them with several conditions, one such in is that each of them has to deposit cash security of Rs. 10,000. The persons have moved the High Court in revision challenging such condition siting the cash security. The Karnataka High Court has held that nowhere Code there is any insistence on cash security. The decision of the Keshav Banerjee's (supra) has been relied upon. The earlier decision of the same irt in Afsar Khan v State[4] has also been relied upon. So, the High Court set aside the condition relating to the deposit of cash security keeping in tact other condition imposed.

Saudan Singh v State ofU.P. 1987 All Cr R 634; 1987 AL.J. 929.

20. the Trial Court for offences allegedly committed under ss. 420,464,467 i468, IPC has directed the accused to furnish bail bond of surety of Rs. 25 and imposed the condition that the surety shall be of the local surety, the |ti High Court has observed that the heavy amount of bail is so onerous that tally amounts to denial of bail itself. The condition that the surety shall be local was also not found favour with the High Court. So, the High Court in revision $d the bail bond to Rs. 50,000 and has directed that the surety need not be a local surety.

1992Cr. L. J. 1676.
Kaleem v. State 2003 Cr. L.J. 353 (Kant)
Amit Kumar Jain v. State of Nagaland 2005 Cr. L.J. (NOC) 110 (Gau.); 2005 (2) Gau LT 161.

21. When bail was granted to the applicant with a direction to deposit Rs. 2,50,000 which was alleged to be misappropriated by him and on furnishing surety bond of Rs. 50,000. The Supreme Court affirmed the bail order by deleting the condition depositing Rs. 2,50,000 by the appellant.

S. Ayub v State of M.P. (2004) 13 SCC 457

22. In another case when the accused appellant was directed to continue to deposit Rst 1 lakh per month by way of repayment after release on bail on the assumption that offence-tad been committed by him has been set aside by Supreme Court being Tunreasonable and unwarranted.

Shyam Singh v. State (2006) 9 SCC 169; (2006)2 SCC (Cri) 613.

23. No condition to be imposed which violates Art. 20(3) of the Constitution. The condition imposed by Court cannot direct the accused to do an act which would have the effect of incriminating the accused. Such a condition would be violative of Art. 20(3) of the Constitution. While releasing an accused on bail the Court may direct the accused to facilitate the police in investigation and for that purpose he may be directed to meet the Investigating Officer as and when required by him. But the Court cannot direct the accused to show the place wherefrom the police can .WHver some incriminating articles.

Sk. Layak v. State of A.P. 1981 Cr. L.J. 954; 1981 ML.J. (Cri) 309; (1981) 1 Andh LT 343.

24. The Rajasthan ^igh Court has, however, expressed the view that even a person while on bail on being interrogated by police makes any statement leading to the discovery of any incriminating object, it would be a discovery under s. 27 of the Evidence Act because the custody within the meaning of s. 27 is not a formal yprtody and it would include any sort of surveillance or restriction.

Kanhaiya v. State of Rajasthan 1976 Cr. L.J. 1652; Radhashyam v. State of Rajasthan 1982 Cr. LR 177 (Raj)

25. Conditions not contemplated by law. When an accused charged with the I offence under s. 124A, IPC has been released on bail on condition that he would not deliver any speech until the decision of the case, such a condition cannot be imposed.

Giani Mahesh Singh v. Emperor AIR 1939 Cal 714;

26. Magistrate restraining the accused entering Into suit land. The complainant and the accused were having property dispute and civil suit is pending between the parties and the Court has directed maintenance of status quo. A criminal complain f has been lodged against the accused petitioner alleging assault. The Magistrate granted the accused petitioner bail but with the condition restraining him from entering into the suit land. The Orissa High Court has held that such condition imposed while granting bail is improper.

Vijayananda Swain v. State 1996 Cr. L.J. 4231 (Ori)

27. IS Directing accuced to hand over charge of office. The condition imposed by the Court on granting bail that he shall hand over charge of his office within ten days is illegal as this condition is nothing but a bargain not permissible within the

ambit and sweep of sub-sec- (3) of s- 437- Cr PC.[15] It is observed at pp. 107-108 as follows:

> "Grant of bai 1 is not like a commodity to be bargained about by the Court with the accused. It is clearly beyond the competence of the Court to indulge in such bargaining while granting bail to the accused. The accused cannot be subjected to any conditions other than that contemplated in s. 437(3), Cr PC. The Courts must refrain from contracting a bargain with the accused while granting bail. A duty is, cast upon the Court to ensure that the conditions imposed upon the accused is in consonance and intendment of the provisions of s. 437, Cr PC".

Ramnath Sharma v Khalil Khan 1988 All L.J. 105

28. Condition directing nccutufto attend Court everyday. When the Magistrate ordered the release of the accused on his executing a personal bond of Rs. 7,000, and on giving an undertaking to attend Court everyday with one surety for like amount and until the disposal of the case, it has been held that Court can direct the accused to attend the Court on all dates of hearing, but the undertaking from the accused and the surety that the accused shall attend the Court whether the case was fixed or not, is not a reasonable condition and is liable to be vacated.

B.L. Joshi v. State 1954 Cr. L.J. 1159.

29. Condition restricting movement within a particular area. Sometimes the Court can impose restriction on the movement of the accused and direct him not to visit a particular area or to stay within a particular area. However, such condition should not be imposed for an indefinite period. Moreover, such condition must also be reasonable and should not affect the accused financially. When an accused charged with committing theft from a railway wagon was granted bail on condition that he would not leave the limits of the town of Midnapore then such condition was held to be improper when the accused was an inhabitant of Kharagpur and the sole means of his livelihood was at Kharagpur. The High Court set aside the condition on the view that imposition of such condition upon the accused directing him not to leave Midnapore town would amount to refusing bail because as he was a resident of Kharagpur and his source of livelihood was at Kharagpur, he couldjiot sustain hinuelf if he were not allowed to cross the limits of Midnapore Town.

Kamla Pandey v. Empress AIR 1949 Cal 582;

30. Condition to pay Interim maintenance to procecutrlx In a rape case. When the Additional Sessions Judge while granting bail to an accused in a rape case directed he accused to pay Rs. 700 by way of interim compensation to the prosecutrix till he disposal of the Session case, relying on the Supreme Court decision in 'odhisattwa Gautam v Subhra Chakraborty[19] the condition has been challenged efore the Gujarat High Court. The Gujarat High Court has held that in the i>ve-mentioned case the Supreme Court in exercise of power under Art. 142 of f Constitution issued a direction to pay compensation in favour of the victim of Bxual abuse namely developing sexual intimacy giving a show of marriage causing (liscarriage twice and ultimately refused recognizing the victim to be his wife for vhich the criminal case under ss. 312,493, 496 and s. 498A was filed. When the eused failing to quash the criminal case moved the Supreme Court, the Supreme Eourt laid down certain scheme for dealing with such sexual abuses for assisting He victims of rape and has directed among others the compensation for victims, conviction by the Court and by Criminal Injuries Compensation Board to be iStituted by the State Government whether or not the conviction has taken place, vever, in that case till the disposal of the criminal case the Supreme Court cted Rs. 1000 to be paid as interim compensation. The Gujarat High Court has rved that such an order has been passed by the Supreme Court in exercise of lary power of the Supreme Court under Art. 142 of the Constitution and when guidelines of the Supreme Court have not yet been worked out by constituting lminal Injuries Compensation Board then while granting bail to the accused such i Condition cannot be imposed by the Court that the accused should pay the psecutrix the interim compensation of Rs. 700 per month as a condition for grant of bail to the accused. So, the High Court quashed the order of the Additional Session Judge directing interim compensation.

Mukeshbhai v. State 1998 Cr. L.J. 194 (Guj)

31. When the accused who is not, otherwise entitled to be released on bail prays for relelse on the ground of his wife's illness and the Court grants him short-time bail with the condition that he must surrender after a period, such short-time bail can be granted and the accused has to surrender after the expiry of such period, the warrant of anesfisan be issued against him.

Omprakash v. State of U.P. 1976 All Cri. C. 312.

32. Operation of the bail—If can bastayed. When the accusedis released on bail, the Court releasing the accused on bail cannot on the prayer of the State stay operation of the bail. Until and unless any Superior Court passes order of

stay of operation of the bail, the bail order passed by the Court shall continue. The Sessions while releasing the accused on bail, cannot on the prayer of the State stay the iofi of the order of bail.

Rameswar v State 1975 Cr L.J. 658 (All).

33. Bail granted by Magistrate—power of stay by Sessions Judge. The question arose before the Bombay High Court if the Session Court possesses the legal authority to stay operation of the order of a Magistrate releasing the accused on bail. Against the grant of bail of the accused implicated in an offence under Customs Act Ihe Session Court was moved in Criminal Revisional Jurisdiction who, on entertaining the petition, stayed the operation of the bail. The High Court of Bombay has observed that the Criminal Revision application was for cancellation of bail granted by the Magistrate. The order of cancellation of bail can only be made after examining the materials produced and it being an extraordinary step can only be granted on application of the principles governing the cancellation of bail. There is no power of the Sessions Judge under s. 439(2), Cr PC to make an interim order illation of the bail. The decision of Allahabad High Court in Rameswar State has been relied upon.

State v Sanjoy Gandhi AIR 1978 SC 961; 1978 Cr L.J. 952; Bhagirath v State 1984 Cri. L.J.160.
Yunus Hutsain Raihad v Asst. Controller of Ctiitonu, Bombay 1991 Cr L.J. 437 (Bom.)

34. Oral application for bail—If permissible. Section 437 does not make it mandatory, that the accused has to file written application for bail. Ordinarily, however, an application for bail is to be filed in writing but there is no illegality in the accused in custody applying for bail verbally. It has thus been held that when a person accused of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of police station or appears or is brought before a Court, he can either himself or through a lawyer apply for bail even verbally. It has been observed, that a written application for bail is only intended to place on record that the accused has moved the bail. But itjs not mandatory, that a written application has to be made and the Court can consider the prayer for bail if made by the accused or his lawyer verbally.

Babu Singh v. State of U.P. 1978 Cr. L.J.. 651; R.K. Nabachandra Singh V. Manipur Administration AIR 1964 Mani 39.

35. However, when the interim bail is in vogue and the petitioner prays for -of the interim bail, the same cannot be dismissed on the ground that for confirmation of the interim bail, the accused was not in custody and no bail application cannot be considered unless the accused is in custody. The Supreme Court has held that such a view cannot be taken when at the stage of filing bail application the accused was in custody and at the stage of confirmation of such interim bail it is not required for the accused to surrender to custody.

K.M. Mangrola v. State of Gujarat (2006)9 SCC 54O. (2006)3 SCC (Cri) 224

36. However, in another decision a single judge of Kerala High Court regard being had to Art. 21 of the Constitution has observed that a bail application on behalf of the person who appears in Court on his own volition or is produced in execution of the warrant has to be considered and orders should be passed on the same day Itself since the personal liberty of an accused cannot be curtailed in a whimsical or disdainful manner.

Biju S. Praveen v. State of keral 2007 Cr. L.J. (NOC) 291 (Ker).

37. Allahabad High Court tias also held that the High Court should not direct any subordinate Court to decide the bail application on the same day, as that would be interfering with the judicial discretion of the Court hearing the bail application. It is, however, pointed out that when the bail application is under s. 437, Cr PC, ordinarily, the Magistrate should himself decide the bail application on the same day and if he decides in a rare and exceptional case not to decide on the same day, he must record his reasons in writing.

Amravati v. state of U.P. 2005 Cr. L.J. 755 (ALL) (Full Bench of Seven Judges

38. Withdrawal of bail application. There is no bar to any accused applying subsequently for the withdrawal of the application for bail or not to press the bail petition. But the accused cannot as of right claim withdrawal of bail application.

Ahoke Dhariwal v. State of Rajasthan 1982 Cr. L. J. 2335 (Raj).

39. Magistrate granting bail ex parte. There is no bar to the Magistrate in granting bail ex. Parte
during investigation arid such order can be justified bythe urgency of the situation in doing so.

Aruna Goenka v. Rajesh Goenka 1986 Cr. LR 82 (Cal).

40. Order of bail can be modified at any time. It has been observed by Bombay High Court that it is well- settled that the order of bail is an interlocutory order and same can be modified even by the same Court at any time.

Nazeem v. Asst. Collector of Customs 1992 Cr. L. J. 390 (Bom).

41. While granting bail, the Court must indicate the reasons for prima facie concluding why the bail was being granted. Any order dehors such reasons suffers from non-application of mind. Though a conclusive finding in regard to points urged by the parties is not expected of the Court considering the bail application, yet giving reason is different from discussing merits or demerits. But a detailed documentation of the merits of the case has not to be undertaken. But that does not mean that while granting bail some reasons for prima facie is not required to be indicated.

Mansab Ali v. irsan 2003 Cr. L. J. 871 (SC) ; (2003) 1 SCC 632. 3

42. On the other hand, the Bombay High Court has expressed the view that an order granting the bail under s. 437(1) or under s. 439(1), Cr PC is a **final eider** and if such an order is passed by a Magistrate under &. 432, Gr BG the same can, be challenged in the Court of Session or High Court under the revisional power and there cannot be any bar in entertaining a revisional application under s.437 Cr. PC. The first such decision of Bombay High Court has been rendered **in** Sakuntala YRoshanlat Agarwal.

1985 Cr. L. J. 68; 1984 Cr. LR 305 (Mah).

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BAIL GRANTED

SOME LEGAL POSITIONS WHERE ACCUSED ENTITLED TO BE RELEASED ON BAIL-

Even when the investigation proceeded to some extent no evidence has been collected so far against the accused then the Punjab and Haryana High Court has ordered the accused to be released on bail.

(2) When it is found that the petitioner is in jail for several months and his previous petition for bail was refused by High Court but the present petition has been filed on the ground of delay in trial of the case, the Punjab and Haryana High Court ordered release of the accused on bail on taking the view that it is not known as to how long the trial would continue.

(3) When in a rape case the investigation is already over and evidence so far collected is not very convincing then even though it is neither expedient nor proper to express any opinion regarding the merits or demerits of the prosecution case, yet when the investigation is already over, the accused should not be detained further and should be released on bail.

(4) When it is found that the trial of the accused in a murder case is being dragged and the case was adjourned for two months since the submission of the public Prosecutor that he had illegible copies of the challan papers notwithstanding that original challan papers were on record and the order-sheet also was not showing whether summonses had been issued for the witnesses or whether they had been served or not, the learned Judge of Madhya Pradesh High Court has observed that the accused has been made to suffer the delay which was occasioned by the state of affairs smacking of the abuse of the process of the Court and, therefore, the accused was entitled to be released on bail.

(5) When the High Court found that there was no serious attempt at all on the part of the prosecution, and the Trial Court, for a speedy trial and if what has happened so far as an indication the applicant is surely going to languish for quite some time in jail for no fault of his so far as the tardiness of the trial is concerned, it is a fit case for the accused being released on bail even if he is being tried in an offence under s. 302, IPC.

(6) When it is found that the Magistrate is not committing the accused to Session Court for a period of nine months though the case had been

taken by him on several dates, the learned Judge of Allahabad High Court held that the accused is entitled to be released on bail.

(7) When the accused is ailing in jail but despite order of expeditious disposal of the case accused has not been produced before the Court on a number of occassions necessitating adjournment of the case, it is a fit case in which the accused should be released on bail.[B]

(8) Only because there is a necessity of searching the house of the accuse bail cannot be refused when there is no other valid ground for refusing bail.

(9) When the petitioners who were of young age were arrested for offences under ss. 148, 302 and 325, IPC there were no specific allegations made against them in FIR. No incriminating materials were found from them. Their bail application were rejected several times for holding T.I. Parade. Gauhati High Court thought the case fit for granting bail to the petitioners.[15]

(10) In Divrala Sati's case, the accused a child being the real brother of the decreased husband of Rup Kanwar lit fire on the pyre. The Children Court trying the child accused refused bail. The Appellate Court dismissed the appeal on the ground that the accused if allowed to remain in the custody of his parents might believe in the glorification of sati. Before High Court an application under s. 439, Cr PC was moved for the bail of the child accused. The learned Judge released the accused on bail on the ground that in the interest of the child not only for his physical development but also for mental development he should be released on bail instead of being sent to observation home.

(11) The accused persons are prosecuted under ss. 395 and 397, IPC. No recovery of stolen property was made from them. Arrest was made on the next date of the occurrence from a place about 10 or 15 kilometres away from the place of occurrence. No identification parade was held. Even though the challan has been filed against the accused persons, the bail should be granted.

(12) It is found that there is continued extension of judicial detention without production of the accused. Only next date of production has been noted -by the Magistrate on the jail warrant bearing the rubber seal impression. It is held that under s. 309, Cr PC custody of the accused in jail can be maintained and continued only by a warrant issued by the Magistrate and when there is no valid warrant, his confinement is illegal and he should be released on bail.

(13) The accused has been arrested on suspicion of being engaged in manufacture, distribution and sale of adulterated medicine. They are in jail

for long and the investigation is almost over. Other persons have already been released on bail. It is a fit case to grant bail on conditions.

(14) When the bail application by accused and co-accused was refused but the CO-accused was granted bail on second application, then the second application by the accused should also be allowed' to maintain parity.

(15) The dispute between the accused party and the complainant party is one for the possession of land and against the complainant party a cross case under SS. 440,447,323 arid 324, IPC is also pending and the accused also sustained injury. So it is a fit case for the accused to-be released on bail.

(16) The charge against the accused is under s. 306, IPC for instigating the deceased to commit suicide. But the deceased committed suicide 13 years after the marriage. No prima facie evidence is there of abetment of suicide. The deceased was a mental patient. So the bail has been granted to the husband of the deceased.

(17) The applicant even though accused of a gruesome murder was in custody for about six months. He was granted interim bail but did not misuse liberty. He is a heart patient. The police is opposing bail application on fabricating materials. The prosecutor has tried to hoodwink the Court by relying on complaints which are false to their knowledge. It has been held by Bombay High Court that the accused cannot be denied bail any longer.

(18) When evidence against the accused is recovery of some stolen articles and the other accused person similarly situated have been released on bail and when the accused is tender aged he should be released on bail even if his earlier bail applications have been rejected.

(19) The accused is the husband of the victim girl who committed suicide. On the basis of the FIR of the step-mother of the victim the accused has been charged under Ss. 304B/498A read with s. 34, IPC. His earlier two bail applications have been rejected. When the third application has been filed, the High Court having considered the materials that transpired during investigation and also considering the fact that the daughter of the petitioner is hardly 20 months' old considered the case on humanitarian ground and directed the accused to be admitted on bail.

(20) When the Trial Court rejected bail petition of the accused only on the ground that Other cases are pending against the accused the High Court in an application under s. 439, Cr PC has observed that only on the ground that other cases are pending against the accused bail cannot be refused. When that was the only ground to refuse bail the High Court granted bail to the accused under s. 439, Cr PC.

(21) After filing of the challan four eye-witnesses have been examined from which no offence has been made out against the accused, the application, for bail has been made to High Court. It is also disclosed that other co-accused who also actively participated in the murder had been released on bail. So the High Court has granted the accused bail with condition that he would appear in Court as and when called by the Court during the pendency of the bail.

(22) The accused, a foreign national is charged with offences under ss. 11, 12 and 13 of the Prevention of Corruption Act 1988 for which maximum punishment is five years. The investigation is completed even though charge-sheet has not yet been submitted. In these circumstances the Delhi High Court granted the accused bail subject to the term that his passport already confiscated will remain with the CBI and the officer of Foreign Registration Office shall not permit the accused to tavel out of India by any Airlines.

(23) When several police constables have been charged with gang rape but the applicant in bail who is a cook in Police Outpost charged for abetting the said rape on ground that even though he had seen the incident he did not prevent commission of offence but he is aged 70 years. So he deserved to be released on bail.

(24) When the accused petitioner is charged with minor offence of exhortation and was neither involved in any other offence nor was a history sheeter, he cannot be denied bail only because the main accused, his elder brother was a desperado and could not be arrested because of political influence.

(25) Occurrence took place ten years before. There is no allegation of apprehension of repetition of offence or abscondence of the accused or tampering with evidence in case of release on bail. So the bail can be granted to the accused even if the accused is implicated in an offence of murder.[11]

(26) The accused persons are charged under s. 120B read with s. 420, IPC. There is no likelihood to tampering with evidence. Bail should be granted.

(27) When there was no strong prima facie case of murder and the complicity of the accused of the same was not proved and initially the case was registered for offence of rash and negligent driving against the driver of the vehicle in which the deceased was traveling and subsequently on the death of the victim the accused was charged with offence of murder,

the accused was entitled to be released on bail in view of the above facts and circumstances.

(28) Even though it was a case of murder of a young boy but both the accused persons were behind the bar for more than two years. During the trial only some of the witnesses were examined. There was apprehension that the examination of the remaining witnesses would take much time. The Rajasthan High Court having found that such apprehension was not without any foundation thought it fit to release an accused person on bail.

(29) Where the trial could not commence for long for which the accused respondents were not responsible, it would be travesty of justice to keep the accused under further detention as under-trial prisoners. So, the bail granted by the High Court with the appropriate conditions has been upheld by the Supreme Court.

(30) The accused is in the custody for about a year. Charge-sheet has been filed. Having regard to the fact that the trial may take longtime the Supreme Court released the accused on bail imposing certain conditions on him due to his alleged links with the international terrorists.[16]

(31) Bail cannot be refused merely on the ground that the appellant hailing from another State may abscond from the jurisdiction of the Court who granted bail. So, the bail was granted by the Supreme Court with some conditions for ensuring his participation in the trial.

(32) The accused were aged 79 years and 76 years, The bail is opposed on the ground that the accused were not available for investigation. It was a case of misappropriation of huge amount of money and for the purpose of investigation custody of the accused was not required. The accused persons submitted that they were never called by the investigating agency for the purpose of investigation and that they were ready and willing to co-operate with the investigation. Considering the facts and circumstances of the case, bail was granted to the accused subject to certain conditions.

(33) The affidavit has been filed by the sister of the appellant in May, 2004 that in note of the 24 cases registered against the appellant for the period from the year, 19-80-2002, tthe police had applied for production of the appellant. That averment have not been controverted despite grant of opportunity, it was a fit case for releasing the accused on bail pending trial.

(34) When on facts prima facie a strong case has been made out for grant of bail of the appellant petitioner, the bail was granted by the Supreme Court on certain terms.

(35) in a fodder scam case, the appellant having been in the custody for fourteen months and merely eight months having elapsed since the Supreme Court rejected the last bail application and other accused in the said case who had been in the 'custody for over six months or more having been released on bail, the appellant is also granted bail.

(36) When the economic offences have been alleged against the petitioner, Director of Co-Operative Bank, but there is no apprehension that if enlarged on bail, he will tamper with the evidence and he has deposited the considerable amount of money defalcated and promised to pay the balance by installments he should not be refused bail when in the meantime he has. been removed from the post of the Director.

(37) When the accused alleged to be implicated in murder is in the custody for six years and four months and the co-accused has been granted bail, he should be released on bail.

(38) The allegation against the accused is for cheating and forgery. The investigation was not complete despite expiry of sixty days for filing the charge-sheet. The initial report submitted by the police cannot be treated to be supplementary charge-sheet, so as to defeat the right of the accused as he is in the custody for about six month. The accused is entitled to be released on bail.[6]

(39) The allegations against the accused persons who are office bearers of the Co-Operative Bank are involved in financial irregularities with the applicants/ borrowers resulting in huge loss to the bank. But they have paid part of the loan to the Bank during the criminal proceedings. The other accused having the same status has already been released on bail. When the investigation qua of the applicants have become complete, they should also be released on bail.

(40) The FIR indicated that the shot was fired accidentally. The bail has been rejected by the Trial Court because the informant appeared and stated that the shot was fired in his presence by the accused. It is held that for considering whether the bail should be granted or not, the FIR and materials collected during the investigation were to be looked into. But such statement of the informant before the Court at the time of bail hearing should not be used by the Court to refuse bail. So, the bail was granted by the High Court.

(41) The accused is charged with the offence of conspiring with the co-accused to commit the murder. But the statement of eye-witnesses, confession of the co-accused and the conduct of the co-accused to contact the applicant after crime is not sufficient to connect the applicant with the crime. So, he should be released on bail.

(42) The accused is in the custody for two years. Trial is being postponed for no fault of the accused. Trial is not likely to be concluded soon. So, the accused should be enlarged on bail on imposing certain conditions.[10]

(43) Offence of murder arises out of the political rivalry. The application for bail is resisted only on the ground that one of the bullets/empty case of the revolver of main accused allegedly used by him in commission of crime is yet to be recovered. But even after the custody of the accused for over twenty days, the same cannot be recovered. In such a case, considering the evidence collected by the police, nature of accusation and gravity of offence, the accused has been released on bail by the High Court with P.R. Bond of Rs. 20,000 with one surety."

(44) The accused is charged with pouring acid on the face of two girls. But the case diary and the report of the doctor who examined them did not indicate any attack with acid and only the allegation was of assault. Nothing except a plastic bag alleged to be containing a drop of acid was recovered from the spot but the same has not been chemically examined. The victims were never sent to the Government hospital but were alleged to be treated in the private hospital. The circumstances give rise to reasonable doubt regarding the veracity of the prosecution story. So, the applicant is entitled to bail.

(45) The evidence of prosecution witnesses is already over. But the trial has been stayed by the order of the Supreme Court at the stage of recording the statement of the accused. The applicant-accused persons are already in the jail for over two years. They are, entitled to be released on bail.

(46) The accused involved in s. 498A, IPC is in fact in custody for sufficiently long time. He should be released on bail.

(47) In Telgi Stamp case, the appellant, Deputy Superintendent of Stamps was arrested during the course of investigation about fourteen years after the registration of the case. He is in custody for more than two years and three months. On consideration of the relevant circumstances and taking note of the period during which the accused was in custody, the Supreme Court thought it fit to release him on his furnishing security to the satisfaction of the Special Court and imposing certain conditions.

(48) The accused is charged with the offences under ss. 192, 217, 218, 263(a), IPC read with s. 3 and s. 34 of the Maharashtra Control of Organised Crimes Act, 1999. The allegations in the charge-sheet are not per se sufficient to bring home offence under s. 3 of the Maharashtra Act

of 1999. Moreover, maximum punishment under the Maharashtra Act is three years imprisonment of which the accused petitioners are in custody for two years. So, it is a fit case for grant of bail.

(49) Allegations are that the applicant did not supervise the work properly in the capacity as S.D.O. and wrong measurements have been made by his subordinate. But his subordinate has already been released on bail. So, the applicant is entitled to regular bail.

(50) In case of death of a married woman within 5-7 months of marriage, to incriminating m material was found pointing as to homicidal or suicidal death supported by medical evidence. Allegation of torture meted out to the deceased by her husband and relatives for demand of dowry has not been substantiated prima f The doctor conducting post mortem examination has not been examined. Investigation has been completed long back and the accused persons are permanent residents of the locality. Hence, they are directed to be released on bail.

(51) The accused husband sustained number of injuries while trying to save the life of the wife. Injuries were not superficial. Accused can be said to have no intention to cause the death of his wife. Moreover, in the dying declaration there was no mention of dowry or ill-treatment. So for the alleged offence of dowry death. the accused is entitled to bail.

(52) The accused is involved in the offence of criminal conspiracy to commit murder. But no overt act was attributed to the accused in the commission of me crime only an isolated witness who supported the prosecution case had motive to falsely implicate the accused. The trial court did not complete the trial even within extended time. The accused was well-educated youngman not having any objectionable antecedents. He did not indulge in tampering the witness. So, the High Court granted bail to the accused.

(53) The accused police officer was charged in stamp scam for abstaining from taking necessary action by himself or though his subordinate. The plea of the accused is that he himself is a subordinate officer not in position to take some actions alleged to have been taken by him. The High Court granted bail. The Supreme Court did not wish to interfere.

44. The Supreme Court has laid enphsis on the disposal of the bail application the same day.

Naresh Kumar Yadav V. Ravinder Kumar, (2008) I SCC 632 (638) : AIR 2008 SC 218 : (20008) I SCC (Cri) 277.

45. WHERE THE ACCUSED AN ADVOCATE IS AN INFLUENTIAL PERSON, HIS RELEASE ON BAIL MAY PREJUDICE THE PROSECUTION CASE, BAIL WOULD BE REFUSED.

Arjun Sau. V. State of Madhya Pradesh, 2008 Cri. L.J. 2771 (2775) (MP); Shaikh Jaffar v. State of Maharashtra, 2008 Cr. L.J. 2413 (2417, 2418) : 2008 (4) Mah L.J. 713 (Bom).

46. Illegal detention.—Illegal detention of the accused constitutes ground for grant of bail. If the Court is satisfied on the basis of information placed before it that the accused has his roots in the community and is not likely to abscond, his release on his executing personal bond may be ordered.

Sayeed Ahmad v. State, 1978 Cri.L.J. 541 (All).

47. Time lag.—The liberty of a person, even if he is accused of a heinous crime, cannot be taken away lightly, especially when there is considerable time-lag between the date of occurrence and the conclusion of me trial.

HussainaraKhatoon v. State of Bihar, AIR 1979 SC 1360: (1980) 1 SCC 81:1979 Cri.L.J. 1036.

48. Student accused.—Where in daylight murder of two persons, two accused were already been granted bail, accused applicant, a student in jail for more than one year, was also granted bail.

Ramesh Chaader Singh v. High Court of Allahabad, (2007) 4 SCC 247 : (2007) 2 SCC (Cri)

49. Where accused applicants office bearers 01 a Cooperative bank were charged for committing financial irregularities, and causing loss to the bank, had paid part of the Idan amount during pending of criminal proceedings, co-accused had already been released on bail, the applicants were enlarged on bail for offences under Ss. 167, 406, 420, 467, 468 and 471 read with S. 120B and S. 46 of the Banking, Regulation Act, especially when investigation qua applicants was over and charge sheet had been submitted in the case.

DashrathbhaiBholidars Patelv. State of Gujarat, 2004 Cri.L.J. 4368 (4374,4375) (Guj).

50. Ex parte bail order.—When the exigency of the situation warrants ex pane bail order can be' passed.

Goenka v. Rajesh Goenka, 1986 (1) Crimes 325, 328 (Cal-DB).

51. The law of parity is to be applied in granting bail and not rejecting bail to a co-accused. Where accused with co-accused persons forcibly caught deceased and put him in jail, co-accused was released on bail, accused was also enlarged on bail.

Yunis V. State of U.P., 1999 (2) Crimes 284 (All).

52. **Cross** case-In cross-cases where both the parties have received serious injuries, FIR has been filed, the usual practice is to grant bail to the accused persons in both the cases. Where in cross cases registered under Ss. 307/34, IPC one party had been released on bail, the accused in other case was also held entitled to be released on bail.

Ashish Pateliya v. State of Chattisgarh, 2003 (2) Crimes 367 (368) (Chhatt)

53. Where in a case under S. 302 IPC, the role of firing was assigned to co-accused only, accused was enlarged on bail.

Surendra Singh v. State of U.P., 2009 CrL.J (HOC) 760 (All-DB).

54. Where no pre-plan was hatched by the accused husband and the death occurred at the spur of moment bail may be granted.

Parveen Malhotra v. State, 1990 Cri. L.J. 1977, 1986 (Del) : ILR 1990 Del 559

55. Where there was no foundation for demand of dowry, also no evidence of mental cruelty and harassment alleged to be caused by accused husband the accused was released on bail.

Suhaib Ilyasi v. State, 2000 CrU 4766 (Del).

56. Where the report of CFSL stated that the suicide note was not in the handwriting of the deceased, bailwas allowed.

Deputy Rai Bhasin v. State, 1994 Cri.L.J. 47 (Del).

57. Where there was no direct or specific allegation against the mother-in-law offence was under S. 304B I.P.C., she was granted bail.

Amarnath Gupta v. State of M.P., 1991 Cri.L.J. 2163 (MP).

58. Where there was no evidence of demand of dowry or harassment, applicant having daughter aged 20 months, accused was enlarged on bail.

Ravi Kumar v. State, 1991 Cri.L.J. 2579 (Del).

59. Where there was prima facie evidence of dowry death, mother-in-law and husband accused were denied bail, other co-accused were granted bail was irrelevant.

Simantini Samantaray v. State of Orissa, 1998 Cri.L.J. 2752 (Ori),

60. Where the allegations against the accused sister-in-law were of torture and ill-treatment though had substance, but she being unmarried girl of 20 years of age, she was granted anticipatory bail under S. 437(1), proviso.

Lal Singh v. State of UP., 1999 Cri.L.J. 3705 (All). O

61. The accused elder brother-in-law of the deceased, was living separately, marriage of deceased had taken place 2-1/2 years before, he was enlarged on bail. In dowry death cases relatives of the husband of the deceased living separately were enlarged on bail. Even where the allegations of offences under Ss. 498A, 304B and 306, IPC are of serious nature, in the absence of allegations that the accused on being released on bail would flee away or tamper with prosecution evidence, the accused (husband) would be released on bail.

Raj Kumar v. State of H.P., (2002) 4 Rec Cri R 792 : 2002 Cr. L.J. 3816 (3817) (HP).

62. Where the accused had been having sexual relations with the prosecutrix with her consent for a considerable period and only when he refused to many tile case under S. 376, DPC was fieM by Hie prosecutrix, accused would be entitled to be released on bail.

Arjun Gupta v. State ofJharkhana', AIR 2002 Jhar HCR196:2002 Cr. L.J. NOC 102 (Jhar).

63. Indian Arms Act—Where the accused is alleged to have been carrying on business of arms and ammunitions in Violation of the provisions of the Indian Arms Act, case is based on documentary evidence, most of the prosecution witnesses are Government and police officials, the accused would be released on bail.

JehangirManban Patelv. State of Gujarat, 2004 Cri.L.J. 1162 (1167,1168) (Guj).

64. Customs Act, Ss. 132,135,—Where an accused a non-resident Indian was charged fer offences under Ss. if2, 135 Customs Act, offences not punishable with death or imprisonment of file, accused had lairge business/properties in India, was not likely to flee from India, mere was no case of tampering with prosecution evidence, bail was allowed.

Anand Swarup Gupta v. Union of India, 1999 Cri.L.J. 4003 (Del).

65. Under Essential Commodities Act, 1955.—An accused found selling adulterated petrol ;harged under Ss. 3/7 of the B.C. Act would not be entitled to bail.[63] Bail may be granted to an accused ,vho is at wholesale dealer in goodgrains and whose mills have been raided and incriminating materials seized under the Essential Commodities Act, 1955 as amended by Essential Commodities (Special Provisions) Act, 1981.

S. Murugeshappa v. State of Kamataka, 1984 Cr.L.J. 1819 (Kant).

66. Offence under Official Secrets Act - Where there was no direct evidence connecting the accused with the leakage of information relating to the Defence Ministry, order of the High Court granting bail to the accused was upheld.

CBI v. Abhishek Verma, 2009 (6) SCC 300 (307) (SC).

67. Unlawful Activities (Prevention) Act, 1967, Ss. 17, 10.—In prosecution for offences under Ss. 17 and 10 of the Unlawful Activities (Prevention Act), 1967, the Magistrate has jurisdiction to entertain bail application. Narcotic Drugs and Psychotropic Substances Act, 1985.

A.D.Sathe v. State of Maharashtra, 1994 Cr.L.J 99 (Bom).

68. Cases where the tests of S. 37 NDPS Act are not satisfied, if the case falls under the proviso to S. 437(1) Cr. PC, accused would be enlarged on bail.

Gopu Dalaiah v. State ofA.P., 2002 (2) Crimes 191 (196,197) (AP).

69. Where the evidence against the accused involved m onence under S. 21, NDPS Act is unbelievable, e.g. disclosure statement of co-accused and is ridiculous, bail would be granted.

Manoj Kumar Gupta v. State of NCT of Delhi, (2003) 102 DLT 765 :2003 Cr.L.J. 2353 (2354) (Del).

70. Where the charas recovered from me possession of the accused is less than the commercial quantity, the rigour of S. 37, NDPS Act would not apply, accused would be released on bail.

Manoj Kumar v. State of HP (2002) 4 Crimes 264 : 2003 Cri. L.J. 1644 (1646) (HP); Sartori Livio v. State Delhi Admn.), 2005 Cr. L.J. NOC 71:

71. Prosecution aider Prevention of Corruption Act, 1947 (New Act, 1988).— Under Ss. 48®, 420, 120B I.P.C. & S. 13 of the Prevention of Corruption Act, 1947, case was based on documentary evidence, there was no chance of tampering with evidence or running away, accused was enlarged on bail.

D. Mallesham Goudv, State, 1999 Cr.L.J. 3864 (Del).

72. Where m prosecution under Ss. 420,467,468, 471, read with S. 420B I.P.C., me mam accused was not arrested, co-accused applicant was in jail for about one year, only one prosecution witness had been partly examined, co-accused was released on bail.

Arvinder Singh Khama v. B.S. Thakur, 1994 Cr.L.J. 287 (Del).

73. Order of commitment not a bar – The factum of commitment by Magistrate would not preclude the Sessions Judge or High Court form grnating bail when he finds that there are reasonable ground for believing that the accused is not guildty of the offence with which he was charged.

Ahmad Shaikh v. State, 1975 Cr. L.J. 81 (J&K)

74. Where the accused undergoing treatment of cardiac, he was enlarged on bail.

Krishnappa Das v. State of Tripura, 2007 Cr. L.J. (NOC) 350 (Gauh).

75. Where the accused applicant charged under Ss. 302, 307, 147, 148 and 149, IPC was aged 80 years, he was enlarged on bail though on fourth bail application.

Jodhan v. The State of Chattisgarh th. P.S. Kawardha Distt., 2002 (1) Crimes 804 (804) (Chhatts).

76. Merely because the accused may be required for identification the bail cannot be refused, if he is otherwise entitled to bail.

Maharaj Singh v. State of Rajasthan, 1988 (1) Crimes 236 (Raj)

77. Demand of local sureties – Where the accused is not able to offer local sureties bail order may be modified to enable him to give surety who need not be local persons.

Kumar Biswakarma v. State of Sikkim, 1990 Cr.L.J. 2368 (Sik); Motiram v. State of MP, AIR 1978 SC 1594 : 1978 Cr.L.J. 1703; Keshab Narayan Banerjee v. State of Bihar, AIR 1985 SC 1666 : 1985 Cr.L.J. 1857; Anwari Begum v. Sher Mohammad, 2005 Cr.L.J. 4132(4135) (SC)

78. In order rejecting bail application it is necessary for the court to record all the submission/ arguments of the counsel for the accused, it would be sufficient if salient grounds are records in the order allowing the bail or rejecting the bail.

Dronenda Jha V. State of Jharkhand, 2004 Cr.L.J. 2950 (2951, 2952) (Jhar)

79. Where the court grants bail to accused and not to co-accused without recording reasons, the order is improper.

Mansab Ali v. Isran, (2003) 1 SCC 632 : 2003 Cr.L.J. 871 (872) (SC)
Gheesya v. State of Rajasthan , 1989 (1) Crimes 524, 528 (Raj).

80. Case under Ss. 302, 303, 201, IPC based on circumstantial evidence, accused as allegedly was last seen with the deceased accused was admitted to bail.

Barati v. State of U.P., 2004 ACC 472 (All).

81. Affidavit – No bail application can be rejected by the office at the inception or threshod merely on the groun that it is not accompanied by an affidavit.

Shaji P.R. v. State of Kerala, 2007 Cr. L.J. 240 (246) (DB) : 2006 (2) Ker L.J. 779 (Ker)

82. Anticipatory bail—when may be granted.—The anticipatory bail under S. 438, may be granted to the following persons—

(i) Government servants

(ii) Minors

(iii) Women

(iv) Old and infirm persons

(v) Handicapped persons

(vi) Persons having permanent disability

(vii) Persons who are involved in petty cases

(viii) Persons who are likely to be harassed in police custody. For other category of cases, the general law of bail is already provided in S. 439.

The discretion of granting anticipatory bail has to be exercised sparingly in appropriate cases, with due care and caution imposing required conditions.

NarayansiHgh v. State of MP., 1996 Cr.L.J 551 (MP).

83. Absence of records.—Interim anticipatory bail can be granted to the petitioner even in the absence of the records.

Sanjeev Chandel v. State ofH.P., (2003) 2 Rec Cri R 450 : 2603 Cri.L.J. 935 (936) (HP); Anil Kapoorv. Himachal Pradesh, (2002) 1 Chand LR (Civ & Cri) 269 (HP).

84. Pretrial punishment—This power is not to be exercised as if a punishment before trial is being imposed. The only material consideration in such a situation is whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in bis favour by tampering

with the evidence. For mere interrogation arrest of the accused is not all necessary.

Sajjan Kumar v. State, 1991 Cr. L.J. 645,653 (Del).

85. Refusal an exception.—The grant of bail is the rule, and refusal is the exception

R.L. Jalappa V.Delhi Police Establishment, 1989 (3) Crimes 113,120 (Kant).

86. Sickness.—Sickness of the accused pre-arrest bail order. Accused ex-Chairman of Bank charged under Ss. 406,409,420,439,471,473 and 120-B for financial irregularities, aged 87 years and suffering from various diseases, was granted anticipatory bail on health

Sureshchandra Romanlal v. State of Gujarat, 2008 AIR SCW 4004 (4006).

87. The counsel for the complainant or the first informant has no right of audience in a petition filed u/s. 438, CrPC for grant of anticipatory bail. He cannot be permitted to orally address the Court.

Sunil Puri v. State of Chhattisgarh, 2Q06 Cr. L. J. 2866 (2871): 2006 Rec Cri R 682 (Chhat).

88. When arrest is needless.—When there is no need whatsoever to arrest the applicant for the purposes of investigation, the same can be done without his arrest provided the applicant appears before the police as an when necessary.

Devi Das Raghu Nath Naik v. State, 1987 (3) Crimes 363,366 (Bom): 1989 Cri.L.J. 252.

89. Needless to establish political or other enmity.—Anticipatory bail cannot be refused merely on the ground that the accused has failed to establish political or other enmity. Cases in which falsity of the charge is not established are also covered by this section.

Jagannath v. State of Maharashtra, 1981 Cr. L.J. 1808 (Bom).

90. Extra-judicial confession.—Anticipatory bail cannot be refused on the ground that the accused who is in high status has been implicated by an accused in the extra-judicial confession.

Jagannath v. State of Maharashtra, 1981 Cri.L.J. 1808 (Bom).

91. Vague allegations.—Bail cannot be refused on vague allegations.

Parshottam Lai Banwarilal Agarwal v. State of Maharashtra, 1986 (1) Crimes 207 (Bom).

92. If the role assigned to an accused is of general nature, he can be released on anticipatory bail with conditions.

Bhagwat Singh v. State of Rajas than, 1989 (1) Crimes 592 (Raj).

93. When there k not even a subdued suggestion that the accused is likely to flee from justice or to tamper with fte prosecution evidence; anticipatory bail may be granted.

K.K. Jajodva v. "State (CBI), 1988 Cr. L.J. 968 (Del).

94. Absence of name in FIR.—Where the name of the accused is not mentioned in the FIR co-accused has already been granted bail, accused hails from a respectable family, had deep roots in the society, is not likely to abscond or evade the process of the Court or in any way hamper investigation can be granted anticipatory bail.

Arun Sharma v. State of Assam, 1986 (2) Crimes 61, 68 (Gau-DB).

95. Keeping out of reach of police.—The mere circumstance that the petitioners are keeping themselves out of the reach of the police is not a sufficient ground to deny the relief of anticipatory bail to them, when there is no possibility of the absconding as they are agriculturists by professionl.

Gaffarsah v. State of Karnataka, 1991 Cri.L.J. 2136,2138 (Kant).

96. Embezzlement - In a case of embezzlement where the amount has been recovered and the accused has undertaken to face the trial, when it come up then he can be released on anticipatory bail.

Rajender Kumar Sharma v. State of Rajasthan, 1988 (3) Crimes 887 (Raj).

97. Rape case.—Bail without jail in a rape case is an extraordinary situation, but when the case is one of the unusual nature with puzzling allegations anticipatory bail may be granted.[31]

Abdul Majid v. State of Rajasthan, 1981 Cri.L.J. 1316 (Raj); Padan Paltasigh v. State of Orissa, (2002) 22 OCR 50: 2002 Cri.L.J. (NOC) 125 (Ori) (Rape case).

98. Where in a case registered under S. 376IPC, and S. 3(l)(xii) of SC & ST Act, the evidence showed that the complainant was living with the applicant as his wife for more than 4 years and dispute arose when the applicant refused to marry, anticipatory bail was allowed.

Praveen Kumar Sahu v.State of Chhattisgarh, 2007 Cri.L.J. 1134 (1136): 2007 (1) Crimes 452 (Chhatt).

99. Where FIR showed that the prosecutrix at the time of the commission of offence was more than 18 years of age and was a consented party, the petitioner accused was held entitled to anticipatory bail.

AshokBapurao Thorat v. State of Maharasth, 2008 Cri.L.J. (NOC) 165 :2007 (6) AIR Bom R 531 (Bom).

100. Nature of injuries.—Where the incident took place because the accused belonging to a particular caste did not support a candidate and the injuries inflicted were on arms, discretion be exercised in favour of release of the accused.

Daulat Ram v. State ofRajasthan, 1989 (2) Crimes 257,259 (SC).

101. Where the accused assembled and pelted stones injuries to a person and have not played any role in the act of murder, the accused are entitled to bail.

In re, Mongol, 1989 (2) Crimes 698 (Raj).

102. Anticipatory bail may be granted in a shooting case where neither the FIR nor investigation showed that it was petitioner who fired the shots and by which no one was injured.

Narinder Singh v. State, 1977 Cri.L.J. 596 (P&H).

103. Enticing girl.—In the case of enticing a girl who is aged above 18 years, the accused having married the girl since then gives an undertaking to treat her well, besides, the girl had accepted the marriage and claimed to be pregnant, anticipatory bail may be granted in the interest of justice to protect the victim girl from social stigma.

Arm Kumar v. State, 1990 Cri.L.J. 1988 (Ori).

104. Delay.—When no action was initiated against the accused for about six months, and he was not interrogated and there was no material to show his involvement in respect of an offence under Ss. 27, 29, 31, 39. 50 & 51 of the Wild Life (Protection) Act, 1972 the accused was held entitled to be enlarged on bail.

BadriLalY. State of Rajasthan, 1989 (3) Crimes 192 (Raj).

105. Grant of bail to co-accused (Parity).—Where other two accused persons on similar allegations have been granted bail, the accused applicant should be granted anticipatory bail. Anticipatory bail was allowed to the accused appellant.

KamaL.J.it Singh v. State of Punjab, 2006 Cri.L.J. 4617 (4618): 2005 SCC (Cri) 1668.

106. Where one co-accused is acquitted, on that ground alone the absconding co-accused is not entitled to anticipatory bail.

Manna Muni Khan v. State of Rajasthan, 1996 Cri.L.J. 831 (Raj).

107. Anticipatory bail to an accused would not be refused merely because other accused has been granted regular bail.

State of Kerala v. K.R. Suraj, 2004 Cri.L.J. 1995 (2000) (Ker).

108. Recovery.—The fact that recovery is to be made is no ground for refusing anticipatory bail.

AnandKay v. State of Delhi, 1986 (1) Crimes 153 (Del).

109. In pre-arrest bail application under S. 438 the Court cannot give direction for recovery of dowry articles.

MohinderKaurv. State of Punjab, 2008 CrD 2623 (2625) : AIR 2008 SC 2068 : 2008 (4) SCC 580,

110. Provisions of this section can be applied with respect to offence under the Customs Act, 1962 and anticipatory bail may be granted.

E. Joseph v. Asst. Collector of Customs, Tuticorin, 1982 Cri.L.J. 559, 564 (Mad).

111. Where the accused is an established businessman, has roots in society, he should not be denied bail merely because he is involved in serious economic offences.

Anil Mahajan v. Commr. of Customs, 2000 Cri.L.J. 2094 (Del).

112. Where case was registered under clauses 5 and 15 of C.G. Public Distribution System (Control) Order 2004 read with S. 3 of the EC Act, the accused was authorised transporter of Food trains from godown to various Fair Price shops pinishment for contravention of the provisions of Control Older could extend to 7 years and also to fine, offence was non-bailable, hence anticipatory bail petition under S. 438 CrPC was maintainable and was allowed.

Amar Nath Sahu v. State of Chattisgarh, 2007 Cri.L.J. 3014 (3016) (Chht).

113. Railway Property (Unlawful Possession) Act, 1966.—Anticipatory bail can be granted in respect of an offence under S. 3 of Railway Property (Unlawful Possession), Act 1966.

Union of India v. State of Assam , (2004) 7 SCC 474: 2004 SCC (Cri) 1951 : 2004 Cr.L.J. 4647 (4649) (SC)

114. Kidnapping case.—Where the prosecutrix was legally married wife, of the petitioner as revealed by the certificate of marriage and photographs of marriages, the petitioner in charge for offence under Ss. 363 and 366, IPC was granted anticipatory bail.

Dhanaram v. State of Chhattisgarh, 2002 (1) Crimes 726 (726) (Chhatt).

115. Police officials.—Where the accused is a police constable, delay in registering complaint against him is no ground for granting anticipatory bail to him.

Stanley v. State, 1998 Cri.L.J. 1304 (Mad).

116. Where the accused are sub-inspector and police constables who have made themselves scarce by absconding and they have not even appeared to draw their subsistence allowance as they are placed under suspension, the case is a case of extreme sensitive nature with wide social and political repercussions, the accused by their very status wield their influence over the material witnesses required for interrogation and thereby hamper the investigation, they are not entitled to anticipatory bail.

V. Shekarv. State ofKarnataka, 1991(1) Crimes 365,376: 1991 Cri.L.J. 1100,1110 (Kant).

117. Scheduled Castes **and Scheduled Tribes (Prevention of Atrocities)** Act, 1989.—The bar of S. 18 of the Act would apply in genuine cases which fall under S. 3 of the Act, it would certainly not apply to situations in which the provisions of the Act have wrongly been invoked or where the facts do not justify it.

N.B. Gungarakoppa v. State ofKarnataka, (2002) 3 Kant 3308 : 2002 Cri.L.J. 33] 1 (3316) (Kant-DB); Virendra Singh v. State of Rajasthan, 2000 Cri.L.J. 2899 (Raj); Rajkumar Agrawal v. State of Chhattisgarh, 2007 Cri.L.J. 2475 (2477, 2478) (Chhat).

118. Where the complaint filed under the, Act, contained false allegations, the accused was released on bail.

Somesh Das v. State of Chattisgarh, 2004 Cri.L.J. 680 (684) (Chart); Rajkumar v. State of Chhattisgarh, 2006 Cri.L.J. (NOC) 389: 2006 Cri.L.J. (NOC) 401 (Chh) : 2006 Cri.L.J. (NOC) 371: (2006) 1 MPL.J. 370 (MP); Rajkumar Agarwal v. State ofChhatisgarh, 2007 Cri.L.J. 2475 (2475, 2427) (Chh) (Charge under S. 376(2)(g) IPC & S. $ SC & ST Act. Accused applicant not named in FIR, also not identified by the prosecutrix in test identification parade).

119. Offence under S. 498A.—Several families are ruined; marriages have been irretrievabiy bndten down and chances of reconciliation of spouses have been spoiled on account of unnecessary and the consequent arrest and remand of the husbands, and their kirn and kin. To discourage this unhealthy practice, it is desirable that anticipatory bail is granted very liberally in aU cases of S..498-A, IPC., particularly when the petitioner/accused is not tile husband of the complainant and when the allegations are not very specific and prima facie do not inspire confidence.

Kamireddy Mangamma Reddy v. State ofA.P., 2008 Cri.L.J. 1083 (1084) (AP).

120. Instances **where anticipatory** bail **allowed.**—Where the case was pending investigation before CBI, Advocate-General apprehended his arrest, anticipatory bail was granted, however for limited period.

Indrajeet Roy v. State of Orissa, 1998 Cri.L.J. 2415 (Ori).

121. Where the accused had exceeded limits for taking loan without furnishing guarantee, undertook to re-pay, and also started making re-payment anticipatory was allowed.[1]

V.A. Pameerselvam v. State, 1998 Cri.L.J. 2720 (Mad).

122. Where death of deceased disciple of an Ashram was due to consumption of poisonous insecticide, accused was head of the said Ashram, FIR was lodged after twenty days by rival competitor of accused, and member of the family of the deceased had no grudge against the applicant anticipatory bail was allowed.

Swami Rameshwara Nand Puriv. State of Rajasthan, 1998 Cri.L.J. 2193 (Raj).

123. Where accused was involved in murder case there was political rivalries between the parties, accused was alleged to have instigated crime on the spot, anticipatory bail allowed.[19]

S. Saravanan v. State, 1995 Cri.L.J. 1999 (Mad).

124. Where no offence under S. 498A prima facie was made out, accused was granted anticipatory bail.

Ramesh PrasadBhanja v. State ofOrissa, 1996 Cri.L.J. 2743 (Ori).

125. Where accused employee of a firm, was evading payment of dues, was old and sick, accused was allowed anticipatory bail.

Assistant Director, D&E v. Nathmal Bajaj, 1997 Cri.L.J. 930 (AP).

126. Where in a murder case, there w,ere three versions the accused applicant involved was teacher, there was no allegation of tamperihg/influencing witnesses, no chance of fleeing, anticipatory bail was allowed.

Ram Kumar Tyagi v. State, 1995 Cri.L.J. 1877 (Del).

127. Where accused applicant was not main accused in the case, was unarmed at the time of occurrence in view of age of and extent participation of the accused applicant, anticipatory bail was allowed.

MolakRam v. State of H.P., 1996 Cri.L.J. 1198 (HP).

128. Where there was apprehension in the mind of the accused persons that they would be arrested for non-bailable offences, anticipatory bail was allowed.

Asgar Alt Khan v. State ofKarnataka, 1995 Cri.L.J. 2302 (Kant).

129. Looking to the facts of the case, in a case under S. 498A I.P.C., and S. 4 Dowry Prohibition; Act, accused was granted anticipatory bail.

Govinda v. State of Orissa, 1996 Cri.L.J. 1014 (Ori); Bindu Devi alias Bindu Singh v. State of Jharkhand, 2008 QL.J. (NOC) 1135:2008 (2) AIR Jhar R 921 (Jhar) (Mother-in-law granted anticipatory bail).

130. In a case for offence under S. 498A, mother-in-law a retired constable was granted pre-arrest bail, the refusal of the bail on the ground that the accused would influence the investigation was not proper.

MohinderKaurv. State of Punjab, 2008 Cri.L.J. 2623 (2625) : AIR 2008 SC 2068:2008 (4) SCC 580.

131. Where letters written by the wife showed that she was subjected tp cruelty and harassment, other members of the family of the husband who were not living with Iter were granted anticipatory bail, husband was not allowed anticipatory bail.

Prakash Kunwar v. State of Rajasthan, 1997 Cri.L.J. 824 (Raj).

132. Where no offence under S 498A prima facie was made out, accused was granted anticipatory bail.

Ramesh PrasadBhanja v. State ofOrissa, 1996 Cri.L.J. 2743 (Ori).

133. Where complaint prima facie disclosed offences under Ss. 498A and 306 D?C against the accused mother-in-law aged 67 years, looking to her age she was granted anticipatory bail.

Mahadevi (Smt.) v. State ofKarnataka, 2006 Cri.L.J. (NOC) 49 : 2006 (1) AIR Kar R 337 (Kant).

134. Where in case "under S 498A the allegations of demand of dowry and cruel treatment were vague, the accused husband Was released on anticipatory bail.

Pavtira Uraon v. State of Chhatisgarh, 2007 GrL.J. (NOC) 637 (Chh); see also Sushanta Patray. State ofOrissa, 2008 (1) Crimes 715 (Ori).

135. Where charge was of sexual harassment and misbehaviour, the FIR was fifed after one year of the occurrence, embellishments in FIR could not be ruled out accused was enlarged on anticipatory bail.

D.N. Rao v. State, 2001 Cri.L.J. 3739 (Ori).

136. Where in a dowry death case, the petitioners were living separately from die deceased, allegations against the petitioners were of general nature, anticipatory bail was allowed.

Anju v. State, 2007 Cri.L.J. 143 : (Del); Sudesh v. State of NCT of Delhi, 2008 (1) Crimes 193 (Del) (Married sistere of husband).

137. In a bride burning case sister-in-law of the deceased living separately alleged to have eaught-hold hands of the deceased when deceased's husband poured kerosene oil on her, was allowed anticipatoiy bail.

(2002) 4 Crimes 86 : (2002) 97 DLT 906 : 2002 Cri.L.J. NOC 240 (Del); Katrnrzddy Mangamma Reddy v. State of AJP., 2008 Cri.L.J. 1083 (AP) (S. 498-A—Sister-in-law and her husband living in USA—Allegations that sister-in-law instigated father-in-law and husband to harass complainant—All accused granted anticipatory bail).

138. Where search, investigation and seizure are conducted by an investigating officer not empowered, and as such investigation is illegal, the accused would be allowed anticipatory bail.

Laxmikant Sea-da v. State of Maharashtra, (2002) 1 Cur Cri R 484:2002 Cri.L.J. 1040 (1050) (Bom).

139. Where the allegations against the accused at the most made out offences under Ss. 451 and 354, IPC, which are bailable, the accused was granted anticipatory bail.

Rajesh Utra Kumar v. State of Chattisgarh, (2002) 3 Cur Cri R 528 :2002 Cri.L.J. 1175 (1177) (Chatt).

140. Where the appellants joined investigation whenever required, they were named as accused for committing offence under S. 120B, after a period of four and half months on the disclosure statement of a hardened criminal, the order granting anticipatory bail would be proper.

Mahant ChandNath Yogiv. State of Haryana, 2003 Cri.L.J. 76 (81) (SC).

141. In a case registered under Ss. 419,420,467,468 and 471, IPC petitioner an advocate verifying £ surety as per practice was allowed anticipatory bail as he had no intention to commit any offence.

Surendra Kumar Sahu v. State ofChhattisgarh, 2004 (2) Crimes 86 (87) (Chhatt).

142. Where the accused facing prosecution under S. 3(l)(x) of the SC & ST Act was not aware that the" complainant was a scheduled caste, anticipatory bail would be allowed.

Pishora Singh v. State of Punjab, (2002) 2 Rec Cri R 215 :2002 Cri.L.J. 4130 (4133) (P&H).

143. Where immediately after the death all the relatives of the deceased gave statement that there was no dowry was settled, nor any dowry was demanded, petitioners facing prosecution under S. 304B, IPC sure granted anticipatory bail for a period of 30 days;

144. In case registered under Ss. 307, 498A and 304B/34, where the death summary showed'that it was case of suicide, the petitioner married sister-in-law of the deceased having two minor children was granted pre-arrest bail.

Sonul@ NeerajRani (Ms) v. State (NCI'of Delhi, 2002 (4) Crimes 86 (88) (Del).

145. Mother-in-law aged 62 years was granted anticipatory bail.[41]

Mahendra Rani Johar v. State of NCT of Delhi, 2005 Cri.L.J. 2110 (Del).

146. In case registered under Ss. 307, 323 etc. the main accused who had grievous injury had been granted bail, petitioners women to whom no grievous injury was attributed to?ere allowed anticipatory bail·

Manbahari Devi v. State of Rajasthan, 2004 (1) Crimes 650 (651) (Raj).

147. Where FIR was registered under S. 153A IPC with allegations that the petitioner in a television serial by a radio jockey deliberately insulted the sentiments of the Gorkha Nepali community in West Berig^, as the petitioner had tendered apology and he could be interrogated by the investigating officer without taking him into custody, he was allowed anticipatory bail.

Nanathan Nitin Brady v. State of West Bengal, (2008) 3 SCC (Cri) 627: (2008) 8 SCC 660.

148. Where the petitioner Branch Manger of a Bank and other petitioners directors of a company in conspiracy, were charged under Ss. 420, 120B and S. 13 of the Prevention of Corruption Act, the petitioner Branch Manger of the Bank issued bank guarantees in excess of the financial limits and allowed credit facilities beyond his power amckbank norms, it was a case of mere irregularity and no loss was caused to the bank, the petitioner w'aTfranted anticipatory bail.

Ramesh Gandhi v. State of Jharkhand, 2004 Cri.L.J. 1037 (1040,1041) (Jhr).

149. The petitioners charged under Ss. 465,468,477A, 420,420-B/34, IPC for committing irregularities in admission of private engineering college were enlarged on anticipatory bail.

Kamini Kanta Patnaik v. State of Orissa, 2002 (2) Crimes 517 (525) (On).

150. Where the petitioner hi a case registered under Ss. 329, 498A,' 1206/34, IPC the petitioner a Psychiatrist was charged for admitting and treating a patient in Contravention of the provisions of Mental Health Act, anticipatory bail was allowed.

Sandeep (Dr.) Vohra v. State, 2002 (3) Crimes 341 (Del).

151. In case registered under Ss. 147,179, Indian Railways Act, petitioner found with reservation forms and cash near the Reservation Counter, where co-accused had been granted bail was also enlarged on anticipatory bail.

SyedNazim Ali v. State ofChattisgarh, 2002 (4) Crimes 221 (Chatt.).

152. Where in case registered under Ss. 314, 315 and 120B/34, IPC, applicant had developed illicit relationships with the deceased, deceased died after 20 days of alleged termination of pregnancy but investigation revealed that the deceased had delivered the child, the death of the deceased was due to ' poisoning, the petitioner was enlarged on anticipatory bail.

Raj Kumar v. State of Chattisgarh, 2002 (4) Crimes 240 (Chhat).

153. Where parties had entered into compromise and there were cross-cases, anticipatory bail was allowed.

Modern Lai v. State of Haryana, 2002 (1) Crimes 697 (699) (P&H).

154. The imposition of other conditions must have some nexus with the object of stipulating such conditions of direction to pay certain amount to some person has no nexus, it is nothing but amounts to enforcement of a civil liability such a condition cannot be imposed.

V. Satyanarayana v. State ofA.P,, 2000 Cri.L.J. 605 (AP); Shaik Layak v. State, 1981 Cri.L.J. 14 (AP); Darshan Singh v. State of Rajasthan, 1993 Cri.L.J. 1973 (Raj).

155. Where accused involved in offence under Ss. 420, 406, 468, 467, 471 and 120B I.P.C., was enlarged on bail subject to deposit of Rs. 10 crores, it was not a proper exercise of discretion, hence the order as to deposit of Rs. 10 crores was set aside.

Avinash Aroray. State of U.T.Chandigarh, AIR 2000 SC 3563 (1): AIR 2000 SCW 3563 2000 Cr L.J. 4674(SC)

156. Where a person applies for bail in a case accused of embezzlement, that the accused should deposit the embezzled aihount or should furnish bank guarantee therefor, is not relevant and not unsustainable.

Darshan Singh v. State ofRajasthan, 1993 Cri.L.J. 1973 (Raj); Bhanwar Lai v. State of Rajasthan, 1979 Raj Cri C 158 (Raj).

157. Interim balk an Girder of interim bail in appropriate cases.

Durga Prasad v. State of Bihar, 1987 Cri.L.J. 1200 (Pat-DB).

158. When the accused a driver has to remain normally out of Ms village and he had no knowledge of the offence and when co-accused have been acquitted interim bail can be grafted.

Mam Raj v. Siate of Rajasthan, 1988 (3) Crimes 74 (Raj).

159. An interim anticipatory bail for a limited period may be granted by the Court even without issuing notice to the Public Prosecutor pending consideration of the petition on merits.

N, Surya Rao v. State of Maharashtra, 2001 (2) Andh LT (Cri) 341 (343) : 2002 Cri.L.J. NOC 170 (AP); Balchandv. State ofM.P., AIR 1977 SC 366; Gurbaksh Singh v. State of Punjab, AIR 1980 SC 1632.

160. In cases where there is no likelihood of the accused fleeing from justice or tampering with the evidence-or a clear case of custodiaLintenogation is not made out, and application for grant of cjyaticipatory bail cannot be heard at an early date, interim protection should be normally be provided to 3uch accused persons.

Parminder Singh v. State, 2002 (1) Crimes 692 (695) (Del).

161. An application for anticipatory bail can lie for directing the Committing Magistrate not to commit the accused to custody under S. 209.

Ramsewak v. State ofM.P., 1979 Cri.L.J. 1485,1494 (MP-DB).

162. Enforcement of anticipatory bail order.—The arresting authority or the lower Court before vhieh the order granting anticipatory bail is produced are bound to enforce the pre-arresfcorder.

Shukoor v.MS Kanti, (2002) 5 Kant L.J. 194 :2002 Cri.L.J. NOC 246 (Kant-DB).

163. Power of cancellation.—Anticipatory bail granted by the High Court can only be cancelled by it and not by the Magistrate or the Session Judge.

Bholai Mistry v. State, 1977 Cri.L.J. 492 (Cal-DB).

164. Where an accused was enlarged on bail in the event of his arrest for offences alleged under , Sections 279,337 and 304A, I.P.C., but about 33 days later the offences were altered to Sections 302 and 3071.P.C., for about a year since grant of bail accused has not violated any of the conditions of bail and police have not filed charge-sheet even after lapse of a year and two months and in the absence of cogent and overwhelming circumstances cancellation of anticipatory bail is not justified.

Uttam Chandv. State of J&K, 1989 (2) Crimes 626,630 (J&K-DB)

165. Territorial Jurisdiction.—The Sessions Court/High Court within whose territorial jurisdiction the offence has been committed and not the place where the offender resides or apprehends his arrest has the jurisdiction to entertain application for anticipatory bail.

Mahesh Kumar Sarda v. Union of India, 2000 Cri.L.J. 2951 (Cal-FB); State ofManipur v. Vikas Yadav, 2000004229 (Gau); Neela J. Shah v. State of Gujarat, 1998 Cri.L.J. 2228 (Guj); SyedZafrual Hassan v. State, AIR 1986 Bat 194 : 1986 Cri.L.J. 605 (FB) : 1984 Cri.L.J. 714 (P&H) : 1983 Cri.L.J. 1 182 (J&K) : 1990 Cri.L.J. 2055 (MP); State of Assam v. UK. Krishna Kumar, AIR 1997 SCW 4102 : JT 1997 (8) SC 650.

166. The place where the arrest is threatened has also jurisdiction to entertain application for anticipatory bail under S. 438.

Rama Shankar Prasad v. The State, 1998 Cri.L.J. 1926 (Sik).

167. Where the case against the petitioners was registered in State of Bihar, the petitioners resident of State of Orissa apprehended their arrest in the State of Orissa, they were granted anticipatory bail with'direction to approach the appropriate Court in the State of Bihar, for bail within four weeks from the date of their arrest.

Manoj Kumar Binayak Prasad Mohapatra v. State of Orissa, 2002 (1) Crimes 15 (18) (Ori).

168. Where FIR against the petitioner for offences under Ss. 120, 216 and 225 IPC was pending in the Court of CJM Jaipur (Rajasthan), the petitioner apprehended his arrest in State of Orissa High Court was entertained.

Bidya Bhusan Mohanty v. State of Orissa, 2007 Cri.L.J. 2187 (2192) Ori.

169. If the arrest is likely to be effected within the jurisdiction of a particular High Court, the concerned person should have the remedy of applying to that High Court even if the offence has been committed within the jurisdiction of a different High Court.

N.K. Nayor v. State of Maharashtra, 1985 Cri.L.J. 1887 (Bom-DB).

170. An anticipatory bail under S. 438 cannot be granted by any Court in the country.

Madan Mohan Sahoo v. State of Orissa, 19% Cri.L.J. 1 169 (Ori) :

171. An application for anticipatory bail ties before the Court within whose jurisdiction the accused apprehends his anest, the fact that the offence has been committed outside the jurisdiction of such Court is not relevant

Jodha Ram v. State of Rajasthan, 1994 Cri.L.J. 1962 (Raj); Bimal Kumar Jain v. State, 1988 (3) Crimes 894 (Raj); Pritam Singh v. State of Punjab, 1981 Cri.L.J. NOC 159 (Del); N.K. Nayyar v. State of Maharashtra, 1985 GO 1887 (Bom); BiR. Siriha v. State, 1982 Cri.L.J. 61 (Cal); LR. Naidu (Dr.) v. State of Kamataka, 1984 Cri.L.J. 757 (Kant);

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ARREST

1. In absence of any fear of creation of problem for security of community, no possibility of extortion arresting an applicant on basis of chapter is illegal.

   Shyam Dattatray Beturkar vs. Special Executive Magistrate . 1999 Cr.L.J. 2676 Bom

2. Arrest not made on credible information regarding the participation of the assembled persons in any cognizable offence. Such arrest would be illegal.

   Sagwan Pasi Vs. State of Bihar 1978 Cr. L. J. 1062 Pat.

3. The plaintiff's name, however continued to be shown as absconder in police papers for subsequent years, but he was no declared as proclaimed offender.

   It was held that the plaintif's subsequent arrest without warrant treating him as absconder was unjustified.

   Ram Pyare Lal Vs. Om Prakash 1977 Cr. L.J. 1984 Del

4. Where there is no order in writing as required by this section [55 Cr.P.C.], the arrest made without warrant by a subordinate officer deputed for that purpose is illegal .

   Gandharba Vs. Aparti AIR 1960 Ori 23

5. AIR 1967 Bom 56.

6. Investigation was conducted by sub Inspector, but Asstt. Sub-Inspector effected arrest not in the presence of Sub-Inspector and without written warrant from him. Held it was illegal.

   Supt. Vs. Sona AIR 1948 Cal 95

7. Non-compliance with the provision makes the arrest illegal

   Bir Bhadra Vs. D.M. AIR 1959 All 384

8. The powers of arrest without warrant under the provisions of this section have to be exercised where the obtaining of warrant from a magistrate would involve unnecessary delay which might defeat in effecting the arrest. Thus where the incident took place long before the arrest was made and the person arrested was known individually the arrest without a warrant, in such cases calls for some explanation.

Bir Bhadra Vs. D.M.A. AIR 1959 All 384

9. An illegal arrest is punishable as wrongful confinement u.s. 342 of I.P.C.

Tribhuwan Vs. St. AIR 1949 oudh 74

10. Abuse of the power to arrest corruptly or maliciously is punishable u.s. 220 I.P.C. of the question of malice would however be immaterial unless there has been an excess or abuse of the legal powers of the police officer.

[Sita Ram Vs. Makiat 1956 Cr. L.J. 412]

11. Magistrate is entitled to refuse taking cognizance if there is serious defect in investigation.

L.L. Vs. Kalyana K. Rao. 1969 Mad L.J. (Cr) 821

1969 (2) Andh W.R. 449

12. The entries in the case diary are neither substantive nor corroborative evidence and they cannot be used by or against any witnesses other than the police officer.

AIR 1995 SC 1748 Shamshul Vs. State

13. If Arrest is illegal, order of remand is bad and vitiated – accused are to be released forthwith.

Madhu Limye – AIR 1969 SC 1014

14. Late entries in case diary made by Police Officer in their register/records by interpolation is not permissible.

Bahadur Sing Vs. State (2002) 1 SCC 606

15. Court cannot use confessions and statements found in police diary to disbelieve prosecution OR Defence cases.

1981 Cr.L.J. 563, 569

16. Each and every suggestion of the defence at the investigation need not lead the investigator to follow it. But it is different in cross-cases.

1992 Cr. L.J. 2325 SC.

17. The police officer must produce a copy of the entires in the case diary along with the accused when he is being produced before the Judicial Magistrate u/s 167 (1)

AIR 1957 AP 561

18. If the police do not transmit to the court a copy of the entries in the case diary relating to the case the Magistrate has no jurisdiction to direct the detention of the arrested person. He may release him.
AIR 1964 Manipur 39.
1997 Cr. L.J. 1086
2003 Cr. L.J. 701 at Pg. 702

19. Remand order to be passed in accordance with the provisions of section 167 of code of Cr. P.C. it is judicial order to be passed on application of mind to the contents of remand report submitted by I.O. It is not an empty formality or a routine course to extend remand time and again as and when rough by the police. The authorization of the detention of the accused in custody must be with refrence to entries made in the remand report that the investigation could not be completed within a period of 24 hours as fixed u/s 54 of Cr. P.C. That is the season why I.O. is obliged under Law to forward the entries in the diary while seeking remand to custody.

Effect of detention in contravention of this section. (167) is illegal a complaint for illegal detention may be filed.

AIR 1961 Bom. 42

AIR 1951 MP 70

[Hidayat Vs state]

[2002 Cr. L.J. 120]

20. After a Charge-Sheet has been submitted the Magistrate can not pass remand order u/s 167 before taking cognizance. After the charge – sheet has been submitted he can pass order of remand under section 309.
If he passed order of remand under section 167 it is illegal and accused are entititled to bail.

Gyanu Madhu Vs State of Kant 1977 Cr. L.J. 632 Kant

1978 Cr. L.J. 1074

21. Submission of Charge – Sheet after Six months from date of arrest of accused vitiates trial.

2001 Cr. L. J. 2678
1994 Cr. L.J. 2269
1982 Cr. L.J. 747 (Del) – Detention without Law.

22. Non filing of complete charge-sheet :-
Where the complete charge – sheet along with the police report was not filed withing stipulated time, the accused can claim bail as of right. Congnizance can not be given on the basis of in – complete charge- sheet.

Matchamari China Vs. state 1994 Crd. L.J. 25 (AP)

23 **– Ss 438 – Regular bail after surrender before trial court** after grant of limited duration anticipatory bail – Need for disposal on the same day, emphasized – Request for direction for no adjournment on ground of non-availability of records if the accused – respondents proposed to surrender three days in advance, allowed – State giving an undertaking accordingly – Constitution of India – Art. 21.

Naresh Kumar Yadav v. Ravindra Kumar, (2008) 1 SCC 632 : (2008'0 1 SCC (Cri) 277 : AIR 2008 SC 218 : (20080 1 KLT 839.

S. 438 – Anticipatory bail – Registration of a case and entries of case diary not necessary for entertaining an application for grant of – Mere imminence of a likely arrest on a reasonable belief on an accusation of having committed a non- bailable offence, will be sufficient to invoke that provision. **Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440: 1994 (1994) 2 An LT (Cri) 173 : (1994) 70 ELT 12.**

S. 438- Anticipatory bail – Grant of – Considerations – Nature of offence and age of accused – Considering that offence was under Ss. 308 and 323 IPC and the

accused was a student, held on facts, accused should be enlarged on anticipatory bail – Penal code , 1860 , Ss. 308 and 323 (Para 3).

Harpreet Singh v. Govt. of NCT of Delhi, (2005) 11 SCC 551.

S. 438- Anticipatory bail – Accused a lady and offence less serious – Considering the facts that the appellant is a lady and the offence involved is a less serious offence, appellant directed to be released on bail on her executing a bond of Rs. 10,000 – How ever, appellant can be questioned by IO under S. 161 . **Maqsoodan v. State of Haryana, (2002) 10 SCC 97.**

S. 438 – Anticipatory bail Dowry death – Statement in FIR that appellants, the parents and brother of he husband, wee living separately from the deceased and her husband- Factum of separate residence also supported by ration card – Held, these circumstances wee relevant for grant of anticipatory bail **–**

Dolat Ram v. state of Haryana, (1995) 1 SCC 349: 1995 SCC (Cri) 237 : (1994) 3 Crimes 10103 : (1995) 32 ACC 149 : (1995) 1 Andh LT (Cri) 37.

S. 438- Anticipatory bail – complaint lodged with the police indicating that main allegations relating to offences under Ss. 323 and 498 – A IPC were against the husbands who is in jail – Hence anticipatory bail granted subject to conditions under S. 438 (2)

Joageshwar Tanti v. State of Bihar, (2005) 12 SCC 178.

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-: CHAPTER = 3 :-

- LAW OF PRECEDENTS -

APPLICABILITY & BINDING NATURE OF CASE LAW/ CITATION

AND

LAW RELATING TO PROSECUTION OF JUDGES / JUDICIAL OFFICERS

Cross Citation :2012 ALL MR (Cri) 271

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

(Division Bench)

CORAM: V. M. KANADE & A.M. THIPSAY, JJ.

Farooq Abdul Gani Surve ....Vs .... The State of Maharashtra

CRIMINAL APPLICATION NO.1087 of 2011 IN CRIMINAL APPEAL NO.315 OF 2007

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Contempt by Judge - Arrest of accused - Bail - Non compliance of direction given by High Court and Apex Court - Non granting bail to accused - The Session Judge was shown with the case Law/Order passed by the Supreme Court and Bombay High Court but the Sessions Judge refused to grant bail to accused- He did not follow the guidelines without justifiable reasons or recording any reason in writing - Held, if any Sessions Judge is found not following the directions of Higher Courts then besides taking administrative action against such Sessions Judge, he shall be liable for action of contempt of this Court.

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P.C.: ***(Per V.M. Kanade, J.)***

1. This is an application for bail. Brief facts are that the Petitioner, alongwith other accused, was tried by the Trial Court for the offences punishable under sections 465, 468, 121, 121-A, 120-B read with section 34 of the Indian Penal Code and also under section 25(1) of the Arms Act and section 74 of the Indian Information and Technology Act. The learned Ad-hoc Additional District & Sessions Judge, Thane was pleased to acquit the Petitioner for the offences with which he was charged by the judgment and order dated 22/12/2004.

2. The State preferred an appeal against acquittal vide Criminal Appeal No.315 of 2007 in this Court and while admitting the appeal, this Court directed that action be taken under section 390 of the Criminal Procedure Code. Thereafter, the matter was adjourned from time to time for compliance of action under section 390 of the Criminal Procedure Code.

3. Since the Petitioner was not found at his earlier address, a non-bailable warrant was issued against him by this Court by order dated 18/07/2011. According to the Petitioner, he was informed by his neighbours who were residing at the earlier address that the non-bailable warrant had been issued and, therefore, after taking legal advice, he has filed this application in this court for granting stay to the execution of the non-bailable warrant and for grant of his release on bail, pending the hearing and final disposal of the appeal.

4. The learned Counsel appearing on behalf of the Petitioner submitted that the Petitioner had changed his residence and was residing at his native place near Ratnagiri alongwith his family members and he was not aware about admission of appeal filed by the State in this Court. He submitted that in order to prove that he was residing at Ratnagiri he has relied upon the copy of his and also his wife's election card and also the ration card, Unique Identification Card of his family, Birth Certificate issued by Ratnagiri Municipal Council in respect of his son and his Permanent Account Number Card.

5. The learned APP appearing on behalf of the State, after verification of the said documents, submitted that the said documents are genuine and, therefore, it is apparent that the Petitioner was not deliberately absconding after nonbailable warrant was issued against him. In view of this, by order dated 29/08/2011, this Court was pleased to cancel the non-bailable warrant which was issued by this Court and released him on bail on his executing P.R. Bond in the sum of Rs 5,000/- before the Trial Court.

6. During the course of arguments, the learned Counsel appearing on behalf of the Petitioner made a grievance that in large number of cases though the accused is acquitted by the Trial Court, after action is directed to be taken under section 390 and after he is arrested he continues to languish in jail. He submitted that, in the past also, this Court in the year 2004 and 2009 had given suitable directions to the Trial Court to ensure that accused who are acquitted by the Trial Court should not continue to languish in jail as it clearly amounted to violation of Article 21 of the Constitution of India. He also submitted that in view of recent amendment to the Cr.P.C and introduction of section 437-A, Trail Courts are insisting on execution of P.R. Bond with sureties and, as a result, even after the accused is acquitted, he continues to languish in jail. In support of his submissions, he relied upon the following judgments.

1. State of Maharashtra vs. Bapu Pandu Maili reported in 2010 ALL MR (Cri) 120
2. State of U.P. vs. Poosu and another reported in (1976) 3 SCC 1
3. Shaik Mullapalli Shamshad Begum & Ors. vs. Public Prosecutor, High Court of Andhra Pradesh, reported in II (2004) DMC 105 (DB).
4. State of Punjab vs. Bachittar Singh Lal Singh and others reported in 1972 CRI.LJ. 341 (V 78 C 80) FULL BENCH.

7. We have heard the learned Counsel appearing on behalf of the Petitioner and the learned APP appearing on behalf of the State.

8. It has been brought to our notice that, in large number of cases, though accused are acquitted by the Trial Court, they continue to languish in jail during pendency of the appeal against acquittal filed by the State on account of direction given by this court under section 390 of the Criminal Procedure Code. Secondly, it is also brought to our notice that the provisions of section 437-A are not properly interpreted and on account of likelihood of the victim filing appeal against acquittal, the acquitted accused are directed to furnish P.R. Bond alongwith sureties and, as a result, even after acquittal, those accused who are unable to furnish sureties, continue to languish in jail and, in some cases, on erroneous interpretation of section 437-A bail is granted by the Sessions Court to the accused who are convicted on/or before pronouncement of judgment of conviction. Under these circumstances, therefore, though the Petitioner is released on bail by our order dated 29/08/2011, it has become necessary to lay down certain guidelines on this issue.

9. Section 390 of the Criminal Procedure Code reads as under:-

"390. Arrest of accused in appeal from acquittal.- When an appeal is presented under section 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail."

On the plain reading of the said provision, it is quite apparent that discretion is vested in the High Court to issue warrant directing the arrest of the accused and his production before it or before any subordinate court who may then commit him to prison, pending disposal of the appeal or admit him to bail. The obvious purpose of giving this power to the High Court is to ensure that the accused who is acquitted by the Trial Court is made available during pendency of the appeal against acquittal and, to that extent, his status as accused revives and, at the same time, it has to be borne in mind that principle that accused is presumed to be innocent is confirmed by virtue of the order of acquittal by the Trial Court and, therefore, he is no longer an accused and, therefore, under normal circumstances, he is entitled to avail of his liberty during pendency of the appeal.

Therefore, if the relevant documents are tendered regarding proof of his permanent residence and ownership of the property then, in such cases, he is entitled to be released on bail as a matter of rule. It has to be also remembered that Mr. Justice

Krishna Iyer in his famous judgment has coined a phrase that bail is a rule and jail is an exception. Therefore, Sessions Court should remember that there is all the more reason to immediately release the accused after he is produced before it and his further detention would certainly be viewed as a breach of his fundamental right under Article 21.

10. The Apex Court in *State of U.P. vs. Poosu and another*1 has traced the background and the circumstances under which the said provision was inserted in the Cr.P.C. In the said case, the question which fell for consideration before the Supreme Court was : whether the Supreme Court, while granting special leave to appeal under Article 126 of the Constitution against an order of acquittal passed by the High Court, can pass similar order as is passed by the High Court under section 390. While answering this question in the affirmative, the Apex Court has traced the historical background of the exercise of such power and also has observed that it does not offend Article 21. The Apex Court has referred to section 427 of the Cr.P.C., 1898 which was re-enacted as section 390 of a new Code of 1973 and has noted that even before its enactment, the High Court, as a matter of judicial practice, had the power pending appeal against the order of acquittal to secure attendance of the accused/respondent by bailable or non-bailable warrant. In 1 (1976) 3 SCC 1 this context, it would be relevant to refer to paragraphs 7 to 10 of the said judgment which read as under:-

"7 It may be noted that this provision was for the first time enacted in the Code of 1882. But even before its enactment, the High Court as a matter of judicial practice, had the power, pending the appeal against an order of acquittal to secure the attendance of the accused-respondent by bailable or non-bailable warrants. As pointed out by Panigrahi, C.J in State v. Badapalli Adi [ILR 1955 Cut 589].

What was formerly the judicial practice received statutory recognition in the year 1882 when this provision in Section 427, Criminal Procedure Code, was introduced. In Empress of India v. Mangu [ILR (1879) 2 All 349] (which was decided several years before the addition of this provision in the Code), a Full Bench of Allahabad High Court held, that the High Court has the power to cause the arrest and detention of the accused in prison, pending an appeal against an order of acquittal. To the same effect was the decision of the Calcutta High Court in Queen vs. Gobin Tewari [ILR (1876) 1 Cal. 281. Again in Queen-Empress vs. Gobardhan [ILR (1887) 9 All 528], Sir John Edge, Chief justice without laying down any inflexible rule, emphasized that it is not desirable that, pending the appeal against acquittal in a capital case, the prisoner should remain at large while his fate is being discussed by the High Court. The ratio of this decision was followed by a Division Bench of Orissa High Court in state v. Badapalli Adi (supra)."

8. Viewed in this perspective, it is clear that even before the enactment of this provision, the High Court had the power to cause, in its discretion, the arrest and detention in prison of the accused respondent or his enlargement on bail, pending disposal of the appeal against his acquittal. This power was ancillary to and necessary for an effective exercise of its jurisdiction in an appeal against an order of acquittal, conferred on the High Court by the Code.

9. As far back as 1824, in the English case, Bana v. Methuen [2 Bens 228] Best, J., following an older precedent, enunciated the rule that When an act of Parliament gives a justice jurisdiction over an offence, it impliedly gives him a power to make out a warrant, and bring before him any person charged with such offence.

10. This is the rationale of Section 427. As soon as the High Court on perusing a petition of appeal against an order of acquittal considers that there is sufficient ground for interfering and issuing process to the respondent, his status as an accused person and the proceedings against him, revive. The question of judging his guilt or innocence in respect of the charge against him, once more become *sub judice."*

11. The High Court, therefore, has discretion of issuing warrant under section 390. In our view, the said warrant need not necessarily be non-bailable warrant, though section states that he has to be produced before the Trial Court, which would ordinarily mean that the said warrant would be a non-bailable warrant. Secondly, since the power is vested in the High Court, the High Court also would be in a position to direct that the accused when produced before the Trial Court may be released on bail on his execution of P.R. Bond with or without sureties. The High Court or Trial Court may also release him on execution of the same bond and surety which was offered during pendency of the trial. The High Court would be empowered to do so in view of the language used in section 390 and also, in our view, on account of inherent power vested in it under section 482 of the Cr.P.C. The Division Bench of this Court in *State of Maharashtra vs. Bapu Pandu Mali*1 noticed that though the accused was acquitted by the Trial Court he languished in jail for a period of five years. The Division Bench has observed in paras 3, 4, 5 and 6 of its judgment as under:- 1 2010 ALL MR (Cri) 120

"3. This is a sorry state of affairs in which not only the prosecuting agency but also the Courts are involved. This is a reflection on our own system, which needs to be corrected. A person, who is acquitted of the charges by a Court of law, should not remain in jail even for a day after acquittal, unless the order of acquittal is reversed by an appellate Court.

Even if the acquittal of the respondent were to be set aside by this Court today, even then, we cannot justify his detention after his acquittal by the Sessions Court till date.

4. We have perused Section 390 of the Criminal Procedure Code, which section only lays down a mechanism by which it is ensured that an acquitted person does not abscond while an appeal is filed against his acquittal. Therefore, we do not feel that there should be any impediment for the Courts to release the persons who are acquitted during the pendency of the appeals against acquital.

5. After hearing the learned amicus curiae and the learned Additional Public Prosecutor, we give the following directions:-

That in case of warrant under Section 390, the Sessions Judge, on production of the persons, shall immediately offer him bail on conditions which are just and proper, and in appropriate cases, the Sessions Judge may also consider release of such persons on personal bond. However, if he learned Sessions Judges are of the view that the surety is not produced or surety is not sufficient, they would remand the persons to the prison. In that case, they should inform the High Court immediately that the person has been remanded to the custody in case originally, the warrants are issued by the High Court.

6. We are told that such directions were given in year 2004 also, but the learned Sessions Judges have not been following these directions. Therefore, in case, in future, any Sessions Judge is found not to follow the directions, besides taking departmental action against such 13 (APPA-1087.11) learned Sessions Judge, he shall also be liable to contempt of this Court."

12. We are, therefore, constrained to issue similar directions to the Sessions Court. We have been told that though orders which are passed by the Supreme Court and this Court are shown to the Sessions Court, without justifiable reasons or recording any reasons in writing, directions given by this Court are not followed. It is, therefore reiterated that, in case, in future, if any Sessions Judge is found not to follow the directions, besides taking administrative action against such learned Sessions Judge,
he shall also be liable for contempt of this Court.

13. The presence of accused can also be secured in the
following manner:-

(i) Name and address of the Accused shall be taken on record at the time of pronouncement of Judgment by the Trial
Court.

(ii) The accused should submit his local address where he would reside after Order of acquittal as well as address of his native place.

14 (APPA-1087.11)

(iii) Declaration of place of residence should be made and proof of it, if any, may be supplied. No insistence should be
made about proof of residence if particulars are given.

(iv) The accused – Respondent should furnish the addresses of his near and dear relatives.

(v) The Accused be also directed to not to leave India without the prior permission of this Hon'ble Court.

(vi) Under certain circumstances, the Accused be directed to furnish the details of his passport and/or passport be deposited with the prosecution agency for a period of six months.

(vii) The Accused may also be released on his executing the same P.R. Bond and Surety Bond if the Accused were on bail
pending trial.

(viii) If the Accused is not on bail pending trial then he may be released

15 (APPA-1087.11) forthwith on P.R. Bond and time be granted to him to furnish surety to the satisfaction of the Trial Court.

(ix) The Trial Court may also release the accused on cash bail in appropriate cases and they may be directed to furnish surety within a reasonable period.

14 So far as section 437-A of Cr.P.C. is concerned, it was incorporated by virtue of Amendment Act No.5 of 2009. The aim and object of the said Amendment Act was to ensure that victims are given certain additional rights of filing appeal in three categories of cases. It is brought to our notice that in certain cases even when the accused is convicted, the Sessions Court has released the accused on bail. In Sessions Case Nos.912/07, 956/07 and 480/09 the following order was passed by the Sessions Court.

"**CORAM: HIS HONOUR THE 1ST AD-HOC ADDL SESSIONS JUsGE SHRI. S.Y. KULKARNI**

APP Shri Kenjalkar for the State present. Sr. PI Ms. Medha Jaiprakash Kadam attached to Churchgate Railway police stn. is present. Accused nos. 1, 2, 3, 4, 5, 6, 7, 8 & 9 produced

16 (APPA-1087.11) from J.C. Adv. Mr. Passbola for accused No.1 present. Adv. Mr. Shinde for accused nos. 2, 7 and 9

present.

Adv. Mr. Shetty for accused nos. 3 & 8 is present.

Adv. Mr. Rajput for accused no.4 is present.

Adv. Mr. Kumthekar for accused no.6 is present.

Adv. Mr. Wahab Khan for accused No.5 is present.

Before pronouncing judgment by invoking provision u/s 437-A of Cr.P.C and as accused no.3 namely Asaitambi and accused no.7 Kadirawan, were on bail during the trial and during the pronouncement judgment they were taken in MCR, therefore accused no.3 Asaitambi @ Langada Statta and accused no.7 Kadiravan are ordered to be released on PR Bond of Rs 40,000/- and furnishing surety of like amount by each. That bail will be forced for further period of 6 months. Before pronouncing judgment by invoking provision u/s 437-A of Cr.P.C the accused nos. 5 & 6 are directed to furnish PR Bond of Rs 20,000/- and furnishing surety of like amount, that surety and PR Bond will be in force for further period of six months in case any appeal is preferred against the present judgment and order. Accused nos. 5 & 6 are permitted to furnish surety on or before 19.5.2011."

17 (APPA-1087.11) In this context, therefore, it is necessary to consider the said provision 437-A which reads as under:-

"437-A. Bail to require accused to appear before the next appellate Court.- (1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.

(2) if such accused fails to appear, the bond stand forfeited and the procedure under section 446 shall apply."

15. In our view, though the section states that Trial Court may direct the accused to execute the P.R. Bond with sureties the said directions of execution of P.R. Bond with sureties will have to be treated as directory order and not mandatory order since the said provision will have to be

18 (APPA-1087.11) read alongwith other provisions which are there in the Cr.P.C. viz. Sections 441, 445 and, therefore discretion would vest in the Trial Court of directing the accused to execute a P.R. Bond and also ensure that his presence is secured in the manner as stated aforesaid in para 13 above.

16. From the language of section 437-A, it is apparent that the said provision is applicable only in cases where the Trial Court acquits the accused and it would not be applicable on conviction of the accused. All the Sessions Court are, therefore, directed not to release the convicted accused on bail under this provision.

17. In the case of *Hussainara Khatoon and others (1) vs Home Secretary, State of Bihar*1, the Supreme Court had expressed its anguish over the shocking state of affairs in regard to administration of justice in the State of Bihar when it noticed that alarmingly large number of men, women and children were behind bars for years, waiting trial in courts of law even in cases where offences with which some of them were charged were trivial and, even if proved, they would not warrant punishment for more than few months or perhaps for a year or two and yet, they were languishing in jail for a period ranging from 3 to 10 years even without trial. It appears that trials and tribulations of the accused are not over even after they are acquitted by the Trial Court 1 (1980) 1 SCC 81

19 (APPA-1087.11) and merely because appeal against their acquittal is pending in this Court, they continue to languish in jail. The State of Maharashtra is, therefore, directed to find out number of prisoners who fall in this category and who are in jail even after they are acquitted by the Trial Court merely because they are not in a position to furnish surety and report to that effect be submitted to this Court within a period of eight weeks. With these directions, application is disposed of.

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Cross Citation :AIR 1990 SUPREME COURT 261 = 1991 AIR SCW 2124

SUPREME COURT

(From : Bombay)

Coram : 2 G. L. OZA AND K. JAGANNATHA SHETTY, JJ.

Civil Appeals Nos. 5736 of 1985 and 508 of 1986, D/- 13 -7 -1989.

Sundarjas Kanyalal Bhathija and others …. v… The Collector, Thane, Maharashtra and others AND

Prahlad Hiranand Advani and others ….vs... The Collector, Thane, Maharashtra

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Constitution of India, Art.141- PRECEDENTS - Judges are bound by precedents and procedure - They could use their discretion only when there is no declared principle to be found, no rule and no authority - where a single judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure - it is the duty of judges of superior courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Sub-ordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute- One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. (Paras 17, 20)

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Cases Referred : Chronological Paras
AIR 1989 SC 1933 : (1989) 2 SCC 754 (Rel. on) 20, 21
AIR 1987 SC 1239: (1987) 2 SCC 510 27
(1982) Writ Petn. No. 706-A of 1982, D/- 24-12-1982 (Bom). The Village Panchayat Chikalthane v. State of Maharashtra 5, 14, 15
AIR 1980 SC 882 : (1980) 2 SCR 1111 : 1980 All LJ 401 (Foll) 14, 26
(1972) 1 WLR 1373 : (1972) 3 All ER 1019 Bates v. Lord Hailsham of St. Marylebone 25
AIR 1965 SC 1767 (Rel. on) 19
AIR 1960 SC 936 (Rel. on) 18
AIR 1954 Cal 119 18
Mr. N. N. Keswani and Mr. R. N. Keswani, Advocates, for Appellants; Mr. G. Ramaswamy, Solicitor General, Mr. S. K. Dholakia, Sr. Advocate, Mr. Shishir Sharma, Mr. P. H. Parekh, Mr. A. S. Bhasme and Mr. V. B. Joshi, Advocates with them, for Respondents.
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* Civil Writ Petn. No. 3420 of 1983, D/- 14-8-1985 (Bom)
Judgement
K. JAGANNATHA SHETTY, J.:- The case involved in these two appeals, with leave, seems indeed straightforward enough, but the High Court of Bombay made it, as we venture to think, unsatisfactory and in a sense against judicial propriety and decorum.
2. The facts which are of central importance may be stated as follows :
On June 19, 1982, the Government of Maharashtra issued a draft notification under See. 3(3) of the Bombay Provincial Municipal Corporation Act, 1949 (the "Act"). The draft notification proposed the formation of what is termed as "Kalyan Corporation" (the "Corporation"). It suggested the merging of Municipal areas of Kalyan, Ambarnath, Dombivali and Ulhasnagar. Against this proposal, there were many objections and representations from persons, companies and the authorities. Amarnath and Ulhasnagar Municipal bodies and also some of the residents therein submitted their representations. They objected to the merger of their municipal areas into the Corporation. It is said that in Ulhasnagar Municipal area, Sindhies are predominant. In 1947, they were the victims of partition of the country. Being uprooted from their home land, they have since settled down at Ulhasnagar. They have formed union or federation called the All India Sindhi Panchayat Federation.. It is interested in having a separate identity for Ulhasnagar. The Federation challenged the said draft notification by a writ petition before the Bombay High Court. The writ petition was not disposed of on merits. It was permitted to be withdrawn on an assurance given by the Government. The Government gave the assurance that the representatives of the Federation would be given an opportunity of being heard before taking a final decision. As per the assurance, they were given personal hearing on their representations. The others who have filed similar representations were not heard. But their objections or representations were duly considered. Thereupon, the Government decided to exclude Ulhasnagar from the proposed Corporation. Accordingly, a notification under Sec. 3(2) of the Act was issued. The Corporation was thus constituted without Ulhasnagar. That was the only alteration made in the proposal earlier notified. All other areas indicated in the draft notification were merged in the Corporation.
3. The residents of Ambarnath Municipal areas were not satisfied. They were, perhaps, more worried by the exclusion of Ulhasnagar than the inclusion of their own area. They moved the High Court under Article 226 of the Constitution challenging the notification issued under Sec. 3(2) of the Act. They interalia, contended that the action of the Government affording an opportunity of being heard only to the Federation and not to

other objectors was contrary to Article 14. It was a hostile discrimination to hear only one of the objectors. They asserted that the establishment of the Corporation without Ulhasnagar Municipal area, having regard to the geographical contiguity was unintelligible and incomprehensible. It was arbitrary and opposed to the object of the Act. They also contended that there ought to have been a fresh draft notification after taking a decision to exclude Ulhasnagar from the proposal. With similar contentions and for the same relief, there was another writ petition before the High Court. It was filed by the National Rayon Corporation Limited which is a company located within the Municipal limits of Ambarnath.

4. The Sindhi Panchayat Federation was not a party to the writ petitions. It was, however, allowed as an intervener. Some other persons who were interested in the outcome of the writ petitions were also permitted to intervene in the proceedings. They supported the stand taken by the Government which was the main respondent in the writ petitions.

5. The State in its counter affidavit resisted the- petitioners' claim raising several grounds. The first point to be noted in this context is this :

"That the formation of Municipal Corporation under sec. 3 of the Act is an extension of the legislative process and, therefore, Sec. 3 is nothing but a piece of conditional legislation. The principles of natural justice will not apply to such legislative

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function nor it could be imparted into it even by necessary implication. The petitioners have not challenged the validity of the subsection (2) of Sec. 3 of the Act and even otherwise the said validity has been upheld by a Division Bench of this Court (Shah and Deshpande, JJ.) in Writ Petition No. 766-A of 1982 (The Village Panchayat Chikalthane and anr. v. the State of Maharashtra and anr.) decided on 23/24 December, 1982. Therefore, it cannot be said that the notification issued in exercise of the said legislative power is vitiated by non-compliance with the principles of natural justice. The conditions laid down by Sec. 3 are fully complied with; a preliminary notification was issued as contemplated by sub-section (4) of Sec. 3 of the Act; the objections and suggestions made by the various citizens and persons were duly considered by the State Government and thereafter the final notification was issued. In the very nature of things there is bound to be difference and variance between the preliminary notification and the final notification. Only because the Ulhasnagar Muncipal Council is excluded from the final notification, it cannot be said that there was any major departure from the preliminary notification or it was necessary to issue a preliminary notification over again before the final notification was issued in that behalf."

The second factual point to be noted in this :

"Due to partition of India in 1947, the Sindhi people have been uprooted from their homeland and with hard labour they have settled themselves in different parts of the country. One can appreciate their feelings about their anxiety to maintain their separate entity. If such a large part is forcibly included in the Corporation ignoring their sentiments and wishes, it may not result in smooth working of the proposed Corporation which is necessary for proper development. It is, therefore, desirable to constitute the new Kalyan Corporation without including Ulhasnagar for the time being."

6. The High Court was not impressed with the above reasonings. The High Court said that the decision to exclude Ulhasnagar was taken by the Government abruptly and in an irrational manner. The decision was arbitrary and against the purpose of the Act. On the legality of the procedure followed by the Government, the High Court said :

"Once that decision was taken, it was obligatory on the part of the Government to reconsider the proposal as a whole so far as the rest of the areas are concerned."

7. Reference was also made to the report of the "Sathe Commission" to fortify the conclusion that Ulhasnagar could not have been isolated. The "Sathe Commission" was a

one man Commission appointed by the State Government to enquire and report on the establishment of new Municipal Corporations. The Commission in its report among others, seems to have indicated that Kalyan, Ulhasnagar and Ambarnath are one contiguous stretch of territory with a length of about 8 kms. from north-west to south-east.

8. The High Court then made some general observations as to the purpose for which Municipal Corporations should be constituted and went on:

"It was the avowed policy after independence to change the socio-economic map of the village and town. A corporate life can only be ensured if there is a corporate conscience and an attitude to live together. City is an epitome of the social world where all belts of civilization interest along its avenues. A Municipal Corporation is in nature, where people belonging to different castes,creeds, religions and language want to live with each other. Town planning cannot be denominational or fractional. It is not a museum of human beings otherwise Harijan Bastis, Mominpures and such other Mohallas will have to be preserved to maintain its separate identity and the socio-economic map of the village or city will never change. It cannot be forgotten that we are heading towards a global village. By saying this, we do not want to belittle the achievements of sacrifice of the Sindhi Community. However, that is not very relevant for deciding the question of the establishment of a Municipal Corporation. Its main object is to ensure better municipal government of the city. It

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appears that Government was also aware of this and this seems to be the reason why the decision "for the time being" is pertinent and clearly indicates that the Government wanted to reconsider the issue at a later stage. However, unfortunately till today Government has not taken any decision in that behalf."

9. The High Court, however, felt that it was not necessary to quash the notification establishing the Corporation. This is how the conclusion was reached :

"It will not be fair to quash the notification as a whole and unsettle the Municipal Administration. In our view, that is also not necessary since from the affidavit of the Government, it is clear that the decision taken in that behalf was tentative, i.e., for the time being and it is not all-time permanent decision. Under sub-section (3) of Sec. 3 of the act, the State Government has power to exclude or include any area specified in the notification issued so far as Ambarnath Town is concerned, reconsideration of the present case of the whole matter was absolutely necessary when the decision to exclude the Ulhasnagar Municipal Council from the proposed Municipal Corporation, though tentative in nature, was taken."

10. Finally, the operative portion of the Order was put in the following terms:

"Therefore, without setting aside the final notification, we direct the State Government to reconsider the proposal under sub-sec. (3) of Sec. 3 of the Bombay Provincial Municipal Corporations Act either to exclude or include any area, within a period of six months from today. The writ of mandamus to be issued accordingly. It is needless to say that after the necessary steps are taken under Sec. 3(3) of the Act, the State Government shall make the necessary amends in the notification issued.

xx xx xx xx xx xx xx

"In the result, therefore, the rule is made partly absolute and the State Government is directed to exercise its power under Sec. 3 sub-sec. (3) of the Act in accordance with law within a period of six months. It is needless to say that the petitioners will be entitled to raise objections and make their suggestions in that behalf after a notification under sub-sec. (3) read with sub-sec. (4) of Sec. 3 of the Act is issued. Since the popular local self Government is not in existence in any of the Municipal Councils or even in the newly established municipal corporation and having regard to the peculiar facts and

circumstances of the case, in our view, this is a fit case where the petitioners of these two petitions and All India Sindhi Panchayat Federation should be given a reasonable opportunity of being heard before any final decision in the matter is taken."

11. Against the judgment of the High Court, the State Government has not preferred any appeal. The Kalyan City Corporation though vitally concerned with the matter, has also not appealed to this Court. The present appeals are only by those who were impleaded as interveners in the writ petitions.

12. We have heard counsel for all parties and gave our best attention to the questions raised by the appellants. Counsel for the appellants reiterated the stand taken by the Government before the High Court. He urged that the State has, a wide discretion in the selection of areas for constituting the Corporation and the Court cannot interfere with such discretion. The Court has no jurisdiction to examine the validity of the reason that goes into the decision of the Government. The power to constitute Municipal Corporations under Sec. 3 of the Act is legislative in character. It is an extension of legislative process for which rules of natural justice have no application. He said that the Government in the instant case has complied with the statutory requirements and it was not expected to do anything more in the premises. And, at any rate, it is wholly unnecessary according to the counsel to go through that exercise again as the High Court has suggested.

13. The other limb of the argument of counsel for the appellants relates to the manner in which the High Court disposed of the matter. It was said that a decision of this Court has been disregarded and a binding decision of a co-ordinate Bench of the same Court has been ignored.

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14. The grievance of the appellants' counsel, in our opinion, is not wholly unjustified. At the beginning of the judgment, we have said that the High Court rendered the judgment in a sense against the judicial propriety and decorum. We were not happy to make that observation, but constrained to say so in the premise and background of the case. It may be noted that the result of the writ petitions before the High Court turns on the nature and scope of the power conferred on the Government under Sec. 3 of the Act. A division Bench of the High Court has taken the view that that power is in the nature of legislative process. That judgment was rendered on 23/24 December, 1982, by a Bench consisting of Shah and Deshpande, JJ. It was in writ petition No.706-A of 1982 - The Village Panchayat Chikalthana and another v. The State of Maharashtra and another. In that case, the challenge was to the validity of Sec. 3(2) of the Act on the ground that it suffers from the vice of excessive delegation for want of guidelines for the exercise of power. Repelling the contention, it was held that Sec. 3 is in the nature of a conditional legislation and, therefore, laying down the policy or guidelines to exercise the power was unnecessary. It was emphasized that the exercise of power under Sec. 3(2) is conditioned by only two requirements, viz., (1) previous publication as contemplated by sub-sec. (4) of Sec. 3 of the Act, (2) issuance of a notification by the Government after such previous publication. Once the Government publishes such a notification, the legislation becomes complete and the other provisions of the Act are ipso facto attracted to the Corporation so constituted. This was the view taken by the High Court in Chikalthane case. To reach that conclusion, the learned judges relied upon the decision of this Court in Tulsipur Sugar Company case (1980) 2 SCR 1111:(AIR 1980 SC 882).

15. The attention of the High Court in the present case was drawn to the decision in Chikalthane case. Counsel for the State and interveners seemed to have argued that the present case really fell fairly and squarely within that was said there. They were indeed on terra firma since the decision in Chikalthane case was a clear authority against every contention raised by the petitioners. Faced with this predicament, counsel for the

petitioners urged before the High Court that their case should be referred to a larger Bench to reconsider the decision in Chikalthane case. But learned Judges, (Dharmadhikari and Kantharia, JJ.) did not heed to that submission. They neither referred the case to a larger Bench nor followed the view taken in the Chikalthane case. It was not as if they did not comprehend the issue to be determined and the principle to be applied. They were very much aware of it when they remarked :

"In our opinion, once it is accepted that this is a piece of conditional legislation, then it will have to be held that the principle of natural justice would not apply to such a case as held by the Division Bench of this Court in village Panchayat Chikalthane's case nor it could be said that because under a mistaken notice the Federation was heard, the denial of such a right to the petitioners will amount to hostile discrimination within the contemplation of Article 14 of the Constitution of India."

16. After referring to these simple legal principles, it was unfortunate that the issue at stake was little explored. The key question raised in the case was side-tracked and a new strategy to interfere with the decision of the Government was devised. The learned Judges directed the Government to publish against a draft notification for reconsideration of the matter. They gave liberty to the writ petitioners and the interveners to submit their representations. They observed that "this is a fit case where the parties should be given a reasonable opportunity of being heard." They did not quash the impugned notification, but told the Government to make necessary changes in the light of fresh consideration. All these directions were issued after recording a positive finding that the exclusion of Ulhas. nagar from the Corporation was arbitrary and irrational. The net result of it is that there is now no discretion with the Government to keep Ulhasnagar away from the Corporation.

17. It would be difficult for us to appreciate the judgment of the High Court.

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One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-judge court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure.

18. Deprecating this kind of tendency of some judges, Das Gupta, L, in Mahadeolal Kanodia v. The Administrator General of West Bengal, AIR 1960 SC 936 said (at p. 94l) :

"We have noticed with some regret that when the earlier decision of two Judges of the same High Court in Deorajin's case, 58 Cal WN 64 : AIR 1954 Cal 119 was cited before the learned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring no less than legal propriety form the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of co-ordinate jurisdiction in a High Court start overruling one another's decison."

19. The attitude of Chief Justice, Gajendragadkar, in Lala Shri Bhagwan v. Ram Chand, AIR 1965 SC 1767 was not quite different (at p. 1773) :

"It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the

question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

20. The Chief Justice Pathak, in a recent decision stressed the need for a clear and consistent enunciation of legal principle in the decisions of a Court. Speaking for the Constitution Bench (Union of India v. Raghubir Singh (1989) 2 SCC 754: (AIR 1989 SC 1933) learned Chief Justice said (at p. 766) (of SCC) (at p. 1939 of AIR):

"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court."

Cardozo propounded a similar thought with more emphasis :

"I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly by some consideration of history or custom or policy of justice. Lacking such a reason, I must be logical just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another" (The Nature of the Judicial Process by Benjamin N. Cardozo p. 33).

In our system of judicial review which is a part of our Constitutional scheme, we hold it to be the duty of judges of superior Courts and Tribunals to make the law more predictable. The question of law directly arising In the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within, the Courts, profession and public. Otherwise,

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the lawyers would be in a predicament and would not know how to advise their clients. Subordinate Courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute.

21. Judge learned Hand has referred to the tendency of some judges "who win the game by sweeping all the chessmen off the table". (The Spirit of liberty by Alfred A. Knopf, New York (1953) p. 131). This is indeed to be deprecated. It is needless to state that the judgment of superior Courts and Tribunals must be written only after deep travail and positive vein. One should never let a decision go until he is absolutely sure it is right. The law must be made clear, certain and consistent. But certitude is not the test of cetainty and consistency does not mean that there should be no word of new content. The principle of law may develop side by side with new content but not inconsistencies. There could be waxing and waning the principle depending upon the pragmatic needs and moral yearnings. Such development of law particularly, is inevitable in our developing country. In Raghubir Singh case, learned Chief Justice Pathak had this to say ((1989) 2 SCC 754 at p. 767 : (AIR 1989 SC 1933 at p. 1939)) :

"Legal compulsions cannot be limited by existing legal propositions, because, there will always be, beyond the frontiers of the existing law, new areas inviting judicial scrutiny and judicial choice-making which could well affect the validity of existing legal dogma. The search for solutions responsive to a changed social era involves a search not only among competing propositions of law, or competing versions of a legal proposition, or the modalities of an indeterminacy such as "fairness" or "reasonableness", but also among propositions from outside the ruling law, corresponding to the empirical knowledge or

accepted values of present time and place, relevant to the dispensing of justice within the new parameters.

And he continued :

The universe of problems presented for judicial choice-making at the growing points of the law is an expanding universe. The areas brought under control by the accumulation of past judicial choice may be large. Yet the areas newly presented for still further choice, because of changing social, economic and technological conditions are far from inconsiderable. It has also to be remembered, that many occasions for new options arise by the mere fact that no generation looks out on the world from quite the same vantage-point as its predecessor, nor for that matter with the same perception. A different vantage point or a different quality of perception often reveals the need for choice-making where formerly no alternatives, and no problems at all, were perceived".

Holmes tells us :

"The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at the end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to -row." (Holmes The Common Law, p. 36 (1881)).

22. Apart from that the judges with profound responsibility could ill-afford to take stolid satisfaction of a single postulate past or present in any case. We think, it was Cicero who said about someone "He saw life clearly and he saw it whole". The judges have to have a little bit of that in every case while construing and applying the law.

23. Reverting to the case, we find that the conclusion of the High Court as to the need to reconsider the proposal to form the Corporation has neither the attraction of logic nor the support of law. It must be noted that the function of the Government in establishing a Corporation under the Act is neither executive nor administrative Counsel for the appellants was right in his submission that it is legislative process indeed. No judicial duty is laid on the Government in discharge of the statutory duties. The only question to be examined is whether the statutory provisions

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have been complied with. If they are complied with, then, the Court could say no more. In the present case the Government did publish the proposal by a draft notification and also considered the representations received. It was only thereafter, a decision was taken to exclude Ulhasnagar for the time being. That decision became final when it was notified under Section 3(2). The Court cannot sit in judgment over such decision. It cannot lay down norms for the exercise of that power. It cannot substitute even "its juster will for heirs".

24. Equally, the rule issued by the High Court to hear the parties is untenable. The Government in the exercise of its powers under Section 3 is not subject to the, rules of natural justice any more than is legislature itself. The rules of natural justice are not applicable to legislative action plenary or subordinate. The procedural requirement of hearing is not implied in the exercise of legislative powers unless hearing was expressly prescribed. The High Court, therefore, was in error in directing the Government to 'hear the parties who are not entitled to be heard under law.

25. Megarry, J., in Bates v. Lord Hailsham of St. Marylebone (1972) 1 WLR 1373 while dealing with the - legislative process under Section 56 of the Solicitors .Act, 1957 said (at p. 1378) :

"In the present case, the committee in question has an entirely different function : it is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally and the terms of the order

will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative authority is a commonplace; but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections (see, for example,: the Factories Act 1961 Schedule 4), 1 do not know of any implied right to be consulted or, make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. 1 accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attack, whether by injunction or otherwise; but what is important is not its form but its nature, which is plainly legislative."

26. There are equally clear authorities on this point from this Court. The case in Tulsipur Sugar Co. Ltd. v. The Notified Area Committee, Tulsipur, (1980) 2 SCR 1111 : (AIR 1980 SC 882) was indeed a hard case. But then, this Court did not make. and bad law. There a notification dated August 22, 1955 was issued under Section 3 of the U.P. Town Area covering the petitioner's factory. Consequently, the octroi was levied on goods brought by the factory management into the limits of Town Area Committee. The Company questioned the validity of that notification. The case pleaded was that the company had no opportunity to make representation regarding the advisability of extending the limits of the Town Area Committee. Venkatar miah, J., as the present learned Chief Justice then was, while rejecting the contention observed (at pp. 1119-20). (of SCR):. (at p. 887 of AIR):

"The power of the State Government to make a declaration under Section 3 of the Act is legislative in character because the application of the rest of, provisions of the Act to

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the geographical area which is declared as a town area is dependent upon such declaration. Section 3 of the Act is in the nature of a conditional legislation. Dealing with the nature of functions of a non-judicial authority, Prof. S. A. De Smith in Judicial Review of Administrative Action (third edition) observes at page 163 : "However, the analytical classification of a function may be a conclusive factor in excluding the operation of the audi alteram partem rule. It is generally assumed that in English law the making of a subordinate legislative instrument need not be preceded by notice or hearing unless the parent Act so provides."

27. In Baldev Singh v. State of Himachal Pradesh, (1987) 2 SCC 510 : (AIR 1987 SC 1239) a similar question arose for consideration. An attempt was made to constitute a notified area as provided under Section 256 of the Himachal Pradesh Municipal Act, 1968, by including portions of the four villages for such purposes. The residents of the villages who were mostly agriculturists challenged the validity of the notification before the High Court on the ground that they had no opportunity to have their say against that notification. The High Court summarily dismissed the writ petition. In the appeal before this Court, it was argued that the extension of notified area over the Gram Panchayat limits would involve civil consequences and therefore, it was necessary that persons who would be affected thereby ought to be given an opportunity of being heard. Ranganath Misra, J., did not accept that contention, but clarified (at p. 515) (of SCC) : (at p. 1242 of AIR):

"We accept the submission on behalf of the appellants that before the notified area was constituted in terms of Section 256 of the Act, the people of the locality should have been

afforded an opportunity of being heard and the administrative decision by the State Government should have been taken after considering the view of the residents. Denial of such opportunity is not in consonance with the scheme of the rule of law govering our society. We must clarify that the hearing contemplated is not required to be oral and can be by inviting objections and disposing them of in a fair way."

28. The principles and precedents thus enjoin us not to support the view taken by the High Court. We may only observe that the Government is expected to act and must act in a way which would make it consistent with the good administration. It is they, and no one else - who must pass judgment on this matter. We must, therefore, leave it to the Government.

29. In the result and for the reasons stated, we allow the appeals and set aside the judgment of the High Court. In the circumstances of the case, we make no order as to costs.

Appeals allowed.

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Cross Citation :2006-ALL MR(CRI)-0-2269 , 2006-MH LJ-5-264

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : D.B.BHOSALE,J

Bank of Rajasthan Ltd ….Vs…State of Maharashtra

Criminal Writ Petition 932 of 2006 Of Jul 27,2006

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Case Law – Duty of the Judge – The Judge dismissed the complaint by a cryptic order without discussing case Laws – The Courts are not expected to pass such cryptic orders – The Judge should record reasons in his order demonstrating how case law cited by Party is applicable to the case in hand – The Judge should exhibit from the conduct and from their orders concern for the justice and not casualness.

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(1.) HEARD learned counsel for the petitioner and respondent no. 1 and learned A. P. P. for the State.

(2.) ALL these writ petitions are directed against cryptic order passed by the Sessions Court on 19. 1. 2006 by which all the complaints filed by the petitioner-bank have been

dismissed. The order passed by the Sessions Court reads thus: "ms. Joshi APP for State present. Ms. Pradhan Advocate for applicant and ms. Sagar Advocate for the Respondent are present. Heard. In view of SMS Pharmaceuticals the case cannot be maintained against the present applicant. Complaints against them dismissed. "

(3.) THE courts are not expected to pass such cryptic orders. The learned Judge, in the present case, ought to have record short reasons demonstrating as to how the case in hand was covered by the judgment of the Apex Court in S. M. S. Pharmaceuticals Pvt. Ltd. Vs. Neeta Bhalla and Anr. AIR 2005 S. C. 3512. The learned Judge even did not feel it necessary to mention full title of the judgment of the Apex Court and the citation thereof while dismissing all the complaints relying upon the said judgment. His approach while passing drastic orders, dismissing the complaints under section 138 of the Negotiable instruments Act, 1881 filed by the Bank involving huge amounts, was absolutely casual. The courts should exhibit from their conduct and their orders, concerned for the justice to be done in the cases and not casualness , as seen from the impugned order in the present case. The learned counsel for the parties have fairly agreed that I need not examine the merits of the case and record reasons for setting aside the impugned order and that all the matters be remanded to the Sessions Court for deciding the same on merits in accordance with law. In the circumstances I am satisfied that the following order shall meet the ends of justice: "the orders impugned in all the writ petitions dated 19. 1. 2006 are quashed and set aside. All the revisions stand restored to file. The Sessions Court shall decide all the revisions on merits in accordance with law and by passing speaking order as expeditiously as possible and preferrably within a period of three months from the date of receipt of this order. "

With these observations all the writ petitions stand disposed of.

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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CORAM: HONOURABLE MR.JUSTICE M.R. SHAH and HONOURABLE MS JUSTICE SONIA GOKANI

Date : 21/10/2013

TAX APPEAL NO. 847 of 2013

With

TAX APPEAL NO. 848 of 2013 TO TAX APPEAL NO. 849 of 2013

DATTANI AND CO.....Appellant(s) .. Versus.. INCOME TAX OFFICER....Opponent(s)

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Law of precedent- Judicial propriety- Applicability of the case law – Duty of the Court / Tribunal - The decision relied upon by the party has not considered and/or dealt with – Held, it appears that the learned tribunal has not considered and/or dealt with the aforesaid decision relied upon by the assessee at all -Whenever any decision has been relied upon and/or cited by the assessee and/or any party, the authority/tribunal is bound to consider and/or deal with the same and opine whether in the facts and circumstances of the particular case, the same will be applicable or not. In the instant case, the tribunal has failed to consider and/or deal with the aforesaid decision cited and

relied upon by the assessee- Under the circumstances, all these appeals are required to be remanded to the tribunal to consider the addition made and to take appropriate decision in accordance with law and on merits. (Para 4)

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Appearance: MR RK PATEL, ADVOCATE for the Appellant(s) No. 1 MR PRANAV G DESAI, ADVOCATE for the Opponent(s) No. 1

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(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1.00. As common question of law and facts arise in this group of Appeals, they are disposed of by this common order.

2.00. All these Tax Appeals have been preferred by the common appellant - assessee challenging the common impugned judgement and order passed by the Income Tax Appellate Tribunal, Rajkot Bench, Rajkot in ITA Nos.1249 to 1252 of 2010 with respect to Assessment Years 2002-03, 2004-05 and 2006-07.

2.01. It is required to be noted that in the respective appeals, the appellant proposed the following substantial questions of law :

TAX APPEAL No.847 of 2013 :-

"1. Whether Tribunal is right in law and on facts in confirming addition of Rs.24,151/-, Rs.4,443/- & Rs.4,70,000/- towards alleged bogus purchases/sales in contravention of settled principles of law?

2. Whether on facts and in law, the Tribunal has substantially erred in not resorting to provision of section 255 for referring the matter to Full Bench/Special Bench and deciding the disputed issue of purchases & sales in conflict with earlier Tribunal's decision of the same Bench pressed into service by the appellant?

3. Whether on facts and in law, the Tribunal's and conclusion for confirming addition towards purchases and sales for the year under consideration is in ignorance of relevant material on record and taking aid of irrelevant factors not germane to subject matter of appeal with the result that the finding and conclusion of the Tribunal is "vitiated" on facts and in law?"

TAX APPEAL No.848 of 2013 :-

"1. Whether Tribunal is right in law and on facts in confirming addition of Rs.3,42,311/- & Rs.1,42,908/- towards alleged bogus purchases/sales in contravention of settled principles of law?

2. Whether on facts and in law, the Tribunal has substantially erred in not resorting to provision of section 255 for referring the matter to Full Bench/Special Bench and deciding the disputed issue of purchases & sales in conflict with earlier Tribunal's decision of the same Bench pressed into service by the appellant?

3. Whether on facts and in law, the Tribunal's and conclusion for confirming addition towards purchases and sales for the year under consideration is in ignorance of relevant material on record and taking aid of irrelevant factors not germane to subject matter of appeal with the result that the finding and conclusion of the Tribunal is "vitiated" on facts and in law?"

TAX APPEAL No.849 of 2013 :-

"1. Whether Tribunal is right in law and on facts in

confirming addition of Rs.6,42,769/- & Rs.1,83,168/- towards alleged bogus purchases/sales in contravention of settled principles of law?

2. Whether on facts and in law, the Tribunal has substantially erred in not resorting to provision of section 255 for referring the matter to Full Bench/Special Bench and deciding the disputed issue of purchases & sales in conflict with earlier Tribunal's decision of the same Bench pressed into service by the appellant?

3. Whether on facts and in law, the Tribunal's and conclusion for confirming addition towards purchases and sales for the year under consideration is in ignorance of relevant material on record and taking aid of irrelevant factors not germane to subject matter of appeal with the result that the finding and conclusion of the Tribunal is "vitiated" on facts and in law?"

2.02. By order dtd. 1/10/2013 passed in the respective Tax Appeals, we dismissed all these Tax Appeals so far as proposed Question Nos.2 and 3 are concerned and issued notice to consider proposed Question No.1 and observed as under :

"Now, so far as the proposed substantial question of law i.e. question No.1 is concerned, Shri Patel, learned counsel appearing on behalf of the appellant assessee has heavily relied upon the decision of this court in the case of Commissioner of Income Tax vs. President Industries reported in 258 ITR 654, which seems to be not dealt with and/or considered by the learned Tribunal. Hence, for the aforesaid, NOTICE returnable on 21st October 2013. Direct service is permitted."

2.03. Mr.R.K. Patel, learned advocate appearing on behalf of the appellant has vehemently submitted that with respect to addition made towards alleged bogus purchases / sales, the assessee heavily relied upon the decision of this Court in the case of

Commissioner of Income Tax vs. President Industries, reported in 258 ITR 654. It is submitted that though
the said decision was cited before the learned tribunal and even the same was so stated in the Written Submission before the learned tribunal, the tribunal has not considered and/or dealt with the same at all.

2.04. Mr.Pranav Desai, learned advocate appearing on behalf of the respondent – revenue has tried to support the common order of the tribunal impugned in the main Tax Appeal, however, he has fairly conceded that the learned tribunal has not considered and dealt with the decision in the case of Commissioner of Income Tax vs. President Industries reported in 258 ITR 654, relied upon by the assessee and even cited by the assessee in the written submission before the learned tribunal.

3.00. Considering the fact that the decision of this Court in the case of Commissioner of Income Tax vs. President Industries (supra), which was relied upon by the assessee, was cited and pointed out before the learned tribunal, the learned tribunal at least ought to have considered and dealt with the same. From the written submissions, it also appears that the
aforesaid decision was cited before the learned tribunal. From the impugned Judgment and Order passed by the learned tribunal it appears that the learned tribunal has not considered and/or dealt with the aforesaid decision relied upon by the assessee at all.

4.00**.** Whenever any decision has been relied upon and/or cited by the assessee and/or any party, the authority/tribunal is bound to consider and/or deal with the same and opine whether in the facts and circumstances of the particular case, the same will be applicable or not. In the instant case, the tribunal has failed to consider and/or deal with the aforesaid decision cited and relied upon by the assessee. Under the circumstances, all these appeals are required to be remanded to the tribunal to consider the addition made by the Assessing Officer towards alleged bogus purchases/sales and to take appropriate decision in accordance with law and on merits and after considering the decision of this Court in the case of Commissioner of Income Tax vs. President Industries reported in 258 ITR 654. However, it is clarified that we have not expressed any opinion on merits whether in the facts and circumstances of the case, the decision of this Court in the case Commissioner of Income Tax vs. President Industries (supra) will be applicable or not. It is

ultimately for the learned tribunal to consider the same in the facts and circumstances of the case.

5.00. With this, all these appeals are allowed in part and the same are remanded to the learned tribunal to consider the issue with respect to addition made towards alleged bogus purchases/sales and to consider the decision of this Court in the case of Commissioner of Income Tax vs. President Industries reported in 258 ITR 654. As stated hereinabove, so

far as Question nos.2 and 3 are concerned, by our earlier order dtd. 1/10/2013 we have already dismissed the present appeals. Present appeals are allowed in part to the aforesaid extent only.

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ALLMR(CRI)-2008-0-751 = LAWS(BOM)-2008-2-146

BOMBAY HIGH COURT

Coram :- V.R.Kingaonkar J.

Decided on February 01, 2008

Criminal Application 1653 of 2003

Roy Joseph CreadoAppellant

VERSUS

Sk.Tamisuddin s/o.Late Sk.Nazir AhmedRespondents

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Precedents – How to deal with case law relied by the party - Sessions Judge merely reproduced the head notes/placitums - The Magistrate also did not discuss the case law with reference to the ratio of the decisions - Held, many Judicial Officers follow practice of reproducing the head notes/placitum from the reported precedents. The Judicial Officers need to understand that the head notes are drawn by editors/staff members of the Law Journals. It is necessary to read the precedent in entirety. The judicial Officer is required thereafter to cull out the ratio of the authority. The matching of facts and circumstances would then enable the Court to examine whether such ratio is applicable to the case with which the Court is required to deal with- the Judicial Officers shall avoid such practice. They

shall not merely quote the head notes/placitum appearing from the indexes or the prelude to the judgments reported in the law Journal.(Para 6)

The learned sessions Judge quoted a part of the observations of the Single Bench in support of his conclusion that filing of the complaint by a power of attorney is prima facie legal and proper. However, the quotation as stated in paragraph 14 of the impugned order is just reproduction of the head notes/placitums. Not only that but even in respect of other quotations, the learned sessions Judge merely reproduced the head notes/placitums. The learned Judicial Magistrate also did not discuss the case law with reference to the ratio of the decisions.

This Court has noticed, of late, the practice adopted by many Judicial Officers to simply refer the decision of this Court or the apex Court without examining whether the ratio is really applicable to the given case. So also, many Judicial Officers follow practice of reproducing the head notes/placitum from the reported precedents. The Judicial Officers need to understand that the head notes are drawn by editors/staff members of the Law Journals. It is necessary to read the precedent in entirety. The judicial Officer is required thereafter to cull out the ratio of the authority. The matching of facts and circumstances would then enable the Court to examine whether such ratio is applicable to the case with which the Court is required to deal with. Unfortunately, both the Courts below have failed to undertake such exercise before making references to the authorities cited before them. How I wish, the Judicial Officers shall avoid such practice. They shall not merely quote the head notes/placitum appearing from the indexes or the prelude to the judgments reported in the law Journal.

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Advocates :- C.R.Deshpande , D.R.Adhav , P.R.Patil , S.L.Jondhale

JUDGEMENT

1. THIS is an application filed by the original accused. They challenge legality and correctness of orders passed by learned judicial Magistrate, First Class, Aurangabad and learned IVth Additional Sessions Judge, aurangabad in SCC 2888/2001 and Criminal revision Petition No. 76/2003. They seek quashing of the orders of issuing process and denying discharge from the Criminal Case.

2. THE applicants allege that the proceedings of Criminal Case (SCC No. 2888/ 2001) are liable to be quashed inasmuch as the same amounts to abuse of process of law.
Background facts may be summarised as follows :
The Respondent No. 1 Sk. Tamisuddin claims himself to be Special Power of Attorney of deceased Sairabi. He alleges that on 20. 6. 2001 the applicants issued a cheque for amount of Rs. 1,00,000/- (Rupees one lac)towards part payment of agreed amount payable to Sairabi for her share in an immovable property. The cheque was presented for encashment in the concerned Bank. However, it was dishonoured. A demand notice was issued by the Respondent No. 1 which drew blank. He, therefore, lodged the complaint before the learned Judicial Magistrate, First Class, aurangabad, on 8. 8. 2001. The learned magistrate issued process on 18. 8. 2001 on the basis of verified statement of the Respondent no. 1 - Sk. Tamisuddin.
The applicants filed an application (Exh. 41) to acquit them U/s. 256 of the Cr. P. C. for the reason that in the month of June, 2002, aggrieved person, namely, Sairabi demised. Thereupon, the Respondent NO. l filed an application (Exh. 43) seeking permission to grant leave to continue the complaint proceedings in his capacity as legal representative of the deceased Sairabi i. e. original complainant.
3. THE applicants filed yet another application for recalling the process on the ground that the complaint filed by the respondent No. 1 for and on behalf of said sairabi was untenable. They asserted that the respondent No. 1 had no locus-standi to file such complaint nor process cou d be issued on the basis of his verified statement. They asserted that the complaint filed on behalf of the deceased Sairabi ought to have been signed by herself and she ought to have verified correctness of the contents. Therefore, they urged to dismiss the complaint.
By a common order dated 12. 3. 2003 the learned Magistrate rejected both the applications filed by the applicants. The applicants preferred a Revision Petition (Cr. Rev. No. 76/2003) which came to be dismissed.
4. MR. Jondhale, learned advocate for the applicants, would submit that the complaint for offence U/s. 138 of the N. I. Act could not be filed by the Respondent No. 1 in the name of deceased Sairabi. He argued that verification of the complaint by the Respondent no. 1 is totally illegal inasmuch as the respondent No. 1 is not the holder of cheque in due course. He argued that the Respondent No. 1 had no legal authority to file the complaint under his own signature. It is argued that issuance of the process without recording verified statement of original complainant - Sairabi is illegal and liable to be set aside. It is contended that the power of Attorney holder cannot substitute himself as a complainant. It is argued that the impugned orders deserve to be set aside inasmuch as the complaint proceedings are totally illegal. Per contra, Mr. P. R. Patil, learned advocate for the Respondent No. 1 and learned a. P. P. support the impugned orders.
A perusal of the complaint reveals that the complaint was filed in name of deceased smt. Sairabi whose age was shown as 72 years at that time, and it was presented through Special power of attorney, namely, Sk. Tamisuddin. The complaint purports to show that Sk. Tamiusddin is well conversant with the facts of the complaint. He claimed to be authorised person to file the complaint by virtue of the Special power of Attorney executed by said Smt. Sairabi. The complaint reveals that Smt. Saira had interest in a property

which the applicants agreed to develop. The appellants allegedly entered into a Memorandum of Understanding (MOU) with her four sons. The allegations in the complaint further disclose that a notice of demand was issued by the deceased Smt. Saira to pay her the due share. The applicants had agreed to pay Rs. 3,00,000/- (Rupees three lacs). The cheque in question was issued as a part payment for discharging the liability which they accepted, she being lawful co-sharer of the property left by her husband, likewise her sons. The cheque issued on 20. 5. 2001 was dishonoured when presented to S. B. I, at Kranti chowk branch, Aurangabad. The demand notice issued by the deceased drew blank and, therefore, the complaint was filed.

Another significant fact which can be noticed on perusal of the complaint is that the complaint is signed by the special power of attorney - Sk. Tamisuddin as a complainant. The complaint is not signed by deceased Smt. Saira. The complaint is verified by Sk. Tamisuddin as if he is the original complainant. The verified statement which purportedly is of complainant smt. Saira is signed by Sk. Tamisuddin in her stead, being special power of attorney. Obviously, the complaint is not signed and verified by deceased Smt. Saira. The learned magistrate issued process on the basis of such a verified statement of the special power of attorney. No attempt was made to call upon deceased Smt. Saira to sign the complaint. The vakilpatra was also filed by Sk. Tamisuddin as special power of attorney of complainant Smt. Saira.

5. IN the above backdrop, definition of the word "complaint" as enumerated in section 2 (d) of the Cr. P. C. may be noticed. The word "complaint" means a written or oral accusation made to Judicial Magistrate to start appropriate proceedings against a known or unknown person as per provisions of the Code. It does not include report given to Police (F. I. R.). So, the complaint may be oral. The purpose of complaint is to move the Judicial magistrate for setting Criminal Law in motion. However, Section 142 of the Negotiable instruments Act specifically deals with the expression "complaint" filed under the N. I. Act. A plain reading of Section 142 of the N. I. Act shows that the cognizance of any offence punishable U/s. 138 of the N. I. Act cannot be taken unless there is complaint, in writing made by the payee or by holder of the cheque in due course. Section 142 commences with non-obstante clause. Therefore, it supersedes the general definition of the word "complaint" as given in Section 2 (d) of the Code of Criminal procedure. The legal requirements of a valid complaint for the purpose of N. I. Act are :

(i) There has to be a complaint in writing regarding commission of offence; (ii) The complaint must be made by the payee or one who is holder of the cheque in due course;

(iii) The allegations in the complaint shall make out a prima facie case of cognizable offence.

6. AT this juncture, it may be said that verification of the complaint U/s. 200 of the cr. P. C. is necessary. The purpose of such verification is to determine prima facie truth into the allegations made in the complaint. The verification of complaint is essential U/s. 200 of the Cr. P. C. before taking cognizance of the offence not only with a view to find out prima facie truth but also in order to identify the person who, in case the prosecution is found to be frivolous or malafide, would be liable to answer the charge of perjury or to indemnify the accused persons. In other words, when the complainant gives statement before the Judicial magistrate, in support of his complaint, it is implicit that if certain statements are

found to be false then identity of perjurer is explicitly made clear. So also if the complaint is found to be malicious and frivolous then action for recovery of compensation can be taken against such a complainant. In this context, observations of the Apex Court in "sabitha Ramamurthy and another Vs. R. B. S. Channabasavaradhya (2006 AIR SCW 4582 : 2007 ALL SCR 190) may be usefully quoted as follows :

"by reason of the said provision a person although is not personally liable for commission of such an offence would be vicariously liable therefore. Such vicarious liability can be inferred so far as a company registered or incorporated under the companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted. Not only the averments made in paragraph 7 of the complaint petitions does not meet the said statutory requirements, the sworn statement of the witness made by the son of respondent herein, does not contain any statement that Appellants were in charge of the business of the company. In a case where the court is required to issue summons which would put the accused to some sort of harassment, the court should insist strict compliance of the statutory requirements. In terms of Section 200 of the Code of Criminal procedure, the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible there for. In the event, ultimately, the prosecution is found to be frivolous or otherwise malafide. the court may direct registration of case against the complainant for malafide prosecution of the accused. The accused would also be entitled to file a suit for damages. The relevant provisions of the Code of Criminal procedure are required to be construed from the aforementioned point of view. " (Emphasis supplied)

The statutory provision requires, therefore, that the complaint must be signed by the complainant and that it shall be verified by the complainant. In the other words, a complaint which is not signed by the complainant, is, therefore, incomplete and on the basis of such incomplete complaint, no cognizance can be taken U/s. 142 of the N. I. Act. As stated before, verification of the complainant is essential in order to ensure that in future nobody may be allowed to deny liability arising out of frivolous complaint, false charges, malicious prosecution or like unfounded criminal action. Corollary of the foregoing discussion is that for the purpose of a valid complaint the test is to examine whether identity of the person, who would be liable to pay compensation to the accused persons, may be U/s. 357 of the Cr. P. C. or may be under the tortious liability, is clearly set out in the complaint. Looked from this angle, the complaint filed by the special power of attorney does not show that he accepted any liability for such adverse effects on the complaint being found frivolous or vexatious. The recitals of the copy of special power of attorney filed alongwith the complaint also do not show that sk. Tamisuddin agreed to indemnify the accused persons in case any compensation was found payable under provisions of the Law. It is difficult to say, therefore, that the complaint which is not signed by deceased Smt. Saira could be regarded as a complaint within the meaning of the provisions of the N. I. Act. It was incomplete complaint. The defect cannot be cured because Smt. Saira died, during the intervening period, on 28. 6. 2002. By his application Exh. 43 the special power

of attorney holder sought leave of the Court to prosecute the complaint on her behalf. The leave was granted to him as per order dated 12. 3. 2003.

In "finolex Industries Ltd. Vs. Mr. Pravin V. Sheth and others" 2002 (2)ALL MR 644, a Single Bench of this Court held that for the purpose of Section 142 of the n. I. Act, the complaint must be signed by the complainant. It is held that the complaint which is not signed by the complainant, is, therefore, incomplete and on basis of incomplete complaint, no cognizance can be taken U/s. 142 of the N. I. Act. The learned Sessions Judge placed heavy reliance on "dr. Pradeep mohanbay Vs. Mr. Minguel Carlos Dias", [2000 (2) ALL MR 664] : 2000 Vol. 102 (1)Bom. L. R. 908. In the given case a Single Bench of this Court held that a power of attorney has right to file complaint U/s. 138 of the N. I. Act but cannot depose on behalf of the complainant. He can appear as a witness. The learned sessions Judge quoted a part of the observations of the Single Bench in support of his conclusion that filing of the complaint by a power of attorney is prima facie legal and proper. However, the quotation as stated in paragraph 14 of the impugned order is just reproduction of the head notes/placitums. Not only that but even in respect of other quotations, the learned sessions Judge merely reproduced the head notes/placitums. The learned Judicial Magistrate also did not discuss the case law with reference to the ratio of the decisions.

This Court has noticed, of late, the practice adopted by many Judicial Officers to simply refer the decision of this Court or the apex Court without examining whether the ratio is really applicable to the given case. So also, many Judicial Officers follow practice of reproducing the head notes/placitum from the reported precedents. The Judicial Officers need to understand that the head notes are drawn by editors/staff members of the Law Journals. It is necessary to read the precedent in entirety. The judicial Officer is required thereafter to cull out the ratio of the authority. The matching of facts and circumstances would then enable the Court to examine whether such ratio is applicable to the case with which the Court is required to deal with. Unfortunately, both the Courts below have failed to undertake such exercise before making references to the authorities cited before them. How I wish, the Judicial Officers shall avoid such practice. They shall not merely quote the head notes/placitum appearing from the indexes or the prelude to the judgments reported in the law Journal.

7. REVERTING to the case of "dr. Pradeep Mohanbay Vs. Mr. Minguel Carlos dias" [2000 (2) ALL MR 664] (supra) it may be mentioned that a specific question was raised by the Single Bench as to whether the power of attorney can depose on behalf of the complainant. The learned Single Judge held that the power of attorney holder can appear, plead and act on behalf of a party but he cannot become a witness of the party. He can only appear in his own capacity. The principle enunciated U/o. 3, Rule 2 of the C. P. C. is equally applicable to appearance of a power of attorney in criminal proceedings. True, in case of "dr. Pradeep Mohanbay Vs. Mr. Minguel Carlos dias", the learned Single Judge held that a complaint for offence U/s. 138 of the N. I. Act can be filed by the power of attorney in terms of Section 142 of the said Act. Filing of complaint by the power of attorney holder is quite different from signing of the complaint and due verification thereof. A power of attorney holder can file a complaint for and on behalf of the person who has delegated the power to him for presentation of the complaint. However, he cannot depose instead of

such a complainant on whose behalf he files the complaint. The learned Single Judge (R. K. Batta, J.) in the given case clearly observed :

"the complainant can appoint a Power of attorney for filing the complaint in view of section 142 of the said Act. However, neither Code of Criminal Procedure nor the said Act contemplates that any one can depose for and on behalf of the complainant. In such complaint the Power of Attorney is entitled to appear as a witness and depose in respect of facts which are within his knowledge and on the basis of record on which reliance is placed. "

There is no difficulty in accepting the proposition that a Power of Attorney may enter witness box in his own capacity so as to spell out the facts known to him. In no case, however, he can substitute himself in place of the complainant right from the stage of verification of the complaint till end of the trial. In other words, the original complainant cannot be a mere name lender when the complaint is filed for the offence under the N. I. Act. This is more so having regard to the purpose of the verification U/s. 200 of the Cr. P. C. being one to fix identity of the person who may be made liable to pay compensation when the complaint is found to be false, frivolous or vexatious.

8. MR. P. R. Patil, learned counsel for the Respondent, seeks to rely on "m/s. G. J. Packaging Private Ltd. and another Vs. M/ s. S. S. Sales and another", [2005 ALL MR (Cri) 2782] : 2006 (2) Bankers Journal 244. The question before the learned Single Judge (S. P. Kukday, J.) in the said case was whether a complaint filed for offence punishable U/s. 138 of the N. I. Act, 1881, could be quashed U/s. 482 of the Cr. P. C. on the ground that it was defective because it was filed by the power of attorney in the name of the payee or holder in due course. The learned Single Judge held that even if the complaint is signed by a person, who is not properly authorised, this defect can be subsequently rectified. The complaint cannot be quashed merely on this ground. The learned single Judge observed, during the course of discussion, that "where a power of attorney has full knowledge of the transaction, his statement can be recorded by the Magistrate for verification of the complaint for ascertaining the truth of the allegations and to enable him to take appropriate decision that the process should be issued or not. " These observations are merely obiter. The issue involved was whether or not the order regarding the issuance of process by the learned Chief Judicial Magistrate called for interference on the ground that the complaint was filed by unauthorised person. The earned single Judge observed :

"this Court in Mamtadevi Prafullakumar bhansali (supra) after noticing relevant provisions came to the conclusion that in cases where Power of Attorney holder can depose on behalf of the principal if he transacts business from the beginning to the exclusion of the principal, as his capacity as a witness and as Power of Attorney merges in such a case. " (emphasis supplied)In the fact situation of the present case, there is hardly any material to infer that Respondent Sk. Tamisuddin transacted the business from beginning and that too to the exclusion of deceased Smt. Saira. There is nothing in the statement of Sk. Tamisuddin to show that Smt. Saira had no knowledge about the transaction which entailed issuance of the cheque for rs. 1,00,000/- nor the complaint is signed by said smt. Saira. In "jimmy Jahangir Madan Vs. Mrs. Boly Cariayappa Hindley (Deceased) by l. Rs. " (A. I. R. 2004 Supreme Court 48), the apex Court held that Power of Attorney holder cannot file an application U/s. 302 of the Cr. P. C. on behalf of the heirs of the complainant

and unless permission is obtained from the Court he cannot be treated as a pleader. The delegated powers may be availed by the Special Power of attorney only to the extent of filing of the complaint and pursuing the same by making appropriate applications during the trial.

A Division Bench of this Court in

"maharaja Developers and another Vs. Udaysingh Pratapsinghrao Bhonsle and another" (2007 Cri. L. J. 2207), held that it is mandatory for the Magistrate to examine the complainant U/s. 200 of the Cr. P. C. The division Bench held that non-obstante clause in Section 142 of the N. I. Act does not relieve the Magistrate of his duty to examine the complainant and his witnesses on oath U/s. 200 of the Cr. P. C. In "janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and others", [2004 (5) ALL MR (S. C.) 396] : (A. I. R. 2005 Supreme Court 439), the Apex court crystalised scope of Order 3, Rule 1 and 2 of the C. P. C. It is held that power of attorney holder cannot depose in place and instead of the principal. A Single Bench of this Court (J. H. Bhatia, J.) in "sanjay Vinze and others Vs. State of Maharashtra and others" 2007 ALL mr (Cri) 3170, held that order to issue process on the basis of verification statement by son of the complainant, in regard to the facts which were only within exclusive knowledge of the complainant, was improper and illegal. The order issuing process was therefore, quashed. The relevant observations may be reproduced for ready reference :

"merely because he was constituted power of attorney holder, he could not claim to be the complainant himself or witness of the facts which were not known to him but which were within the exclusive knowledge of the complainant. In view of this, it must be held that verification statement of the respondent No. 3 was not verification statement made by the complainant or by witness who had personal knowledge of the fact. Therefore, on the basis of such statement, the learned Magistrate could not proceed to issue process under Section 204 of the Cr. P. C. "

In "s. P. Sampathy Vs. Manju Gupta" 2002 (4) ALL MR (JOURNAL) 6, a Division bench of Andhra Pradesh High Court held that complaint ought to be made and signed by the payee or holder in due course. The power of attorney holder, it is held, cannot file complaint. In "anil G. Shah Vs. J. Chittranjan Co. and another" 1998 (2) Crimes 347, a Single Judge of Gujarat High Court held that cognizance taken on complaint filed by payee or through power of attorney holder does not suffer from illegality. It is further held that death of the payee of the cheque has no bearing on the trial. The legal heirs of the original complainant are entitled to come forward and ask for their substitution in place of the complainant so as to proceed further with the trial.

There are cases and cases. Each case needs to be examined on the basis of the fact situation obtained therein. In the case in hand, the complaint filed by Respondent - Sk. Tamisuddin was defective because it was not signed by the complainant - Smt. Saira. The defect was curable during her life time. She could have been asked to sign the complaint. That was not done. The complaint is verified by the Respondent although, he did not state in clear words that he is not only Special Power of Attorney holder but has the full knowledge of the facts in which the cheque was issued by the applicants in name of Smt. Saira, as a result of liability to discharge the legal debt or money due to her. It appears that gist of the complaint is reproduced as the verified statements of Sk. Tamisuddin. The

copy of Special Power of attorney does not show that the Respondent did undertake the liability to indemnify the accused persons if the complaint was found to be frivolous or false. The issuance of process on the basis of such a verified statement is, therefore, illegal and improper.

9. THE matter does not stop here. After the death of Smt. Saira, the Respondent obtained permission to continue the prosecution as her Special Power of Attorney. He did not seek his substitution as a legal heir of the deceased. Secondly, when the initial complaint itself was defective and process could not be issued thereunder, there arise no question of substitution of the complainant U/s. 256 of the cr. P. C. In this view of the matter, I am of the opinion that both the impugned orders are improper and illegal. Needless to say, the prosecution against the applicants would tantamount to abuse of the process of law.

10. THE Chapter relating to penalties in case of dishonour of cheques was introduced by the Banking, Public Financial Institutions and negotiable Instruments Laws (Amendment)Act, 1988. The Chapter XVII comprising of sections 138 to 142 came on the statute book with a view to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques. The civil liability is partly transformed into criminal liability. The offence u/s. 138 of the N. I. Act is, therefore, a hybrid product of Civil and Criminal Laws. The special enactment requires certain conditions to be satisfied before taking cognizance of the offence. Hence, the provision of Section 142 will have precedence over the normal procedure of entertaining a complaint. The Respondent cannot be termed as the payee of the cheque in question nor can he be regarded as holder thereof in due course. Hence, his complaint would not be maintainable.

For the reasons aforesaid, the application is allowed. The impugned orders are quashed and the complaint filed by the respondent shall be deemed as dismissed as the order to issue process thereon is unsustainable. No costs. Application allowed.

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Cross Citation :1997-AIR(SC)-0-2477 , 1997-SCC-6-450

SUPREME COURT OF INDIA
(FULL BENCH)

Hon'ble Judge(s) : K. S. PARIPOORNAN, K. VENKATASWAMI AND B. N. KIRPAL, JJ.

Dwarikesh Sugar Industries ….Vs.. Prem Heavy Engineering Works Private Limited

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JUDICIAL ADVENTURISM – Order by ignoring case laws of Supreme Court - The appellant would be entitled to costs quantified at Rs. 20,000.00 - Sub ordinate Courts should not pass orders by ignoring law settled by Higher Courts – When a position, in law, is well settled as a result of judicial

pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate Courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops - It is unfortunate, that notwithstanding the authoritative pronouncements of this Court, the High Courts and the Courts subordinate thereto, still seem intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled - The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it in avoiding to follow and apply the law as laid down by this Court- (Para 32 ,33,29)

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Civil 3376 Of 1997 , May 07,1997

KIRPAL, J.

(1.) Special leave granted.

Having been thrawted by orders of the court below in its attempt to get encashment of the bank guarantees, issued by the State Bank of India, Meerut Cantt. Branch (respondent No.2) respondent No. 1 has led to the filing of this appeal by the aggrieved beneficiaries.

(2.) The appellant and respondent No. 1 had entered into an agreement on 27/07/1994 whereby respondent No. 1 was to supply boiling house equipment the cost of which was Rs. 5.23 crores. The supply of equipment and material was to start from 15/09/1994 and the same was to be completed by 10/08/1995, as per the schedule of the supply agreed to by the parties.

(3.) According to one of the clauses of the aforesaid agreement respondent No. 1 had agreed to furnish bank guarantees in favour of the appellant. Out of the above six, only four bank guarantees were furnished including bank guarantee No. 40/51 dated 1/12/1994 for a sum of Rs. 26,15,000.00 and bank guarantee No.40/47 dated 24/11/1994 for a sum of Rs. 35 lacs. These are the bank guarantees with which we are concerned in the present case.

(4.) Bank guarantee No. 40/51 was issued to ensure timely delivery of equipment and supply by respondent No. 1. The relevant clauses of the said bank guarantee No. 40/51 are as follows :

"In consideration of the premises the Guarantor hereby unconditionally and irrevocably undertakes to pay to the Purchaser on their first written demand and without demur such a sum not exceeding Rs. 26,15,000.00 (Twenty six lacs fifteen thousand only) as the purchasers may demand representing 5% (five per cent) of the contract price, and if the guarantor fails to pay the sum on demand the guarantor shall also pay on the sum demanded interest at the bank lending rates then prevailing reckoned from the date of demand till the date of payment.

2. The guarantor shall pay to the purchaser on demand the sum under clause 1 above without demur and requiring the purchasers to invoke any legal remedy that may be available to them, it being understood and agreed firstly that the purchasers shall be the sole judge of and as to whether the sellers have committed breach(es) of any of the terms and conditions of the said agreement and secondly that the right of the purchasers to recover from the guarantor any amount due to the purchasers shall not be affected or suspended by reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that proceedings are pending before any Tribunal, arbitrator(s) or Court with regard to or in connection therewith, and thirdly that the guarantor shall immediately pay the aforesaid guaranteed amount on demand and it shall not be open to the guarantor to know the reasons of or to investigate or to go into the merits of the demand or to question or to challenge the demand or to know any facts affecting the demand, and lastly that it shall not be open to the guarantor to require the proof of the liability of the seller to pay the amount before paying the aforesaid guaranteed amount to the purchasers.

(5.) The other bank guarantee No.40/47 was originally issued for a sum of Rs. 51,70,000.00 for securing advance payment. The agreement contemplated the liability being gradually reduced and on 28/08/1995 this bank guarantee was reduced for a diminished amount of Rs. 33 lacs. The relevant clause of this bank guarantee is as follows :

"In consideration of the premises the guarantor hereby unconditionally and irrevocably undertakes to pay to the purchaser on their first written demand and without demur such a sum not exceeding Rs. 51,70,000.00 (Rupees fifty one lacs seventy thousand only) as the purchasers may demand representing 10% (Ten per cent) of the contract price, and if the guarantor fails to pay the sum on demand the guarantor shall also pay on the sum demanded interest at the bank lending rates then prevailing reckoned from the date of demand till the date of payment. Provided that liability of the guarantor hereunder shall reduce to the extent of the advance adjusted under clause 13 of the said agreement.

The guarantor shall pay to the purchaser on demand the sum under clause 1 above without demur and requiring the purchasers to invoke any legal remedy that may be available to them, it being understood and agreed firstly that the purchaser shall be the sole judge of and as to whether the sellers have committed any breach(es) of any of the terms and conditions of the said agreement and secondly that the right of the purchasers to recover from the guarantor any amount due to the purchasers shall not be affected or suspended by reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that proceedings are pending before any Tribunal, arbitrator(s) or court with regard thereto or in connection therewith, and thirdly that the guarantor shall immediately pay the aforesaid guaranteed amount on demand and it shall not be open to the guarantor to know the reasons of or to investigate or to go into the merits of the demand or to question or to challenge the demand or to know any facts affecting the demand, and lastly that it shall not be open to the guarantor to require the

proof of the liability of the seller to pay the amount before paying the aforesaid guaranteed amount to the purchasers".

(6.) According to the appellant respondent No. 1 did not supply the equipment at site, within the time allowed, nor replaced any of the defective items which, according to the appellant, had resulted in the late commencement of the trial crushing in the mill. It is further the case of the appellant that it had to make direct purchases of many parts from other sources as the respondent No. 1 had failed to supply the equipment. Ultimately by letter dated 21/11/1995 written to respondent No. 2, the appellant invoked the bank guarantee. The material portion of his letter was as follows :

"We wish to inform you that M/s Prem Heavy Engineering Works (P) Ltd. Rani Mill, Delhi Road, Meerut have failed to fulfil the conditions of our agreement dated 27-7-1994 in so far as timely supply of the machinery and equipment under order with them.

In view of their failure, we hereby invoke the bank guarantee in terms of clause 1, 2 and 3 of the aforesaid guarantee and hereby demand payment of Rs. 26,15,000.00 (Rupees twenty six lakhs fifteen thousand only). You are, therefore, required to issue a demand draft drawn in favour of our company payable at Najibabad for Rs. 26,15,000.00 (Rupees twenty six lakhs fifteen thousand only). The original guarantee is enclosed which may please be acknowledged."

(7.) Respondent bank did not make the payment, notwithstanding the receipt of the aforesaid letter dated 21/11/1995 but the effect which this letter had was that, on 23/11/1995, respondent No. 1 filed original Suit No. 1182 of 1995 before the Court of Civil Judge, Meerut, under Section 20 of the Indian Arbitration Act, 1940. In the said suit the appellant herein was impleaded as defendant No. 1 while the State Bank of India was impleaded as defendant No. 2. The only relief claimed in this suit was that the dispute between the parties should be referred to an arbitrator. Along with this suit respondent No. 1 also filed an application for the grant of injunction restraining the appellant herein from encashing the aforesaid bank guarantee No. 40/51 which had been issued for a sum of Rs. 26,15,000.00.

(8.) It appears that there was some discussion between the representatives of the appellant and respondent No. 1 in connection with the encashment of the said bank guarantee No.40/51. Pursuant thereto letter dated 24/11/1995 was written by respondent No. 1 to the appellant which was to the following effect :

As discussed with your managing director Sh.G.R. Mararka today at your Delhi guest house, we are confirm that we shall despatch balance parts except lime elevator direct from our works by 26-11-1995 and shall arrange despatch of balance fright oil after payment except air compressor by 27-11-1995. We shall ensure commissioning of the two shall (sic) of cooling towers of one complete shall of twin crystalizer and F.M. Piping by 30-11-1995 and F.M. Tonor with rouling in 10-12-1995. We request you to kindly keep the invocation of the above guarantee in abeyance till 10-12-1995.

(9.) According to the appellant it was not aware that original Suit No. 1182 of 1995, along with an application for injunction had already been filed by respondent No. 1 a day earlier to the respondent's letter dated 24/11/1995. Acting on the basis of the aforesaid letter of the respondent No. 1 the appellant wrote a letter dated 27/11/1995 to the Manager, State Bank of India, Meerut Cantt. After expressing its regret that the proceeds of the guarantee had not been paid to the appellant, it was stated in this letter that respondent No. 1 had assured to make a complete supply of the ordered plant and machinery within next three or four days. In view of this it withdrew its letter of invocation dated 21/11/1995 but it was added that "it may, however, be noted that demand payment is being withdrawn without prejudice to our right of invocation under the guarantee".

(10.) Apparently having succeeded in pursuading the appellant to write the aforesaid letter dated 27/11/1995 withdrawing the letter of invocation, respondent No. 1 on the very next day, i.e. 28/11/1995 obtained an ex parte injunction from the Court of Civil Judge, Meerut, restraining the appellant from encashing the aforesaid bank guarantee No. 40/51.
(11.) According to the appellant, respondent no. 1 did not make the requisite supplies with the result that vide letter dated 9/01/1996, written to the Assistant General Manager, State Bank of India, Meerut, it invoked bank guarantee No. 40/51 by, inter alia, stating as follows :
"As per clause 14 of the supply agreement M/s Prem Heavy Engineering Works (P) Ltd., Meerut has failed to deliver the equipments and its commissioning within the scheduled time frame.
Now we hereby invoke the aforesaid guarantee for Rs. 26,15,000.00 (Rupees twenty six lacs fifteen thousand only) being 5% of the contract value and enclose herewith the original guarantee for your record. Kindly hand over the Demand Draft in our favour payable at Najibabad, Distt. Bijnor, Uttar Pradesh towards the invocation amount."
(12.) As on 28/11/1995 respondent No. 1 had already obtained an ex parte injunction restraining the encashment of bank guarantee, no payment was made to the appellant by the bank.
(13.) Respondent No. 1 then filed another injunction application dated 12/01/1996 with regard to the second bank guarantee dated 24/11/1994 which was for a sum of Rs. 33 lacs. It obtained an ex parte injunction in respect thereto on the same day. Being ignorant of this the appellant wrote a letter dated 16/01/1996 to the respondent bank invoking the said bank guarantee No.40/47. In the said letter it was stated that respondent No. 1 had failed to deliver the equipment as per the terms of the agreement and that the appellant had bought equipment from various markets due to which the advance amount which had been paid to respondent No. 1, in respect of which this bank guarantee had been issued, remained unadjusted. The bank was accordingly required to pay the said amount of Rs. 33 lacs.
(14.) According to the appellant it is only after 16/01/1996 that it became aware of the filing of the aforesaid suit and the injunction application and it entered appearance in Court on 18/01/1996 even though no notice had been served on it. As per the appellant, there was delay in the disposal of the injunction application, consequently it approached the High Court for appropriate directions and the Allahabad High Court vide order dated 10/05/1996 directed the Civil Judge, Meerut Cantt, to dispose of the suit within the time fixed by it.
(15.) By a detailed order dated 20/08/1996, the Second Civil Judge (Sr. Division), Meerut vacated the ex parte injunctions which had been granted and dismissed the injunction applications. In arriving at this conclusion it observed that respondent No. 1 had not stated that the work had been completed and nor was there any allegation of cheating or fraud contained in the plaint which had been filed. The trial court referred to a number of decisions of this Court and came to the conclusion that there was no basis, in law, for the grant of any interim prohibitory order.
(16.) The appellant on 22/08/1996 again approached the respondent bank for the encashment of the bank guarantees, but without success.
(17.) Respondent No. 1 then filed revision petition No. 257 of 1996 on 10/09/1996* before the Allahabad High Court challenging the order dated 20/08/1996 of the trial court. Single Judge of the Allahabad High Court took up the revision petition and disposed it of on the same day and, after setting aside the order dated 20/08/1996 it remanded the matter back to the trial court for a fresh decision but, at the same time, directed that till the disposal of injunction application the bank guarantees in question shall not be invoked

or encashed. The trial court was directed to hear the parties within fifteen days of the receipt of the order and to dispose of the injunction application within fifteen days thereafter. Needless to state, due to dilatory tactics adopted by respondent No. 1, which is evident from the documents available on the record of this case, the said injunction applications have not been disposed of till date with the result that the injunction granted by the single judge of the High Court vide order dated 10/09/1996 still continues.

(18.) While allowing the civil revision the single judge in his judgment did not think it necessary to refer to the judicial decisions which were cited before him. The court observed that reference to the same was not necessary because the trial court, who had observed that the plaint did not contain any allegation with regard to fraud, had not noticed that allegation of fraud was contained in the injunction application. The learned judge noticed that the liability of bank under the guarantee was absolute and that it was not supposed to question the authority of the beneficiary to encash the bank guarantee but observed that the same "could not be the guideline for allowing the defendant to encash the bank guarantee unless there was a finding that the defendant was having undue enrichment thereby".

(19.) The aforesaid decision of the High Court has been assailed by Sh. Harish N. Salve, learned senior counsel for the appellant, who has contended that the High Court fell in serious error in ignoring and not in even referring to the decisions of this Court where the principles regarding the grant of injunction in matters relating to encashment of bank guarantees have been clearly spelt out. Had this been done, the learned counsel submits, the High Court could not, in law, have continued with the temporary injunction.

(20.) Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the Courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelshanken v. M/s. Indian Charge Chrome, (1994) 1 SCC 502 : (1993 AIR SCW 4002), Larsen and Toubro Ltd. v. Maharashtra State Electricity Board, (1995) 6 SCC 68 : (1975 AIR SCW 4134), Hindustan Steel Workers Construction Ltd. v. G. S. Atwal and Co. (Engineers) Pvt. Ltd., (1995) 6 SCC 76 : (1995 AIR SCW 3821) and U. P. State Sugar Corporation v. Sumac International Ltd., (1997) 1 SCC 568 : (1997 AIR SCW 694). The general principle which has been laid down by this Court has been summarised in the case of U. P. State Sugar Corporation's case as follows :

"The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour, it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The Courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and

irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country."
Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in Bolivinter Oil S. A. v. Chase Manhattan Bank, (1984) 1 All ER 351, are apposite:
"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged."
(emphasis supplied)
(21.) The aforesaid passage was approved and followed by this Court in U. P. Co-operative Federation Ltd. v. Singh Consultants and Engineers (P.) Ltd., (1988) 1 SCC 174.
(22.) The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.
(23.) In the instant case, as has been already noticed there were two types of bank guarantees which were issued. Bank Guarantee No. 40/51 for Rs. 26,15000.00 was issued to ensure timely performance of the agreement by respondent No. 1. The relevant terms of this guarantee firstly makes it clear that the bank has unconditionally and irrevocably undertaken to pay to the appellant, on written demand and without demand, the amount demanded by it. Secondly, Clause II of the said guarantee clarifies that the payment shall be made without demand and on the undertaking that the appellant is to be sole Judge whether the seller has committed any breach. Consequently the right of the appellant to recover the guaranteed amount is not to be effected or suspended by reason of any dispute which can be raised or pending before the Courts tribunals or arbitrator. Thirdly the guarantor had no right to know the reasons of or to investigate the merits of the demand or to question or to challenge the demand or to know any facts affecting the demand and lastly it was not open to the bank to require the proof of the liability of respondent No. 1 to pay the amount before paying the aforesaid guaranteed amount to the appellant.
(24.) The letter of invocation issued by the appellant demanding the payment of Rs. 26,15,000.00 was in accordance with the terms of bank guarantee No. 40/51 and the bank was, therefore, under an obligation to honour its undertaking and to make the payment. It, however, chose not to fulfil its obligation. If the bank could not in law avoid the payment, as the demand had been made in terms of the bank guarantee, as has been done in the present case, then the Court ought not to have issued an injunction which had the effect of restraining the bank from fulfilling its contractual obligation in terms of the bank guarantee. An injunction of the Court ought not to be an instrument which is used in nullifying the terms of a contract, agreement or undertaking which is lawfully enforceable. In its aforesaid letter dated 24/11/1995 respondent No. 1 had clearly admitted that entire supply had not been made. In view of this also the High Court was not justified in granting an injunction.
(25.) Bank guarantor No. 40/97 dated 24/11/1994, which had been issued to secure the advance of Rs. 129.24 lacs which had been given by the appellant, was also similar in

terms to the earlier bank guarantee No. 40/51. The main contract between the parties contemplated that the amount of bank guarantee shall stand reduced on adjustment being made. It is contended by Shri Sudhir Chandra, learned counsel for the respondents that the full amount which was given had been adjusted and no amount remained outstanding and, therefore, the bank guarantee No. 40/47 could no longer be regarded as alive. In support of this contention, the learned counsel relied on the observations of this Court in Larson and Toubro Ltd. v. Maharashtra State Electricity Board, (1995) 6 SCC 68 : (1995 AIR SCW 4134) where an injunction was granted where the bank guarantee which was issued was to be kept alive till the successful completion of trial operations. In our opinion, this decision can be of no assistance to respondent No. 1 because in Larson and Toubro's case (supra) this Court found that the guarantee which had been given by the bank was to ensure only till the successful completion of the trial operations and the taking over of the plant. The documents revealed that the contractual term in this regard has been complied with and after successful completion of the trial operation, the plant had admittedly been taken over. In view of this, it was held by this Court that the terms of the bank guarantee did not permit its invocation once the trial operations have been successfully completed.

(26.) In the present case clause 3 of bank guarantee No. 40/47 relating to adjustment of the advance stipulated as follows :

"The guarantee shall come into force from date thereof and shall remain valid till the full advance amount is adjusted under Clause 13 of the said agreement which according to the terms and conditions of the said Agreement is stipulated to be adjusted proportionately from each bill of the Sells against actual deliveries of the machinery and equipment at site but if the deliveries as aforesaid have not been completed by the Sellers within the said period for any reason whatsoever the Guarantor hereby undertakes that the Sellers shall furnish a fresh or renewed guarantee on the Purchaser's pro forma for such further period as the purchaser's may intimate failing which the guarantor shall pay to the purchaser a sum not exceeding Rs. 51,70,000.00 (Rupees fifty one lacs seventy thousand only) or the residual amount of balance unadjusted advance left after proportionate adjustment in accordance with clause 1 above as the purchaser may demand."

(27.) No plea was taken before the Courts below, and no document has been shown to us by the respondents, which can prima facie indicate that the full amount of advance had been adjusted under Clause 13 of the main contract between the appellant and the defendant No. 1. According to the appellants, the original guarantee was for Rs. 51,70,000.00 but the same, after adjustment of the advance, in terms of clause 13 of the main agreement, stood reduced to Rs. 33,00,000.00. This amount was still outstanding and, therefore, the bank guarantee had not come to an end and was rightly invoked.

(28.) Coming to the allegation of fraud, it is an admitted fact that in the plaint itself, there was no such allegation. It was initially only in the first application for the grant of injunction that in a paragraph it has been mentioned that the appellant herein had invoked the bank guarantee arbitrarily. This application contains no facts or particulars in support of the allegation of fraud. A similar bald averment alleging fraud is also contained in the second application for injunction relating to bank guarantee No. 40/47. This is not a case where defendant No. 1 had at any time alleged fraud prior to the filing of injunction application. The main contract, pursuant to which the bank guarantees were issued, was not sought to be avoided by alleging fraud, nor was it at any point of time alleged that the bank guarantee was issued because any fraud had been played by the appellant. We have no manner of doubt that the bald assertion of fraud had been made solely with a view to obtain an order of injunction. In the absence of established fraud and not a mere allegation of fraud and that also having been made only in the injunction application, the

Court could not, in the present case, have granted an injunction relating to the encashment of the bank guarantees.

(29.) It is unfortunate that the High Court did not consider it necessary to refer to various judicial pronouncements of this Court in which the principles which have to be followed while examining an application for grant of interim relief have been clearly laid down. **The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it in avoiding to follow and apply the law as laid down by this Court.** Yet another serious error which was committed by the High Court, in the present case, was not to examine the terms of the bank guarantee and consider the letters of invocation which had been written by the appellant. If the High Court had taken the trouble of examining the documents on record, which had been referred to by the trial Court, in its order refusing to grant injunction, the Court would not have granted the interim injunction. We also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application.

(30.) We are constrained to make these observations with regard to the manner in which the High Court had default with this case because this is not an isolated case where the Courts, while disobeying or not complying with the law laid down by this Court, have at time been liberal in granting injunction restraining encashment of bank guarantees.

(31.) It is unfortunate, that notwithstanding the authoritative pronouncements of this Court, the High Courts and the Courts subordinate thereto, still seem intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled.

(32.) When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate Courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.

(33.) Before concluding we think it appropriate to mention about the conduct of the respondent-bank which has chosen not to be in this case. From the facts stated hereinabove it appears to us that the respondent bank has not shown professional efficiency, to say the least, and has acted in a partisan manner with a view to help and assist respondent No. 1. At the time when there was no restraint order from any Court, the bank was under a legal and moral obligation to honour its commitments. It, however, failed to do so. It appears that the bank deliberately dragged its feet so as to enable respondent No. 1 to secure favourable order of injunction from the Court. Such conduct of a bank is difficult to appreciate. We do not wish to say anything more but it may feel that it will be prejudicial in the event of the appellant taking action against it.

(34.) For the aforesaid reasons this appeal is allowed. The judgment and order of the Allahabad High Court dated 10/09/1996 in revision petition No. 257 of 1996 is set aside and the order of the trial Court dated 20/08/1996 dismissing the injunction application is restored. The appellant would be entitled to costs which are quantified at Rs. 20,000.00.

Appeal allowed.

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Cross Citation : (1995) 1 Supreme Court Cases 259

(BEFORE M.M. PUNCHHI AND K. JAYACHANDRA REDDY, JJ.)

SPENCER & COMPANY LTD. AND ANOTHER ....*Vs....* VISHWADARSHAN DISTRIBUTORS PVT. LTD. AND OTHERS

SLP (Civil) Nos. 12597-600 of 1993-t—, decided on December 6, 1994

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A) Contempt of Court - Constitution of India— Arts. 141, 142 and 144 — Flouting of the order of Supreme Court by High Court - Power of Supreme Court to initiate contempt proceedings against the erring Judges of High Court - Supreme Court's order to High Court— Even if it is only in the form of a request instead of explicit command or direction, it is a judicial order and is binding and enforceable throughout the territory of India— In case of flouting of the order by High Court, it is open to Supreme Court to initiate contempt proceedings against the erring Judges of High Court.

Supreme Court while adjourning the case asking the parties to approach High Court for early disposal of a matter pending before it and to apprise it on the next date of hearing the result of it and adding. We have no doubt that the High Court would give the matter due attention as is expected by us — Division Bench of the High Court finding nothing important in the matter, directing that the appellant before it to a take his chance strictly in order in which he approached this Court by filing these appeals. — Held, High Court flouted the order of Supreme Court by causing deliberate and conscious obstruction to compliance with that order— Having regard to advice obtained from Solicitor General of India and counsel appearing for the parties as regards the action to be taken against the Judges of the High Court, request reiterated by Supreme Court to the High Court to dispose of the matter expeditiously; at any rate within one month.

Held-.

Bhagavad Gita, Verses 63 and 73, referred to In the present case there was a deliberate and conscious obstruction, put and recorded by the Hon'ble Judges of the High Court, even when the judicial order of the Supreme Court was before them, in support of the prayer for an early hearing of the appeal. This case is of a negative or reverse action instead of a bare inaction of far less in gravity on the part of the

Judges of the High Court. Patently the order of the Supreme Court had been flouted by the High Court. (Para 9)

Bayer India Ltd. v. State of Maharashtra, (1993) 3 SCC 29, relied on

It has obvious ramifications, far and significant. The Supreme Court's action has parameters ranging between total apathy and punishment for contempt after initiating contempt proceeding. Therefore, the advice of the Solicitor General of India besides that of the senior advocates appearing for the parties as to what step need the Supreme Court take in respect of the erring Judges of the High Court had to be taken. They in one voice advised the Court to show at this juncture judicial statesmanship, and let the present order go on record, more as a reminder and a message, travelling far and wide, less as a warning, solely to uphold and preserve the independence and majesty of the Supreme Court, as the highest Court of justice in the Sovereign Republic of India; a pillar of the body politic, established under the Constitution, conferred with plenary powers under Articles 141, 142 and 144 of the Constitution. The Supreme Court has singular constitutional role and correspondingly all authorities, civil or judicial in the territory of India have assisting role towards it, who are mandated by the Constitution to act in aid of the Supreme Court. That the High Court is one such judicial . authority covered under Article 144 is beyond question. The order of the Supreme Court was indeed a judicial order and otherwise enforceable throughout the territory of India under Article 142. The High Court was bound to come in aid of the Supreme Court when it required the High Court to have its order worked out. The language of request often employed by the Supreme Court in such situations is to be read by the High Court as an obligation, in carrying out'the constitutional mandate, maintaining the writ of the Supreme Court running large throughout the country.

B) Practice and procedure— Supreme Court's order to High Court— It should normally be in the form of a request, not command or direction- The language of request often employed by the Supreme Court in such situations is to be read by the High Court as an obligation, in carrying

out'the constitutional mandate, maintaining the writ of the Supreme Court running large throughout the country.

> For Arjuna, the freedom given to act as he wished to, was an illusion; acting in conformity with the instructions of Krishna a bounden duty. This message has perceptibly percolated down as part of Indian culture, philosophy and behavioural setting the tenor in the Constitution for interaction between the high constitutional authorities and institutions. One needs only to be aware of this thought with which the Constitution is soaked.

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Advocates who appeared in this case :

Dipankar P. Gupta, Solicitor General (G.L. Sanghi, K. Parasaran, S. Arvind, V. Balachandran, P. Parameswaran, Ajit Kumar Sinha, Ms Sarin Khanjuria and Ms Indu Malhotra, Advocates, with them) for the appearing parties.

JUDGMENT:

The Order of the Court was pronounced by PUNCHHI, J.- It has been said before, and needs to be said again, what we are about to through this order, to strengthen the functional chains which pull the judicial machine to its destination on the track laid by the Constitution.

2.We have on our board Special Leave Petition Nos. 12597- 600 of 1993 against the judgment and order dated 29-4-1993 of a Division Bench of the High Court of Judicature at Madras passed in some CMPs in OSA Nos. 6973 of 1993. These are at the instance of the first and the second defendant in the original suit filed by the plaintiff-first respondent, pending before a learned Single Judge of the High Court, in which in intra-court appellate jurisdiction the petitioners have been subjected to certain interim orders of significance by the Division Bench. This Court on 10-9-1993 ordered issuance of notice in the special leave petitions as also on the application for stay returnable within four weeks. On response, and consideration of the counter- affidavits filed by the respondents and rejoinder affidavits by the petitioners, we had on 14-1-1994 passed the following order:

"Let the matter stand by three months. In the meantime, parties' counsel shall approach the High Court for an early disposal of the OSA Nos. 69-73 of 1993 pending before it and apprise to us on the next date of hearing the result of it. We have no doubt that the High Court when approached for the purpose would give the matter due attention as is expected by us."

3. In order to await the outcome of the order we had kept the matter adjourned from time to time when a Division Bench of the Madras High Court consisting of Hon'ble Mr Justice Gulab C. Gupta (now Chief Justiceof Himachal Pradesh High Court) and Hon'ble Mr Justice K.A. Thanikkachalam passed on 18-8-1994 the following order: "These applications are filed for fixing early hearing of the appeal. The order of the Supreme Court dated 14-1-1994 in Special Leave Appeal (Civil) No. 12597-600/93(AN) is produced before us to support the aforesaid prayer. We have considered the matter with the seriousness it deserves; but find nothing important so as to give precedence to the appeals over large numbers of pending appeals in this Court. The appellant must take his chance strictly in order in which he approached this Court by filing these appeals, The applications are rejected."

4. Patently our order dated 14-1-1994 has been flouted, which is a matter of grave concern to us. On our part what else is expected? It has obvious ramifications, far and significant. We therefore have on our own solicited the advice of the Solicitor General of India Mr Dipankar P. Gupta, besides that of Mr K. Parasaran, Senior Advocate, the ex-Attorney General of India representing one of the parties instantly, and Shri G.L. Sanghi, Senior Advocate appearing for the other parties, as to what step need we take in respect of the Hon'ble but erring Judges of the High Court. Conceivably our action has parameters ranging between total apathy and punishment for contempt after initiating contempt proceeding. They have, in all seriousness, in one voice, advised us to show at this juncture judicial statesmanship, and let the present order go on record, more as a reminder and a message, travelling far and wide, less as a warning, solely to uphold and preserve the independence and majesty of the Supreme Court, as the highest court of justice in the Sovereign Republic of India; a pillar of the body politic, established under the Constitution, conferred with plenary powers under Articles 141, 142 and 144 of the Constitution. We appreciate and value their advice. We would rather remain advised on a matter like this, for then we are on sure ground.

5. The Articles above referred to are reproduced hereafter as a reminding

exercise:

"141. Law declared by Supreme Court to be binding on all courts.The law declared by the Supreme Court shall be binding on all courts within the territory of India.

142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.- (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2)Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the 263

territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

144, Civil and judicial authorities to act in aid of the Supreme Court.- All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court."

6. Ex facie courtesy is the blend of our order of 14-1-1994. Outwardly it is neither commanding in nature nor explicitly in terms of a direction. Such is not the sheen and tone of our order, meant as it was, for a high constitutional institution, being the High Court. It comes from another high constitutional institution (this Court) hierarchically superior in the corrective ladder. When one superior speaks to another it is always in language sweet, soft and melodious; more suggestive than directive. Judicial language is always chaste.

7. Traditions and norms in this regard, well-established and followed in this country since time immemorial, are best reflected in the "Song Celestial", the Bhagavad Gita. It would for the purpose be apposite to turn to the 18th Chapter of the Bhagavad Gita, containing the concluding portion of the dialogue between Lord Krishna, the Best of Beings, (Purushotamma) and Arjuna, the Best of Humans, (Narotamma), both superiors in themselves. Verse 63 in the words of Lord Krishna is:

9. Recently, on a lesser aberration, this Court in Bayer India Ltd. v. State of Maharashtra' had occasion to strike a sad note in the following words: (SCC pp. 31-32, paras 5-6) "5. We are saddened to notice that in spite of the Court's request contained in this order dated 6-2-1991, the High Court has not disposed of the review petition till now. The High Court was requested to dispose of the said writ petition within four months from the date of the said order and, at any rate, by 30-9-1991. It is more than two years since the order was made. While we certainly respect the independence of the High Court and recognise that it is a co-equal institution, we cannot but say, at the same time, that the constitutional scheme and judicial discipline requires that the High Court should give due regard to the orders of this Court which are binding on all courts within the territory of India. The request made in this case was contained in a judicial order. It does no credit to either institution that it has not been heeded to. We hope and trust that the delay in the disposal of the review is either accidental or on account of some or other procedural problem. Be that as it may, the present situation would not have arisen if only the review petition had been disposed of within the time contemplated in the order dated 6-2-1990.

6. In this view of the matter, the IA is disposed of with the following directions: (1)We reiterate our request to the High Court to dispose of the review petition expeditiously, at any rate within two months of this order.

(2) (3)

The case which we are dealing with is far more angular because there is a deliberate and conscious obstruction, put and recorded by the Hon'ble Judges of the High Court, even when the judicial order of this Court dated 14-1-1994 was before them, in support of the prayer for an early durated hearing of the appeal. The case in hand is of a negative or reverse action, whereas Bayer India case 1 was barely of inaction, far less in gravity.

10. The afore-narrated words, we think, presently, are enough to assert the singular constitutional role of this Court, and correspondingly of the assisting role of all authorities, civil or judicial, in the territory of India, towards it, who are mandated by the Constitution to act in aid of this Court. That the High Court is one such judicial authority covered under Article 144 of the Constitution is beyond question. The order dated 14-1-1994 of this Court was indeed a judicial order and otherwise enforceable throughout the territory of India under Article 142 of the Constitution. The High Court was bound to come in aid of this Court when it required the High Court to have 1 (1993) 3 SCC 29

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its order worked out. The language of request oftenly employed by this Court in such situations is to be read by the High Court as an obligation, in carrying out the constitutional mandate, maintaining the writ of this Court running large throughout the country.

11. Therefore, in these circumstances, we upturn the order of the High Court dated 18-8-1994 and reiterate our request to it to dispose of OSA Nos. 69-73 of 1993 expeditiously, at any rate now within one month from the date of communication of this Order, as this Court awaits the result thereof. Orders be communicated to the High Court forthwith. Copies thereof for information be also sent to the Hon'ble Judges of the Division Bench with our utmost respect.

12. The special leave petitions be listed on 31-1-1995. 266

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-: CHAPTER = 7 :-

LAW RELATING TO CRIMINAL PROSECUTION AGAINST JUDGES

Cross Citation :1971-AIR(SC)-0-1708 , 1971-SCC-3-329

SUPREME COURT OF INDIA

Hon'ble Judge(s) : C. A. VAIDIALINGAM AND A. N. RAY, JJ.

GOVIND MEHTA ….Vs….State of Bihar
Criminal 154 Of 1969 May 07,1971

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Cri. P.C. Sec. 197 – I.P.C. Sec. 167, 465, 466 and 471 – Prosecution of Judge who made interpolation in the order sheet – The appellant was posted as first class Magistrate – Accused whose case was pending in his Court filed transfer petition before District Judge to transfer case to another Court – The appellant Judge made some interpolation in the order sheet to show that some orders had passed earlier – After enquiry ADJ sent report to District Magistrate for initiation of proceeding against appellant – Magistrate – The report of District Magistrate forwarded to state Govt., Who accorded sanction for prosecution – The senior District prosecutor filed a complaint in the court against appellant u.s. 167, 465, 466 471 of I.P.C. – Charges framed against appellant – The appellant raised objection that there is bar under sec. 195 of cri. P.C. in taking cognizance – Held – The proceeding against appellant the then Judge is valid and legal-proceeding not liable to be dropped.

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VAIDIALINGAM

(1.) J.: The accused in this appeal, by special leave, challenges the common order dated 16/12/1968 passed by the Patna High Court dismissing Criminal Revision Nos. 345 and 346 of 1968 and the connected Criminal Miscellaneous Petition Nos. 248 and 249 of 1968. The Criminal Revisions and the Criminal Miscellaneous Petitions were all directed against the orders passed by the criminal courts directing that the appellant should stand his trial for offences under Ss. 167, 466 and 471 of the Indian Penal Code (hereinafter called the Penal Code).

(2.) The facts giving rise to the Criminal Revisions and the Criminal Miscellaneous Petitions may be stated : In 1963 the appellant was posted at Patna as Magistrate, Ist Class with special powers to try Bad Livelihood Cases (which are called B. L. Cases) under

S. 110 of the Code of Criminal Procedure (hereinafter called the Code). In September, 1963, two B. L. Cases Nos. 4 and 5 of 1963 had been started against Kailash Gope and Ramprit Gope and others respectively. Those cases were transferred to the file of the appellant for disposal. At the time of the transfer of cases, the accused persons had already been enlarged on bail. But the appellant claims to have noticed some defects in the bail bonds furnished by those persons. He gave directions that the defects the bail bonds should be rectified. On the parties failing to rectify the defects, the appellant cancelled the bail bonds and remanded them to jail custody. The parties against whom the B. L. Cases had been started, filed two applications before the District Magistrate. Patna for transferring their cases from the file of the court of the appellant to the file of another Magistrate on the grant that they seriously apprehended that they will not get justice at his hands. After coming to know of the filing of the transfer applications, the appellant recorded two orders on the order sheets of cases Nos. 4 and 5 making very serious allegations against the District Magistrate before whom the transfer applications were pending to the effect that the latter was attempting to interfere with the course of justice in the proceedings connected with the cases Nos. 4 and 5. The appellant is alleged to have inserted these two orders in the order sheets of the two cases long after the last orders were passed in those cases to make it appear that the remarks against the District Magistrate had been made much earlier. The District Magistrate called for a report from the appellant and he sent the records of the proceedings to the District Magistrate with his report. In his report he had also stated that the matter is of great importance and the entire case and the order sheets should be kept intact for favour of any action that the High Court may consider fit and proper.

(3.) In view of the allegations made by the appellant against the District Magistrate mentioned in the order sheets, the latter transferred the transfer applications to the file of the Additional District Magistrate on 11/11/1963. The Additional District Magistrate after hearing the parties transferred both the cases from the file of the appellant to another Magistrate and sent a report to the District Magistrate for initiation of proceedings against the appellant for having committed forgery in the order sheets in both the B. L. Cases. The report of the District Magistrate was forwarded to the State Government, who accorded sanction for prosecuting the appellant. The Senior District Prosecutor, Patna filed on 21/12/1964 a complaint in the Court of the Sub-Divisional Magistrate, Patna Sadar against the appellant. In the complaint it was alleged that the appellant has committed offences under Ss. 167, 465, 466 and 471 of the Penal Code. The Sub-Divisional Magistrate after taking cognizance of the offences alleged to have been committed by the appellant, transferred the cases to the file of the Magistrate, 1st Class, Patna, initiating two commitment proceedings in respect of the alleged offences said to have been committed in each of the B. L. Cases. After examining the witnesses and perusing the documents, the Magistrate, 1st Class, committed the appellant to the Court of Session in both cases for trial under Ss. 167, 466 and 471 of the Penal Code.

(4.) The two Sessions Cases were accordingly started in the Court of the Assistant Sessions Judge, Patna and charges were framed against the appellant under Sections 167, 466 and 471 of the Penal Code.

(5.) The appellant filed two petitions before the Assistant Sessions Judge that his trial could not be proceeded with as the mandatory provisions of Sections 195 and 476 of the Code have not been complied with. In fact his prayer in the applications filed before the Assistant Sessions Judge was that he should be acquitted. The Assistant Sessions Judge by his order dated 22/11/1966 rejected the applications filed by the appellant and declined to consider the competency of trial as a preliminary issue at that stage.

(6.) The appellant filed Criminal Revisions before the Sessions Judge against the order made by the Assistant Sessions Judge with a prayer to quash also the commitment orders of the Magistrate. He had also made a prayer for a reference to be made to the High Court to quash the proceedings pending before the Assistant Sessions Judge. The Sessions Judge rejected the applications filed by the appellant. ln consequence the appellant filed before the High Court Criminal Revision Nos. 345 and 346 of 1968 against the orders of the Sessions Judge declining to quash the commitment proceedings and to making a reference to the High Court in the two Sessions Cases against the appellant. He also filed Criminal Miscellaneous Petitions Nos. 248 and 249 of 1968 to quash the orders of the Magistrate, Ist Class to stand his trial for offences under Ss. 167, 466 and 471 of the Penal Code.

(7.) The High Court rejected both the Criminal Revisions and the Criminal Miscellaneous Petitions.

(8.) Mr. Jyoti Narayan, learned counsel for the appellant, has urged that the entire proceedings initiated against the appellant were without jurisdiction inasmuch as the Sub-Divisional Magistrate was not competent to take cognisance of the complaint filed by the Senior District Prosecutor. According to the learned counsel the authority to file the complaint against the appellant was the court to which the appellant was subordinate at the material time as is mandatory under S. 195 (1) (b) and (c) of the Code. His further contention is that there has been a violation of the mandatory provisions of S. 476 of the Code. The mere sanction given by the State Government under S. 197 at the Code is not, in the circumstances, sufficient to give jurisdiction to the Magistrate to take cognizance of the offences alleged against the appellant.

(9.) On the other hand, Mr. R. C. Prasad, learned counsel for the State urged that the offences alleged against the appellant are under Ss. 167, 466 and 471 of the Penal Code. None of these sections is covered by S. 195 (1) (b) of the Code. Section 466 is not covered by cl. (c) of S. 195 (1) of the Code. Section 471, is no doubt, taken in by the said clause but in order to attract that clause it is necessary that the offence alleged should have been committed "by a party to any proceeding in any court ...." If the conditions mentioned in cl. (c) are satisfied, then the complaint should be made in writing by the court before whom the offence is committed or by some other court to which such court is subordinate. The appellant can by no means be characterized to be a party to any proceeding in any court, in respect of the offence under S. 471 alleged against him. Therefore, there is no violation of either cl. (b) or (c) of S. 195 (1) of the Code. Section 476 of the Code also, according to Mr. Prasad does not apply as the conditions stated therein do not exist in the present case.

(10.) Briefly the allegations is the complaint are as follows. The appellant has recorded serious allegations in the order sheets against the then District Magistrate, Patna, Sri R. C. Sinha and the counsel Sri Mathura Sharma, appearing on behalf of the accused in the B. L. Cases. The said allegations and certain other entries were interpolations and forgery. The appellant has framed incorrect documents with intent to cause injury and he has committed forgery in judicial records and used the forged documents as genuine with intent to cause injury to others. The said entries, interpolations and forgeries have been committed by the appellant between 7/11/1963 and Nov 11/11/1963 after the appellant received the order dated 6/11/1963 of the District Magistrate Patna directing him to submit a report in respect of the allegations made against him in the transfer applications filed by the parties in the B. L. Cases. The complaint alleged that the appellant has committed offences under Ss. 167, 465, 466 and 471 of the Penal Code.

(11.) We have already indicated that the appellant has been committed to the Sessions to take his trial only under Ss. 167, 466 and 471 of the Penal Code.

(12.) According to Mr. Jyoti Narayan, the point of time at which the legality of the cognisance taken by the Magistrate is to be adjudged, is the time when cognizance is actually taken under S. 190 of the Code and applying that test in the present case, it will be seen that there has been a breach of S. 195 (1) (b) and (c) and S. 476 of the Code. The proposition that the point of time at which the legality of the cognisance taken is to be adjudged is the time when cognisance is actually taken is laid down by this Court in M. L Sethi v. R. P. Kapur (1967) 1 SCR 520 = (AIR 1967 SC 528). The Magistrate has normally got jurisdiction to take cognizance under Section 190 of the Code in the circumstances enumerated therein. Section 195 is in fact a limitation on the unfettered powers of a magistrate to take cognizance under S. 190 of the Code. Therefore, at the stage when the magistrate is taking cognizance under S. 190, he must examine the facts of the complaint before him and determine whether his power of taking cognizance under S. 190 has or has not been taken away by any of the clauses (a) to (c) of S. 195 (1). Therefore, it is needless to state that if there is a non-compliance with the provisions of S. 195, the Magistrate will have no jurisdiction to take cognizance of any of the offences enumerated therein.

(13.) Mr. Jyoti Narayan on the basis of the decision of this Court reported in Nasir-Ul-Huq v. The State of West Bengal, 1953 SCR 836 = (AIR 1953 SC 293) urged that though S. 195 trade no bar to the trial of an accused person for a distinct offence disclosed by same facts and which is not included within the ambit of that section, the provisions of that section cannot be evaded by resorting to device of charging a person with an offence to which that section does not apply.

(14.) We have already referred to the sections of the Penal Code under which the appellant has been charged. They are sections 167, 466 and 471. Admittedly, none of these sections is covered by cl (b) of S. 195 (1). Therefore clause (b) prima facie will not in terms bar the jurisdiction of the magistrate to take cognizance of the offence under section 167 of the Penal Code. The contention of Mr. Jyoti Narayan is that the various averments made in the complaint will really show that the nature of the offence, if any, committed by the appellant will really come under Ss. 192 and 193 I. P. C. It the charge has been framed under section 193 of the Penal Code, it will squarely fall under cl. (b) of S. 195 (1) of the Code. With a view to really evade the bar of cl. (b) of S. 195 (1), the prosecution has adopted the device of not charging the appellant under S. 193 of the Penal Code, though in effect they want him to be convicted for an offence under S. 193 of the Penal Code. We are not inclined to accept this contention of the learned counsel.

(15.) The High Court after a careful analysis of the allegations made in the complaint and the materials placed before it and after a very elaborate consideration of the matter has come to the conclusion that on the case of the prosecution the charge framed under Section 167 of the Penal Code, is justified. The High Court has considered the ingredients of the offence under Ss. 192 and 193 as well as Section 167 of the Penal Code. As the charge has been framed under S. 167, the bar under S. 195 (1) (b) or (c) of the Code has no application. We agree with the view of the High Court S. 195 (1) (b) or (c) is no bar to the magistrate taking cognizance for an offence under S. 167. The offence under S. 466 of the Penal Code is, admittedly, not covered by cl.(b) or cl. (c) of S. 195 (1) of the Code. Therefore, that section does not operate as a bar in respect of this offence.

(16.) Section 471 of the Penal Code, no doubt is taken in by cl. (c) of S. 195 (1). But, for crl (c) to operate as a bar to taking cognizance for an offence under S. 471, it is essential that the offence must be alleged to have been committed "by a party to any proceeding in any court.. . . . . " According to Mr. Jyoti Narayan, the appellant must be considered to be a party to the transfer applications filed by the persons concerned in the B. L. Cases, which transfer applications were pending before the District Magistrate.

Allegations have been made against the appellant in the transfer applications and the District Magistrate has called for a report from the appellant in respect of those allegations. The Additional District Magistrate has inquired into the allegations made in the transfer applications and given a decision transferring the cases from the file of the appellant to another Magistrate. All the above circumstances according to the learned counsel, will make the appellant a party to the proceedings connected with the transfer applications, which were pending before the Additional District Magistrate.

(17.) We have no hesitation to reject the contention of the learned counsel. Merely on the basis that the applications for transfer of certain cases pending before the appellant had been filed making allegations against the appellant will not make the appellant a party to those proceedings. He was functioning as a magistrate and he has no personal interest in the outcome of the transfer applications. No doubt when allegations of prejudice have been made against the appellant, it was his duty as a subordinate court and as an officer against whom allegations have been made to offer explanations in his report sent to his superior or appellate authority, namely, the Additional District Magistrate. Therefore, cl. (c) of Section 195 (1) again does not bar the jurisdiction of Magistrate to take cognizance of offence under Section 471 of the Penal Code.

(18.) The further contention of Mr. Jyoti Narayan is based upon Section 476 of the Code. According to him the Additional District Magistrate has inquired into the applications filed by the counsel for the parties in the B. L. Cases filed against the appellant under Sections 466 and 471, I. P. C. The Additional District Magistrate inquired into the matter behind the back of the appellant and after examining the witnesses passed an order on 16/12/1963 holding the appellant guilty of the said offences and forwarded a copy of the order to the State Government to sanction criminal and administrative action being taken against the appellant. The complaint filed in this case suffers from an infirmity inasmuch as it has not been filed by the Additional District Magistrate. We are not inclined to accept this contention either. We have already held that S. 195 (1) (b) or of the Code does not apply to the of the appellant. If that is so, that finding is enough to hold that S. 476 of the Code does not come into picture. Even otherwise. S. 476 of the Code will not apply as we will presently show. The records, no doubt, show that the counsel appearing for the parties in the B. L. Cases in connection with the transfer applications filed by them, filed an application before the Additional District Magistrate that action should be taken by him to file a complaint against the appellant for offences under Ss. 467 and 471 of the Penal Code. It is also seen that the Additional District Magistrate has examined certain witnesses and ultimately passed an order on 16/12/1963. This order is a combined order dealing with transfer applications as well as the application filed by the lawyer for filing a complaint against the appellant. The Additional District Magistrate has held that prima facie the appellant must be considered to be guilty of having committed forgery and interpolations in the order sheets and therefore there is a good ground for transferring the B. L. Cases from his file to another magistrate. Accordingly, the Additional District Magistrate transferred the B. L. Cases to the file of the Sub-Divisional Magistrate, Patna Sadar. He had directed that a copy of the order be sent to the State Government for considering the question of giving sanction to take criminal and administrative action against the appellant. It may appear prima facie that the Additional District Magistrate was conducting a preliminary inquiry under S. 476 (1) of the Code. But a perusal of the order passed by the Additional District Magistrate will dearly show that all the findings recorded against the appellant were only reasons for transferring the B. L. Cases from the file of the appellant. He himself has not taken any action as contemplated under S. 476 of the Code. He was merely dealing with the transfer application and incidentally also with the applications filed by the lawyer. It was on the basis of this order that the State Government ultimately gave

the sanction. The validity of the sanction given by the State Government as such is not challenged. The contention is that over and above the sanction given by the State Government, the provisions of S. 195 (1) (b) and (c) and S. 476 of the Code should have been complied with. We have already held that the bar of either clause (b) or (c) to S. 195 (1) does not apply. From our discussion of the nature of the inquiry conducted by the Additional District Magistrate on the complaint filed by the lawyer appearing on behalf of the parties of the B. L. Cases, it follows that S. 476 of the Code also has no application. In our opinion none of the provisions relied on by the learned counsel operated in a bar to the jurisdiction of the magistrate taking cognizance of the complaint in this case.

(19.) We have already referred to the fact that in the complaint the offence under S. 465 of the Penal Code was also included. Section 463 of the Penal Code defines forgery and S. 465 deals with punishment for the said offence. Section 463 of the Penal Code is, no doubt, taken in by cl. (c) of S. 195 .(i) of the Code. Even on the basis that S. 465 of the Penal Code will also be covered by cl. (c) as the offence under S. 463 is dealt with therein, nevertheless, cl. (c) will not operate as a bar to the jurisdiction of the magistrate in taking cognizance of the said offence as the offence is not alleged to have been committed "by a party to any proceeding in any court . . . " We have already discussed this aspect in the earlier part of our judgment. We have also referred to the fact that the appellant has been committed only for the offences under Sections 167, 466 and 471 of the Penal Code. Section 465 of the Penal Code is not the subject of the committal order. Any how we have discussed about that section also as the appellant was contesting the jurisdiction of the magistrate to take cognizance on the basis of S. 195 (1) (b) and (c).

(20.) Mr. Jyoti Narayan referred to the contempt proceedings that may be started against the appellant. The question whether action for contempt can or cannot be taken against the appellant does not at all arise nor consideration a present.

(21.) Finally Mr. Jyoti Narayan contended at the complaint does not disclose offence and therefore the committal proceedings should be quashed. This contention is absolutely devoid of any merit. Whether the appellant is ultimately found to be guilty or not is a different point. The allegations in the complaint do disclose that the offences alleged against the appellant require investigation. Therefore, it cannot be said that no offence is disclosed in the complaint This contention is also rejected.

(22.) Before concluding it must be emphasized that any observations made in this judgment agreeing with the views expressed by the High Court are only for the purpose of dealing with the contentions raised on behalf of the appellant based on the provisions of Section 195 (1) (b) and (c) and Section 476 of the Code.

(23.) In the result the order of the High Court is confirmed and this appeal dismissed.

Appeal dismissed.

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Cross Citation :1993 CRI. L. J. 499

HIMACHAL PRADESH HIGH COURT

Hon'ble Judge(s) : V. K. MEHROTRA AND LOKESHWAR SINGH PANTA, JJ.

Bidhi Singh …Vs.. M. S. Mandyal and another
Crl. Misc. Petition (M) No. 229 of 1983, D/- 13 -10 -1992.

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Criminal P.C. (2 of 1974), S.197 - SANCTION FOR PROSECUTION - Prosecution of judges and public servants - Complaint under Section 504 I.P.C. - Use of words "non-sense" and 'bloody fool' by Presiding Officer against complainant - Sanction to prosecute, not necessary – This is not the part of his official duty.

A Presiding Judge is expected to maintain decorum in the proceedings before him. He is expected also to act with restraint- One would expect him to be sober, unruffled and temperate in language even when faced with a situation where those appearing before him may tend to lose their composure. In this scheme of things any vituperative outburst on the part of the Presiding Officer, howsoever grave the provocation to him, cannot be countenanced as an action sustainable as one performed by him "while acting or purporting to act in the discharge of his official duty."

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Judgement

1. **V. K. MEHROTRA J.** :- Respondent Shri M. S. Mandyal (at present posted as Additional District and Sessions Judge, Shimla) was posted as Sub-Divisional Judicial Magistrate, Palampur in the month of July, 1981. On July 7, 1981 head constable Bidhi Singh (petitioner before us) escorted some under-trial prisoners for their production in the Court of Shri Mandyal along with some constables. The under-trial prisoners were produced in hand-cuffs before the learned Magistrate. It is said that on seeing that the under-trial prisoners were brought before him hand-cuffed, the learned Magistrate lost his temper and abused Bidhi Singh by uttering the words 'non-sense' and 'bloody fool'.

2. On July 22, 1981 applicant Bidhi Singh filed a complaint in the Court of the Chief Judicial Magistrate. He alleged that by his conduct in the open Court Shri Mandyal had intentionally insulted the complainant Bidhi Singh and had given provocation to him, knowing that it was likely to cause the complainant to break public peace. Preliminary

evidence was recorded by the Chief Judicial Magistrate. He directed issue of summons to Shri Mandyal to answer an offence under Section 504 IPC. This was on October 30, 1981.

3. Shri Mandyal felt aggrieved by this order and assailed it in criminal revision No. 1 of 1982 which came to be heard by the Additional Sessions Judge, Kangra Sessions Division at Dharamshala. The learned Additional Sessions Judge held in his order of February 10, 1983 that cognizance could not have been taken by the Chief Judicial Magistrate of the complaint against Shri Mandyal in the absence of a proper sanction under Section 197 Cr. P.C. He also held that there is no, prima facie, case justifying issuance of the process to Shri Mandyal. The proceedings pending before the Chief Judicial Magistrate were quashed.

4. The present petition has remained pending for several years in view of an order of September 19, 1983 by the then Chief Justice of this Court that it be listed for admission "after the decision of Contempt Petition (Cr.) No. 3 of 1982 - Court on its Own Motion V. Milkhi Ram". After disposal of the Contempt petition, the present proceedings came up before us on June 2, 1992. After hearing Shri K. C. Rana appearing for petitioner Bidhi Singh we directed issue of notice, pending admission of the petition, to respondent Shri Mandyal. Shri M. S. Chandel appeared on behalf of the respondent. After hearing him as well, we directed that the matter be listed for dictation of judgment in open Court.

5. Shri Malkiat Singh Chandel has, with his usual fairness, urged before us that the view taken by the learned Additional Sessions Judge that cognizance of the complaint made by petitioner Bidhi Singh against the Presiding Officer Shri M. S. Mandyal could not be taken in the absence of a proper sanction as envisaged by Section 197(1) Cr. P.C. is sound law and the present petition should be dismissed at this stage itself. He has also urged, in the alternative, that having regard to the circumstances of the present case this Court should not interfere with the order of the Additional Sessions Judge quashing the proceedings against Shri Mandyal.

6. It has not been disputed before us that Shri Mandyal, while functioning as the Sub-Divisional Judicial Magistrate at Palampur on July 7, 1981 used the two words attributed to him, namely, 'Non-sense' and 'Bloody fool' addressing them to complainant Bidhi Singh when he escorted certain under-trial prisoners and produced them before the Court of the Magistrate in hand-cuffs, along with some other constables. It is also not disputed that Shri Mandyal falls in the category of persons contemplated by Section 197(1) Cr. P.C.

7. Section 197(1), Cr. P.C. in its material part, says :

"197. Prosecution of Judges and public servants :

(1) When any person who is or was ..... Magistrate ..... not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction -

(a) .....

(b) in the case of person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

(4) The ..... State Government ..... may determine the person by whom, the manner in which, and the offences for which, the prosecution of such ..... Magistrate ..... is to be conducted, and may specify the Court before which the trial is to be held."

8. The provision has come up for consideration, time and again, before various Courts in this Country. In S. B. Saha v. M. S. Kochar, AIR 1979 SC 1841 : (1979 Cri LJ 1367) the Supreme Court, speaking through Sarkaria, J. said, (in paragraph 18), that :

"the words "any offence alleged, to have been committed by him while acting or purporting to act in the discharge of his official duty" employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are considered too narrowly; the Section will be rendered altogether sterile, for, "it is no part of an official duty to commit an offence, and never can be". In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes ..... an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision. As pointed out by Ramaswami, J. in Baijnath v. State of Madhya Pradesh, AIR 1966 SC 220 : (1966 Cri LJ 179) at p. 222 "it is the quality of the act that is important and if it falls within the scope and range of his official duties, the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted."

9. Later; (in paragraph 21) the Supreme Court extracted the observations from an earlier Constitution Bench decision in Matajog Dobey v. H. C. Bhari, AIR 1956 SC 44 : (1956 Cri LJ 140) where it had said that :

"in the matter of grant of sanction under Section 197, the offence alleged to have been committed by the accused 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 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 duty."

10. The aforesaid observations have been extracted from those made by the Supreme Court in paragraph 17 of its judgment in Matajog Dobey. These observations echo the view expressed by the Supreme Court earlier in Amrik Singh v. State of Pepsu, AIR 1955 SC 309 : (1955 Cri LJ 865) when it said (in paragraph 8) that :

"It is not every offence committed by a public servant that requires sanction for prosecution under Section 197(1), Criminal P.C.; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties.....".

And, (in paragraph 9) that :

"..... If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under Section 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required."

11. The view expressed in these decision's has been reiterated by the Supreme Court again and again as is clear from what it said in B. S. Sambhu v. T. S. Krishnaswamy, AIR 1983 SC 64 : (1983 Cri LJ 154); Balbir Singh v. D. N. Kadian, AIR 1986 SC 345 : (1986 Cri LJ 314) and Bakhshish Singh Brar v. Smt. Gurmej Kaur, AIR 1988 SC 257 : (1988 Cri LJ 419).

12. The legal position admits of no doubt in view of these pronouncements.

13. Our attention was invited by Shri Malkiat Singh Chandel to some decisions of a few High Courts wherein prosecution for use of abusive language by the Presiding Officer, during the course of proceedings before him was said to require sanction under Section 197 Cr. P.C. or example, in Lala Bhagirath v. Saiyid Ali Hamid Sahib, AIR 1931 Oudh 392 : (32 Cri LJ 991) a complaint against the Subordinate Judge of Bara Banki, before whom a

miscellaneous application was presented by 145 persons, was returned by the Judge on the ground that it did not contain the parentage and place of residence of the applicants, while observing "in a somewhat facetious vein that there was only one personage known to him in history whose miraculous birth gave rise to the Christian theological dogma of the Immaculate Conception, and that surely these 145 applicants did not claim the same divine origin." and further remarking that the application which was written in Urdu was so badly written that the name of one of the applicants Gupta could be read as 'kutta' (dog), was held not sustainable for want of sanction, interalia, on the ground that Mr. Gupta himself had filed no complaint against the Subordinate Judge for the alleged defamatory remark said to have been made against him and that, "to compare the birth of Jesus Christ with that of these two complainants is not to defame the latter however in-apposite and irreverent the comparison may be."

14. In Harumal Hotchand v. Haji Imambux Jatoi, AIR 1933 Sindh 165 : (34 Cri LJ 819) an Executive Engineer, while dealing with an application made by a Zamindar requesting to provide him a more liberal supply of water used abusive language in relation to the Zamindar. It was held that a complaint made against the Executive Engineer was not maintainable in absence of a valid sanction, because when he uttered those words "he was clearly acting in his official capacity. The words used by him could not have been uttered except in that capacity."

15. The occasion when the offending words used by the Executive Engineer alone seems to have been taken into consideration by the Court in coming to this conclusion.

16. Sukhdeo v. Emperor, AIR 1934 All 978 : (36 Cri LJ 331) was a case where the Special Magistrate of Benares (as Varanasi was then called) used abusive language towards the complainant when he was appearing as a witness before the Magistrate in the witness box. The complaint by the witness against the Magistrate was dismissed for want of sanction under Section 197 Cr. P.C. The learned Judge, dealing with the matter in the High Court, said at Page 332 :

"In the present case there is no doubt that Rai Kishanji was acting or atleast purporting to act in the discharge of his official duty, when it is said that he used insulting language to the petitioner. The test is whether the officer at that particular moment was actually engaged in the discharge of his official duty."

17. This decision overlooks that it is not only the occasion when offending words are used by the Presiding officer which is to be considered but also the fact that "there should be something in the nature or quality of the act complained of which attaches to or partakes of the official capacity of the offender." and that there should be "reasonable connection between the act.....and the doer."

18. Yet another single Judge in M. Subbiah v. T. Ramacharlu, AIR 1939 Madras 604 : (40 Cri LJ 853) took the view that on being disturbed in the dictation of judgment, the President of a Panchayat Court :

"who.....got up from his seat abusing the complainant and slapped him on the cheek twice and on his protest unlaced his shoe, took it up in his hand raised it saying "I will beat you with my shoe" :

....." was acting throughout, till the very minute when the alleged offence had been committed in, official capacity and that no Court could take - cognizance of the matter in the absence of a sanction under Section 197 Cr. P.C.

19. Mewalal v. Totalal, AIR 1957 MP 230 : (1957 Cri LJ 1413) was a case where the complainant was examined as a witness in a case and while he was being so examined, the learned Civil Judge before whom be was being examined, was said to have used the expression 'Nalayak' (unfit) and ultimately to have expressed that the witness would be turned out after being given shoe beating.

The view taken was that : "What was said to have been done was an offence in relation to the official act of a Judge."

20. Likewise, in Prabhu Dayal v. Milap Chand, AIR 1959 Rajasthan 12 : (1959 Cri LJ 82) the Sarpanch of a Panchayat which was acting as a Court is said to have asked the complainant to go out of the Court-room and upon the complainant trying to argue out against it,, abused the complainant. The view taken by the High Court was that the Sarpanch ".....purported to act in the discharge of his official duty when he asked the complainant to go out of his Court-room," though he was not expected to use objectionable language. As such, sanction under Section 197 Cr. P.C. was necessary before cognizance could be taken by the Court of the matter.

21. In State v. P.C. Sharma, (1975 ILR Himachal Series 700) a Divisional Forest Officer, while making an injury from his subordinate, lost his temper when this subordinate gave a reply and he, in a fit of anger, dragged him and gave a cane blow to the subordinate. The Court took the view that the action of the D.F.O. was not proper. But since he was making an inquiry from the subordinate in the purported exercise of official duties, the action attributed to him though in excess of his authority under a wrong notion about the extent of powers, could not be said to be one which was not done in purported exercise of his official duties. Sanction under Section 197 Cr. P.C. was thus, necessary before prosecution the Divisional Forest Officer.

22. These decisions, we feel, are not apposite precedents in view of the legal position clarified by the Supreme Court.

23. We would like to borrow the words from the opinion of Lord Simonds in H. H. B. Gill v. King, AIR 1948 PC 128 : (49 Cri LJ 503) when he says (in paragraph 30) that :

"A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus, a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act : nor does a Government medical officer act or purports to act as a public servant in picking the pocket of patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office.....".

24. a Presiding Judge is expected to maintain decorum in the proceedings before him. He is expected also to act with restraint. One would expect him to be sober, unruffled and temperate in language even when faced with a situation where those appearing before him may tend to lose their composure. True it is that the Presiding Officer has to be firm in maintaining decorum in the Court and deal decisively with those who present themselves in the Court-house irrespective of the distinction that they possess, yet, we reiterate, that the action should be consistent with the dignity of the high pedestal on which society places him, while he is discharging his duty as a Judge. In this scheme of things any vituperative outburst on the part of the Presiding Officer, howsoever grave the provocation to him, cannot be countenanced as an action sustainable as one performed by him "while acting or purporting to act in the discharge of his official duty."

25. Thus viewed, the use of the words 'Non-sense' and 'Bloody fool' by Shri Mandyal cannot be said to be one attributable to him "while acting or purporting to act in the discharge of his official duty". We are unable to accept the submission made by Shri M. S. Chandel in this regard or to uphold the view taken by the learned Additional Sessions Judge that sanction under Section 197(1) Cr. P.C. was necessary, before the Chief Judicial Magistrate, Kangra could take cognizance of the offence in respect whereof complaint had been filed by - petitioner Bidhi Singh against Shri Mandyal.

26. In spite of the view expressed by us, we feel disinclined to interfere with the order passed by the Additional Sessions Judge way back in the year 1983. Shri Chandel is plainly

right in his submission that the action complained of has become stale by lapse of time, albeit, without much fault on the part of the complainant. It would seem inappropriate to permit it to be reopened after the lapse of more than a decade from July 7, 1981 when the incident is said to have taken place in the Court of Shri M. S. Mandyal. Moreso, when we find that in respect of the same incident the Presiding Officer, that is Shri M. S. Mandyal, had made a reference requesting this Court for initiation of contempt proceedings against petitioner Bidhi Singh and his witnesses Gian Singh and Kanshi Ram. This was through a letter dated July 8, 1981. The complaint against the Presiding Officer was filed by petitioner Bidhi Singh thereafter on July 22, 1981.

27. We, therefore, refuse to intervene in the matter and dismiss the present petition.

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Cross Citation :- 2002 ALLMR(CRI)-0-2640 , 2003-MhLR-2-117, 2003(I)B. CR. C.

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : D.G.DESHPANDE, A.S.AGUIAR,JJ

State Of Maharashtra ...Vs... Kamlakar Nandram Bhawsar

Criminal Appeal 334 Of 1987 Of Oct 31,2002

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I.P.C. Sec. 193, 196, 466, 471, 474, r/w 09 – Criminal Procedure code, 1978, Sec. 344 – Summary trail against Judicial Magistrate ,P.P., Police Officer,and others for fabricating false evidence – Trial court acquitting accused on basis of forged dying declaration not produced by the prosecution – Trial Judge without clarifying anywhere as to who produced the dying declaration directly taking it on record – Held Acquittal set aside – High Court issued show cause notice to Advocate for accused, Additional public Prosecutor for State, PSI, Special, Judicial Magistrate calling explanation as to why they should not be tried summarily for giving false evidence or fabricating false evidence.

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JUDGMENT

1. This is an appeal against the acquittal filed by the State. All the accused - respondents were prosecuted for offence under Sections 306 read with 34, 498 and 498A of the Indian Penal Code by the Sessions Judge, Nashik in Sessions Case No. 131 of 1986.

2. The facts giving rise to the case of the prosecution were as under:

Deceased Mina was married to accused Kamalakar at Ahmednajar on 27.4.1982. She was ill-treated on account of non-payment of sufficient dowry and also because she

was black in complexion, she was beaten, driven out of the house. The marriage had taken place due to intervention of Vimalabai who was the maternal aunt of Mina and who was also living in the said village where the accused used to live. Mina used to complain to maternal" aunt about the ill-treatment given by the accused. Vimalabai therefore, intervened and asked the accused No. 3 mother-in-law to treat Mina properly. Mina went to her parents, stayed there for 6-7 months, when she was brought back by her mother, she was insulted and sent away.

However before January 1983 she went to stay with them again.

3. In January 1983 parents of Mina received a telegram of accused No. I inquiring if Mina had come to their house. Mina's brother Subhash went to Yeola to the house of the accused and he learnt that Mina was staying in the house of one Sarode Talathi. Subhash found that Mina was in very bad condition at the house and she was in semi-dead condition. At that time she told about the cruel ill-treatment given to her by the accused and about severe beating given to her. She, therefore, requested Subhash to take her away as her life was in danger. Accordingly Subhash brought her back to Ahmednagar, Thereafter Mina stayed with parents for over 7-8 months and filed a petition for maintenance under Section 125 of the Criminal Procedure Code. During the pendency of that petition, her husband accused No. 1 approached Subhash, asked for a loan, but Subhash did not agree. Thereafter maintenance application was decided in March 1985. The maintenance was not paid but thereafter accused started showing their willingness to keep Mina in their house and then on the pretext of some Satyanarayan Puja, Mina was brought back to the house on 16-2-1986 and on 28.4.1986 Mina was burnt in the house. She was removed to Civil Hospital, Nashik. Ultimately because she had 94% of burns, on the next day Mina died.

4. While Mina was being removed to Civil Hospital from Yeola to Nashik one Kantilal went to Yeola Police Station and gave information about the incident. An entry was taken down in that regard by the Constable Deshmukh. Panchanama was done by the said Constable Deshmukh. Some articles were seized.

5. Thereafter Subhash lodged a report to the police at Sarkarwada Police Station as per Exhibit 14. It was registered as an accidental death and then ultimately after investigation charge-sheet was filed under Sections 306, 498-A.

6. During the trial the prosecution examined in all eight witnesses. After the prosecution evidence was over, the accused filed an application for calling the dying declaration of Mina. The same was taken on record, exhibited and after hearing the arguments, the accused were acquitted of all the charges levelled against them. The acquittal was based mainly upon the dying declaration and the so-called settlement between Mina on one side and the accused on the other side after the order of maintenance under Section 125 of the Criminal Procedure Code was passed, certain letters

filed of Mina were also made the basis for acquittal, It is this judgment of acquittal that is challenged by the State in this case.

7. When matter appeared before us on 26.8.2002, the learned APP, Pravin Singhal after going through the papers requested for time to personally verify the record and then prayed for calling original case papers from Civil Hospital, Nashik, pertaining to medico legal case of Mina Bhavsar. We gave necessary directions and thereafter doctor from Civil Hospital, Nashik, produced the case papers.

8. Secondly the arguments advanced by Mr. Singhal, the learned APP for the State and Mr. Pendse for all the accused were heard by us at length.

9. The learned APP vehemently and strenuously urged before us that the entire judgment is perverse and this is a case where not only the Trial Court has erred in allowing dying declaration of Mina to come on record but according to him the learned APP who conducted the trial, the learned defence Counsel, the Investigating Officer, the doctor from the Civil Hospital, and the Judge himself have conspired together to bring on record a forged dying declaration of Mina and he, therefore, urged that necessary action against all these persons should be taken by us. In addition Mr. Singhal also contended that there was more than sufficient evidence to prove the charge under Sections 306 and 498-A of Indian Penal Code against all the accused coupled with the fact that the presumption under Section 131-A of the Evidence Act was required to be used against the accused because Mina died within 7 years of her marriage. According to him the rejection of the evidence of the witnesses by the Trial Court was totally wrong. Further, according to him the assumption of the Court that there must have been a settlement between the parties after the order of maintenance under Section 125 of Criminal Procedure Code and when Mina went to reside with the accused had factual basis and assumption was based on surmises. Further the blame put by the Trial Court upon the prosecution for non-production of dying declaration of Mina was totally uncalled for because the dying declaration and the medical certificate were totally forged and fabricated. Secondly according to him even on facts the dying declaration was proved to be false because the dying declaration of Mina which was exhibited as Exhibit 40. It was stated by Mina that she woke up at night, fell on chimney i.e. a very small burning lantern and the chimney broke, the kerosene spread on her saree and she caught fire. Mr. Singhal pointed out that in the panchanama it is mentioned mainly that there were electric lines in the house and that no chimney was found either intact or in broken condition but to the contrary circumstances found and noted in the panchanama clearly pointed out the accused as abetting suicide of Mina.

10. The learned Counsel for the accused did not try to meet the arguments of Mr. Singhal about taking action against all the concerned officers who were conducting the trial including the Investigating Officer, Medical Officer and the Judge also, but he contended that dying declaration which came on record at the behest of the accepted was genuine and that was rightly accepted by the Court and accused were rightly acquitted. So

far as the oral evidence of witnesses is concerned, the learned Advocate for the accused contended firstly that the witnesses were interested, there were omissions and improvements in the evidence and the circumstances did not point out at all that Mina was subjected to ill-treatment. In the alternative it was contended by the Advocate for the accused that even if some ill-treatment was there to Mina, the same stood wiped out as soon as Mina joined her matrimonial home even after the order of maintenance. It was also contended that there was no direct nexus between her death and the ill-treatment and the instances of ill-treatment were stale instances and there was no evidence of any immediate provocation to Mina to commit suicide by any of the accused. It was, therefore, urged that the judgment of the Trial Court was proper and even if other view was possible that was not a ground to allow this appeal against acquittal.

11. Since the submissions made by Mr. Singhal about forgery and fabrication of the dying declaration and achieving the said object jointly by all those involved in conducting the case including the defence lawyer, Police Prosecutor, I.O., Doctor and even the Judge are very serious, it is necessary to consider the said argument at the outset.

12. We had before us the original record of the trial. From the said record it is clear that charge against the accused was framed on 23.10.1986. Recording of evidence was started before the Sessions Judge, Nashik, Witness P.W. 8 was examined on 26.11.1986. On that date itself accused filed an application for exhibiting the dying declaration. The dying declaration was taken on record and marked Exhibit 40. Further statement of the accused was recorded on 27.11.1986, arguments were heard and on 29.11.1986 judgment was delivered and the accused were acquitted.

13. Regarding the dying declaration Exhibit 40 and the application of the accused in that regard Exhibit 39, Mr. Singhal took strong objection and exception. According to him by filing application Exhibit 39 accused had called upon the prosecution to produce the dying declaration, which meant if such an application is made, according to Mr. Singhal, then the Court has to pass an order calling upon the prosecution to produce the said document and the prosecution can produce document on the same day if it is with it or can take time to produce the said document and then on the next date they will produce the document along with list or pursis and thereafter the Court will decide about the admissibility of the document. If the prosecution admits the document or their contents under Section 294 of the Criminal Procedure Code the document will be exhibited otherwise the defence will have to prove the contents of the document by examining the witnesses and then after the evidence the document will be exhibited.

14. According to Mr. Singhal in this case what is strange and suspicious that the application for production of the dying declaration was filed on 26.11.1986 vide Exhibit 39. The Court did not pass any order directing the prosecution to produce the document. The Prosecutor did not take any time to produce document. Roznama of 26.11.1986 does not show who produced the document on record or at whose instance it was brought. Thereafter no notice was given by the defence to the prosecution to admit the said

document nor the defence examined any witness to prove the dying declaration that is they did not examine the Special Judicial Magistrate who recorded the dying declaration nor the doctor who gave an endorsement and without following any of the procedures without taking any of the steps the Court directly exhibited the document as Exhibit 40, took it into consideration and on the very next date or on 29.11.1986 judgment of the acquittal was passed.

15. Mr. Singhal on the basis of the original medical case papers which were produced by the doctor of Civil Hospital, Nashik contended that the medical papers have been tampered with. He also contended that Dr. Narayan Pawar who is alleged to have given the certificate about Mina's fitness and capacity to give the dying declaration was not concerned with the burns ward of the said hospital but was concerned with post mortem of Mina and that lie has no business to give any certificate of fitness of Mina to give dying declaration.

16. In order to appreciate submissions made by Mr. Singhal, it is necessary to see the application, Exhibit 39 itself (Exhibit 39 page 143 of English File I). The title of the application is "Notice - calling upon the prosecution to produce the Dying Declaration", and the accused has called upon prosecution to produce dying declaration of the deceased Mina dated 28.4.1986 and has also prayed that the said be exhibited and read in evidence. Application is signed by accused Kamalakar and his Advocate. The order of the Court is of the same, date. It is to the effect "Dying Declaration be produced and taken on record marked Exhibit". Roznama of 26-11-1986 shows as under ;

"Ex. 39 - Application by accused No. 1 for exhibiting the Dying Declaration.

Ex. 40 - Dying Declaration of deceased Mina Kamalakar dated 28.4.1986."

Dying declaration Exhibit 40 is on record page 145 of English File I.

17. From the aforesaid, Exhibit 39 and the Roznama dated 26-11-1986 it is absolutely clear that as soon as the application Exhibit 39 was filed for production of the dying declaration dated 28.4.1986, the order was passed by the Court and the dying declaration was taken on record and marked Exhibit 40. There is nothing anywhere on the record to show and also on Exhibit 39 and in the Roznama dated 26.11.1986 as to who produced this dying declaration, Police Prosecutor/ APP, who was conducting the prosecution has not given his say on Exhibit 39, he has not stated whether the dying declaration was with him at that very moment and he was ready to produce it from police record, nor he has asked for time to produce the document if the same was not with him. The learned Sessions Judge in the order passed on Exhibit 39 nowhere says as to who produced the dying declaration or from whose custody the dying declaration was produced. The Roznama dated 26.11.1986 also does not show who produced the dying declaration or at whose instance or from whose custody the dying declaration was produced.

18. Roznama of 26.11.1986 also shows that on that day deposition of P.W. 8 was recorded vide Exhibit 36 and the extract of diary dated 28.4.1986 was also taken on record and marked Exhibit 37. This order was passed requiring the accused to enter upon defence as per Exhibit 38 and in the same sequence of events, application Exhibit 39 came to be filed, and order came to be passed thereupon and the dying declaration was exhibited on the same day as Exhibit 40. The trial Court recorded further statements of accused Nos. 1 to 5 and adjourned the case for arguments on 27.11.1986. The said further statement is marked as Exhibit "O".

19. In fact even though the roznama dated 26.11.1986 shows that after exhibiting the dying declaration as Exhibit 40, further statement of accused Nos. 1 to 5 was recorded, the roznama of the said date does not show that prior to that statement of the accused under Section 313 of Criminal Procedure Code was recorded at all. In the sequence of happenings of 26.11.1986 whatever has happened has been produced above and if the last witness of the prosecution was examined as Exhibit 36 on 26.11.1986 and the prosecution has closed his case, first there could have been pursis by the prosecution, that it has closed its case then the Court should have recorded the statement of the accused under Section 313 of the Code of Criminal Procedure and if thereafter some document was produced and further statement was necessary, then the Court should have recorded the further statement. The roznama of 26.11.1986 does not show that after the evidence of the prosecution was over, statement of the accused was recorded. What it shows only is that after exhibiting the dying declaration further statements of the accused Nos. 1 to 5 was recorded.,

20. On the other hand statements of the accused are there on record and they show that all the statements were recorded on 26.11.1986 initially and then four lines were added to it showing recording of further statement. In the aforesaid so-called further statements only two questions are put to the accused : (1) Do you wish to examine yourself as a witness on oath, and (2) Do you wish to examine any witness in your defence. The answer to both these questions obviously from all the accused were in the negative.

21. What will be clear therefore, from the roznama on 26.11.1986 is that the evidence of the prosecution was over on 26.11.1986 after examining P.W. 8, thereafter no statement of the accused was recorded and immediately application for calling upon the prosecution to produce the dying declaration was made vide Exhibit 39, order was passed therein, dying declaration was tendered (by whom not known) it was exhibited and then further statement of the accused as shown to have been recorded.

22. We have already noted above that evidence in this case commended on 24.11.1986, it was concluded on 26-11-1986 and the judgment of acquittal was delivered on 29.11.1986. The speed with which the trial has proceeded before the Trial Court and the manner in which things took place on 26.11.1986 as noted above from the roznama, create a very suspicious picture about fairly conducting the trial.

23. Chapter XVIII of Criminal Procedure Code deals with trial before the Court of Sessions. Section 231 refers to evidence of prosecution, Section 232 deals with acquittal if there is no evidence but if there is evidence Section 233 requires the Court to call upon the accused to enter upon his defence and adduce any evidence he may have in support thereof. Exhibit 38 is an order of the Court, on the same date calling upon the accused to enter into their defence, if any. Section 233 thereafter requires "that if the accused applies for issue of any process for..... the Judge shall issue such process or (call upon the production of document) unless the Judge decided to reject the application on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice". It is, therefore, clear from this Section 233 that the judicial order has to be passed by the Sessions Court, if an application for production of document is made. In this case such an application was made by the accused vide Exhibit 39 and, therefore, the Judge should have taken care to record as to from whose custody the dying declaration is produced, who is producing it and prior to that the Judge should have called upon the Police Prosecutor/APP to file his say to the said application, ascertain whether the dying declaration was in existence, whether it was in the custody of police and then call upon the prosecution to produce the said document; Nothing has been done and directly the dying declaration is taken on record without clarifying anywhere either on Exhibit 39 or in the Roznama as to who produced the dying declaration or at whose instance it was produced or from whose custody it was produced and taken on record.

24. This is, therefore, a serious lapse on the part of the Trial Court.

25. Secondly when the dying declaration came on record, there is no explanation, nothing on record to show as to how the same came to be exhibited as Exhibit 40. The record does not show that any notice was given by the accused. When the dying declaration came on record admittedly the accused were relying upon the same because it was to their benefit. Accused did not examine any witness to prove the dying declaration because when they were questioned in their so called further statement under Section 313 of Criminal Procedure Code whether they want to examine any defence witness, their reply was in the negative. Therefore, Special Judicial Magistrate who recorded the dying declaration was not examined by the accused. The doctor who gave endorsement about the mental condition of the deceased Mina was also not examined. The police officer to whom the dying declaration should have been handed over by the Special Judicial Magistrate was not examined or if the dying declaration was with the Special Judicial Magistrate throughout from the date of recording till its production in Court, nobody was there to examine these facts. Nobody was examined to prove the thumb impression of the deceased on the dying declaration of the deceased nor any notice was given by the accused to the prosecution under Section 294 of the Cr.P.C. to admit the document. Section 294 provides "that where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in the list and the prosecution and the accused.....shall be called upon to admit or deny the genuineness of such document". Sub-section (2) provides "that the said list as may be prescribed" and Sub-section (3) provides "that where the genuineness of any document is

not disputed such document may be read in evidence without proof of the signature of the person to whom it purports to be signed". Proviso to Section 294 provides "that the Court may in its discretion require such signature to be proved".

26. Therefore, it will be clear that when the dying declaration came on record, it was obligatory and necessary for the accused to examine the Special Judicial Magistrate, the doctor and/or the police officer to prove the contents of the dying declaration as well as thumb impression of the deceased Mina. Examining of the doctor was necessary to prove the endorsement about the mental condition of Mina before and after the dying declaration. Admittedly this was not done by the defence or by the accused nor the defence or accused gave any notice under Section 294 of the Cr. P.C. to the prosecution to admit the genuineness of the document and no opportunity was given by the Trial Court in that regard. Without following any of these mandatory legal provisions the dying declaration was marked as Exhibit 40 on the same day and read in evidence, relied upon and the accused acquitted.

27. On the other hand Trial Court observed in para 11 of its judgment that:

"The. prosecution did not produce the document as its evidence though it was bound to do so". Regarding exhibiting of the document the Trial Court in the same para has stated : "Since the accused sought production of this document and since it is in the custody of the prosecution, there was no difficulty in exhibiting this document and admitting the same In evidence". It is surprising to note that without clarifying anything in the order of Exhibit 39 or in the roznama as to from whose custody document came to be produced, and without following any procedure or taking any caution in that regard, how the trial Judge came to the conclusion that the document was in the custody of the prosecution and, therefore, it could be exhibited easily without following any legal provisions in that regard. Further the Court has observed in para 11 : "In fact, it is the evidence of the prosecution, and normally the prosecution ought to have produced this evidence. In fact, the prosecution tried to suppress and withhold this document". These observations are also unjustified and uncalled for because the Judge himself committed grave mistake of not following the procedure and taking a document on record without clarifying as to from whose custody it was being produced or tendered. The Court has accepted the dying declaration and as such in the same para observed : "If Ex. 40 is thus taken to be the piece of evidence, that negatives the case of the prosecution that Mina committed suicide".

28. The matter does not end here as is urged by Mr. Singhal. The original case papers of Mina were called from the Civil Hospital, Nashik and they were produced by the doctor of the said hospital. Production of these papers was necessary because on the dying declaration Exhibit 40 there is an endorsement of doctor in the beginning of the dying declaration as well as in the end and the endorsement in the beginning is to the following effect:

"Date 28.4.86 at 9.05 a.m. Patient is fully conscious and in condition to speak properly and give her statement properly."

An endorsement at the end is as under:

"28.4.86 at 9.40 a.m. Pt. is fully conscious and in condition to speak properly and give her statement properly."

Signed by the same doctor.

29. According to Mr. Singhal, this entire dying declaration is fabricated and forged to further benefit of the accused. Some of the circumstances pointed out by him have been discussed by us as above regarding the production of the dying declaration and the order passed therein. Further it was pointed out by Mr. Singhal that this doctor who gave an endorsement is Dr. Narayan Manohar Pawar who was examined as P.W. 5 and he has stated in his evidence that on 28.4.1986 at 1 p.m. the dead body of Mina Kamalakar Bhavsar of Yeola was brought to Civil Hospital, Nashik for P.M. Examination and he and Dr. Doshi conducted the post mortem from 1.30 to 2.30 p.m. Mr. Singhal contended that this doctor has not stated in his evidence that he was attached to the burns ward where Mina was kept on 28.4.1986 and record does not show that Dr. Narayan Pawar, P.W. 5 was so attached to burns ward or with ,the casualty ward and had any duty to examine about Mina about her mental condition when the Special Judicial Magistrate allegedly recorded her dying declaration. Number of circumstances pointing to the forgery and fabrication of the dying declaration including the certificate of the doctor are pointed out in this regard and some of them are :

(i) that the original medical case papers are tampered and page No. 3 is inserted therein subsequently in order to substantiate this fitness certificate given by Dr. Pawar;

(ii) Dr. Pawar was not attached to bums ward or casualty ward and had no business to give any certificate about the mental condition of Mina;

(iii) condition of Mina was extremely serious at the time when the alleged dying declaration was recorded;

(iv) that Mina died at 10.10 a.m. when her dying declaration is alleged to have been recorded between 9.10 a.m. to 9.45 a.m.;

(v) Mina was having 94% of burns and was not at all in a position to give any statement;

(vi) that when P.W. 5 Dr. Narayan Pawar was examined on 25.11.1986 by the Trial Court the dying declaration Exhibit 40 was not on record, there was nothing on record to suggest that any dying declaration of Mina was recorded by the police. Even then the question was put to Dr. Pawar in the cross-examination by the

Advocate of the accused and Dr. Patil admitted "that he was requested to examine Mina at 9.05 a.m. to find out whether she was in a position to make the statement, he then examined her and certified that she was fully conscious and in a state to make a statement properly". Thereafter her statement was recorded but he was not present. Same question is put to P.W. 7 Ramesh Manohar Patil in the cross-examination on 25.11.1986 when the dying declaration Exhibit 40 was not in record at all and P.W. 7 admitted "Mina has given dying declaration before the Special Judicial Magistrate, Nashik, I have read it and therein she has not involved any of the accused".

30. We find strong force in the contention of Mr. Singhal and all his objections about the dying declaration being forged and fabricated.

31. Admittedly on 25.11.1986 when P.W.7 and P.W. 5 were examined, dying declaration was not before the Court. Dr. Narayan Pawar was not confronted with any dying declaration. No witness has stated about the dying declaration of Mina but even then in anticipation of the dying declaration being filed in future, both P.W. 5 and P.W. 7 were questioned in cross-examination and they admitted that Mina gave a dying declaration.

32. Secondly the time of recording of the dying declaration is shown in Exhibit 40 as between 9.05 to 9.35 a.m. The time is written by Special Judicial Magistrate, Nashik Mr. P.S. Bawiskar. Original medical case papers show that when Mina was examined by doctor at 8.00 a.m. doctor noted 'urine not passed' and when she was admitted at 4.50 a.m. doctor has noted "inform seriousness of the patient to relatives". Further it was noted oxygen elasation SOS meaning thereby she was on oxygen right from the time she was admitted. The exact words used by Doctor are "02 inhalation". Therefore, if the condition of Mina was so critical at the time of admission and at 8 O'clock she had not passed urine and was on oxygen or was likely to be given oxygen any time then certifying by Dr. Pawar on 28-4-1986 that Mina was fully conscious and in a condition to speak properly and give her statement properly at 9.05 a.m. and at 9.45 a.m., is highly improbable and suspicious.

33. Not only Dr. Pawar has given endorsement on Exhibit 40 but on the medical case papers also he has given his endorsement. The original case papers are running from 1-7 pages. On the first page history is given in the form and noting dated 28.4.1986 recorded at 4.50 a.m., on the third page is the noting regarding 28.4.1986 at 10 a.m. and then at 10.10 noting about her health, on page No. 5 there is noting of Mina at 8 a.m. on 28.4.1986 that urine not passed. However, Dr. Pawar gave his note on 2nd page on 28.4.1986 at 9.05 a.m. about the fitness of mental condition of Mina, neither the earlier noting nor the subsequent noting are in the handwriting of Dr. Pawar. In his evidence also he has nowhere stated that he was attached to burns ward or casualty ward or emergency ward. He has not stated who requested him to examine Mina and how he was authorised to deal with the patient. He came to be examined as prosecution witness because he has performed post mortem of Mina but inspite of that he gave admission in favour of the

accused in the cross-examination that he examind Mina and found her fit to give statement and that he examined her.

34. All these circumstances i.e. the manner in which Exhibit 40 came on record, roznama, original medical case papers, putting questions to doctor and P.W. 7, in the cross-examination with reference to the dying declaration, when dying declaration was not before the Court at all, getting their admission in favour of the accused, critical condition of Mina right from the stage of admission and her immediate death at 10.10 a.m. and giving of fitness certificate by Dr. Pawar (P.W. 5) when he was not attached nor concerned with the burns ward, casualty ward or emergency ward. Whatever that may be are the circumstances that justify the submissions of Mr. Singhal that the dying declaration Exhibit 40 is forged and fabricated so also endorsement of the doctor thereupon. Non-explanation by the Court as to from whose custody the dying declaration came on record is also a serious factor which throw serious doubt about the genuineness of the dying declaration.

35. Mr. Singhal also argued that even on facts this dying declaration has to be considered as a forged and fabricated one and, therefore, totally false one. As per this dying declaration, Exhibit 40, Mina alleged to have stated to Answer No. 4 that she woke up at 1 a.m. night for drinking water, at that time she gave dash to the chimney i.e. a small lantern. It was kept on tin. The said chimney fell on her person. She was, therefore, burn and at that time she was wearing nylon saree (chimney is a small lamp which burns on a kerosene with glass around it and a glass to hold kerosene and holder of tin by which the chimney attached to wall or kept on anything so required, it contains kerosene maximum upto 50 or 70 milliliters), In order to substantiate its contention Mr. Singhal pointed out that spot panchanama of the house was recorded by the police in the morning of the same day i.e. on 28.4.1986 between 8.25 a.m. to 9 a.m. and in the spot panchanama it is noted that the house and electric light fittings had electric lights. There are two rooms, one of 6' x 12' and the other kitchen of the same size and measurement and there is no mention in the panchanama of any chimney. There is no cross-examination of the witnesses to the effect that they had not prepared the panchanama according to the spot or that they had made false entries or deliberately avoided to make mention about the chimney. To the contrary, this panchanama was proved by witness Prabhakar P.W. 4. There is no suggestion about the chimney. Only one question was asked wherein the witness admitted that there was a lantern but its glass was not broken. It needs to be clarified that lantern is much big in shape and size than chimney. It will, therefore, be clear that the panchanama so far as it does not mention the finding of any chimney is concerned has gone unchallenged.

36. We find considerable force in the contention of Mr. Singhal that the dying declaration Exhibit 40 is belied by the panchanama as chimney was not found. To the contrary what is found in the room where the incident has taken place is the saree, petticoat, blouse, brassier. Burnt pieces of all these clothes were found and all were smelling of kerosene. There was a can of 4 liters which was also smelling of kerosene and

it was empty and one match box having 3-4 match sticks and one burnt match stick was found on the ground.

37. The panchanama therefore, belies dying declaration and lends strong support to the contention of Mr. Singhal that it is a forged and fabricated dying declaration. All the clothes which Mina was wearing at the time and the burnt pieces which were found as stated above were smelling of kerosene shows that kerosene was poured upon her. If chimney was there and Mina had fell down and the glass container containing 50 to 70 milli-litres kerosene was spread, it cannot spread over all the clothes. Further finding of one burnt match stick falsifies the dying declaration totally and completely.

38. In view of the aforesaid facts, it is clear that reliance placed by the Trial Court on the dying declaration of Mina is wholly unjust, illegal and improper. The said dying declaration, Exhibit 40 should not have been relied upon and no benefit of the same should have been given to the accused. The finding of the Trial Court in that regard are, therefore, perverse and are required to be quashed.

39. So far as the case on merits is concerned, it was contended by Mr. Singhal that prosecution has succeeded in proving its case under Sections 306 and 498-A read with 34 of I.P.C. beyond reasonable doubt and order of acquittal is totally wrong and it has to be set aside. He also contended that on other counts the judgment of the Trial Court is perverse. Mina died on 28.4.1986 soon after at 10 O'clock after she was admitted in the hospital. She was married to the accused Kamalakar on 27.4.1982. She died within 7 years of her marriage and since the dying declaration has to be totally disregarded as fabricated document and since panchanama shows that kerosene was used, it has to be held that Mina committed suicide. Since the accused are charged under Section 306 it has to be seen whether there is evidence for abetment of the suicide.

40. The admitted facts in that regard are that Mina had filed proceedings under Section 125 of Criminal Procedure Code against husband on 12.10.1983 and the same came to be decided in her favour on 6.3.1985. Filing of maintenance proceedings clearly show that Mina was not satisfied with the treatment given to her by her husband. The judgment of the Magistrate under Section 125 also forms part of the record and in the said judgment the Magistrate who decided her application has given a specific finding. Copy of the judgment is forming part of the paper book it is at Exhibit 13. It is an admitted fact that the accused did not challenge the judgment by filing appeal. The following four points out of six are held by the Magistrate in the affirmative. They are :

(1) Whether Mina proves ill-treatment to her on the part of the opponent ? Affirmative

(2) Does she prove neglect ion and refusal to maintain her on the part of the opponent ? Affirmative

(3) Whether she is ready to maintain herself ? and

(4) Whether she is entitled to maintenance ? Both in Affirmative

The date of the order of judgment as stated above is March, 1985.

41. The Trial Court has taken note of this judgment and the Magistrate has observed in paragraph 12 of the judgment that the reasons and findings therein are stated to be not relevant in the present case. The Trial Court also accepted that there was a settlement between the parties about the past and that whether whatever ill-treatment or cruelty was there was condoned and matrimonial offence was washed away. About this the Trial Court has further given its finding in paragraph 13 as under:

"Even accepting the submissions of Mr. Pawar, APP for moment that circumstances, of Mina going to her maternal aunt and complaining about ill-treatment just after 8-10 days, her going to parents and complaining to the same effect, her stay in the house for 6-7 months just after marriage, her finding in feeable condition in the house of P.W. 3 Radhikabai and complaint made at that time, filing of maintenance application and the decision there in based on the ground of ill-treatment, would indicate some kind of cruelty, yet as submitted by Mr. Abhyankar, all that episode had come to an end on 16.2.1986 when Mina went to stay with accused."

Further the Trial Court has observed in the same para :

"However, just thereafter on 16.2.1986, Mina was taken to the house of accused and this would go to show that there must have been settlement of the disputes between the parties."

The Trial Court further gave finding :

"As rightly submitted by Mr. Abhyankar, therefore, if cruelty is assumed on the basis of the circumstances enumerated above, that must have been condoned and no longer existed after 16th February, 1986."

All these findings are absolutely perverse. There is no evidence at all to show that either Mina or her parents had condoned earlier instances of cruelty, placing reliance upon certain letters to which we will refer subsequently by the Trial Court was wholly unjustified. Therefore, in this background of the matter further finding of the Trial Court that:

"If the possibility of ill-treatment after 16.2.1986 is thus ruled out, there remains no cause for Mina to commit suicide and that the letters relied upon by the accused and brought in evidence negatived the possibility of suicide."

42. So far as not finding of lantern or chimney in the house as per the panchanama is concerned, the Trial Court has given very strong reasoning in paragraph 14 again while considering the submission of APP. In this regard the Trial Court has held that submissions

made by the APP do not arise at all because existence of chimney is not the case or the defence of the accused but that is the case of the Mina stated by Mina in dying declaration, The Trial Court has stated :

"If anything is to be disbelieved from the circumstances that no lantern was found, that would be the dying declaration."

About clothes smelling of kerosene, the Trial Court has stated those clothes were not forwarded to the Chemical Analyser. These reasonings are totally devoid of any merit and they arc perverse. If factual position on record falsify the dying declaration, then the Court would have rejected the dying declaration and if the clothes smelling of kerosene, namely saree, blouse, petticoat, brassier etc. were not sent to the Chemical Analyser, the Court should have taken the I.O to task.

43. About the smell of kerosene to all the clothes of Mina, namely saree, blouse, petticoat and brassier, the Trial Court held in paragraph 14 that :

"It is equally possible that kerosene might have spread on the clothes and perhaps that might be giving the smell of kerosene."

It pains us to note that the Judge who conducted the trial or before whom the trial proceeded was knowing very well about the quantity of kerosene in chimney cannot be more that 50 to 70 milli-litres and if chimney fell and kerosene spread it can almost spread to some negligible part of the saree and petticoat touching the ground and the blouse cannot smell of kerosene but even this aspect appears to have been twisted by the Trial Court to the benefit of the accused.

44. Mina's maternal aunt Vimlabai is an important witness for the prosecution. She is examined as P,W. 2. She stays at Yeola where the accused are staying. She has arranged the marriage of Mina with the accused Kamalakar. She has slated that after 8-10 days of marriage Mina came to see her and told her that her mother-in-law, sister-in-law and husband were ill-treating her on the ground that she was black in complexion, and that she was short of hearing. 7-8 days thereafter P.W. 1 Subhash came to her house and asked that if Mina had come to her. He also staled that he has also received a telegram from accused No. 1 two months before the incident. According to this witness mother of Mina had brought Mina and left her in the house of the accused. There is no cross-examination of this witness by accused Nos. 2 to 5 and only one question was asked by accused No. 1. in cross-examination and that if the witness had not herself seen ill-treatment to Mina.

45. Next witness is P.W. 3 Radhikabai Sarode. This witness has staled that 2-3 months after the marriage of Mina she came to her house at about 8.15 a.m. and told her that her husband, mother-in-law and sister-in-law had beaten her previous night and she would commit suicide if she was required to go back. This thing was conveyed to Vimlabai by

P.W. 3 Radhikabai. He said that he will send telegram to the father of Mina. At about 2 p.m. accused No. 1 Kamalakar went to the house of P.W. 3 and enquired about Mina but since Mina started crying P.W. 3 told accused No. 1 that Mina was not in their house. In the same manner accused No. 3 went to the house of this witness to enquire about Mina but she was also told that Mina was not in the house. In the night the accused No. 2 went to the house of P.W. 3 and saw Mina. He asked Mina to come with him. Mina got frightened and started weeping, then the husband of P.W. 3 intervened and asked accused No. 2 to allow Mina to stay in the night. Next morning P.W. 1 Subhash, brother of Mina came and took Mina away. There is no cross-examination worth consideration at all of this witness.

46. Evidence of cruel treatment to Mina is given by Subhash P.W. 1. He corroborates P.W. 2 and further stated that after a month of the marriage, his father went and brought Mina back and at that time Mina told the same story and also further stated that she was not allowed conjugal happiness by accused No. 1. Mina stayed with her parents for about 6-7 months thereafter. Thereafter mother of Mina took Mina to her husband's house but at that time accused No. 3 threw rubbish on them and told them accused No. 1 would keep mistress instead of keeping Mina and she would not be even allowed to wash clothes of accused No. 1, therefore, Mina and her mother returned back. Then accused No. 1 approached Subhash in January 1983 and asked for Rs. 2,000-3,000 as hand loan for starting new business and put the condition that if the amount is paid then he will take Mina for cohabitation. That this incident took place in January, 1983. Subhash has stated that in January, 1983 he received a telegram from accused No. 1 as to whether Mina had come to their house. He went to Yeola along with Bhaskarrao Chavan, contacted maternal aunt P.W. 2, Mina was not there. Then he went to the house of the accused and learnt that Mina was in the house of Sarode Talathi. At that time he found that Mina was lying in semi-conscious condition in the house of Sarode. She was found to have been put to starvation and froth was coming from her mouth and Mina told her that she was being harassed severely and that she should be taken away. Mina narrated her ghast (?) and told that sisters of Kamalakar accused Nos. 4 and 5 were saying that Kamalakar accused No. 1 should perform second marriage. Mina also told that she was severely beaten. Mina was taken to Bhagirathseth - a prominent panch of Yeola. He advised them to take back Mina to Ahmednagar.

47. Thereafter according to P.W. 1 Subhash, Mina filed maintenance proceedings and he has also stated that accused did not pay maintenance inspite of the order of the Court. Further according to her at the time of Rathasapatami festival of 1986 mother of accused No. 1 came to their house and offered to take away Mina. Mina was however not sent. Thereafter accused No. 3 alone came and asked them to send Mina because of some Satyanarayan Puja but Mina was not sent with her. On 16.2.1986 the mother of Mina took Mina to the house of the accused but she found that there was no S.alyanarayan Puja. Soon thereafter i.e. on 28.4.1986 Subhash learnt that Mina was burnt and was admitted in the hospital. He then lodged complaint to the police.

48. The aforesaid evidence of P.Ws. 1,2 and 3 was challenged by the Counsel for the accused on the ground that Mina stayed in Sarode's house. Her narration of torture to P.W. 3 Radhikabai does not say a word. Further it was argued that from the letters on record it is clear that all these instances of cruelty were forgiven and were the thing of the past since Mina came to reside with the accused from 18-2-1986.

49. At this juncture therefore, it is necessary to consider the letters with which P.W. 1 was confronted. Those letters are Exhibits 17,18,19, 20, 21, 22, 23, 24 and 25. They are dated respectively.

Exhibit 17 is letter dated 16.8.1982,

Exhibit 18 is letter dated 11.9.1985,

Exhibit 19 is letter dated Nil,

Exhibit 20 is letter dated 5.2.1986,

Exhibit 21 is letter dated 19.2.1986,

Exhibit 22 is letter dated 25.2.1986,

Exhibit 23 is letter dated 7.3.1986,

Exhibit 24 is letter dated 6.4.1986, and

Exhibit 25 is letter dated Nil.

Out of these letters Mina has written Exhibit 20 letter dated 5.2.1986 and Exhibit 25 letter - no date. It will be seen that out of all these letters only two are written by Mina. In none of these two letters Mina has ever expressed that she has pardoned the accused for ill-treatment given to her or that forgiven them. In Exhibit 25 Mina has shown her willingness to go to the house of the accused because of Puja. Year and month of Puja cannot be ascertained from this letter. Exhibit 20 is a general letter not throwing any light upon the relationship of the parties. Exhibit 19 is a letter without any date and does not reflect upon the relationship of the husband and the wife or between Mina and her in-laws. Exhibit 21 is written by Tarabai. It is written to Aunty. It is about safe arrival of Mina and her mother at Yeola. This letter appears to have been written by accused No. 3. Exhibit 22 is addressed to accused Nos. 2 and 3. It also does not speak anything about the relationship between Mina and her in-laws or the husband. Exhibit 23 is addressed to accused Nos. 2 and 3. It is dated 7.4.1986 and it is about informing Mina's well-being. Exhibit 24 is written by Subhash to accused No. 1 and Mina. It is dated 6.4.1986. It is also a letter general in nature. However, Counsel for the accused pointed out from this letter that Subhash P.W. 1 has written that Mina should presume family of her husband to be her own family and she

should serve them as far as possible and it should be her duty as a wife. Exhibit 25 is written by Mina as stated earlier.

50. It will, therefore, be clear that in none of her two letters, Mina has ever forgiven accused or has stated that she is ready to join the company of the accused by forgiving the past nor in the other letters particularly those written from her parents or brother, there is no mention that his past ill-treatment was to be pardoned or forgiven. The Trial Court has however drawn totally wrong and perverse inference on the basis of these letters to the effect that these letters show that Mina has forgiven the accused and the ill-treatment given to her was and cannot be taken into consideration for the purpose of this case.

51. What emerges from the evidence of P.Ws. 1, 2 and 3 that Mina was subjected to mental and physical torture and ill-treatment because of her black complexion, because of the allegation that she was short of hearing. She was brutally beaten and assaulted, made to starve and she was brought back to home by the accused inspite of the maintenance order and inspite of his failure to pay the maintenance on the false pretext of Satyanarayan Puja, the accused have therefore, strong motive to further torture and harass Mina. About Satyanarayan Puja, Question No. 23 was put to the accused in their statement under Section 313 and they admitted that Mina's mother brought Mina to their house but there was no Satyanarayan Puja. The accused have admitted that Mina was brought by her mother but due to some difficulty Puja could not be performed. This lends support to the submission of Mr. Singhal that it was on the pretext of Satyanarayan Puja that Mina was brought in the house.

52. In this regard it was strenuously urged by Counsel for the accused that from evidence of the prosecution, it cannot be said that any ill-treatment was meted out to Mina, in the near proximity of her death. It was further contended that old and stale instances of ill-treatment could not be taken as abetment to suicide. We do not find any substance in this argument because the fact of ill-treatment is amply proved by the prosecution, the fact of an order in favour of Mina is also proved, the fact of non-payment of maintenance is also proved and the pretext of Satyanarayan Puja that was given by the accused for taking back Mina is also proved to be false. It is, therefore, clear that while maintenance order was hanging on their head accused took Mina to their home. There was no intervention of any elderly members for this, nor any compromise after the maintenance order between Mina and husband, nor Mina had forgiven or pardoned the accused for the ill-treatment given to her.

53. Writing letter by Subhash asking Mina to accept the house of the accused as her own is a general advice given by any man to his wife or to daughter. It cannot be inferred from such advice or from Mina's letter that she had decided to treat the chapter of ill-treatment as closed for ever. There is, therefore, strong and sufficient evidence to connect the accused with the offence charged, namely Sections 498-A and 306 of the I.P.C.

54. Mr. Singhal also further contended that when Mina was having 94% burns and a valuable period of 4-5 hours was wasted in the Government Hospital, Nashik, it was impossible that Mina would be in a fit physical and mental condition to give any declaration. He further contended that conduct of the accused No. 1 husband or of the other accused was also suspicious inasmuch as there were only two rooms to the house. The accused and Mina were sleeping in kitchen and others were sleeping in the front room. If Mina had accidentally caught fire as alleged in the dying declaration there would have been an attempt on the part of the accused No. 1 or other accused to extinguish the fire and it would not have been difficult to extinguish the fire because it was caught (if story of dying declaration is accepted) by breaking of chimney and catching fire by the lower portion of the petticoat and saree. Further according to Mr. Singhal record shows that none of the accused made any attempts to extinguish the fire. There are no burn injuries to anyone including the accused No. 1 and this is, therefore, a strong circumstance which has to be taken into consideration. We also find considerable force in this argument. Even in their statement under Section 313 of the Cr. P. C. none of the accused have given any explanation as to what they were doing at the house and why no attempts to extinguish the fire were made.

55. In the aforesaid background and for the reasons stated above, this appeal is to be allowed and accused are required to be convicted.

56. The learned APP, Mr. Singhal also submitted that this Court should take action against all those who were concerned for fabrication of the dying declaration including the Judge of the Trial Court, we have given consideration to the submissions regarding this prayer. The only contention of the respondents-accused through their Advocate was that there is no forgery or fabrication. We are disagreeing with the same and rejecting the same. There is more than sufficient material on record to hold that the dying declaration, Exhibit 40 is forged and fabricated in all respects. So far as taking action is concerned it is true that the Trial Court committed serious lapses in that regard, however, it cannot be held that the Trial Court was a party to the conspiracy of fabrication of the dying declaration, it could be a bonafide mistake on the part of the Trial Court.

57. However so far as Additional Public Prosecutor (Mr. B.A. Pawar), defence lawyer (Mr. B.J.Abhyankar), Dr. NarayanManohar Pawar Civil Hospital, Nashik, PS1 Ramesh' Manobar Patil - Yeola City Police Station is concerned, action is required to be taken and also against Mr. P.V. Baviskar, Special Judicial Magistrate.

58. Section 340 of the Criminal Procedure Code has laid down procedure in that regard and as per it if in the opinion of the Court it is expedient in the interest of justice to make an enquiry into any offence referred to in Sub-clause (b) of Sub-section (1) of Section 195 in relation to a proceeding in that Court or in respect of document produced or given in evidence the Court may as per Sub-section (2). These powers can be exercised by any Court to which the Sessions Court is subordinate and, therefore, those powers can be exercised by this Court. Section 340 empowers the Court to record the finding and to

make a complaint in writing. However before filing such complaint it would be appropriate that the persons concerned above named are given notice to show cause. Section 344 of the Cr. P. C. gives summary powers to the Court to try offenders for giving false evidence. According to us this is a fit case to take action under Section 344 after giving reasonable opportunity to those offenders to show cause and, therefore, we are passing the following order. However, a note of appreciation for the commendable job done by the learned APP, Mr. Pravin Singhal in this case in going through all the papers thoroughly, unearthing the truth is required to be made before parting with this case.

ORDER

Appeal of the State against the acquittal is allowed.

Order of acquittal of the Sessions Court, Nashik, is quashed and set aside.

All the accused are found guilty of offence under Section 498-A of Indian Penal Code. They are sentenced to imprisonment for three years and to pay a fine of Rs. 5,000/- each under Section 498-A, in default of payment they shall undergo R.I. for six months. All the accused are also convicted under Section 306 of IPC and they are sentenced to suffer R.I. for ten years and to pay a fine of Rs. 5,000/- each, in default of fine R.I. for one year.

Substantive sentences to run concurrently.If the amount of fine is paid, 80% thereof shall be paid to the parents of the victim girl towards compensation.

Accused-respondents to surrender before the Trial Court for undergoing sentence within four weeks from today.

Issue show cause notice to Mr. B.J. Abhyankar, Advocate for the accused, Mr. B.A. Pawar, Additional Public Prosecutor, Dr. Narayan Manohar Pawar, Civil Hospital, Nashik, PSI Ramesh Manohar Patil, Yeola Police Station, and Mr. RS. Baviskar, Special Judicial Magistrate, Nashik, why action under Section 344 of the Criminal Procedure Code should not be taken against them and they should not be summarily tried for knowingly and wilfully giving false evidence or fabricating false evidence with an intention that such evidence should be used in Trial Court, or in the alternative why they should not be prosecuted for offences under Sections 193, 196, 466, 471 and 474 read with 109 of Indian Penal Code. Show cause notice returnable on 12.12.2002 before the regular Division Bench.

All the papers of the Trial Court and the papers produced by the Medical Officer of Nashik should be kept in seal in the custody of the Registrar of this Court.
Order accordingly

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Cross Citation :1996-AIR(SC)-0-2299 , 1996-SCC-4-152

SUPREME COURT OF INDIA

Hon'ble Judge(s) : S. C. AGRAWAL AND S. SAGHIR AHMAD, JJ.

Re: M.P. Dwivedi; Contempt Petition 10 Of 1996, Writ Petition (Civil) 239 Of 1993

Jan 11,1996

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A) Constitution of India – Handcuffing – Contempt of court by S.P. and Magistrate – The accused were handicuffed by the police – When produced before Magistrate he did not perform his duty by directing removal of handcuff – This is clear violation of supreme court's direction nisarissued by Supreme court to S.P. , concerned police and Magistrate – While filing reply S.P. did not taken stern action against erring police officials – it means that S.P. has approved the illegality committed by the police and therefore he is guilty of contempt of Supreme Court – Strong disapproval of Supreme Court is directed to be placed in personal file of S.P. and all erring police officers.

B) Contempt by Magistrate – Contemnor B.K. Nigam was J.M.F.C. – When prisoners were produced before him he did not take any action against handcuffing by police – The magistrate simply passed order calling explanation by police – Held, the Magistrate was bound to take immediate actions for removal of handcuffs – Magistrate was completely insensitive about the serious violation of the human rights – This is a serious lapse on the part of judicial officer – The Magistrate was expected to ensure that the basic human rights of the citizens are not violated – The Magistrate should also expected to take action against police officer for bringing the accused to the court in handcuffs and taking them away in the handcuffs without his authorization – Keeping in view that contemnor Magistrate is a young judicial officer Supreme court did not imposed punishment on him – However recorded strong disapproval of his conduct and directed that a note of this disapproval shall be kept in his personal file.

C) Handcuffing – Authorisation – The Police and jail authorities on their own have no authority to direct the handcuffing of any inmate from jail to court and elsewhere.

D) Handcuffing – Permission by Magistrate – The Magistrate should have concrete proof regarding proneness of the prisoner to violence, his tendency to escape- he being so dangerous/ desperate and finding that no other practical way of forbidding escape is available then only Magistrate can grant permission for handcuffing – It could not be done in a routine way but in rarest of rare case.

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JUDGEMENT

(1.) These contempt proceedings have been initiated in pursuance of the order dated 4/06/1993 passed in Writ Petition No. 239 of 1993, Khedut Mazdoor Chetna Sangath v. State of Madhya Pradesh. The said order dated 4/06/1993 for issuing notices for contempt against the contemners was passed in the following circumstances.

(2.) Khedut Mazdoor Chetna Sangath (hereinafter referred to as the 'Sangath'), is a registered trade union of tribals of Alirajpur Tehsil in District Jhabua of the State of Madhya Pradesh. It started functioning in October 1985 and has been working for the upliftment of the tribals in the region. It is opposed to the construction of Sardar Sarovar Dam on river Narmada on the ground that the construction of the Dam would be prejudicial to the interest of the tribals residing in the catchment area of the Dam since their lands would be submerged in water and they would be displaced. The members of the Sangath have been agitating against the construction of the Dam. In connection with the said agitation, the members of the Sangath were arrested by the police authorities on various dates in connection with criminal cases registered against them and after their arrest, the arrested persons were handcuffed while being taken from jail to the Court and from Court to jail or from jail/Court to civil hospital and back to jail/Court. On some occasions they were paraded while handcuffed through the streets of Alirajpur. In the writ petition, mention is made of the following incidents of handcuffing of under trial prisoners:

"17-11-92--Khemla Aujanharia was handcuffed and paraded in Alirajpur.

and

19-11-92

2-2-93--Revji was handcuffed and paraded in Alirajpur

3-2-93--Ravi Hemadri, Amit Bhatnagar, Khajan, Tilia, Vesta, Bava Kaharia,Bamita were handcuffed and taken from the police station to hospital and back, and from Court to the police station and back.

3-2-93--Ram Singh and Vanjara were handcuffed and taken from Alirajpur Police Station to Sondwa Police Station.

5-2-93--Ram Singh and Vanjara were handcuffed and paraded on the streets of Alirajpur.

7-2-93--Rahul Ram and Ashvini Chhatre were handcuffed and paraded on the streets of Alirapur and were taken in a truck to Sondwa.

8-2-93--All the above, as well as Rahul Ram and Ashwini Chhatre were handcuffed and taken into the hospital. Handcuffs were removed during the examination. They were handcuffed again and taken to Court and then to police station, then back to Court.

8-2-93--Motla and Punja were taken through Alirajpur in handcuffs.

24-2-93--Rahul Banerjee was handcuffed and paraded in Alirajpur.

25-2-93--Rahul Banerjee produced before the Magistrate in handcuffs (Noted by JMFC, Alirajpur in his order)".

(3.) The fact about the handcuffing of these aforementioned persons on the dates referred to above was not disputed by the respondents in the said writ petition. Having regard to the decision of the Court in Prem Shankar Shukla v. Delhi Administration (1980) 3 SCR 855 : (AIR 1980 SC 1535); Sunil Gupta v. State of Madhya Pradesh, (1990) 3 SCC 119, and Baradakanta Mishra, Ex-Commr. of Endowments v. Bhimsen Dixit, (1973) 2 SCR 495 : (AIR 1972 SC 2466), this Court was satisfied that a prima facie case is made out for taking action for contempt of Court against persons responsible for the aforementioned acts of handcuffing of under trial prisoners. A direction was, therefore, given by order dated 4/06/1993 to issue notice to the contemners to show cause why they should not be punished for having committed contempt of this Court.

(4.) In response to the said notice, affidavits have been filed by the aforementioned contemners. Before we deal with the explanation offered by the contemners, it would be necessary to refer to the provisions of Regulation 465 of the M.P. Police Regulations which prescribes as follows:

"465. Hand-cuffs when Used - Hand cuffs shall be used only if they are necessary.

The following instructions regulate their use - Instructions regarding the use of Handcuffs:

1) When a prisoner has to be taken in custody from a Court to a Jail or vice-versa, the Magistrate or the Jail Officer should give a direction in writing to the Commander of the escort as to whether the prisoner should or should not be hand-cuffed and the escort Commander shall obey that direction, provided that if the direction is not to hand-cuff the prisoner and at any time thereafter the escort Commander has reason to consider it necessary to hand-cuff the prisoner, he should do so, not withstanding such directions.

(2) (i) and (ii) x x x x

(3) The escort Commander must, without fail, ask for and obtain orders in writing from the Magistrate or the Jail Officer in regard to hand-cuffing of the prisoners committed to his custody before taking over the prisoner from the Court or Jail. Any neglect of these instructions must be dealt with most severely.

(4 to 6) x x x x x

A List of prisoners who must be hand - cuffed :-

1. Every person arrested by a police Officer or remanded to custody by a Magistrate on a charge of having committed one of the following offences shall be hand-cuffed unless by reasons of age, sex or infirmity he can easily and securely be kept in custody without hand-cuff :-

a) Offences relating to coin, sections 231 to 254 Indian Penal Code.
b) Murder and culpable homicide, Sections 302 to 304 Indian Penal Code.
c) Attempt to commit murder and culpable homicide, Sections 307 and 308 Indian Penal Code.
d) Being a Thug, Section 311 Indian Penal Code.
e) Robbery, Section 311 Indian Penal code.
f) Dacoity, Section 395 Indian Penal Code and all sections relating to decoity.
g) Any other offences against property, if the offender has been previously convicted of any offence against property or has been ordered to find security for good behaviour.
h) Persons accused of an offence punishable under Section 148 Indian Penal Code".

(5.) In the present case, it is not disputed that provisions of sub-clause (3) Regulation 465 of the M.P. Police Regulations were not complied with inasmuch as no orders were obtained from the concerned Magistrate/Jail Officer by the concerned police personnel with regard to handcuffing of the prisoners while taking them to and from Court or Jail. Handcuffing of the under trial prisoners has been sought to be justified on the ground that (i) the accused persons attempted to resist the arrest and made attempts to run away; and (ii) a large number of supporters of the Sangath had reached Alirajpur on knowing about the arrest of accused persons and there was strong possibility that they would have attempted to free the accused persons from the police custody. It has also been stated that two cases involving offences under Section 307 Indian Penal Code had been registered against the accused persons.

(6.) In Prem Shankar Shukla v. Delhi Administration (1980(3) SCR 855 : AIR 1980 SC 1535) (supra) this Court has considered the matter of handcuffing of prisoners under trial as well as convicts in the context of the provisions contained in Punjab Police Rules, 1934, Krishna Iyer J., speaking for himself and Chinnappa Reddy J., has observed that "handcuffing is prima facie inhuman and, therefore, unreasonable, is over-harsh and at the first flush, arbitrary".

(7.) Examining the justification offered by the State for this mode of restraint, the learned Judge has said:

"Surely, the competing claims of securing the prisoners from fleeing and protecting his personality from barbarity have to be harmonised. To prevent the escape of an under-trial is in public interest, reasonable, just and cannot, by itself, be castigated. But to bind a man hand-and-foot, fetter his limbs with hoops of steel, shuffle him along in the streets and stand him for hours in the Courts is to torture him, defile his dignity, vulgarise society and foul the soul of our constitutional culture".

"Insurance against escape does not compulsorily require hand-cuffing. There are other measures whereby an escort can keep safe custody of a detenu without the indignity and cruelty implicit in hand-cuffs or other iron contraptions. Indeed, binding together either the

hands or the feet or both has not merely a preventive impact, but also a punitive hurtfulness. Manacles are mayhem on the human person and inflict humiliation on the bearer. The Encyclopedia Britannica, states " handcuffs and fetters are instruments of securing the hands or feet of prisoners under arrest or as a means of punishment". The three components of irons forced on the human person must be distinctly understood. Firstly to handcuff is to hoop harshly. Further, to handcuff is to punish humiliatingly and to vulgarise the viewers also. Iron straps are insult and pain writ large, animalising victim and keeper. Since there are other ways of ensuring security, it can be laid down as a rule that handcuffs or other fetters shall not be forced on the person of an under trial prisoner ordinarily".

"The only circumstances which validates incapacitation by irons - an extreme measure - is that otherwise there is no other reasonable way of preventing his escape, in the given circumstances. Securing the prisoner being a necessity of judicial trial, the State must take steps in this behalf. But even here, the policeman's easy assumption or any scary apprehension or subjective satisfaction of likely escape if fetters are not fitted on the prisoners is not enough. The heavy deprivation of personal liberty must be justifiable as reasonable restriction in the circumstances. Ignominy, "inhumanity and affliction, implicit in chains and shackles are permissible, as not unreasonable, only if every other less cruel means are fraught with risks beyond availability. So it is that to be consistent with Arts. 14 and 19 handcuffs must be the last refuge, not the routine regimen. If a few more guards will suffice, then no handcuffs. If a close watch by armed policemen will do, then no handcuffs. If alternative measures may be provided, then no iron bondage. This is the legal norm. .

"The conclusion flowing from these considerations is that there must first be well-grounded basis for drawing a strong inference that the prisoner is likely to jump jail or break out of custody or play the vanishing trick. The belief in this behalf must be based on antecedents which must be recorded and proneness to violence must be authentic. Vague surmises or general averments that the undertrial is a crook or desperado, rowdy or maniac, cannot suffice. In short save in rare cases or concrete proof readily available of the dangerousness of the prisoner in transit - the onus of proof of which is on him who puts the person under irons - the police escort will be committing personal assault or may hem if he handcuffs or fetters his charge".

"Merely because the offence is serious, the inference of escape proneness or desperate character does not follow. Many other conditions mentioned in the Police Manual are totally incongruous with what we have stated above and must fall as unlawful. Tangible testimony, documentary or other, or desperate behaviour, geared to making good his escape, alone will be a valid ground for handcuffing and fettering, and even this may be avoided by increasing the strength of the escorts or taking the prisoners in well protected vans".

"The nature of the accusation is not the criterion. The clear and present danger of escape breaking out of the police control is the determinent. And for this there must be clear material, not glib assumption, record of reasons and judicial oversight and summary hearing and direction by the Court where the victim is produced".

(8.) In Sunil Gupta v. State of Madhya Pradesh (1990 (3) SCC 119) (supra) this Court, while dealing with Regulation 465 of the M.P. Police Regulations, has observed.

"This Court on several occasions has made weightly pronouncements decrying and several condemning the conduct of the escort police in handcuffing the prisoners without any justification. In spite of it, it is very unfortunate that the Courts have to repeat and re-repeat its disapproval of unjustifiable handcuffing". (p.128)

"One should not lose sight of the fact that when a person is remanded by a judicial order by a competent Court, that person comes within the judicial custody of the Court. Therefore, the taking of a person from a prison to the Court or back from Court to the prison by the escort party is only under the judicial orders of the Court. Therefore, even if extreme circumstances necessitate the escort party to bind the prisoners in fetters, the escort party should record the reasons for doing so in writing and intimate the Court so that the Court considering the circumstances either approve or disapprove the action of the escort party and issue necessary directions.

(9.) That was a case where social activists demanding the appointment of regular teaches in schools located in tribal hamlets had been arrested and were taken to the Court by handcuffing them and this Court expressed its strong disapproval of the said action.

(10.) The position in law with regard to handcuffing of prisoners - convicted or undertrial - has been reiterated in the recent decision in Citizens For Democracy v. State of Assam (1995) 3 SCC 743, wherein it has been held :

"We declare, direct and lay down as a rule that handcuffs or other fetters shall not be forced on a prisoner - convicted or undertrial - while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to Court and back. The police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport from one jail to another or from jail to Court and back.

Where the police or the jail authorities have well-grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being so dangerous/desperate and the finding that no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner.

In all the cases where a person arrested by police is produced before the Magistrate and remanded to judicial or non judicial - is given by the Magistrate the person concerned shall not be handcuffed unless special orders in that respect are obtained from the Magistrate at the time of the grant of the remand.

When the police arrest a person in execution of a warrant of arrest obtained from a Magistrate, the person so arrested shall not be handcuffed unless the police has also obtained orders from the Magistrate for the handcuffing of the person to be so arrested.

Where a person is arrested by the police without warrant the police officer concerned may if he is satisfied, on the basis of the guidelines given by us in para above, that it is necessary to handcuff such a person, he may do so till the time he is taken to the police

station and thereafter his production before the Magistrate, further use of fetters thereafter can only be under the orders of the Magistrate as already indicated by us.

We direct all ranks of police and the prison authorities to meticulously obey the above-mentioned directions. Any violation of any of the directions issued by us by any rank of police in the country or member of the jail establishment shall be summarily punishable under the Contempt of Courts Act apart from other penal consequences under law".

(11.) The justification for handcuffing that has been offered about the under trial prisoners trying to escape from custody does not stand scrutiny because the accused were social activists who were agitating for the protection of the rights of the tribals and at the time of argument on the bail application of the accused persons, bail was not opposed by the prosecution on the ground of seriousness of the charges against them or the likelihood of their absconding. It is not disputed that no orders were obtained from the concerned Magistrate with regard to handcuffing of the prisoners before taking them to Court from jail and to the jail from the Court. The handcuffing of the members of the Sangath who were under trial prisoners was, therefore, not justified and was in clear dis-regard of the law laid down by this Court in the decisions referred to above. The question that arises is whether the said actions of the contemners in handcuffing the prisoners constitute contempt of this Court. We will first take up the case of the five police personnel who are contemners Nos. 1 to 5.

(12.) Contemner No.1, M.P. Dwivedi, was Superintendent of Police of District Jhabwa at the relevant time. He was not personally present in Aliraipur when the incidents of handcuffing had taken place. He is, therefore, not directly involved in the said incidents. In the order dated 4/06/1993, it is stated that notice was being issued to him for the reason that, being over all in charge of the police administration in the distinct, he was responsible to ensure strict compliance with the directions given by this Court in the matter of handcuffing of under trial prisoners by police personnel under his charge and instead of taking action against the police personnel responsible for such violation, he appears to have approved the said action. In the affidavit filed by the contemner in response to the said notice, he has stated that there was no complaint about handcuffing from any member of the public or from the affected persons and he had not come across even any press report about handcuffing and that only on 26/02/1993 Dharmendra Choudhary, SDO (Police) had informed him about the handcuffings and thereafter he visited Sondwa Police Station on 5/03/1993 and inquired into the incidents and the police case diaries in respect of the incidents of handcuffings which showed that the accused persons had attempted to resist the arrest and made attempts to run away and a large number of supporters of the Sangath had reached Aliraipur on knowing the arrest of the accused persons and there was a strong possibility that they would have attempted to free the accused persons from the police custody. The contemner has further stated that he called a meeting of all gazetted police officer and station officers on March 23, 1993 and gave strict directions to the effect that handcuffing was to be resorted to only in rare and exceptional situations and they should try to get written orders from concerned Magistrate in accordance with the provisions of M. P. Police Regulations. He has further stated that he was not aware of the decision of this Court in Prem Shankar Shukla v. Delhi Administration (AIR 1980, SC 1535) (supra), but even without knowledge of the said decision and on the basis of M.P. Police Regulations, he had indicated to his subordinate officers that handcuffing was not to be resorted to except in exceptional cases and that this happens to be in accordance with the exceptions given by the judgment of this Court in that case.

(13.) Contemner No.2, Dharmendra Choudhary, was posted as SDO (Police) at Aliraipur at the relevant time. In the affidavit filed on behalf of the petitioners in writ petition No.239 of 1993 it has been claimed that he was personally present at the time of handcuffing of the undertrial prisoners on 3/02/1993. In his affidavit filed in response to the notice issued to him, the contemner has denied this allegation and has stated that his office at Alirajpur is situate far away from Police Station Alirajpur and on 3/02/1993 he was busy with supervision of investigation in heinous offences (Crime No.6/93 of P.S. Sorwa and Crime No.8/93 of P.S. Chandpur both under Section 307 Indian Penal Code). He has also stated that he has no precise knowledge of law laid down by this Court in the matter of handcuffing and that the subordinate officers involved in the incidents had given him to understand that they had handcuffed the undertrials prisoners due to prevailing circumstances at the relevant time as recorded in the police case diary and also on the basis of Paragraph 465 of M.P. Police Regulations. According to him, the one lapse that appears on their part was that the respective officials did not take the written orders from the learned judicial Magistrate and they acted as per guidelines mentioned in Police Regulations Paragraph 465 of M.P. Police Regulations under title 'the list of prisoners who must be handcuffed.

(14.) Contemner No. 3, S.S. Ansari, was posted as Town Inspector at Police Station Alirajpur at the relevant time. He was admittedly present at the time the incidents of handcuffing took place during the period from 2/02/1993 to Febr 25/02/1993. In his affidavit filed in response to the notice, the contemner has stated that he himself did not participate in the said incidents and that it was the Investigating Officer who was responsible for the handcuffing of the accused persons. He has sought to justify the handcuffing on the basis of the entries in the police case diary by the Investigating Officer that the accused persons were likely to escape.

(15.) Contemner No.4, S.D. Bhargava, was posted as Sub-Inspector of Police/S.O. at Police Station Sondwa, at the relevant time. In his affidavit filed in response to the notice, the contemner has not disputed the incidents of handcuffing during the period from 2/02/1993 to Febr 25/02/1993. He has sought to justify the said action on the basis of Paragraph 465 of M.P. Police Regulations. He has also stated that the said incidents of handcuffings took place due to error of judgment and due to ignorance of law laid by this Court in Prem Shankar Shukla v. Delhi Administration (AIR 1980 SC 1535) (supra).

(16.) Contemner No.5 Natvar Singh, was posted as Head Constable at Police Station Sondwa at the relevant time. He has been placed under suspension in connection with the incidents of handcuffings which took place on 8/02/1993. In his affidavit filed in response to the notice, the contemner has stated that he had no knowledge of law laid down by this Court with regard to use of handcuffs prior to the institution of these proceedings in this Court and no departmental circular had been issued containing the necessary directions in that regard.

(17.) As laid down by this Court "Contempt of Court is disobedience to the Court, by acting in opposition to the authority. Justice and dignity thereof. It signifies in wilful disregard or disobedience of the Court's order; it also signifies such conduct as tends to bring the authority of the Court and the administration of law into disrepute. Wilful disregard or disobedience of the Court's order presupposes an awareness of the order that has been disregarded or disobeyed. In view of the affidavits filed by contemners Nos. 1 to 5 stating that they were not aware of law laid down by this Court in Prem Shankar Shukla

v. Delhi Administration (AIR 1980 SC 1535) (supra) and Sunil Gupta v. State of Madhya Pradesh (1990 (3) SCC 119) (supra), we refrain from taking action to punish them for contempt of this Court.

(18.) The handcuffing of the undertrial prisoners cannot, however, be justified even under the provisions of Regulation 465 of the M.P. Police Regulations inasmuch as the said regulation requires an express authorisation from the Magistrate/Jail Officer for the purpose of taking him to Court from jail and from jail to Court. Admittedly, no such authorisation was obtained in this case. As regards the role and responsibility of contemners Nos. 1 to 5 in these actions involving handcuffing of under trial prisoners, it may be stated that contemners Nos. 3 to 5 were directly involved in the said incidents of handcuffing because the handcuffing was done under their directions or in their presence. Contemners Nos. 1 and 2, even though not directly involved in the said incidents since they were not present, must be held responsible for having not taken adequate steps to prevent such actions and even after the said actions came to their knowledge, they condoned the same by not taking stern action against persons found responsible for this illegality. We, therefore, record our disapproval of the conduct of all the five contemners Nos. 1 to 5 in this regard and direct that a note regarding the disapproval of their conduct by this Court be placed in the personal file of all of them.

(19.) We are also constrained to say that though nearly 15 years have elapsed since this Court gave its decision in Prem Shankar Shukla (AIR 1980 SC 1535) (supra) no steps have been taken by the concerned authorities in the State of Madhya Pradesh to amend the M.P. Police Regulations so as to bring them in accord with the law laid down by this Court in that case. Nor has any circular been issued laying down the guidelines in the matter of handcuffing of prisoners in the light of the decision of this Court in Prem Shankar Shukla (supra). The Chief Secretary to the Government of Madhya Pradesh is, therefore, directed to ensure that suitable steps are taken to amend the M.P. Police Regulations in the light of the law laid down by this Court in Prem Shankar Shukla (AIR 1980 SC 1535) (supra) and proper guidelines are issued for the guidance of the police personnel in this regard. The Law Department and the Police Department of the Government of Madhya Pradesh shall take steps to ensure that the law laid down by this Court in the matter of protection of human rights of citizens as against actions by the police is brought to the notice of all Superintendents of Police in the District soon after the decision is given, by issuing necessary circulars in that regard and the responsibility is placed on the Superintendent of Police to ensure compliance with the said circulars by the subordinate police personnel under his charge.

(20.) Contemner No.6, Vinod Kumar, was posted as SDM at Alirajpur at the relevant time. It has been alleged on behalf of the petitioners in the Writ Petition that the incident of handcuffing on 18/02/1993 took place in his presence. In his affidavit filed in response to the notice, the contemner has, however, stated that he was on earned leave from December 31, 199 2/02/1993 and on 18/11/1992 he was on medical leave. In view of the said statement, no responsibility attaches to the contemner in respect of the incident of handcuffing on 18/11/1992 and notice issued against him is discharged.

(21.) Contemner No.7, B. K. Nigam, was posted as Judicial Magistrate First Class, Alirajpur, at the relevant time. In the order dated 4/06/1993 it is stated that the under trial prisoners were produced before him but he did take any action against handcuffing of those prisoners by the police. In the said order, reference has also been made to the

rejoinder affidavit of Dr. Amita Baviskar filed on 1/06/1993 wherein it is stated that the contemner was apprised about the decisions of this Court and he is reported to have stated that".... the Supreme Court decision has no application there and that the police has the right to transport the accused as they want, with or without handcuffs". The contemner has filed two affidavits in response to the notice. In the affidavit dated 31/07/1993, he has denied having made the statement as alleged by Dr. Amita Baviskar in her affidavit dated 1/06/1993 regarding handcuffing of the undertrial prisoners and has said that on 8/02/1993, two complaints were made before him by accused Ravi and Rahul Narsimha Ram about the handcuffing of prisoners and that on these applications he had passed orders on the same day for in charge of Police Station Alirajpur to submit explanation and that besides these two complaints, no complaint whatsoever, orally or in writing, was made to him regarding handcuffing of the under trial prisoners. In support of his aforesaid submission, the contemner has also filed the affidavits of Shri Betulla Khan and Shri Girdhari Lal Vani, Advocates who were representing the accused persons before him in those cases and who had appeared in his Court on 8/02/1993. In these affidavits the deponents have stated that no decision of this was cited before the contemner on that date regarding handcuffing of undertrial prisoners and that the contemner did not say that the decision of this Court has no application and the police has the right to transport the accused as they want, with or without handcuffs. In the second affidavit dated 18/09/1993 the contemner has tendered his unconditional and unqualified apology for the lapse on his part that when under trial prisoners in Crime No.11/93, 12/93, 17/93 of Police Station Sondwa, who were agitating against the construction of Sardar Sarovar, were produced in handcuffs in his Court, immediate action was not taken by him 'for the removal of their handcuffs and against the escort party for bringing them in Court or taking them away from Court in handcuffs. The contemner has submitted that he is a young judicial officer and that the lapse was not intentional.

(22.) We have carefully considered the two affidavits of the contemner as well as the affidavits of Shri Betulla Khan and Shri Girdhari Lal Vani, Advocates We would assume that on 8/02/1993 the contemner did not make the statement about the judgments of this Court having no application there and the police having the right to transport the accused as they want, with or without handcuffs. But the contemner, being a judicial officer is expected to be aware of law laid down by this Court in Prem Shankar Shukla v. Delhi Administration (AIR 1980 SC 1535) (supra) and Sunil Gupta v.State of Madhya Pradesh (1990 (3) SCC 119) (supra). Prem Shankar Shukla v. Delhi Administration (supra) was decided in 1980, nearly 13 years earlier. In his affidavit also he does not say that he was not aware of the said decisions. Apart from that, there were provisions in Regulations 465 of the M.P. Police Regulations prescribing the conditions in which undertrial prisoners could be handcuffed and they contain the requirement regarding authorisation for the same by the Magistrate. It appears that the contemner was completely insensitive about the serious violations of the human rights of the undertrial prisoners in the matter of their handcuffing in as much as when the prisoners were produced before him in Court in handcuffs, he did not think it necessary to take any action for the removal of handcuffs or against the escort party for bringing them to the Court in handcuffs and taking them away in the handcuffs without his authorisation. This is a serious lapse on the part of the contemner in the discharge of his duties as a judicial officer who is expected to ensure that the basic human rights of the citizens are not violated. Keeping in view that the contemner is a young judicial officer, we refrain from imposing punishment on him. We, however, record our strong disapproval of his conduct and direct that a note of this disapproval by this Court shall be kept in the personal file of the contemner. We also feel that judicial officers should

be made aware from time to time of the law laid down by this Court and the High Court, more especially in connection with protection of basic human rights of the people and, for that purpose, short refresher courses may be conducted at regular intervals so that judicial officers are made aware about the developments in the law in the field.

(23.) In the result, the contempt notices issued against the contemners are discharged subject to the directions regarding disapproval of the conduct of contemners Nos. 1 to 5 and 7 and directions regarding placing the note of the said disapproval in the personal files of all of them. The contempt proceedings will stand disposed of accordingly. A copy of this order be sent to the Chief Secretary to the Government of Madhya Pradesh and the Registrar, Madhya Pradesh High Court.

Order accordingly.

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Cross Citation :2001 CRI. L. J. 800

RAJASTHAN HIGH COURT

Hon'ble Judge(s) : B. S. CHAUHAN, J.

Raman Lal…Vs…State of Rajasthan"
Cri. Misc. Appln. Nos. 164 and 108 of 1999, D/- 5 -4 -2000.

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A] Cri. P.C. Sec. 197 – Sanction for prosecution – Accused are Additional High Court Judge, Suprintendant of Police Sanjeev Bhatt and others – The accused hatched conspiracy to falsely implicate a shop owner in a case under N.D.P.S. Act and when shop owner submitted to their demands he was discharged – Complaint u.s. 120-B, 195, 196, 342, 347, 357, 368, 388, 458, 482, I.P.c. and Sec. 17, 58 (1), (2) of NDPS Act – Held – there is no connection between official duty and offence – No sanction is required for prosecution – Registration of F.I.R. and investigation legal and proper.

B] Cri. P.C. Sec. 156 – Investigation against accused Addl. High Court Judge – Whether prior consultation with Chief Justice is necessary prior filling of F.I.R. against a High Court Judge as has been laid down by Supreme Court in K. Veerswami's case (1991) (3) SCC 655) – Held – In K. Veerswami's case Supreme Court observed that the Judges are liable to be dealt with just the same as any other person in respect of criminal offence and only in offence regarding corruption the sanction for criminal prosecution is required – the directions issued by Hon'ble Supreme Court are not applicable in instant case.

C] The applicant – Ram Lal Addl. High Court Judge hatched criminal conspiracy – The Bar Association submitted a representation to Hon'ble Chief Justice of India on 11-09-1997 requesting to not to confirm Raman Lal as Judge of the High Court – Later on he was transferred to Principal Judge of city Civil and Sessions Court at Ahmedabad – S.P. (C.I.D.) Jaipur sent a questionnaire through the registrar, Gujrat High Court to accused Addl. High Court Judge – Chief Justice granted permission to I.O. to interrogate – Later on I.O. sent letter to applicant to remain present before Chief Judicial Magistrate at the time of filing the charge-sheet – Applicant filed petition before High Court challenging it – Petition of applicant was rejected by High Court and Supreme Court in limine – No relief is required to be granted to petitioner in view of the facts of the case.

D] Conspiracy – I.P.C. Sec. 120 (B) – Apex court made it clear that an inference of conspiracy has to be drawn on the basis of circumstantial evidence only because it becomes difficult to get direct evidence on such issue – The offence can only be proved largely from the inference drawn from acts or illegal ommission committed by them in furtherance of a common design – Once such a conspiracy is proved, act of one conspirator becomes the act of the others – A Co-conspirator who joins subsequently and commits overt acts in furtherance of the conspiracy must also be held liable – Proceeding against accused cannot be quashed.

E] Jurisdiction – Continuing offence – Held – Where complainants allegations are of stinking magnitude and the authority which ought to have redressed it have closed its eyes and not even trid to find out the real offender and the clues for illegal arrest and harassment are not enquired then he can not be let at the mercy of such law enforcing agencies who adopted an entirely indifferent attitude – Legal maxim Necessiatas sub lege Non contineture Quia Qua Quad Alias Non Est Lictum Necessitas facit Lictum, Means necessity is not restrained by laws – Since what otherwise is not lawful necessity makes it lawful – Proceeding proper cannot be quashed.

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Judgement

ORDER :- The cases, deal with here, have chequered history as there have been several rounds of litigation before the Hon'ble Gujarat High Court and the Hon'ble Apex Court in different forms at different stages and also before this Court in bail matters.

2. The instant criminal miscellaneous applications have been filed for quashing the complaint (C.R.No. 403/1996) registered at the Police Station, Kotwali, Pali, as also the further investigation pertaining to offences under Sections 120-B, 195, 196, 342, 347, 357, 368, 388, 458, 482, I.P.C. and Sections 17, 58(1) (2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the "N. D. P. S. Act").

3. The facts and circumstances giving rise to these cases are that on 17-10-96, one Mr. Sumer Singh Rajpurohit, a Practising Advocate, filed a complaint in the Court of the Chief Judicial Magistrate, Pali, alleging that shop No. 6 in Vardhaman Market, Pali, owned by Smt. Amri Bai w/o Shri Jayant Raj had been taken on rent by one Mohan Lal in partnership of Narsingh Rajpurohit, brother of the complainant, for commercial purpose in the name and style of "Deepak Textiles" and part of the same was also used by the complainant as Office for his legal practice. The marriage of one Muli Devi, daughter of Rajmal, brother of accused-Phootar Mal and uncle of applicant-Raman Lal, had been arranged with Mr. Jayant Raj but she died before marriage could take place. Mr. Jayant Raj subsequently got married with landlady Smt. Amri Bai. The family of applicant-Raman Lal maintained very good and cordial relationship with the family of Mr. Jayant Raj and started treating Amri Bai in place of Muli Devi. Applicant-Raman Lal attended the marriage of her son on 27-4-96 along with other family members. Accused No. 1 Phootar Mal, uncle of applicant-Raman Lal, had been Power of Attorney-holder in respect of the said shop and a civil suit was pending in which the plaint had been signed and verified by him. Phootar Mal realised that so long complainant was with the tenants, it would be difficult to get their eviction from the shop. Accused persons conspired to get the said shop vacated and in furtherance thereof, they filed C. R. No. 216/1996 dated 30-4-96 under the provisions of Section 17 of the N.D.P.S. Act, alleging that complainant-Sumer Singh stayed in Room No. 305 in Hotel Lajwanti, Palanpur on 29-4-96; signed the hotel register and his address was shown as resident of Vardhaman Market, Pali, and opium was recovered from the said room after receiving the phone call from an informer from Pali. However, before the recovery could be made, complainant had left the hotel leaving behind the opium. In the night intervening 2/3 May, 1996, the other accused, viz. Mr. I. B. Vyas and Mr. Yagyanik, along with other police officials, came to the complainant's house at about midnight and arrested him. He was handcuffed, manhandled, gagged, and taken away forcibly in a jeep bearing fake registration number. Mr. Goma Ram, P.S.I., Kotwali,

Police Station, Pali, who was on patrolling duty, intercepted the vehicle of Gujarat Police heading towards Palanpur and brought them to the Police Station, Kotwali, Pali, wherein Gujarat Police Officials disclosed their identity and informed that the complainant was wanted in a case under the N.D.P.S. Act. After giving arrest memo in connection with a case under the N.D.P.S. Act, they took away the complainant. By that time, family members and fellow Advocates also reached the Kotwali and some of them also went to Palanpur along with them. In Palanpur, he was produced before Mr. Sanjeev R. Bhatt, the then Distt. Superintendent of Police, Palanpur, co-accused, who enquired from the complainant about the said shop and asked him to vacate the same immediately otherwise he would be involved in a case of recovery of four kilograms of opium. The involvement of the applicant-Ram Lal, who at the relevant time, was the Additional Judge of the Gujarat High Court and is, now, Principal Judge of City Civil and Sessions Court at Ahmedabad, was also shown alleging that being interested in getting the shop vacated, he had hatched the conspiracy and was having telephonic talks with co-accused Phootar Mal and Mr. Sanjeev R. Bhatt and some of his phone-calls had also been taped. One Narain Singh

Kharabara played a role of mediator and after taking all care and precautions, an agreement was signed between co-accused Phootar Mal and Mohan Lal-the original tenant-partner of the complainant's brother for vacating the shop and an understanding was given that on releasing the said shop, complainant would be released and the case against him under the N.D.P.S. Act would be dropped. Raghunath Singh, real brother of the complainant also talked to applicant-Raman Lal and the latter assured him that the complainant would be released and a report under Section 169, Cr. P.C. would be submitted after vacating the said shop. For reaching the agreement in writing, complainant's real brother Raghunath Singh purchased the stamp paper for Rs. 5/- and co-accused Phootar Mal got the agreement typed and it was got signed by Mohan Lal through Raghunath Singh on 5-5-96. The report under Section 169, Cr. P.C. was submitted on 6-5-96 itself, the same was accepted by the learned Special Judge, Palanpur on 14-5-1996 and the complainant was released. Keys of the said shop were handed over to co-accused Phootar Mal on 15-5-96. In sum and substance, according to the complainant, a conspiracy was hatched by the accused persons to get the shop vacated and in order to execute the said plan, the complainant was falsely enropped in a case under the N.D.P.S. Act, arrested, humiliated and on getting the shop vacated, report under Section 169, Cr. P.C. was filed and he was discharged.

4. Along with the complaint, a large number of documents and two audio-cassettes were also submitted. The Chief Judicial Magistrate, Pali passed order dated 16-10-1996 under Section 156 (3), Cr. P.C. for registration of a case under Police Station, Kotwali, with direction that investigation be made by the officer not below the rank of Director General of Police. In spite of said direction, the case was not registered as a revision had been filed by the State of Rajasthan on the ground that the Magistrate cannot pass an order to investigate an offence whatsoever against a Judge of the High Court unless the approval is accorded by the Hon'ble Chief Justice of India. The said revision was subsequently dismissed by the learned Sessions Judge, Pali, vide order dated 15-11-96 with the modification that investigation may be carried out by an officer below the rank of Director General of Police. The case was registered and investigation ensued.

5. District Bar Association, Pali, by way of Public Interest Litigation, filed Writ Petition No. 448 of 1997 before the Hon'ble Supreme Court seeking action against applicant-Raman Lal, pointing out his involvement. However, the said petition was dismissed as withdrawn vide order dated 11-9-1997 with the liberty to approach the Hon'ble Chief Justice of India on administrative side. The Bar Association submitted a representation to the Hon'ble Chief Justice of India on the same day, i.e. on 11-9-1997 requesting His Lordship not to confirm Mr. Raman Lal as Judge of the High Court. State of Gujarat and co-accused I. B. Vyas, Police Inspector, filed Miscellaneous Application Nos. 1302/1997 and 1309/1997 before the Gujarat High Court for quashing the order passed by the Chief Judicial Magistrate, Pali, for investigation. The said applications were rejected by the learned single Judge vide common judgment dated 4-12-1997.

6. The Superintendent of Police (C.I.D.), Jaipur, sent a questionnaire through the Registrar, Gujarat High Court, to applicant-Raman Lal for filling it up and as the applicant did not fill it up and returned the same, rather asked for extension of time, he was informed through the Registrar of the Gujarat High Court to remain present on 30-1-98 at Pali. Applicant was further informed by the Registrar that the Hon'ble Chief Justice of Gujarat High Court had granted permission to the Investigating Officer to interrogate the said applicant at the place and time convenient to the latter. The Investigating Officer further sent a letter to the said applicant through the Registrar of Gujarat High Court to remain present before the Chief Judicial Magistrate, Pali, at the time of filing the charge-sheet on 15-1-98. Instead of appearing before the Chief Judicial Magistrate, Pali, applicant-

Raman Lal and co-accused Sanjeev R. Bhatt filed Special Criminal Applications Nos. 6 and 24 of 1998 before the Gujarat High Court challenging the action of the Authorities/Courts concerned on various grounds including the competence of the Criminal Court at Pali to take cognizance, and the Hon'ble Gujarat High Court, while entertaining their applications, granted interim relief. However, the said applications were rejected by the learned single Judge, vide common judgment and order dated 9-7-98, on the ground that Gujarat High Court had no territorial jurisdiction to entertain the same. Being aggrieved and dissatisfied, applicants therein preferred L.P.A. Nos. 906 and 930/1998 against the said judgment and order. The appeals were also dismissed vide common judgment and order dated 5-10-98. The said applicants filed Special Leave Petition (Cri.) Nos. 4309 and 4375 of 1998 being aggrieved and dissatisfied of the Division Bench judgment of Gujarat High Court dated 5-10-98 and both criminal petitions stood rejected by the Hon'ble Supreme Court vide order dated 15-1-99 in limine.

7. Applicant Raman Lal filed Special Criminal Application against the judgment and order of the learned single Judge dated 4-12-1997, contending that he had not been a party in the said case, even though certain observations/remarks had been made against him, which would adversely affect him. The Division Bench passed an order to the extent that observations made against the said applicant in the judgment dated 4-12-97 should not be used against him and the case is pending before the Gujarat High Court for final decision.

8. The Rajasthan Police filed a challan for various offences including the offence under Sections 17 and 58 (1) and (2) of the N.D.P.S. Act and provisions of the Indian Penal Code against co-accused Phootar Mal before the Special Judge (N.D.P.S.), Jodhpur and the said case stood transferred to the Court of the Special Judge, (N.D.P.S.), Delhi, by virtue of the order dated 3-11-98 passed by the Hon'ble Supreme Court in T.P. (Cri.) No. 38/1998. The investigation is being carried out further in pursuance of the order passed under Section 173 (8), Cr. P.C. Applicant-Raman Lal had also filed T. P. (Cri.) No. 98/1998, along with co-accused Sanjeev R. Bhatt, before the Hon'ble Supreme Court seeking transfer of the case against them outside Rajasthan. However, the Hon'ble Supreme Court passed an order to the effect that as no charge-sheet had been submitted against them, no order could be passed. However, in case charge-sheet is filed before the Court, applicants may renew their prayer for getting the same tried along with Sessions Case No. 19/1997, i.e. the subject-matter of T. P. (Cri.) No. 38/1998.

9. Applicant-Raman Lal filed Special Criminal Application No. 1079 of 1998 on 20-11-98 before the Gujarat High Court challenging the validity of the Gujarat High Court Rules not providing Letters Patent Appeal in criminal cases being discriminatory as the same was limited in civil cases only, and therein he also prayed for transfer of investigation to the Central Bureau of Investigation. Interim relief was granted in favour of the said applicant on concession made by the counsel for the State of Rajasthan and the same is continuing till today, as the same has been extended till further orders and the matter is still pending for final disposal before the Hon'ble Gujarat High Court. The applicants preferred these applications before this Court as they could not succeed in getting any relief from any other Court.

10. It may also be pertinent to mention here that challenging the pendency of these cases, one co-accused I.B. Vyas filed Special Criminal Application No. 680 of 1999 before the Gujarat High Court for transferring the investigation to C.B.I. and vide order dated 13-8-99, an interim order staying all further proceedings in connection with C. R. 403/96 of Police Station, Kotwali, Pali, has been passed and the interim order is still in force. Co-accused Phootar Mal's bail application was rejected by this Court vide order dated 10-7-97 in connection with the same case, against which the Hon'ble Supreme Court also dismissed

the S.L.P. (Cri.) No. 2601/97, in limine vide order dated 12-9-97 and he is in jail for more than two years.

11. In addition to the aforesaid legal proceedings, there have also been following petitions on behalf of the police officials involved in this case before the Gujarat High Court :-

(a) Cri. Misc. Appeal No. 5050/97, Sanjeev Bhatt v. State of Gujarat and others, disposed of on 19-9-1997.

(b) Cri. Misc. Appl. No. 6256/97, Sanjeev Bhatt v. State of Gujarat and others, disposed of on 12-11-1997.

(c) Cri. Misc. Appl. No. 7034/97, Sanjeev Bhatt v. State of Gujarat and others, disposed of on 8-12-1997.

(d) Spl. Cri. Appl. No. 926/98, Pravin Bhai v. State of Gujarat and others, dismissed as withdrawn on 21-11-1998.

(e) Spl. Cri. Appl. No. 988/98, Rajendra Yagnik v. State of Gujarat and others, dismissed as withdrawn on 21-11-1998.

(f) Spl. Cri. Appl. No. 982/98, Sanjeev Bhatt v. State of Gujarat and others, dismissed as withdrawn on 10-12-1998.

(g) L.P.A. No. 102/98, Sanjeev R. Bhatt v. State of Gujarat and others - Pending.

12. The case is required to be considered in the aforesaid background.

(A) Quashing of proceedings :-

Legal maxim "Quando Aliquid Mandatur, Mandatur Et Omne Per Quod Per Venitur Ad Illud" - means if anything is commanded, every thing by which it can be accomplished is also commanded. But the inherent power of quashing the criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R. or complaint and the extraordinary and inherent powers of Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. The same can be resorted to for correcting some grave errors that might be committed by the subordinate Courts or where the complainant, at the instance of somebody else wants to settle his score with other party and uses deliberately the machinery of the Court for oblique purpose and the party is likely to be subjected to unnecessary harassment for facing criminal proceedings or where the Court is satisfied that in case the proceedings are not quashed, there will be gross miscarriage of justice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can "soft-pedal the course of justice" at a crucial stage of investigation/proceedings. (Vide Emperor v. Khwaja Nazir Ahmed, AIR 1945 PC 18 : (1945 (46) Cri LJ 413); State of Karnataka v. L. Muniswamy, AIR 1977 SC 1489 : (1977 Cri LJ 1125); Kurukshetra University v. State of Haryana, AIR 1977 SC 2229 : (1977 Cri LJ 1900); State of West Bengal v. Swapan Kumar Guha, AIR 1982 SC 949 : (1982 Cri LJ 819); Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre, AIR 1988 SC 709 : (1988 Cri LJ 853); Janta Dal v. H. S. Chowdhary, AIR 1993 SC 892 : (1993 Cri LJ 600); Union of India v. V. N. Chadha, AIR 1993 SC 1082 : (1993 Cri LJ 859); Rupan Deol Bajaj v. Kanwar Pal Singh Gill, (1995) 6 SCC 194 : (1996 Cri LJ 381); Mushtaq Ahmad v. Mohammed Habibur Rahman Faizi, (1996) 7 SCC 440 : (1996 Cri LJ 1877); State of Bihar v. Rajendra Agrawal, (1996) 1 JT (SC) 601 : (1996 Cri LJ 1372); Ashim Kumar Roy v. Bipinbhai Vadilal Mehta, (1998) 1 SCC 133 : (1997 Cri LJ 4651); M/s. Pepsi Foods Ltd. v. Special Judicial Magistrate, (1998) 5 SCC 749 : (1998 Cri LJ 1); M. Krishna v. State of Karnataka, (1999) 1 JT (SC) 540 : (1999 Cri LJ 2583); Rakesh Ranjan Gupta v. State of U. P., (1999) 1 SCC 188 : (1999 Cri LJ 3484); State of Kerala v. O. C. Kuttan, AIR 1999 SC 1044 : (1999 Cri LJ 1623); Arun Shankar Shukla v. State of U.P., (1999) 6 SCC 146 : (1999

Cri LJ 3964); Satvinder Kaur v. State (Govt. of N. C. T. of Delhi), (1999) 8 SCC 728 : (1999 Cri LJ 4566); Kanti Bhadra Shah v. State of West Bengal, (2000) 1 SCC 722 : (2000 Cri LJ 746) and G. Sagar Suri v. State of U. P., (2000) 2 SCC 636 : (2000 Cri LJ 824).

13. In State of U. P. v. O. P. Sharma, (1996) 7 SCC 705 : (1996 Cri LJ 1878), the Hon'ble Supreme Court has indicated that the High Court should be loath to interfere at the threshold to thwart the prosecution exercising its inherent power under Section 482 of the Code or under Article 226 or 227 of the Constitution of India, as the case may be, and allow the law to take its own course. Similar view had been taken in Pratibha Rani v. Suraj Kumar, AIR 1985 SC 628 : (1985 Cri LJ 817) :

14. In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi, AIR 1976 SC 1947 : (1976 Cri LJ 1533), the Hon'ble Supreme Court held as under (Para 5) :-

"(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings."

15. In L. V. Jadhav v. Shankarrao Abasaheb Pawar, AIR 1983 SC 1219 : (1983 Cri LJ 1501), the Apex Court held that Courts' power is limited only to examine that the process of law should not be misused to harass a citizen and for that purpose, the High Court has no authority or jurisdiction to go into the matter or examine the correctness of allegations unless the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion and that there is sufficient ground for proceeding against the accused but the Court, at that stage, cannot go into the truth or falsity of the allegations.

16. Similar view has been reiterated in the Nagpur Steel and Alloys Pvt. Ltd. v. P. Radhakrishna, (1997) SCC (Cri) 1073.

17. In Trisuns Chemical Industry v. Rajesh Agarwal, (1999) 8 SCC 686 : (1999 Cri LJ 4325), the Supreme Court placed reliance upon its earlier judgment in Rajesh Bajaj v. State N.C.T. of Delhi, AIR 1999 SC 1216 : (1999 Cri LJ 1833) and observed that the inherent power of the High Court should be limited to very extreme exceptions.

18. In M/s. Medchel Chemicals and Pharma Pvt. Ltd. v. M/s. Biological E. Ltd., (2000) 2 JT (SC) 426 : (2000 Cri LJ 1487), the Apex Court placed reliance upon its earlier judgments, including Dr. Sharma's Nursing Home v. Delhi Administration, (1998) 8 SCC 745, and held that a criminal prosecution can be short-circuited in rarest of rare cases, and even in a case of breach of contract, not only civil remedy is attracted but a person can be held responsible for criminal prosecution and under no circumstance 'civic profile' can out-way the 'criminal outfit.'

19. In State of Haryana v. Ch. Bhajan Lal, AIR 1992 SC 604 : (1992 Cri LJ 527), the Hon'ble Supreme Court laid down the guidelines for exercising the inherent power as under (Para 108) :-

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
(2) to (4) . . . . . .
(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can even reach a just conclusion that there is sufficient ground for proceeding against the accused.
(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."
20. Similar points have been formulated by the Apex Court in State of West Bengal v. Mohammed Khalid, AIR 1995 SC 785.
21. In the instant case, it has been contended that Clauses 5 and 6 are relevant for our purpose, which speak about absurdity, express legal bar in the Code or the concerned Act either against the institution or continuation of proceedings or providing efficacious redressal. It has been submitted that though after the incident, there had been agitations and various representations had been made to the Constitutional/Statutory Authorities including the National Human Rights, the President of India, Hon'ble the Chief Justice of India, Hon'ble the Chief Justice of High Court of Judicature for Rajasthan, Hon'ble the Chief Minister of Rajasthan, regarding the same incident but no action had ever been taken by any of them. Had there been some truth in the allegations, at least some of those Authorities could have acted and taken note of the grievance of the complaint. On the other hand, Mr. Rathore has submitted that on the representations made to the said Authorities, certain action had been taken and applicant-Raman Lal, the then Judge of the High Court, had been transferred from Gujarat High Court and subsequently was not confirmed as a Judge of the High Court.
22. Be that as it may, this can certainly not be the test to examine the absurdity of the complaint. The Hon'ble Supreme Court has consistently observed that complaint should not be so absurd and improbable that no prudent person can think that on such charges, a person should be prosecuted. Thus, the criteria is not whether on representations the concerned Authorities had acted upon or not, it is the absurdity and improbability of the allegations which require examination. The case of absurdity may be if a complaint is filed by "A" that while he was sitting with his family members outsides his house, his neighbour, who had rivalry with him and at present residing in United States of America, had come by aeroplane, thrown bomb on them and run away. Such an instance can be termed as an absurd and improbable.
23. It has vehemently been submitted on behalf of the applicants that impugned order passed by the Chief Judicial Magistrate, Pali under Section 156 (3), Cr. P. C. is in respect of the complaint under Sections 120-B, 195, 196, 342, 347, 357, 368, 388, 458 and 482, I.P.C. read with Sections 17, 58 (1) and 58 (2) of the N.D.P.S. Act. Section 36-A of the said Act provides that notwithstanding anything contained in the Code of Criminal Procedure, all offences under the N.D.P.S. Act shall be triable only by the Special Court constituted for the area in which the offence has been committed. It is only in a case where Special Court has not been constituted, the Sessions Judge shall have the power of trial. Section 58 (1) (b) and (c) provide for a redressal and protection of an innocent person for prosecuting him under the N.D.P.S. Act vexatiously to wreck vengeance and

make the same punishable if an Authority concerned involves a person falsely in an offence under the provisions of the N.D.P.S. Act. Section 17 deals with punishment for contravention in relation to prepared opium. Sections 42 and 43 of the Act empowers a person above peon in Government Department and Sepoy in the Police Force to search, seize and arrest without warrant or authorisation. Such person shall be forwarded to the Magistrate, Judicial or executive, and the said Magistrate shall have power of detention for a specific period provided under the Act. The Special Court alone has been conferred competence to deal with the accused under Section 167, Cr. P.C. Clause (d) to Section 36-A empowers the Special Court to take cognizance either on police report under Section 173, Cr. P.C. or upon the complaint made by an officer of the Central Government or State Government authorised in this behalf. Therefore, there is a complete bar for lodging a complaint/information by any citizen as under Section 154, Cr. P.C. an F.I.R. can be lodged. Moreso, no Court other than the Special Court has competence to take cognizance.

24. The submission is that as the allegations against applicant-Raman Lal and police officials had been for hatching a conspiracy to falsely involve complainant-Sumer Singh in a case under the N.D.P.S. Act, the provisions of Section 58 are attracted. The complaint itself has been under the provisions of Sections, 17, 58 (1) and (2) of the N.D.P.S. Act read with other provisions of the Indian Penal Code. The complaint spells out an offence of involving the complainant falsely at Palanpur (Gujarat) in a case under the N.D.P.S. Act. Thus, the Court at Pali did not have competence to take cognizance and, therefore, the impugned order dated 16-10-96 is a nullity for want of jurisdiction. In order to fortify the submission, judgment of the Hon'ble Supreme Court in Raj Kumar Karwal v. Union of India, AIR 1991 SC 45 has been relied upon.

25. Reliance has also been placed on the judgment in Supreme Court Legal Aid Committee Representing Under-trial Prisoners v. Union of India, (1994) 6 JT (SC) 544 : (1994 AIR SCW 5115), wherein the Hon'ble Apex Court considered the scope of Section 36 and has categorically held that after commencement of the N.D.P.S. Act, the cases pending before the Court of Sessions in relation whereto it has not taken cognizance, would have to be transferred to the Special Court on its constitution and once the Special Court is constituted under Section 36, that Court alone would have jurisdiction to try the offences under the N.D.P.S. Act, save and except those in relation whereto the Sessions Court had already taken cognizance. Section 36 provides for constitution of Special Courts and Section 36-A (1) (a) provides that notwithstanding anything contained in the Code, all offences under the Act shall be triable only by the Special Court constituted for an area in which the offence has been committed. On a congest reading of these two provisions, it becomes clear beyond any manner of doubt that the Special Court alone will have jurisdiction and all other Courts exercising jurisdiction prior to constitution of the Special Courts will cease to have jurisdiction. It is clear from this provision that a Special Court may take cognizance of an offence without the accused being committed to it for trial. Section 36-C makes the provisions of the Code applicable to proceedings before the Special Court save as otherwise provided in the Act, The non obstante clause in this provision makes it clear that until a Special Court is constituted under Section 36, the Court of Sessions shall try any offence committed on or after the commencement of the amending Act and no other Court, including the Magistrate's Court will have jurisdiction to try the offences under the Act. The Court further observed as under ;-

"So, from the date of its introduction of the Statute Book, the Magistratial Courts ceased to have jurisdiction or power to try any offence committed under the Act even if the punishment prescribed is three years or less since only the Court of Session is empowered to deal with such cases . . . . . In the Act, a limited power of detention has been given to the Magistrate, maximum for a period of the fifteen days in a case of Judicial Magistrate

and of the period of seven days in case of Executive Magistrate. But they have not been given any power of enlarging a detenu on bail or granting remand or extending the period of detention, as for any or all of these purposes the application of the detenu has to be referred to the Special Court. In a case like the instant, where the jurisdiction of the Magistrate's Court has been ousted subject by the statutory provisions, the Magistrarial Court cannot proceed and only the Special Judge is empowered even for ordering of investigation under Section 156, Cr. P.C. and any order passed by the Magistrate is improper."

26. Therefore, it is submitted that it is the Special Court alone which has the competence in all matters, pre-trial as well as during trial. The provisions of Section 36-A ousts the jurisdiction of the Sessions Court and the Court of the Magistrate would cease to have jurisdiction after the constitution of Special Court for the reason that sub-section (1) of Section 36-A, by virtue of non obstante clause, would override the provisions of the Code of Criminal Procedure.

27. Before proceeding further, it may be pertinent to clarify that a criminal trial commences with framing of the charges and prior to it, the proceedings can simply be termed as inquiry/investigation. (Vide Emperor v. Khwaja Nazir Ahmed (1945 (46) Cri LJ 413) (supra); Ratilal Bhanji Mithani v. State of Maharashtra, AIR 1979 SC 94 : (1979 Cri LJ 41); V. C. Shukla v. State, AIR 1980 SC 962 : (1980 Cri LJ 690); Union of India v. Maj. Gen. Madan Lal Yadav, AIR 1996 SC 1340; and Common Cause, a Registered Society v. Union of India, AIR 1997 SC 1539 : (1997 Cri LJ 195).

28. In A. R. Antuley v. Ramdas Srinivas Nayak, (1984) 2 SCC 500 : (1984 Cri LJ 647), the Constitution Bench of the Hon'ble Supreme Court held that the Special Judge alone is competent to take cognizance of the offences specified in the Prevention of Corruption Act. A similar view has been reiterated after following the said judgment in A. R. Antuley's case in State of Kerala v. Navab Rajendran, 1995 AIHC 2762, by the Kerala High Court, wherein it has been observed as under (Para 6) :-

"Legal position being such, a Magistrate has no power to take cognizance of the offences which a Special Judge is specified to try under the Act. This, in turn would lead to the conclusion that a Magistrate cannot pass an order under Section 156 (3) of the Code in respect of any offence which a Special Judge alone is competent to try. Hence the order impugned cannot be sustained."

29. Similar view has been reiterated by the Allahabad High Court in Mangli Prasad v. Addl. Sessions Judge, 1996 Cri LJ 3596, while dealing with a case under Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

30. In Hareendran v. Sarada, (1995) 4 Crimes 399, the Kerala High Court held that a Special Court, constituted under the Special Act, can take cognizance of the offence even in a case where offences under the Penal Code are also included without committal proceedings. The Court observed as under :-

"Section 2 (g) of the Code of Criminal Procedure defines 'inquiry'. 'Inquiry' means every inquiry other than a trial, conducted under the Code by a Magistrate or Court. Merely on the basis of the definition of 'inquiry' under the Cr. P.C., it would not be possible to hold that the inquiry under the Act has to commence in the Court of Magistrate. Section 201 of the Cr. P.C. provides for procedure of Magistrate not competent to take cognizance of the case. If a complaint is made to the Magistrate who is not competent to take cognizance of the offence, he shall, if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect. If the complaint is not in writing, direct the complainant to move to the proper Court."

31. In Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy, AIR 1976 SC 1672 : (1976 Cri LJ 1361), the Hon'ble Supreme Court, after placing reliance upon its earlier

judgment in Nirmaljeet Singh Hoon v. State of West Bengal, AIR 1972 SC 2639, held as under (Para 16 of 1976 Cri LJ 1361) :-

"The distinction between a police investigation ordered under Section 156 (3) and the one directed under Section 202 has already been mentioned between the new Code; but a rider has been clamped by the first proviso to Section 202 (1) that if it appears to the Magistrate that an offence triable exclusively by the Court of Session has been committed, he shall not make any direction for investigation."

32. In Union of India v. B. N. Ananthapadmanabhiah, AIR 1971 SC 1836 : (1971 Cri LJ 1287), the Hon'ble Supreme Court has held as under (Para 10) :-

"A Magistrate does not exercise jurisdiction throughout the length and breadth of India for purposes of Code of Criminal Procedure or of Prevention of Corruption Act. The Code of Criminal Procedure defines the territorial jurisdiction of Magistrates. It will not be in consonance with the jurisdiction and structure of Courts of Magistrates to allowed an order of investigation to be made by a Magistrate of Delhi for investigation of a case in the State of Assam. The reason is that a Magistrate orders investigation in a case which he has power to inquire into or try." (Emphasis added)*

*(Emphasis not found in Certified copy - Ed.)

33. The provisions of the N.D.P.S. Act inhibits the Authority other than the Special Court even to take action under Section 167, Cr. P.C. as the Act empowers the Executive Magistrate to pass order of detention for seven days and the Judicial Magistrate for 14 days. It has no other competence either to enlarge the detenu on bail or discharge him or extend the period of detention or to pass any order under Section 169, Cr. P.C.

34. By virtue of the provisions of Section 4 of the Code, all the offences under the Indian Penal Code shall be investigated, inquired into and tried and otherwise dealt with according to the provisions of the Code. However, sub-section (2) of Section 4 provides that so far as any offence under any other law is concerned, the same shall be investigated, inquired into, tried or otherwise dealt with according to the same provisions, but subject to any enactment for the time-being in force, regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. It means, the offence under any other Act can be dealt with by the procedure prescribed under the Code in case there is no procedure prescribed under the said Act.

35. In Directorate of Enforcement v. Deepak Mahajan, AIR 1994 SC 1775 : (1994 Cri LJ 2269), the Hon'ble Supreme Court has held as under (Para 132) :-

"For over-mentioned reasons, we hold that the operation of Section 4 (2) of the Code is straightway attracted to the area of investigation, inquiry and trial of the offences under the Special Laws. . . . . and consequently, Section 167 of the Code can be made applicable during investigation or inquiry of an offence under the Special Acts, also inasmuch as there is no specific provision contrary to that excluding the operation of Section 167."

36. There are various Acts like the Terrorist and Disruptive Activities (Prevention) Act, 1987; Essential Commodities Act, 1955; Prevention of Corruption Act, 1988; N.D.P.S. Act, and Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989. All these Acts fall under the category of "Special Acts" and some of the provisions contained therein provide for a Special Forum and Special Procedure. In case the special procedure or special forum is not provided, the provisions of the Cr. P.C. would be attracted. A Full Bench of this Court in Bhura Lal v. State of Rajasthan, 1999 Cri LR (Raj) 418 : (1999 Cri LJ 3552), has considered the provisions of the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act and observed as under (Para 16) :

"The S.C./S.T. Act does not provide for procedure to try the offences under the Act. It merely creates a special forum without prescribing a special procedure for dealing with or

trying such cases. There are analogous enactments, in which not only the special forum but special procedure also has been specifically prescribed."

37. In Ram Swaroop v. State of Rajasthan, (1991) 2 Raj LW 79, a Division Bench of this Court has held that even in a case under N.D.P.S. Act, if a report under Section 173 (2), Cr. P.C. is filed before the Magistrate, he can take cognizance of the offence under Section 190 (b), Cr. P.C.

38. In Alimuddin v. State of Rajasthan, 1991 Cri LR (Raj) 57, a Division Bench of this Court has held as under :-

". . . . . two courses are open to the Investigating Officer, i.e. either to file the challan before the Magistrate who may commit the accused to the said Court for trial and it may also file a challan directly in Special Court and it can directly take cognizance. We are unable to agree with the learned counsel appearing for the petitioner that filing of challan before the Magistrate is totally prohibited because if that was the intention of the Legislature then there was no necessity to use the words 'take cognizance of that offence without the accused being committed to it for trial' in Clause (d) of sub-section (1) of Section 36 of the Act."

In Bhura Lal (1999 Cri LJ 3552) (supra), the Full Bench of this Court replied the reference as under (Para 34) :-

"(i) The cases including offences under S.C./S.T. Act are exclusively triable by a Special Court created under Section 14 of the S.C./S.T. Act.

(ii) . . . . . .

(iii) The Magistrate having jurisdiction over the area in which offences under S.C./S.T. Act are alleged to be committed, empowered to deal with the cases under Section 190 of the Code will also have the jurisdiction to deal with cases during the 'inquiry' i.e. pre-trial stages including exercise of power under Section 156(3) of the Code and thereafter he shall transmit all such cases to the Special Court situated within that jurisdiction."

39. In State of West Bengal v. S. N. Basak, AIR 1963 SC 447 : (1963 (1) Cri LJ 341), the Hon'ble Supreme Court dealt with a case wherein the High Court had held that the statutory powers of investigation given to the police under Chapter XIV of Cr. P.C. were not available in respect of offences triable under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 and hence the investigation was without jurisdiction. The Hon'ble Supreme Court reversed the said judgment observing as under (Para 3) :-

"The powers of investigation into cognizable offences are contained in Chapter XIV of the Code of Criminal Procedure. Section 154, which is in that Chapter, deals with information in cognizable offence and Section 156 with investigation into such offences and under these sections, police has statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a Magistrate and this statutory power of police to investigate cannot be interfered with by the exercise of power under Section 439 or under the inherent power of the Court under Section 561-A of Criminal Procedure Code."

40. Thus, in such a situation, the order passed by the Magistrate under Section 156 (3) of the Code becomes irrelevant. Moreso, it is settled proposition of law that "social stability and order is required to be regulated by proceeding against the offender as it is an offence against the society as a whole." (Rashmi Kumar v. Mahesh Kumar Bhada, (1997) 2 SCC 397.

41. In a recent judgment, the Hon'ble Apex Court, in Gangula Ashok v. State of Andhra Pradesh, (2000) 2 SCC 504 : (2000 Cri LJ 819), has categorically held that Section 5, Cr. P.C. does not nullify the effect of the provisions of Section 4 (2) of the Code for the reason that later provides that if another enactment contains any provision which is

contrary to the provisions of the Code, such other provision will apply. But if there is no contrary provision in the other laws, then provisions of the Code will apply to the matters covered by it.

42. Much has been argued as what constitutes "cognizance." Mr. Raval has placed reliance upon the judgment of the Hon'ble Supreme Court in State of Maharashtra v. Dr. Budhi Kota Subbarao, (1993) 3 SCC 339, where a passing remark has been made that in general sense, cognizance means "taking notice of." Thus, the Court is precluded from entertaining the complaint or taking notice of it, if it is in respect of a public servant, who is accused of an offence alleged to have been committed during discharge of his official duty. In fact, "taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of the offence." Every order passed by the Magistrate at pre-trial stage may not amount to cognizance. Orders passed on an application for bail or remand, are, undoubtedly, judicial orders but it cannot be said that it amounts to taking cognizance or the Court cannot pass such an order without taking cognizance. Mainly, the function of the Court begins when a charge is preferred before it and not until then. (Vide Emperor v. Khwaja Nazir Ahmad (1945 (46) Cri LJ 413) (supra).

43. In R. R. Chari v. State of U. P., AIR 1951 SC 207 : (1951 Cri LJ 775), the Apex Court considered the issue : whether Magistrate has no jurisdiction to issue any process in a complaint case without taking cognizance and the Apex Court held that issuing a warrant at such stage of investigation by the police in cognizable offence is quite different and the stage, at which warrant is asked for, may be merely of investigation and issuing warrant does not necessarily mean that the Court had taken cognizance and, therefore, issued warrant. While explaining the meaning of cognizance, the Court further held that the cognizance should have been taken for the purpose of proceeding in a particular way as indicated in the subsequent provisions of the Chapter, i.e. proceeding under Section 200 and thereafter, and when the Magistrate applies his mind, not for the purpose of proceeding under the subsequent Sections of this Chapter but for taking action of some other kind, e.g. ordering inquiry under Section 156 (3), or issuing a search warrant for the purpose of the investigation he cannot be said to have taken cognizance of the offence. This judgment was reconsidered and approved by the Apex Court in Narayandas Bhagwandas Madhavdas v. State of West Bengal, AIR 1959 SC 1118 : (1959 Cri LJ 1368).

44. In Gopal Das Sindhi v. State of Assam, AIR 1961 SC 986 : (1962 (2) Cri LJ 39), the Apex Court held that the provisions of Section 190 provide that any Magistrate, empowered under Section 190, may order such investigation as above-mentioned, does not mandatorily require that a Magistrate, entertaining a complaint, shall, at once, examine the complainant and the witnesses present, if any, upon oath and the substance of the examination is reduced to writing and the complainant and the witnesses are asked to sign it. The word 'may' in Section 190, does not mean 'must.' The reason is that a complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving the cognizable offences is with the police. The test as on what stage cognizance is taken, is that it is the stage when the Court satisfies itself whether there is sufficient ground for proceeding. (Vide Chandra Deo Singh v. Prokash Chandra Bose, AIR 1963 SC 1430 : (1963 (2) Cri LJ 397).

45. In Anwar Hussain v. Ajoy Kumar Mukherjee, AIR 1965 SC 1651 : (1965 (2) Cri LJ 686), the Apex Court considered a case where a suit had been filed against a Magistrate for malicious prosecution and for issuing warrant of arrest by him. The Court held that as the Magistrate has not taken the cognizance of an offence against the plaintiff before

ordering his arrest and the order had been passed in executive capacity and not in discharge of the judicial functions of the Magistrate, he was not entitled for the protection of the provisions of the Judicial Officer's Protection Act, 1850.

46. In Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117 : (1968 Cri LJ 97), the Hon'ble Supreme Court observed that even in a case where final report is submitted by the police, the Magistrate, if agrees with the said report, may accept the same and close the proceedings. But there may be instances where the Magistrate may take a view, on the consideration of final report, that the opinion formed by the police is not based on a full and complete investigation, in which case, the Magistrate will have ample jurisdiction to give directions to the police, under Section 156 (3), to make further investigation. Thus, in case the Magistrate is satisfied, after considering the final report, that there is a scope of further investigation, it will be open to him to decline to accept the final report and direct the police to make further investigation under Section 156(3) and if ultimately the police, after such further investigation, submits a charge-sheet or again submit a final report, depending upon the further investigation made by it, and the Magistrate agrees to the conclusion that the report constituted an offence, he can take cognizance of the offence under Section 190 (1) (b), notwithstanding the contrary opinion of the police expressed in the final report.

47. In Kishun Singh v. State of Bihar, (1993) 2 SCC 16 : (1993 Cri LJ 1700), the Hon'ble Apex Court, placing reliance on its earlier judgment in Jamuna Singh v. Bhadai Sah, AIR 1964 SC 1541, held that when the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report and on being satisfied that the allegations, if proved, would constitute an offence, decides to initiate judicial proceedings against the alleged offender he is said to have taken the cognizance of the offence.

48. In Purushottam Jethanand v. State of Kutch, AIR 1954 SC 700 : (1954 Cri LJ 1751), the Hon'ble Apex Court upheld the conviction even on the basis of the cognizance taken by the Magistrate having no jurisdiction.

49. Moreso, cognizance is taken of the offence and there is nothing like taking cognizance of the offender at that stage. (Vide Hareram Satpathy v. Tikaram Agarwal, AIR 1978 SC 1568 : (1978 Cri LJ 1687); and Anil Saran v. State of Bihar, AIR 1996 SC 204 : (1996 Cri LJ 408).

50. Therefore, it is clear that the order passed by the Magistrate to the police to investigate a case under sub-section (3) of Section 156 of the Code does not amount to taking cognizance of an offence and he can take cognizance if the charge-sheet is filed after investigating the matter subsequently. If it is held that issuing a direction to investigate a case under Section 156 (3) amounts to taking cognizance, then what the proceedings when a Magistrate has to apply his mind on submission of the charge-sheet or final report later on will be called. It is settled proposition of law that order passed under Section 156 (3) of the Code by the Magistrate is an administrative order and does not amount to taking cognizance of an offence under Section 190 of the Code, as held by this Court in Kamal Kishore v. Mohan Lal, (1999) 1 WLC 713. Similar view has been reiterated in Dr. Moizuddin v. State of Bihar, (1991) 3 Crimes 769; Ghanshyam v. State of Rajasthan, (1994) 2 Crimes 37; and Madhu Bala v. Suresh Kumar, 1997 Cri LJ 3757 : (AIR 1997 SC 3104).

51. Be that as it may, the grounds taken in this application had been repeatedly taken by applicant-Raman Lal and co-accused Sanjeev R. Bhatt before the Gujarat High Court and also before the Hon'ble Supreme Court in Special Leave Petition (Cri.) Nos. 4309 and 4375 of 1999 as well as in Transfer Petition (Cri.) No. 98/1998 filed by them jointly before the Hon'ble Apex Court. The question of maintainability of these proceedings in view of the

provisions of Section 36-A of the N.D.P.S. Act, had specifically been raised in the said Special Leave Petitions which stood dismissed in limine vide order dated 15-1-99. This Court cannot lose sight of the fact that the case of Phootar Mal, against whom the charge-sheet had been filed before the Special Judge (N.D.P.S.), Jodhpur, stood transferred to the Special Judge (N.D.P.S.), Delhi by virtue of the order of the Hon'ble Supreme Court in T. P. (Cri.) No. 38/1998 and this issue had also been agitated therein. There is also further order of the Hon'ble Supreme Court that in case the charge-sheet is filed against the applicants, they may renew their applications for transfer of the case and to get the trial along with Phootar Mal in Delhi Court.

52. In fact, the case as a whole can be transferred from one Court to another and when a case is transferred, it is to be transferred in respect of all the accused and as the matter of Phootar Mal has become final and he is facing trial in a competent Court at Delhi, it is not desirable for this Court to quash the proceedings in respect of the remaining persons named in the complaint. Moreso, the Hon'ble Supreme Court did not consider it proper to interfere with the matter when these issues were agitated before it repeatedly. The Hon'ble Supreme Court also rejected the S.L.P. (Cri.) No. 2607/97, against the rejection of his bail application in the same case. Attempts after attempts before various forums for the same relief amounts to forum shopping as termed by the Hon'ble Supreme Court in Rajiv Bhatia v. Govt. of N.C.T. of Delhi, (1999) 8 SCC 525 : (1999 Cri LJ 4292).

53. Realising the need of the hour, the Parliament has enacted the N.D.P.S. Act with a view to eliminate drug addiction and illegal trafficking in drugs by providing stringent punishment for the production, manufacture, possession and sale of drugs and psychotropic substances. Section 58 safeguards the innocent persons from arrest and search by providing punishment for vexatious entry, search, seizure or arrest as also for giving the false information wilfully and maliciously and so causing an arrest or a search being made under the Act.

54. Mr. Raval, learned Addl. Sol. Gen. appearing for the State of Gujarat in Application No. 108/99, has urged strenuously that cognizance could not have been taken by the Chief Judicial Magistrate, Pali, without obtaining prior sanction of the Gujarat Government as required under Section 197, Cr. P.C.; nor the complaint ought to have been filed at such a belated stage as entertaining the complaint at such a belated stage is not permissible under the provisions of Section 42 of the Police Act, 1861, in respect of Mr. Sanjeev R. Bhatt, who is a member of Indian Police Service and the said provisions provide for the limitation of three months from the date of misconduct/offence, and for other remaining police officials, of Section 161 of Bombay Police Act, 1951, (applicable in Gujarat also) which provides for the limitation of six months and for taking cognizance and for prosecution, two years from the date of offence. It has further been submitted by Mr. Raval that complaint, involving the false implication, could be filed only at Palanpur Court and not otherwise, as required under Section 195, Cr. P.C.

55. The scope of cognizance in strict legal sense has already been explained. Moreso, the issue of sanction under Section 197, Cr. P.C. has been considered by the Courts time and again. The mandate of Section 197, Cr. P.C. is only that when a public servant, not removable from his office save by or with sanction of the Government, is accused of an offence alleged to have been committed by him while acting or purported to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the competent authority. The embargo put by that section is in order to save the public servant from harassment in the discharge of official duty and to guard against vexatious proceedings and to secure well considered opinion of the superior authority before a prosecution is launched against him, but this qualified protection is limited to a class of offences. A public servant can only be said to act or purported to act in

the discharge of his official duty if his act is such as to lie within the scope of his official duties. The test may well be whether the public servant, if challenged, can reasonably claim that what he does, he does in virtue of his office. Thus, it is not every offence committed by a public servant that requires sanctioned for prosecution under Section 197 (1), Cr. P.C. If the act, complained of, is directly concerned with his official duty so that, if questioned, it could be claimed to have been done by virtue of the office then sanction would be necessary and that would be so irrespective of whether it was, in fact, a proper discharge of duties because that would really be a matter of defence on the merits.

56. Mr. Raval placed reliance upon a large number of judgments of the Apex Court, particularly Virupaxappa Veerappa Kadampur v. State of Mysore, AIR 1963 SC 849 : (1963 (2) Cri LJ 814); Kamalapati Trivedi v. State of West Bengal, AIR 1979 SC 777 : (1979 Cri LJ 679); State of Bihar v. Kamla Prasad Singh, (1998) 5 SCC 690 :(1998 Cri LJ 3601); S. B. Saha v. M. S. Kochar, AIR 1979 SC 1841 : (1979 Cri LJ 1367) and Ram Kumar v. State of Haryana, AIR 1987 SC 735 : (1987 Cri LJ 703), to show that whatever had been done by the police officials was done in good faith and performing their duties. Thus, the Chief Judicial Magistrate ought not have taken cognizance of the offence, by entertaining the complaint.

57. In State of Maharashtra v. Dr. Budhikota Subbarao, (1993 (3) SC 339) (supra), the Apex Court held that use of words "no" and "shall" in Section 197 Cr. P.C. make it abundantly clear that the bar on the exercise of the power of the Court to take cognizance of any offence is absolute and complete. "Very cognizance is barred. That is the complaint cannot be taken notice of." "A Court, therefore, is precluded from entertaining a complaint or taking notice of it or exercise jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty." In State through C.B.I. v. B. L. Verma, (1997) 10 SCC 772, the Hon'ble Supreme Court held that sanction under Section 197 Cr. P.C. is required in case the action alleged against a Government servant has committed it in the purported discharge of his duties and while doing so, he has abused the official position. Similar view had been reiterated by the Apex Court in Pukhraj v. State of Rajasthan, AIR 1973 SC 2591 : (1973 Cri LJ 1795).

58. For the sake of argument, if the allegations made in the complaint are taken to be true, it is evident that under the garb of their official duty, the police officials have committed a crime.

59. In Matajog Dobey v. H. C. Bhari, AIR 1956 SC 44 : (1956 Cri LJ 140), the Constitution Bench of the Supreme Court held as under (Para 19) :-

"There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful, claim that he did it in the course of performance of his duty."

60. In S. B. Saha (1979 Cri LJ 1367) (supra), the Hon'ble Apex Court placed reliance upon the judgments of the Privy Council in H. B. Gill v. The King, AIR 1948 PC 128 : (49 Cri LJ 503); and Hori Ram v. Emperor, AIR 1939 FC 43 : (1939 (40) Cri LJ 468), and held that there is nothing "in the nature or quality of the act complained of which attaches to or partakes of the official character of the appellants who allegedly did it. Nor could the alleged act of misappropriation or conversion, be reasonably said to be imbued with the colour of the office held by the appellants."

61. Same view has been reiterated in Amrik Singh v. State of Pepsu, AIR 1955 SC 309 : (1955 Cri LJ 1365); Om Prakash Gupta v. State of U. P., AIR 1957 SC 458 : (1957 Cri LJ 575); Baijnath v. State of M.P., AIR 1966 SC 220 : (1966 Cri LJ 179); Prabhakar V. Sinari v. Shanker Anant Verlekar, AIR 1969 SC 686 : (1969 Cri LJ 1057); Bhagwan Prasad Srivastava v. N. P. Mishra, AIR 1970 SC 1661 : (1970 Cri LJ 1401); B. S. Sambhu v. T. S.

Krishnaswami, AIR 1983 SC 64 : (1983 Cri LJ 158) ; K. M. Mathew v. State of Kerala, (1992) 1 SCC 217 : (1992 Cri LJ 3779); State of Maharashtra v. Dr. Buddikota Subbarao, (1993) 3 SCC 71; Director of Inspection and Audit v. C. L. Subramaniam, AIR 1995 SC 866; Suresh Kumar Bhikam Chand Jain v. Pandey Ajay Bhushan, (1998) 1 SCC 205 : (1998 Cri LJ 1242); N. K. Ogle v. Sanwaldas, (1999) 3 SCC 284 : (1999 Cri LJ 2105); and A. K. Singh v. Uttarakhand Jan Morcha, (1999) 4 SCC 476 : (1999 Cri LJ 3500).

62. In Shambhoo Nath Mishra v. State of U. P., AIR 1997 SC 2102 : (1997 Cri LJ 2491), the Hon'ble Supreme Court held as under (para 4) :-

"In such a situation it postulates that the public servant's act is in furtherance of his performance or his official duties. If the act/omission is integral to performance of public duty, the public servant is entitled to the protection under Section 197 (1) Cr. P.C. . . . . .The sanction of the Appropriate Government or Competent Authority would be necessary to protect a public servant from needless harassment or prosecution. The protection of sanction is an assurance to an honest and sincere officer to perform his public duty honestly and to the best of his ability. The threat of prosecution demoralises the honest officer..... However, performance of public duty under colour of public duty cannot be camouflaged to commit crime. Public duty may provide him an opportunity to commit crime. The Court to proceed further in the trial or the inquiry, as the case may be applies its mind and records a finding that the crime and the official duty are not integrally connected..... The official capacity only enables him to fabricate the record or misappropriate the public fund etc. It does not mean that it is integrally connected or inseparably inter-linked with the crime committed in the course of same transaction. .. . ."

(Emphasis added).

63. Therefore, it is settled principle of law that in absence of ex-facie official action alleged in the complaint, the accused can be proceeded against in the criminal trial like any other accused without any requirement for sanction under Section 197 Cr. P.C. or any other analogous provision in other Statute/ Rules. And in view of the above, I am of the considered opinion that the said sanction was not required at all, as there was no connection between the official duty and the offence allegedly committed. More so, no person, in discharge of his official duty, can be permitted to use his official position to commit an offence. In the instant case, there was no inter-relationship between the official duty and the offence committed by the applicant and police officials and, therefore, even by means of imagination, no one can postulate reasonably that the offence was committed by them in performance of their official duty. Moreso, it is only the stage of investigation.

64. In Emperor v. Khawaja Nazir Ahmad, (1945 (46) Cri LJ 413) (supra), the Hon'ble Supreme Court held that the provisions of Section 197 Cr. P.C. are not attracted in a case of inquiry/investigation for the reason that "the position in a time at which a Court is required to take cognizance of a matter, has not yet been reached; ..... and there is a marked distinction in a stage of investigation and prosecution."

65. Mr. Raval has placed much reliance on the provisions of Section 69 of the N.D.P.S. Act, which provide that no such prosecution or legal proceedings shall lie against the officer of the State Government for anything done in good faith or intended to be done under this Act or any Rule or Order made thereunder. The submission has been that this provision puts an embargo on prosecution, therefore, the proceedings are liable to be quashed. The provision is attracted provided the action taken by the officer can be held to have been done in good faith. The expression "good faith" has several sets of meaning, however, in popular sense, it simply means honestly, without fraud, collusion or deceit, really, actually, without pretence and without intent to assist or act in furtherance of a fraudulent or otherwise unlawful scheme. The quality and quantity of honestly requisite for

constituting good faith is conditioned by the context and object of the statute in which the term is employed. As per the provisions of Section 3 of the General Clause Act, 1897, a thing shall be deemed to have been done in good faith where it is, in fact, done honestly though might have been done negligently, Section 52 of the Indian Penal Code defines the terms "negatively" that nothing is said to be done or believed in good faith which is done or believed without due care and attention. Therefore, the question of good faith requires consideration with reference to the position of the accused and the circumstances under which he has acted. In insolvency matters, for deciding good faith, the test of honesty is more appropriate than the test of due care and attention. Good faith includes a due inquiry. A person is entitled for excuse for committing an error of judgment only if he exercised due care and attention and his conduct shows that there has been no negligence on his part.

66. Section 14 of the Limitation Act qualifies prosecuting the proceedings in the Court which ultimately is found to have no jurisdiction. The plea of good faith may be negatived on the ground of recklessness, inductive of one on due care and caution. In deed, it does not require logical inflability. In case of defamation, the matter requires care and caution and prudence in the background of the context and the circumstances. (Vide Kailas Sizing Works v. Municipality of Bhivandi and Nizampur, AIR 1969 Bombay 127; Gulabchand Bhundarbhai Soni v. State of Gujarat, AIR 1970 Gujarat 171 : (1970 Cri LJ 1100); N. Subramania Iyer v. Official Receiver, Quilon, AIR 1958 SC 1; Chaman Lal v. State of Punjab, AIR 1970 SC 1372 : (1970 Cri LJ 1266); Brijendra Singh v. State of U. P., AIR 1981 SC 636; Vijay Kumar Rampal v. Diwan Devi, AIR 1985 SC 1669; and Ghasi Ram v. Chait Ram Seni, (1998) 6 SCC 200 : (AIR 1998 SC 2476).

67. Thus, even the quality and quantity of the honesty requisite for constituting good faith has to be examined in the context and object of the statute in which the term is employed, for the reason that it is the cardinal canon of construction that an expression which has no unique, precisely fixed meaning, takes its colour, light and contents from the context. The meaning and scope of the expression "good faith" is to be considered in the light of the scheme of the statute.

68. The N.D.P.S. Act has been enacted to check the social menace of drug trafficking and provides for stringent punishment. Thus, if in the context of the statute, the conduct of the persons involved is examined, as per the allegations in the complaint and record placed by the parties, the action taken by the persons involved cannot be held to be done in good faith if the same be taken to be true on its face value. Therefore, the provisions of Section 69 have no relevancy in the case.

69. Mr. Raval, learned Addl. Sol. Gen., has vehemently submitted that the complaint against Mr. Sanjeev R. Bhatt, who is a member of Indian Police Service, is not maintainable in view of the provisions of Section 42 of the Indian Police Act, 1861, which reads as under :-

"All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done under the provisions of this Act, or under the General police powers hereby given, shall be commenced within three months after the act complaint-of shall have been committed and not otherwise. . . . . ."

70. It has been submitted by Mr. Raval that the complaint was barred by limitation provided under the above provisions and being a Special Act, it will override the provisions providing limitation under the Code of Criminal Procedure or any other Act, therefore, the cognizance could not have been taken only on this ground, so far as accused Mr. Sanjeev R. Bhatt is concerned. Undoubtedly, there can be no quarrel with the legal proposition that special provisions will override general provisions. (Vide Secretary of the State v. Hindustan Co-operative Insurance Society Ltd., AIR 1931 PC 149; J. K. Cotton Spinning

and Weaving Mills Co. Ltd. v. State of U.P., AIR 1961 SC 1170; Patna Improvement Trust v. Smt. Lakshmi Devi, AIR 1963 SC 1077; Sumer Chand v. Union of India, AIR 1993 SC 2579 : (1993 Cri LJ 3531); and State of Orissa v. Commissioner of Land Records and Settlement, Cuttack, (1998) 7 SCC 162 : (AIR 1998 SC 3067). But there is a complete fallacy in the submission made by Mr. Raval as the provisions of Section 42 are confined in their application to actions and prosecutions in respect of anything done or intended to be done under the provisions of the Police Act, 1861. They do not and cannot apply to a person being prosecuted for an offence under any other Act or an action being brought in respect of thing or anything done under the provisions of any other statute.

71. In Moulud Ahmed v. State of U.P., 1963 (Supp) 2 SCR 38 : (1964) (2) Cri LJ 71), the Hon'ble Apex Court repelled the similar contention observing as under (para 9) :-

"Section 42 does not apply to prosecution against any person for anything done under the provisions of any other Act or under Police powers conferred under any other Act. Under Section 36, nothing contained in the Police Act shall be construed to prevent any person from being prosecuted under any regulation or Act for any offence made punishable by this Act or for being liable under any other regulation or Act or anything or higher penalty or punishment than is provided for such offence by this Act. This section makes it clear that the provisions of the Act, including Section 42, do not preclude a person being prosecuted for an offence under any other Act. A combined reading of these provisions leads to the conclusion that Section 42 only applies to a prosecution against a person for an offence committed under the Police Act."

72. The said judgment was approved and followed subsequently by the Apex Court in Ajaib Singh v. Joginder Singh, AIR 1968 SC 1422 : (1969 Cri LJ 4)

73. In Pritam Singh v. State of Haryana, AIR 1973 SC 1354 : (1973 Cri LJ 1152), the Apex Court considered the applicability of the provisions of Section 42 in a case where the police official had been charged under Section 29 of the Police Act itself and the Apex Court held that in such a case, Section 42 would apply.

74. In Sumer Chand, (1993 Cri LJ 3531) (supra), the Apex Court held that application of Section 42 of the Police Act is limited if the person is charged under the said Act alone. This Court has taken this view about half a century ago in Mangi Lal v. The State, 1956 Raj LW 285 : (1957 Cri LJ 158) after placing reliance on various judgments of other Courts and particularly in Mohd. Sharif v. Nasir Ali, AIR 1930 All 742 and Heeralal v. Ramdulari, AIR 1935 Nagpur 237.

75. Thus, the contention raised by Mr. Raval is devoid of any merit.

76. It has next been urged by Mr. Raval that the prosecution of other police officials is barred by limitation provided by Section 161 (1) of the Bombay Police Act, 1951, which reads as under :-

"Sec. 161 (1). - Suits or prosecutions in respect of acts done under the colour of duty, as aforesaid, not to be entertained, or to be dismissed if not instituted within the prescribed period :-

In any case of alleged offence by the . . . . . .Police Officer . . . . . or of a wrong alleged to have been done by such . . . . . .Police Officer .. . . . . .any act done under the colour or in excess of any such duty or authority, as aforesaid, or wherein it shall appear to the Court that the offence or wrong, if committed or done, was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted, more than six months after the date of the act complained of.

Provided that, any such prosecution against a police officer may be entertained by the Court if instituted with the previous sanction of the State Government within two years from the date of the offence."

77. This issue was dealt elaborately by the Division Bench of Gujarat High Court in Fateh Sinh Madhu Sinh Rathod v. N. Rama Iyer, Commissioner of Police (sic), and the Court, after considering a large number of judgments, held that the limitation shall apply even in a case where the malice has been alleged while acting under the colour of office.

78. In M. M. Rajendran v. K. Rama-krishnan, (1997) 6 SCC 85, the Hon'ble Supreme Court has held that the question of limitation for prosecution launched by the party must be necessarily considered even in the proceedings under Section 482 Cr. P.C.

79. In Virupaxappa Kadampur (1963 (1) Cri LJ 814) (supra), the Hon'ble Supreme Court observed as under (para 9) :-

"The expression 'under colour of something' or 'under colour of duty' or 'under colour of office' is not infrequently used in law as well as in common parlance. Thus, in common parlance, when a person is entrusted with the duty of collecting funds for, say, some charity and he uses that opportunity to get money for himself, we say of him that he is collecting money for himself under the colour of making collections for a charity. Whether or not when the act bears the true colour of the office or duty or right, the act may be said to be done under the colour of that right, office or duty, it is clear that when the colour is consumed is the cover or a cloak for something which cannot properly be done in performance of the duty or in exercise of the right or office, the Act is said to be done under colour of office or duty or right. It is reasonable to think that the legislature used the word 'under colour' in Section 161 (1) to include this sense."

80. In State of Andhra Pradesh v. N. Venugopal, AIR 1964 SC 33 : (1964 (1) Cri LJ 16), the Apex Court dealt with the provisions of Section 53 of the Madras District Police Act, 1859, which contains provisions analogous to those contained in Section 42 of the Bombay Police Act, 1861. The Apex Court held that to determine whether the act done could be said to be under a provision of law, one must discover the existence of a reasonable relationship between the provisions and the act. In absence of such a relation, the act cannot be said to have been done under particular provisions of law.

81. In Sumer Chand (1993 Cri LJ 3531) (supra), the Apex Court held that the provisions of Section 161 (1) of the Bombay Police Act has a very wider amplitude as the words "in any case of alleged offence" or "of a wrong alleged to have been done" and "by any act done" are contained therein and, thus, requires to be considered in wider sense. However, the Apex Court dealt with a case where the suit for malicious prosecution against two police officials, for having been registered on false, vexatious and malicious report had been filed. The Apex Court, while interpreting the provisions of Section 140 (1) of the Delhi Police Act, which is analogous to the provisions of Section 161 (1) of the Bombay Police Act, 1951, held that it was the duty of the said police officers to record the report and so also to file the challan in Court and, thus, the acts complained of were done under the colour of office of the said officers and, thus, fell within the ambit of Section 140 (1) of the Act and, therefore, the case had to be filed within limitation provided therein and the suit was found to be barred by limitation having been filed after expiry of three months.

82. The instant case is quite distinguishable for the reason that it cannot be co-related with the duty of the official to get the shop vacated at Pali and for that purpose to hatch a conspiracy and falsely involve the complainant in a case under the N.D.P.S. Act. The instant case, rather, falls within the four-corners of the judgment of the Hon'ble Supreme Court in State of Maharashtra v. Narhar Rao, AIR 1966 SC 1783 : (1966 Cri LJ 1495), where the Hon'ble Apex Court considered the provisions of Section 161(1) of the Bombay Police Act and held that accepting a bribe for weakening the prosecution case, cannot be held to have any reasonable connection between the act complained of and the powers and duties of the officers and it was not permissible to hold that the act was done by the accused-officers under the colour of office. The Court further held that "the alleged

acceptance of bribe by the accused-officers was not an act which could be said to have been done under the colour of office or done in excess of his duty or authority within the meaning of Section 161 (1) of the Bombay Police Act."

83. In State of Maharashtra v. Atma Ram, AIR 1966 SC 1786 : (1966 Cri LJ 1498), the alleged act of assault and confinement of a suspect in police custody was held not to be acts done under the colour of duty or authority since the said acts had no reasonable connection or nexus to the duty or authority imposed upon the officer under the Bombay Police Act or any other enactment conferring power of the police under the colour of which this act was done and that such acts fall completely outside the duties and scope of the police officers and they were not entitled to the protection conferred by Section 161 (1) of the Bombay Police Act.

84. In Bhanuparsad Hariparsad Dave v. State of Gujarat, AIR 1968 SC 1323 : (1968 Cri LJ 1505), the Apex Court considered the provisions of Section 161 of the Bombay Police Act, 1951 and repelled the similar contention holding that accepting illegal gratification could not be brought within the ambit of the said provisions. In such case, a police officer, taking advantage of his position as a Police Officer, and availing himself of the opportunity afforded by another police officer, handed over to him a coerced accused to pay illegal gratification to him. The Apex Court held that such an act cannot be brought within the ambit of an act done under the colour of duty. In a case where the provisions of Section 197 Cr. P.C. are held to be not applicable, it is difficult to assume that provisions of Section 161 (1) of the Bombay Police Act, 1951 can be attracted.

85. In view of the above, I am of the considered opinion that neither the provisions of Section 42 of the Police Act, 1861, nor Section 161 (1) that of the Bombay Police Act, comes to the rescue of the police officers and the contention is hereby turned down.

86. Mr. Raval has further urged that the complaint could not have been entertained by the Chief Judicial Magistrate, Pali, for the same was barred by the provisions of Section 195 Cr. P.C. as the complaint could be lodged only by the Court, for which the false evidence had been fabricated and before which it has been used. In Nirmaljit Singh Hoon, (AIR 1972 SC 2639) (supra), the Hon'ble Apex Court held that fabricated evidence should be tendered in evidence and only then it would attract the provisions of Section 195 (1) Cr. P.C.

87. In Manohar M. Galani v. Ashok N. Advani, (1999) 8 SCC 737 : (2000 Cri LJ 406), the Apex Court considered the application of Section 195 Cr. P.C. and observed that in investigation on the basis of the information cannot be throttled at this stage from proceeding with the investigation when the charges are very serious and grave and the High Court, in its power under the inherent jurisdiction, should not interfere in such matters and it was premature for the High Court to come to the conclusion that the provisions of Section 195 Cr. P.C. were applicable.

88. In Sacchida Nand Singh v. State of Bihar, AIR 1998 SC 1121 : (1998 Cri LJ 1565), the Apex Court considered the scope of application of Section 195 (1) (b) read with Section 340 Cr. P.C. and observed as under (Paras 11, 12) :-

"The sub-section puts the condition that before the Court makes a complaint of 'any offence referred to in Clause (b) of Section 195 (1), the Court has to follow the procedure laid down in Section 340. In other words, no complaint can be made by a Court regarding any offence falling within the ambit of Section 195 (1)(b) of the Code, without adopting those procedural requirements. It has to be noted that Section 340 falls within Chapter XXVI of the Code, which contains a fascicuilus of 'provisions as to offence affecting the administration of justice' as the title of the Chapter appellates. So the offence envisaged in Section 195 (a)(b) of the Code must involve acts which would have affected the administration of justice.

The scope of preliminary enquiry envisaged in Section 340(1) of the Code is to ascertain whether any offence affecting administration of justice, has been committed in respect of a document produced in Court or given in evidence in a proceeding in that Court. In other words, the offence should have been committed during the time when the document was in custodia legis.

(Emphasis added).

89. While deciding the said case, the Hon'ble Supreme Court placed reliance upon large number of its earlier judgments, particularly, Raghunath v. State of U. P., AIR 1973 SC 1100 : (1973 Cri LJ 858); Mohan Lal v. State of Rajasthan, AIR 1974 SC 299 : (1974 Cri LJ 350); Legal Remembrancer of Government of West Bengal v. Haridas Mundra, AIR 1976 SC 2225 : (1976 Cri LJ 1732); and Gopalkrishna Menon v. D. Raja Reddy, AIR 1983 SC 1053 : (1983 Cri LJ 1599), and held as under :-

"The sequietur of the above discussion is that the bar containing in Section 195 (1)(b), (2) (i) of the Code is not applicable to a case where forgery of the document was committed before the document was produced in a Court."

90. The scope of Section 195 Cr. P.C. is, in fact, very limited. (Vide Sanmukh Singh v. The King, AIR 1950 PC 31 : (1950 (51) Cri LJ 651); Budhu Ram v. State of Rajasthan, (1963) 3 SLR 376 : (1963 (2) Cri LJ 698); and Sushil Kumar v. State of Haryana, AIR 1988 SC 419 : (1988 Cri LJ 427).

91. In State of Punjab v. Brij Lal Palta, AIR 1969 SC 355 : (1969 Cri LJ 645), the Apex Court held that for want of such technical requirement, the Court at the most can quash proceedings only in respect of the offence requiring such a course, but there can be no objection to the continuance of proceedings relating to other cognizable offences under other Sections or Statute.

92. Thus, the submission is devoid of any merit and is rejected for the reason that it is nobody's case that documents had been fabricated while in the custody of the Court.

93. Mr. Rathore, learned counsel appearing for the State of Rajasthan, has urged that in the instant case, the Gujarat Police got the information from Pali that the complainant was coming to Gujarat with narcotic drugs and psychotropic substance. The complainant was arrested from Pali. The shop (the subject matter of the main controversy) was situated at Pali and the complainant had been in possession thereof whatever may be nature of his possession. The law involving the complainant in a false case was set at motion in Pali. Therefore, in view of the provisions of Sections 178 and 179, Cr. P. C., it cannot be said that the Chief Judicial Magistrate, Pali, had no jurisdiction at all.

94. It is settled law that in an offence of a continuing nature, the Court, even through whose territorial jurisdiction the vehicle has passed, would have territorial jurisdiction to try the offence. (Vide Mrs. Sujata Mukherjee v. Prashant Kumar Mukherjee, AIR 1997 SC 2465 : (1997 Cri LJ 2985); and Harbans Lal v. State of Rajasthan, AIR 1999 SC 326 : (1999 Cri LJ 455)). In a case where complainant's allegations are of stinking magnitude and the authority, which ought to have redressed it has closed its eyes and not even tried to find-out the real offender and what were the circumstances under which the complainant had been arrested and harassed, whether he can be left at the mercy of such law-enforcing agencies who had, for the reasons best known to them, adopted an entirely indifferent attitude.

95. There is another aspect of the matter. Legal maxim Necessiatas Sub Lege Non Continetur Quia Qua Quod Alias Non Est Lictum Necessitas Facit Lictum, means necessity is not restrained by laws; since what otherwise is not lawful necessity makes lawful. Cognizance has not yet been taken so far as applicant Raman Lal and police officials are concerned. In view of the plea taken by the complainant in objections against the application of Gujarat Police for taking him on remand and in his bail application (Annex.

R/9 and R/10), make it crystal clear that the allegations made by him in the complaint are not afterthought. The submissions cannot be said to be preposterous and not worth consideration.

96. Thus, it is not a fit case where this Court should exercise its extraordinary jurisdiction under Section 482 of the Code. The judgments of the Apex Court, which are legion, have laid down that save in exceptional case where non-interference would result in miscarriage of justice, the Court should not interfere at the stage of investigation. (Vide Eastern Spinning Mills v. Rajiv Poddar, AIR 1985 SC 1668 : (1985 Cri LJ 1858)). There has also been inordinate delay in filing applications, which cannot be explained even by giving reference to various proceedings taken before the High Court of Gujarat as the same stood finalised long ago before filing this application.

97. Entertaining these applications would render the complainant remediless, which is not permissible in law. (Vide Rameshwar Lal v. Municipal Corporation, Tonk, (1996) 6 SCC 100). Moreso, legal maxim Ubi jus, Ibi Remedium, that is, if there is a right, there is a remedy to enforce it. Thus, in no circumstance the complainant can be refused a remedy to get his grievance redressed. Applicant Raman Lal, in his Special Criminal Case No. 1079/98, which is pending before the Gujarat High Court and the interim order is continuing, has taken various grounds challenging the validity of the Rules of Gujarat High Court for not providing Letters Patent Appeal in criminal case. However, the ground No. 1 reads as under :-

"That despite more than two years have passed yet the Palanpur Police has not carried further investigation to find out the real offender. . . . . ."

98. It clearly shows that the Gujarat Police has not considered it proper to find out the truth, if any, in the said case under the N.D.P.S. Act. No material has been produced before this Court to show any progress in the said case by the Gujarat Police after the incident. A mere statement that accused persons have filed the petitions before Gujarat High Court to transfer the case to C.B.I. for finding out the truth, is no explanation. It is strange that one police officer, who was responsible himself for finding out the truth, if any, has filed such petition. Moreso, the allegations of reaching an agreement with Mohan Lal for vacating the premises in dispute, purchasing the stamp papers for executing the agreement by Raghunath Singh, real brother of the complainant, filing applications for discharge just after reaching the agreement. Not holding identification parade by Gujarat Police till the agreement had been executed, cumulatively provide for cogent reasons and compel this Court not to interfere in the matter. Moreso, I failed to understand the appropriateness of entertaining these applications when two applications are already pending before the Gujarat High Court and the Hon'ble Gujarat High Court has stayed the further proceedings in relation to C.R. No. 403/96, Police Station, Kotwali, Pali. None of the parties before this Court considered it proper to bring it to the notice of Hon'ble the High Court of Gujarat that on the date of obtaining the interim order from Gujarat High Court, the interim order passed by this Court was in operation. Involving a person in a criminal case, in which minimum punishment is ten years and maximum twenty years imprisonment and a minimum fine of Rs. One lac or maximum Rs. Two lacs, can also be imposed, has to be taken very seriously as it violates all fundamental rights of a citizen and is abhorrent to any notion of any civilised society. Entertaining these petitions, in view of pendency of two applications before the Hon'ble High Court of Gujarat, can, by no means, be appropriate, rather insisting by the applicants to hear these matters amount to abuse of process of the Court.

99. The State of Gujarat, which has filed the instant application for protecting its officials, could not be justified in maintaining the application, as it had taken no step to redress the grievance of the complainant. Before passing the resolution dated 3-11-1997

to protect the police officials by providing them the so-called statutory protection under para 262 of the Gujarat Police Manual, 1975 (Vol. I), the State ought to have considered as how their action could be said to be bona fide.

100. In Dr. Budhi Kota Subbarao v. K. Parasaran, AIR 1996 SC 2687 : (1996 Cri LJ 3983), the Hon'ble Supreme Court has observed as under (Para 11) :-

"No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access of justice should not be misused as a licence to file misconceived and frivolous petitions." (Emphasis added).

101. The powers conferred upon the High Court under Section 482, Cr. P. C. are applicable in limited cases of grave dereliction from duty and flagrant abuse of any fundamental principle of law or where no

remedy is available. The expression "abusing the process of the Court" is that the proceeding which is wanting any bona fide and is frivolous, vexatious or oppressive and the provisions can be used to otherwise secure the ends of justice.

102. In State of West Bengal v. Rashmoy Das, (2000) 1 SCC 76 : (AIR 2000 SC 228) the Apex Court held that power of the High Court under Section 482, Cr. P. C. does not extent to quashing a prosecution which, though apprehended by the petitioner, has not yet been instituted. The High Court cannot take upon itself the burden to probe; whether the allegations in the complaint are likely to be established by evidence or not. The Court has to see as to whether the uncontroverted allegations, as made prima facie, establish an offence, the Court has to be cautioned that the inherent powers cannot be utilized for any oblique purpose.

103. In Janta Dal (1993 Cri LJ 600) (supra), the Apex Court observed that inherent powers can be used only for the ends of justice. "Such powers unrestricted and undefined, should not be capriciously and arbitrarily exercised but should be exercised in appropriate cases, ex debito justitiae, to do real and substantial justice for the administration of which alone the Courts exist. The powers possessed by the High Court under Section 482, Cr. P. C. are very wide and the very plentitude of the powers requires great caution in its exercise. The Courts must be careful to see that its decision, in exercise of this power, is based on sound proof. . . . .This inherent power conferred by Section 482 to the Court should not be exercised to stifle a legitimate prosecution. The High Court, being the highest Court of the State, should normally refrain from giving a premature decision in a case wherein the entire facts are extremely incomplete and hazy; moreso when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of great magnitude and cannot be seen in their true perspective without material."

104. The facts referred to above make it crystal clear that the instant case does not present special features, which may warrant the exercise of extraordinary power of this Court under Section 482, Cr. P. C., Res Ipsa Loquitur-the things speak for itself. The Court has a duty to do justice to the parties. Fiat justitia ruat caelum-let justice be done, though the heavens may fall.

(B) REGISTRATION OF A CASE AGAINST A HIGH COURT JUDGE:-

105. This issue is limited only to the case of applicant Raman Lal. Admittedly, on the date of lodging the complaint before the Magistrate at Pali, the applicant was the Additional Judge of Gujarat High Court. Therefore, the issue has been raised: whether it was permissible in law to take cognizance on a complaint against him by the Magistrate?

106. In K. Veeraswami v. Union of India, (1991) 3 SCC 655, the Constitution Bench of the Hon'ble Supreme Court considered the issue and observed as under :-

"It is settled law that the authority entitled to grant sanction must apply its mind to the facts of the case and all the evidence collected before forming opinion whether to grant

sanction or not. Secondly, the trial is by the Court which is independent of the Executive. But these safeguards must be adequate. Any complaint against Judge and its investigation by the C.B.I., if given publicity, will have far-reaching effect on the Judge and the litigant public. The need, therefore, is a judicious view of taking action under the Act. Care should be taken that honest and fearless Judges are not harassed. They should be protected. . . . .All that is required is to lay down certain guidelines, lest the Act may be misused. This Court being the ultimate guardian of the rights of people and independents of judiciary will not deny itself the opportunity to lay down such guidelines. We must never forget that this Court is not a Court of limited jurisdiction of only dispute-settling. Almost from the beginning, this Court had been a law-maker, albeit in Holmes's expression, "interstitial" law-maker. In deed, the Court's role today is much more. It is expanding beyond dispute-settling and interstitial law-making. It is a problem solver in the nebulous areas. In this case, we consider it no mere opportunity; it is a duty. It is our responsibility and duty to apply the existing law in a form more conducive to the independence of judiciary."

The Court further directed as under :-

"We, therefore, direct that no criminal case shall be registered under Section 154, Cr. P. C. against a Judge of the High Court, Chief Justice of the High Court or Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter."

107. The issue of consultation, as referred to above, came for consideration before the Hon'ble Supreme Court in C. Ravichandran Iyer v. Justice A. M. Bhattacharjee, (1995) 5 SCC 457 : (1995 AIR SCW 3768) and after considering the judgments in Veeraswami (1991 (3) SCC 655) (supra) and Supreme Court Advocates on Record Association v. Union of India, (1993) 4 SCC 441 : (AIR 1994 SC 268), it was held that Sanction and Approval of the Chief Justice of India was a condition precedent to register a case and investigate into the matter and Sanction for Prosecution of the said Judge by the President of India after consultation with the Chief Justice of India.

108. In U. P. Judicial Officers' Association v. Union of India, (1994) 4 SCC 687, the Hon'ble Supreme Court held that no criminal case could be registered against a judicial officer in respect of anything allegedly done or in his capacity as holder of such judicial office, without the prior permission of the Chief Justice of the High Court concerned. Certain directions had also been issued in the similar line in Delhi Judicial Service Association v. State of Gujarat, (1991) 4 SCC 406 : (1991 Cri LJ 3086). Such directions issued by the Hon'ble Supreme Court are of binding nature for the reason that the law laid down by the Hon'ble Supreme Court is binding on all Courts in India.

109. In Nand Kishore v. State of Punjab, (1995) 6 SCC 614 : (1995 AIR SCW 4650), the Hon'ble Supreme Court has held as under (Para 17) :-

"Under Article 141, the law declared by it is of a binding character and as commandful as the law made by the legislative body or an authorised delegates of such body. . . . .for the Court is not merely the interpreter of the law as existing but much beyond that. The Court, as a wing of the State, is, by itself, a source of law. The law is what the Court says it is."

110. Similarly, a Constitution Bench of the Hon'ble Supreme Court in Supreme Court Bar Association v. Union of India, (1998) 4 SCC 409 : (AIR 1998 SC 1895) has held that the role of the Supreme Court has always been of law-maker and it has travelled beyond merely dispute-settling.

111. In Vishaka v. State of Rajasthan, (1997) 7 JT (SC) 384 : (AIR 1997 SC 3011) the Hon'ble Supreme Court issued large number of directions in order to check the menace of sexual harassment of working women at working places and further directed that the said directions would be treated as the law declared by the Hon'ble Supreme Court under Article 141 of the Constitution.

112. Ignoring the directions issued by the Hon'ble Supreme Court "amounts to judicial impropriety" and such "judicial adventurism cannot be permitted." (Vide Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engg. Works (P.) Ltd., AIR 1997 SC 2477). In C. N. Rudramurthy v. K. Barkathulla Khan, (1998) 8 SCC 275; the Hon'ble Apex Court observed as under :-

"In deed, it is a matter of judicial discipline that requires that when this Court states as to what the law on the matter is, the same shall be binding on all the Courts within the territory of India. This mandate of Article 141 of the Constitution is not piece of any doctrine of precedents, but is an imprimatur to all Courts that the law declared by this Court is binding on them."

113. In K. Veeraswami (1991 (3) SCC 655) (supra), the Hon'ble Supreme Court, while dealing with a case under the Prevention of Corruption Act and the Court had dealt with various aspects of law observing as under :-

"There are various protections conferred to the Judges to preserve the independence of judiciary. They have protection from civil liability for any act done or ordered to be done by them in discharge of their judicial duty whether or not such judicial duty is performed within the limit of their jurisdiction. That has been provided under Section 1 of the Judicial Officers Protection Act, 1850. Likewise, Section 77, I.P.C. gives them protection from criminal liability for an act performed judiciously. But we know of no law providing protection for Judges for criminal prosecution. Article 361(2) confers immunity from criminal prosecution only to the President and Governors of the States and to no others. . . . . The Judges are liable to be dealt with just the same way as any other person in respect of criminal offence. It is only in taking bribes or with regard to the offence of corruption, the sanction for criminal prosecution is required

(Emphasis added).

114. Therefore, it is evident that the Court was dealing with a case under the Prevention of Corruption Act. The Constitution Bench started its judgment stating that the appeal raised the question of singular importance and consequence to the Judge of the High Courts and the Apex Court. "The central issue is; whether the Judge could be prosecuted for offence under the Prevention of Corruption Act, 1947 (for short, "the Act")." Therefore, the Hon'ble Apex Court had considered whether the Judge can be prosecuted under the Prevention of Corruption Act and the Court had not considered the entire aspect of criminal liability of a sitting Judge of a High Court or the Supreme Court. Moreso, while issuing the direction not to register a case under Section 154, Cr. P. C. against a sitting Judge, the Court further observed as under :-

"Due regard must be given by the Government to the opinion expressed by the Chief Justice. If the Chief Justice is of the opinion that it is not a fit case for proceeding under the Act, the case shall not be registered." (Emphasis added).

115. The reference to the Act, while issuing the direction, makes it explicit clear that the Hon'ble Supreme Court was putting such an embargo only in relation to the cases under the Prevention of Corruption Act.

116. In C. Ravichandran Iyer (1995 AIR SCW 3768) (supra) also, the charges had been of corruption and not of other criminal nature. Moreso, in U. P. Judicial Officer's (1994 (4) SCC 687) (supra), the Court distinguished the act done in official capacity and outside of the same. Thus, it is evident that the directions issued by the Hon'ble Supreme Court in the said cases are, by no means, applicable in the instant case and on that count, the applicant cannot succeed.

117. Mr. Barot has valiantly but unsuccessfully tried to bring the allegations against applicant Raman Lal under the provisions of Section 13(1)(a) of the Prevention of Corruption Act. Submission on this aspect is preposterous. An identical submission was

repelled by the Hon'ble Supreme Court in Om Prakash v. State of U. P., AIR 1957 SC 458 : (1957 Cri LJ 575) and State of Madhya Pradesh v. Veereshwar Rao Agnihotri, AIR 1957 SC 592 : (1957 Cri LJ 892) observing that offence under the Prevention of Corruption Act may not be identical in essence to the offence under Indian Penal Code, otherwise it would tantamount to repealing the identical provision in I.P.C. by implication. Similar view has been expressed in State of Bombay v. S. L. Apte, AIR 1961 SC 578 : (1961 (1) Cri LJ 725).

118. More so, it is also settled legal proposition that though Code of Criminal Procedure enables a Court to try all offences together, the same is not mandatory and, thus, the Court may or may not try all offences together in one trial. (Vide Mohinder Singh v. State of Punjab, AIR 1999 SC 211 : (1999 Cri LJ 263). Submissions on this count also are not worth accepting and the same are repelled.

(C) REFERENCE TO/AND CONSIDERATION OF EVIDENCE AT THIS STAGE:-

119. Mr. Barot has vehemently argued on absurdity of the complaint and tried to convince the Court that in view of the depositions of the complainant himself before the Special Court in Delhi in respect of the same subject-matter, the complaint filed by him before the learned Magistrate at Pali cannot be sustained and, therefore, the applicant has a right to refer to and rely upon the said deposition to prove his submission regarding absurdity of the complaint.

120. Mr. Rathore, learned Special Counsel for the State of Rajasthan, has vehemently opposed the submission contending that such an issue cannot be agitated at this stage as it tantamounts to examining the case on merit.

121. In State Anti-Corruption Bureau, Hyderabad v. P. Suryaprakasam, (1999) SCC (Cri) 373, the Hon'ble Apex Court has held that in view of the provisions of Sections 239 and 240, Cr. P. C., at the time of framing of a charge, the trial Court is required to, and can consider, only the police report referred to under Section 173, Cr. P. C. and the documents sent with it. However, in Satish Mehra v. Delhi Administration, (1996) 9 SCC 766, the Hon'ble Supreme Court observed as under:-

"Similar situation arises under Section 239 of the Code (which deals with trial of warrant cases on police report). In that situation the Magistrate has to afford the prosecution and the accused an opportunity of being heard besides considering the police report and the documents sent therewith. At these two stages the Code enjoins on the Court to give audience to the accused for deciding whether it is necessary to proceed to the next stage. It is a matter of exercise to judicial mind. There is nothing in the Code which shrinks the scope of such audience to oral arguments. If the accused succeeds in producing any reliable material at that stage which might fatally affect even the very sustainability of the case, it is unjust to suggest that no such material shall be looked into by the Court at that stage. Here the "grounds" may be any valid ground including insufficiency of evidence to prove charge. . . . . The object of providing such an opportunity as is envisaged in Section 227 of the Code is to enable the Court to decide whether it is necessary to proceed to conduct the trial. If the case ends there it gains a lot of time of the Court and saves much human efforts and cost. If the materials produced by the accused even at that early stage would clinch the issue, why should the Court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial-proceedings. Hence, we are of the view that Sessions Judge would be within his powers to consider even materials which the accused may produce at the stage contemplated in Section 227 of the Code."

122. Both these judgments have expressed the conflicting views on the same legal issue. Therefore, it is to be examined: which of the said judgments is binding as a precedent under Article 141 of the Constitution. The judgment in State Anti-Corruption Bureau (1999 SCC (Cri) 373) (supra) was delivered on 2-5-96 and the case of Satish Mehra

(1996 (9) SCC 766) (supra) was decided by equal number of Hon'ble Judges on 31-7-96. There is no dispute that the judgment of a Larger Bench, if is in conflict of the judgment of the Smaller Bench, is to be followed. (Vide Union of India v. K. S. Subramanian, C.A. No. 212/1975, decided on 30-7-1997; State of U. P. v. Ram Chandra Trivedi, AIR 1976 SC 2547; General Manager, Telecom v. A. Srinivasa Rao, (1997) 8 SCC 767 : (AIR 1998 SC 656) and N. S. Giri v. Corporation of City of Mangalore, (1999) 4 SCC 697 : (AIR 1999 SC 1958). But in the instant case, both the judgments have been delivered by equal number of Hon'ble Judges of the Supreme Court.

123. A Constitution Bench of Karnataka High Court in Govindanaik v. Kalaghatigi West Patent Press Co. Ltd., AIR 1980 Kant 92 (FB) has held that in case there is a conflict in two judgments of the Hon'ble Supreme Court consisting of equal number of Hon'ble Judges, the later of the two decisions should be followed by the High Courts and other Courts. Similar view has been reiterated by the Division Bench of Bombay High Court in Vasant Totaba Hargude v. Dikkaya Muttaiya Rajan, AIR 1980 Bom 341. In Baker v. White, (1877) 5 Ch D 183; and Miles v. Jarvish, (1883) 24 Ch D 633, it was held that a Court may have an option to follow the judgment which is "better in point of law."

124. But there is another aspect of the matter. The subsequent judgments may also be held to be per incurium and, therefore, the earlier judgment can be held to be binding. The concept "per incurium" has been explained by the Courts from time to time and "per incurium" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provisions or of some authority binding on the Court concerned. (Vide M/s. Tourist Guide Service v. B. D. Harsha, (1989) 2 Raj LR 1; Mamleswar Prasad v. Kanahaiya Lal, AIR 1975 SC 907; A. R. Antuley v. R. S. Nayak, (1988) 2 SCC 602 : (AIR 1988 SC 1531); State of Uttar Pradesh v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139; B. Shyama Rao v. Union Territory of Pondichery, AIR 1967 SC 1480; Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 SCC 101 : (AIR 1989 SC 38); Ram Gopal Baheti v. Girdhari Lal Soni, (1999) 3 SCC 112 : (1999 AIR SCW 4721); Sarnam Singh v. Deputy Director of Consolidation, (1999) 5 SCC 638 : (1999 AIR SCW 4749) and N. S. Giri (AIR 1999 SC 1958) (supra).

125. This aspect requires a serious consideration, particularly in view of the judgment in Union of India v. Godfrey Philips India Ltd., AIR 1986 SC 806, wherein the Hon'ble Apex Court observed as under :-

"We find it difficult to understand how a Bench of two Judge in Jit Ram's case, AIR 1980 SC 1285, could possibly overturn or disagree with what was said by another Bench of two Judges in Motilal Sugar Mills' case, (1979) 2 SCC 409 : (AIR 1979 SC 621), they could have referred Jit Ram's case (supra) to a Larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of the law by a coordinate Bench of the same Court."

126. Moreso, in Union of India v. B. R. Bajaj, AIR 1994 SC 1256 : (1994 Cri LJ 2086), the Hon'ble Supreme Court in held as under (Para 8):-

"In the instant case the High Court while interfering at the stage of F.I.R. holding that the F.I.R. did not disclose any offence, as a matter of fact, took into consideration several other records produced by respondents Nos. 1 and 2 and also relied on the affidavit filed by Shri Banerjee and also on a letter written by the Director, State Lotteries. This approach of the High Court say the least, to some extent amounts to investigation by the Court whether the offences alleged in the F.I.R. are made out or not. . . . . That being the case, the High Court has grossly erred in quashing the F.I.R. itself when several aspects of the allegations in the F.I.R. had still to be investigated. The learned Judge of the High Court while coming to the conclusion that the allegations in the F.I.R. do not disclose any offence, has taken into consideration several aspects including the guidelines, normal duty

of Shri B. R. Bajaj, etc. and when further and investigated whether the offences under Section 120-B read with Ss. 418, 468, I.P.C. and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act have been made out. Suffice it to say that the learned Judge has treated the whole matter as though it was an appeal against the order of conviction and that should never be the approach in exercising the inherent power under Section 482, Cr. P. C. particularly at the stage of F.I.R. when the same discloses commission of a cognizable offence which had still to be investigated thoroughly by police." (Emphasis added).

127. In the said case the High Court had quashed the F.I.R. against Mr. Bajaj on the basis of record produced by the applicant therein after referring to Ch. Bhajan Lal (1992 Cri LJ 527) (supra). The Hon'ble Supreme Court held that as the matter was under investigation, High Court should not have quashed the same and especially on the material produced by the petitioner/applicant.

128. In State of Bihar v. P. P. Sharma, I.A.S., 1992 Suppl (1) SCC 222 : (1991 Cri LJ 1438), the Hon'ble Supreme Court has held as under (Para 20) :-

"We do not wish to express any opinion on the rival contentions of the parties based on their respective appreciation of material on the record. We have quoted 'the annexures', the inferences drawn by the High Court and the factual assessment of Mr. Sibal, only to show that the High Court fell into grave error in appreciating the documents produced by the respondents along with the writ petitions and further delving into disputed questions of facts in its jurisdiction under Articles 226/227 of the Constitution of India." (Emphasis added).

129. There is another aspect of the matter. In Satish Mehra (1996 (9) SCC 766) (supra), the facts involved had itself been of absurd nature as the dispute had been between husband and wife regarding the custody of the children and husband had obtained the degree of custody of the children from the competent Court in United States but the wife landed in India to the children to award the execution of the said order. The husband filed habeas corpus in Indian Court and as counterblast, the wife filed an F.I.R. making allegations that the husband had sexually assaulted their three years daughter and outraged her modesty and tried to commit rape on her. It was in the special facts and circumstances of the case that such an observation had been made by the Hon'ble Supreme Court.

130. In State of Madhya Pradesh v. S. B. Johari, (2000) 2 SCC 57 : (2000 Cri LJ 944), the Apex Court held that the High Court has committed grave error by appreciating and weighing the material on record for coming to the conclusion whether charge against the accused could have been framed as it runs contrary to the settled legal proposition that at such a stage, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused and the Court is not permitted to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused.

131. Similar view had been reiterated in Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, (1990) 4 SCC 76 : (1990 Cri LJ 1869).

132. In Supdt. and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja, AIR 1980 SC 52 : (1979 Cri LJ 1390) the Apex Court held that if an inference of strong suspicion about the commission of an offence can be drawn from material on record, it is enough for the Court to frame the charges and Court may, for this limited purpose, shift the evidence as it cannot be expected even at the initial stage to accept "all that the prosecution states as a gospel truth even if it is opposed to common sense or the broad probabilities of the case." The Court concern is limited to the extent to examine "whether

the facts emerging therefrom, taken at their face value, disclose the existence of all the ingredients constituting the alleged offence."

133. In S. B. Johari (2000 Cri LJ 944) (supra), the Apex Court held that so far as the charge of conspiracy under Section 120-B is concerned, in most of the cases it is only from the available circumstantial evidence that an inference of conspiracy has to be drawn for the reason that it becomes difficult to get direct evidence on such an issue.

134. Similarly, in Shivnarayan Laxminarayan Joshi v. State of Maharashtra, (1980) 2 SCC 465 : (1980 Cri LJ 388) the Apex Court held that since it is impossible to adduce direct evidence of conspiracy, the offence can only be proved largely from the inference drawn from acts or illegal omissions committed by the conspirators in furtherance of a common design. Once such a conspiracy is proved, act of one conspirator becomes the act of the others. A co-conspirator, who joins subsequently and commits overt-acts in furtherance of the conspiracy, must also be held liable.

135. Therefore, in view of the above, I am of the considered opinion that as the judgment in Satish Mehra (1996 (9) SCC 766) (supra) is not applicable, and, therefore, contentions raised by Mr. Barot lack merit. This Court cannot assume the jurisdiction either of the trial Court or appellate Court and appreciate the evidence, the exclusive role assigned to the said Courts, in the inherent jurisdiction of this Court.

Conclusion :-

136. In view of the above, I do not find any force in the submissions made on behalf of the applicants. After investigating the matter further, the Rajasthan Police has preferred the charge-sheet before the Special Judge (N.D.P.S. Cases), Jodhpur, and the matter is pending before the Competent Court and the said Court has to decide as; whether further action is required or not, and if yes, in what manner. The applications are devoid of any merit and are hereby dismissed.

137. It is hereby clarified that any observation made hereinabove shall not adversely affect either of the parties and the same should be treated to have been made, if any, for deciding these applications and they do not have reflection on the merit of the case.

Applications dismissed.

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Cross Citation :2010-SCC-6-417 , 2010-AD(CR)-3-353

SUPREME COURT OF INDIA

Hon'ble Judge(s) : Markandey Katju and A.K. Patnaik, JJ.

Criminal Appeal No. 959 of 2010 Decided on, May 03,2010

Rabindra Nath Singh .. Vs.. Rajesh Ranjan Alias Pappu Yadav

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Contempt of Supreme Court by High Court- High Court passed order in breach of Supreme Court directions- It is contempt of order of Supreme Court by the High Court

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(1.) Heard learned counsel for the parties.

(2.) Leave granted in both the petitions.

(3.) These appeals have been filed against the impugned judgment and order dated 18.02.2009 of the High Court of Judicature at Patna whereby the respondent Rajesh Ranjan @ Pappu Yadav has been granted bail in Sessions Trial No. 976 of 1999.

(4.) Learned counsel for respondent-accused handed over to us a letter dated 1.5.2010 written by the respondent-accused to his counsel wherein it is stated that the present case should be heard by a Bench of which one of us (Markandey Katju, J.) is not a member. The said letter is taken on record.

(5.) Having perused the letter, we were inclined to issue notice for contempt of Court against respondent-accused for sending such a letter but we have restrained ourselves although it is clear that the conduct of the respondent- accused is contemptuous. We make it clear that this Court will not tolerate the tactics of Bench hopping by an accused or any other person.

(6.) We have considered the entire facts and circumstances of the case and also noted the fact that earlier two bail applications of the respondent-accused have been rejected. Apart from that, in the case of this very accused reported as Rajesh Ranjan Yadav Alias Pappu Yadav v. CBI Through Its Director [2007 (1) SCC 70], this Court has observed in para 24 as under.

"24. On the facts and circumstances of the case, we find no merit in this appeal. The appeal is accordingly dismissed. We, however, make it clear that no further application for bail will be considered in this case by any court, as already a large number of bail applications have been rejected earlier, both by the High Court and this Court."

(7.) We are surprised that despite the aforesaid clear direction of this Court, the High Court has granted bail to the respondent-accused. In fact, such an order of the High Court amounts to contempt of order of this Court since this Court has observed that no further bail application of the accused shall be entertained.

(8.) Learned counsel for the respondent submitted that the aforesaid decision was given rejecting bail pending the trial, whereas now bail was applied in appeal after conviction by the Trial Court. In our opinion, when it was not found a fit case for bail before conviction, it is even less a fit case for bail after conviction.

(9.) There are very serious allegations against the respondent, but we are not going into the same here because we do not wish to prejudice the appellate court. However, we do wish to express our regret that bail was granted by the High Court for no good reason except by saying that the appeal is not likely to be heard in six months. If bail is granted on such a ground then bail will have to be granted in almost every case, even when the offence is heinous. We cannot approve of such a view.
(10.) For the reasons given, we set aside the impugned judgment and order dated 18.02.2009 and allow these appeals. It is directed that the respondent-accused Rajesh Ranjan alias Pappu Yadav shall be taken into custody forthwith. Appeals allowed.

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Cross Citation :2004-Crimes(SC)-3-33 , 2004-AIR(SC)-0-3976

SUPREME COURT OF INDIA

Hon'ble Judge(s) : N. SANTOSH HEGDE, S. B. SINHA AND S. H. KAPADIA, JJ.

(FULL BENCH)

Writ petition 46 Of 2004, Apr 27,2004

Vijay Shekhar .. Vs .. Union of India

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A) FRAUD ON POWER – MISUSE OF POWER BY THE MAGISTRATE - magistrate issud process and baillable warrents on a fraud complaint - the complaint in question is a product of fraud and a total abuse of the process of court. there is also serious doubt whether the procedure required under the code of criminal procedure was really followed by the magistrate at all while taking cognizance of the offence alleged. - the same is liable to be quashed based on the legal principle that an act in fraud is ab initio void.- this principle applies to judicial acts also.

B) FRAUD ON POWER VOIDS THE ORDER if it is not exercised bona fide for the end design. - there is a distinction between exercise of power in good faith and misuse in bad faith. - when an authority misuses its power in breach of law, say, by taking into account, some extraneous matters or by ignoring relevant matters. that would render the impugned act or order ultra vires. it would be a case of fraud on powers. the misuse in bad faith arises when the power is exercised for an improper motive, say, to satisfy a private or personal grudge or for

wreaking vengeance of a party - a power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.- use of a power for an 'alien' purpose other than the one for which the power is conferred is mala fide use of that power. same is the position when an order is made for a purpose other than that which finds place in the order. - and any action proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative." - "no judgment of a court, no order of minister, can be allowed to stand if it has been obtained by fraud. fraud unravels everything." (emphasis supplied) see also, in lazarus case at p. 722 per lord parker, c.j. : "'fraud' vitiates all transactions known to the law of however high a degree of solemnity."

C) "FRAUD AS IS WELL KNOWN VITIATES EVERY SOLEMN ACT. - fraud and justice never dwell together. fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter. it is also well settled that misrepresentation itself amounts to fraud. indeed, innocent misrepresentation may also give reason to claim relief against fraud. a fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. it is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. an act of fraud on court is always viewed seriously. a collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. fraud and deception are synonymous. although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."

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JUDGMENT

(1.) This is a writ petition filed inter alia seeking a writ of mandamus calling upon the respondents to immediately seize the records pertaining to criminal case no.118 of 2004 titled Suresh Kumar Jethalal Sanghvi v. Rajendra Kumar Jain and Ors. pending in the court of metropolitan magistrate, court no.10, Meghani Nagar, Ahmedabad, on the ground that the proceedings in the said case was an example of the extent to which the 525 criminal justice system in subordinate courts in Gujarat is corrupted.

(2.) This writ petition raises important issues of legal and public importance; one amongst them being the validity of the complaint filed in the court of metropolitan magistrate, court no. 10, Ahmedabad in a complaint filed by the said Suresh Kumar Jethalal Sanghvi under sections 406, 420, 504, 506(1) and 114 IPC against 4 persons named therein and consequential bailable warrants issued against the said persons by the said court.

(3.) Many of the issues involved in the writ petition require further consideration, hence it is agreed by all the parties to this petition that those issues can be separately dealt with. The parties are also at ad idem on the issue of the validity of the complaint being decided at this stage itself. Hence in this order of ours we will consider and decide the validity of the complaint referred to hereinabove.

(4.) Though all the parties to this petition are in one voice have agreed to quash the said proceedings. We do not think we should do so on the basis of the concession shown by the parties. In public interest we think it appropriate to consider the merit of the case and decide the legality of the case on the basis of the law applicable and material available in the records.

(5.) It is stated in the writ petition that the writ petitioner with a view to expose the malpractices in the judicial administration in the subordinate courts in Ahmedabad had approached one of the lawyers named in the writ petition to procure a non-bailable warrants against the persons named in the complaint for proving his case of corruption for which the petitioner was ready and willing to pay such money as was demanded by the lawyers concerned.

(6.) Learned counsel appearing for the writ petitioner has in specific terms contended that the contents of the complaint based on which cognizance was taken and bailable warrants were issued are not true and the same is drafted by the lawyers concerned knowing full well that they are untrue and only with a view to obtain a warrant for a monetary consideration.

(7.) From the affidavit filed on behalf of the said lawyers and from the arguments addressed today on their behalf, it is clear that at least as on today they are also in agreement with the writ petitioner that the contents of the complaint are not genuine though they categorically state that the said statement was recorded at the instance of one Suresh Kumar Jethalal Sanghvi who had approached them to file a complaint and on the basis of the facts narrated by him the said complaint was drafted and filed.

(8.) Be that as it may from the above pleadings and the arguments addressed on behalf of the respective parties before us today, it is clear that the complaint in question is a product of fraud and a total abuse of the process of court. There is also serious doubt whether the procedure 526 required under the Code of Criminal Procedure was really followed by the magistrate at all while taking cognizance of the offence alleged. In this background of inherent falsehood that could be ex facie noticed from the contents of the complaint and coupled with the fact admitted by the parties to this petition, it is evident that the said complaint is a fraudulent one, hence, the same is liable to be quashed based on the legal principle that an act in fraud is ab initio void. This principle in our opinion applies to judicial acts also.

(9.) This Court in Express Newspapers Pvt. Ltd. and Ors. v. Union of India and Ors.1 at has held thus :

"Fraud on power voids the order if it is not exercised bona fide for the end design. There is a distinction between exercise of power in good faith and misuse in bad faith. The former arises when an authority misuses its power in breach of law, say, by taking into account bona fide, and with best of intentions, some extraneous matters or by ignoring relevant matters. That would render the impugned act or order ultra vires. It would be a case of

fraud on powers. The misuse in bad faith arises when the power is exercised for an improper motive, say, to satisfy a private or personal grudge or for wreaking vengeance of a Minister as in S. Pratap Singh v. State of Punjab, (1964) 4 SCR 733 A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. Use of a power for an 'alien' purpose other than the one for which the power is conferred is mala fide use of that power. Same is the position when an order is made for a purpose other than that which finds place in the order. The ulterior or alien purpose clearly speaks of the misuse of the power and it was observed as early as in 1904 by Lord Lindley in General Assembly of Free Church of Scotland v. Overtown, 1904 AC 515, 'that there is a condition implied in this as well as in other instruments which create powers, namely, that the power shall be used bona fide for the purpose for which they are conferred'. It was said by Warrngton, C.J. in Short v. Poole Corporation, (1926) 1 Ch 66 that: "No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative." In Lazarus Estates Ltd. V. Beasley, (1956) 2 QB 702 at Pp. 712-13 Lord Denning, LJ. said : "No judgment of a court, no order of minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." (emphasis supplied) See also, in Lazarus case at p. 722 per Lord Parker, C.J. : "'Fraud' vitiates all transactions known to the law of however high a degree of 527 solemnity." All these three English decisions have been cited with approval by this Court in Pratap Singh's case."

(10.) Similar is the view taken by this Court in the case of Ram Chandra Singh v. Savitri Devi and Ors.1 wherein this Court speaking through one of us (Sinha, J.) held thus :
"Fraud as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."

(11.) Thus, it is clear a fraudulent act even in judicial proceedings cannot be allowed to stand.
(12.) In view of our finding that the complaint filed before the court of metropolitan magistrate, court no.10 at Ahmedabad in criminal case no.118 of 2004 dated 15.1.2004 is ex facie an act of fraud by a fictitious person, and an abuse of the process court, every and any action taken pursuant to the said complaint gets vitiated. Therefore, we think the complaint registered before the metropolitan magistrate, court no, 10 at Ahmedabad in criminal case no.118 of 2004 dated 15.1.2004 and all actions taken thereon including the issuance of bailable warrants is liable to be declared ab initio void, hence, liable to be set aside.

(13.) We, however, make it clear that the quashing of the abovesaid proceedings before the metropolitan magistrate, court no. 10, Ahmedabad would not in any way exonerate any of the parties to the above writ petition of charges levelled against them and the same will be considered independently and de hors the quashing this criminal proceedings.
(14.) We also make it clear that any observations made in the course of this order in regard to the role played by the respective parties in this episode are only tentative and are made for the limited purpose of deciding the validity of the criminal case pending before the magistrate and the same will not be treated as a conclusive finding in any future proceedings.
(15.) For the reasons stated above, the complaint as well as the entire proceedings culminating in issuance of bailable warrants in criminal case no. 118 of 2004 filed before the metropolitan magistrate, court no. 10, Ahmedabad, are quashed.
(16.) The other issues involved in this case will be separately dealt with.

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Cross Citation :1972-AIR(SC)-0-2466 , 1973-SCC-1-446

SUPREME COURT OF INDIA

Hon'ble Judge(s) : J. M. SHELAT,

S. N. DWIVEDI AND Y. V. CHANDRACHUD, JJ.
Criminal 312 Of 1971,Sep 29,1972

BARADAKANTA MISHRA COMMISSIONER OF ENDOWMENTS ... Vs... BHIMSEN DIXIT
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A) CONTEMPT OF COURT - refuse to follow a High Court decision on count that petition for leave to appeal to supreme court against that High Court decision was pending is wrong and illegitimate – it amounts to deliberate and willful disregard of High Court and is contempt of court

B) PUNISHMENT - senior Judicial Officer with experience of 23 serving as commissioner refused to bound by decision –held – his conduct was clearly malafide, amounts to disobedience and disregard of court- by acting in opposition to authority ,justice and dignity thereof and bringing law in to disrepute – judicial officer rightly held guilty by High court – punishment of Rs 300 as cost confirmed.

C) CONTEMPT BY SUBORDINATE COURTS- the conduct of appellant judicial official is calculated to create confusion in the administration of law – it will undermine respect for law laid down by the High court and

impair the constitutional authority of the High court – it is calculated not only to undermine the constitutional authority and respect of the High court but also likely to subvert the rule of law and engenderer harassing uncertainty and confusion in the administration of law .

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(1.) The appellant is a member of the Superior Judicial Service of the State of Orissa, He was at 1972 B. Mishra v. B. Dixit on time officiating as District Judge. At the relevant time he was functioning as Commissioner of Hindu Religious Endowments, Orissa. The office of the Commissioner is created by the Orissa Hindu Religious Endowments Act.

(2.) In village Sanabagalpur there are two deities. The Additional assistant Commissioner of Hindu Religious Endowments took action under S. 27 of the said act for appointing an interim trustee of the deities. The person incharge of the deities made an objection under S. 41 of the said Act that the Act did not apply as the deities were consecrated under a private endowment made by him. The Additional Assistant Commissioner rejected the objection by his order dated 26/07/1967. Without making any inquiry under S. 41, he held that prima facie there was a public endowment. He did not appoint the objector as a trustee of the deities. The objector filed a revision under S. 9 of the said Act before the appellant.

(3.) During the period intervening between the rejection of the objection by the Addl. Assistant Commissioner and the filing of the revision by the objector, the identical issue was raised before the Orissa High Court in Bhramarbar Santra v. State of Orissa, ILR 1970 Cut 54 . In that case the High Court held that the Asstt. Commissioner cannot appoint an interim trustee under S. 27 of the said Act until he has held an inquiry under S. 41 and has found that there was no hereditary trustee of the religious institution.

(4.) At the hearing of the revision, the aforesaid decision was cited before the appellant by the applicant. After hearing the parties, the appellant made the following order:

"1... .It is said on behalf of the petitioner that he has filed a petition under Section 41 of the Act. But no evidence is produced to that effect, thereby disclosing that their plea is humbug. The next argument is that the learned Assistant Commissioner should have first decided that the institution has not hereditary trustee. The Assistant Commissioner has impliedly done so.

2. The next argument that without a final declaration as to the nature of the institution, no appointment under Section 27 can be made, does not seem to be correct. The decision in the High Court on Bantala case would not be applicable to this instance. Further against the order, we have moved the Supreme Court and as such, the matter can be safely deemed to be sub judice.

3. In order to establish that the petitioner is the hereditary trustee, he has to file an application under S. 41 of the Act. No doubt the court can initiate such a proceeding, but we should not do it where the institution appears to be safely a public one, in this instance, a Siva temple."

(5.) The applicant filed a writ petition in the High Court against this order. The Division Bench, on hearing the applicant, issued notice for contempt of the High Court to the appellant. The High Court took exception to the following sentence occurring at the end of paragraph 2 in his order: "Further, against the order we have moved the Supreme Court, and as such, the matter can be safely deemed to be sub judice."(6.) The appellant

appeared before the High Court in response to the notice. According to him the apparently objectionable sentence in his order "was not at all the basis for (his) decision." He said that the revision was dismissed by him after distinguishing the case before him from the facts of Bharamabar Santra, ILR (1970) Cut 54. He further pleaded "that under the Constitution the decisions of the Supreme Court are law of the land. So, I bona fide, was of the opinion that when a matter is under appeal, or otherwise before the Supreme Court, the point of law, becomes sub judice and only a decision of the Supreme Court in the matter, would be binding on the Subordinate Court". It was also pleaded that the proceeding before him was a administrative proceeding and that the act of not following the decision of the High Court in such a proceeding "may not amount to contempt of court."

(7.) The High Court did not accept his pleas in justification. It was held that the appellant "refused to follow" the decision in Bharamarbar Santra, ILR (1970) Cut 54 . The High Court further held that, "We do not find any trace of bona fides of the contemner in the order dated 19-1-1970... ....The contemner is a senior judicial officer who has already put in 23 years of service; having been recruited as a Munsif he has now risen to the rank of District Judge. We regret to find that though he has functioned as a judicial officer for about 23 years he has not been able to pick up the approach and attitude of a judicial officer and has actuated by the bias so often manifested in actions of the executive today while disposing of a judicial proceeding and when found fault with has come up with the stand that he was acting administratively."

(8.) After examining the matter further, the High Court said:

"The conduct of the contemner far from being bona fide is clearly a mala fide one and he intentionally avoided to follow the decision of this Court by advancing grounds which were most inappropriate." On that view of the matter the High Court found him guilty of contempt of Court and admonished him in open Court and directed him to pay Rs. 300.00 as costs of the proceedings. (9.) Shri Daphtari, counsel for the appellant, rightly did not seek to support the justificatory pleas. His argument now is that the appellant is not guilty of contempt of Court, for the sentence in the appellants' order, found objectionable by the High Court, neither interferes with the administration of justice nor scandalises the High Court.

(10.) Shri Dephtary as well as the Solicitor-General appearing for the State have stated before us that there is no decided case either in support of or against the argument. But the absence of a precedent should not preclude an act being held to be contempt merely because it is novel or unusual provided it is comprehended by the principles underlying the law of contempt to Court. The absence of precedent should however put the court on guard that the area of contempt is not being unduly expanded . The present case then is to be decided on principles and analogy.

(11.) Contempt of Court is disobedience to the court, by acting in opposition to the authority, justice and dignity thereof. It signifies a wilful disregard or disobedience of the court's order; it also signifies such conduct as tends to bring the authority of the court and the administration of law into disrepute.

(12.) It is a commonplace that where the superior courts' order staying proceedings is disobeyed by the inferior court to whom it is addressed, the latter court commits contempt of court, for it acts in disobedience to the authority of the former court. The act of disobedience is calculated to undermine public respect for the superior court and jeopardise the preservation of law and order. The appellant's case is to be examined in the light of the foregoing principles and analogy. (13.) The remark in the appellant's order found objectionable by the High Court is this: "Further, against the order we have moved

the Supreme Court, and as such the matter can be safely deemed to be sub judice." It may be observed that on the date of the order nothing was pending in the Supreme Court only a petition was pending in the High Court for a certificate to appeal to the Supreme Court from the decision in Bhramarbar Santra, ILR 1970 Cut 54 . The appellant has thus made wrong statement of fact. Secondly, the use of the personal pronoun "We" is also significant. It indicates that the appellant identified himself as a litigant in the case and did not observe due detachment and decorum as a quasi-judicial authority. Lastly, we agree with the High Court that it is not possible to believe that the appellant could have entertained the view that as soon as a petition for certificate to appeal to the Supreme Court was filed in the High Court against its decision, the binding character of the decision disappeared. He has had 23 years' judicial experience and he could scarcely entertain that belief. We agree with the High Court that the appellant deliberately avoided to follow its decision by giving wrong and illegitimate reasons and that his conduct was "clearly mala fide".

(14.) Under Art. 227 of the Constitution, the High Court is vested with the power of superintendence over the courts and tribunals in the State, Acting as a quasi judicial authority under the Orissa Hindu Religious Endowments Act, the appellant was subject to the superintendence of the High Court.

Accordingly the decision of the High Court were binding on him. He could not get away from them by adducing factually wrong and illegitimate reasons. In East India Commercial Co. Ltd. Calcutta v. The Collector of Customs, Calcutta, (1963) 3 SCR 338 , Subba Rao J. observed: "The Division Bench of the High Court held that a contravention of a condition imposed by a licence issued under the Act is not an offence under S. 5 of the Act. This raises the question whether an administrative tribunal can ignore the law declared by the highest Court in the State and initiate proceedings in direct violation of the law so declared. Under Art. 215, every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Under Art. 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority including in appropriate cases any Government, within its territorial jurisdiction. Under Art. 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer."

(15.) . The conduct of the appellant in following the previous decision of the High Court is calculated to create confusion in the administration of law. It will undermine respect for law laid down by the High Court and impair the constitutional authority of the High Court. His conduct is therefore comprehended by the principles underlying the law of contempt. The analogy of the inferior court's disobedience to the specific order of a superior court also suggests that his conduct falls within the purview of the law of contempt. Just as the disobedience to a specific order of the Court undermines the authority and dignity of the court in a particular case, similarly any deliberate and mala fide conduct of not following the law laid down in the previous decision undermines the constitutional authority and

respect of the High Court. Indeed, while the former conduct has repercussions on an individual case and on a limited number of persons, the latter conduct has a much wider and more disastrous impact.

(16.) It is calculated not only to undermine the constitutional authority and respect of the High Court generally, but is also likely to subvert the Rule of law and engender harassing uncertainty and confusion in the administration of law. (17.) Our view that a deliberate and mala fide conduct of not following the binding precedent of the High Court is contumacious does not unduly enlarge the domain of contempt. It would not stifle a bona fide act of distinguishing the binding precedent, even though it may turn out to be mistaken.

(18.) As a result of the foregoing discussion, we think that the High Court has rightly found the appellant guilty of contempt. So we dismiss the appeal. Appeal dismissed.

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Cross Citation :1969-AIR(PAT)-0-194

HIGH COURT OF BIHAR

Hon'ble Judge(s) : N.L.Untwalia, S.Wasiuddin, JJ

Sailajanand Pande ...Vs... Suresh Chandra Gupta

AFOD 346 Of 1963 Aug 13,1968

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A] Action against Judicial Officer causing illegal arrest– Magistrate acting illegally and without jurisdiction in the matter of arrest is not protected – Magistrate has no absolute protection regard to his act of illegal arrest.

B] First class Magistrate issued letter to appear and directed to show cause against prosecution on the petition filed by another person – When petitioner appeared he was detained to custody – The bail bond furnished by the petitioner were rejected by the Magistrate deliberately – Petitioner claimed that due to such illegal, unauthorized and malafide conduct of the Magistrate in arresting him, he has lowered in the estimation of the public and claimed for the damage – The action of the Magistrate by putting the petitioner under arrest for realinsing the certificate dues by adopting questionable and unlawful method is highly deplorable – It was unbecoming of a Magistrate – It is relevant to investigate to find out the motive, the propriety and the legality of the action of the Magistrate in arresting the petitioner – It is not a judicial act although exercised during the Judicial proceedings – The Magistrate exercised its power with the ulterior object of coercing the petitioner.

C] At page 178 of the 14th Edition of Salmond on Torts it is said -
"The wrong of false imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him without lawful justification from exercising his right of leaving the place in which he is."
In my opinion, defendant No. 1 has committed the wrong of false imprisonment in this case.

D] But - "Wherever protection of the exercise of judicial powers applies, it is so absolute that no allegation that the acts or words complained of were done or spoken mala fide, maliciously, corruptly, or without reasonable or probable cause suffices to found an action." Further it has been pointed out under the title

"Liability of Magistrates" at page 160 of Volume 25 of Halsbury's Laws of England, 3rd Edition, that -

> "Protection is afforded by common law and by statute to justices in respect of acts done in the execution of their duty as such; but this protection does not extend to cases where they have acted either maliciously and without reasonable and probable cause, or without or in excess of their jurisdiction, and in such cases they are liable to an action for damages at the suit of the party "aggrieved,"
>
> A similar passage occurs at page 768 of Volume 38 of the Halsbury's Laws of England, 3rd Edition -
>
> A Magistrate or other person acting In a judicial capacity is not liable for acts done within his jurisdiction, but he is liable to an action for false imprisonment If he unlawfully commits a person to prison in a matter in which he has no jurisdiction, provided that he has knowledge, or the means of knowledge of the facts which show that he has no jurisdiction."

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Untwalia, J.

(1.) This appeal by the plaintiff arises out of a suit filed by him for a decree for damages for a sum of Rs. 25,000 against the two defendants said to be liable jointly and severally. The plaintiff's case is that he is a colliery proprietor living at village Khanudih, pergana Nawagarh, in the district of Dhanbad. He has got extensive cultivation and is an income-tax paver. He belongs to a respectable Brahmin family of the District of Dhanbad, has got his relations in other districts around and is held in high esteem amongst his caste men and also by his relatives, neighbours and various important persons within the district of Dhanbad. Shri Suresh Chandra Gupta, defendant No. 1 was a Magistrate exercising first Class powers, within the Baghmara Sub-Division and was posted at Dhanbad. Daya Sagar Sharan, defendant No. 2, was an Upper Division Clerk attached to the office of the Deputy Commissioner, Dhanbad. The plaintiff's case is that defendant No. 1, as Sub Divisional Magistrate, Baghmara, at Dhanbad, by memo No. 3818 dated 5-12-60 issued a letter to him asking Mm to appear on 13-12-60 at 10.30 a. m. and directed him to show cause against prosecution on the petition filed by one Mohri Majhi and others. The letter purports to bear the signature of defendant No. 1 with date 3/12. According to the plaintiff, defendant No. 1 was not a Sub-Divisional Magistrate, Baghmara, on 5-12-60 or 13-12-60, he had no authority to issue any memo to the plaintiff directing him to appear, no cognizane of any offence had been taken against the plaintiff and defendant No. 1 exercised his functions arbitrarily in issuing the aforesaid memo. On 13-12-60 the plaintiff came to Dhanbad in connection with some civil work He was standing near the Dhanbad Bar Library. At about 4.15 p. m. defendant No. 2 accompanied by a Court constable came to the Bar Library and told the plaintiff that he was directed by defendant No. 1 to appear in his chamber. The plaintiff accordingly went to his court although he was not holding any court at that time, and he brought the record of C. M. A. No. 24 of 1960, State v. S. N.

Pandey and put the plaintiff to hazat In the said case, no summons was served upon the plaintiff nor was any warrant of arrest for disobedience of the summons issued. There was no occasion for the issue of warrant of arrest and the action of the defendant was wrongful In the 11th paragraph of the plaint the case is that -

"The defendant No. I. Shree S. C. Gupta, a Certificate Officer, Baghmara with inordinate and unbecoming zeal of realising the certificate dues asked the defendant No. 2 to bring the record The plaintiff furnished sureties in the aforesaid Criminal case but the defendant no, 1 in order to coerce and put undue pressure upon the plaintiff for paying up the certificate dues sent the plaintiff to Hazat"

Plaintiffs case further is that he furnished bail bonds but defendant No. 1, on some pretext or other, did not accept the bail bond from 13-12-60 to 16-12-60 Plaintiff's men applied for bail with sureties, who were local men and income-tax payers, but defendant No. 1 illegally on some pretext or other did not pass any order and deferred the matter. On 27-12-60, the plaintiff states, he along with his son Shvama Kanta Pandev who was also a co-accused in a mining case appeared before the Sub-Divisional Magistrate, Baghmara. at Dhanbad. in that case. Defendant no 1 was doing the work as Sub-Divisional Magistrate and in open court, in presence of litigant public respectable persons and the lawyers be declared that he would put the plaintiff to Hazat if the certificate dues of his son were not paid. No warranf was issued either in C. M. A. 24 of 1960 or in the certificate case pending against the plaintiff, and there was no order that the warrant was to be executed at Dhanbad. Defendants 1 and 2 or the court constable were not armed with any authority to call the plaintiff and put him to Hazat. The first defendant acted mala fide and he had no jurisdiction to act in the manner stated above. Even when the plaintiff furnished proper surety for his appearance, defendant No. 1 raised frivolous objections and intentionally kept the plaintiff in Dhanbad Jail from 13-12-60 to 16-12-60 and coerced the plaintiff to pay the doubtful certificate dues. The plaintiff claims that he is an old managed about 70, he has been lowered in the estimation of the public, his caste men and relations by the illegal, unauthorised and mala fide conduct of the defendants in arresting the plaintiff and they are jointly and severally liable to pay damages at least to the extent of Rs. 25,000/-. Defendant No. 1, even after the said incident of the 13th and 16th December, 1960 in order to vindicate the wrong done to the plaintiff, openly dishonoured the plaintiff on 27-12-60.

(2.) A joint written statement was filed by both the defendants. Their defence, inter alia, is that defendant No. 1 was a Magistrate having first class powers within the territorial jurisdiction and was also vested with powers under Section 190 (1)(a), (b) and (c) of the Code of Criminal Procedure (hereinafter called the Code). He also held power under Sections 260 and 110 of the Code. He was posted in Baghmara Sub-Division at Dhanbad, In the absence of the Sub-Divisional Magistrate, he worked as such, defendant No. 2 was an Upper Division Assistant posted in Baghmara Sub-Division, and he worked as Law Clerk there.

(3.) It may be stated here that the local limits of Babghmara Sub-Division are quite distinct and apart from the local limits of the Sadar Sub-Division of Dhanbad. Due to non-availability of the Court buildings at Baghmara, the Sub-Divisional Magistrate and other Magistrates are allowed to hold their court in some of the Court buildings at Dhanbad although the court buildings are exclusively within the local limits of the Sadar Sub-Division.

(4.) The defendants' case further is that a petition was filed by Mohri Ma.lM and others on 8-11-60 alleging therein that the petitioners being poor Harijan Adi-vasis were being deprived of their sown paddy as Shri Sailajanand Pande, plaintiff, forcibly cut away the same. Defendant No. 1. While doing the work of the general file of the Sub-Divisional Officer, on 8-11-60 passed orders on the said petition to the effect - "Issue registered notice at once fixing 21-11-60 to show cause against prosecution." Though defendant No. 1 was holding powers under Section 190 of the Code and was in a position also to take cognizance straightway, he refrained from doing so and wanted to give an opportunity to the plaintiff to show cause against prosecution. Even on the adjourned date 13-12-60 as the order sheet shows, he did not appear and file any hazri. Defendant No. 1 worked as Sub-Divisional Officer in absence of the permanent Sub-Divisional Officer, Baghmara, on 3-12-60 and 13-12-60. The plaintiff's case that no summons had been served on him and no warrant was issued against him in C. M. A. 24 of 1960 was denied. It is further pleaded that in C. M. P, case 49 of 1958 the plaintiff was not appearing since cognizance of offence was taken against him on 11-6-58. On 25-6-59 when he appeared in that case, it was transferred to the Court of defendant No. 1. On 21-8-60 and also later the plaintiff chose to remain absent. On 21-11-60 orders were passed to issue fresh warrant of arrest with processes under Section 87 of the Code and the warrant of arrest and the processes were directed to be sent to the Officer in charge of Baghmara Police Station. The next date fixed was 12-12-60. On 12-12-60 the plaintiff who was accused in the case did not turn up. The bail bond furnished earlier was forfeited and show cause notice was issued to the bailor and request was directed to be made to the Deputy Commissioner to depute a section of armed force with a Magistrate to execute the processes and the case was directed to be put on 23-12-60. On 13-12-60 an order was recorded at 4.15 p. m. directing the plaintiff (accused) to be remanded to custody in default of bail of Rs. 1,000 with two sureties of the like amount. Similar order was passed on C. M, A. case 24 of 1960.

(5.) Replying to the allegations contained in paragraph 11 of the plaint, it is stated in the 14th paragraph of the written statement - "That the allegations contained in paragraph 11 of the plaint are not true. The fact is that defendant No. 1 is also the Certificate Officer of Baghmara Sub-Division and when he took over the charge of the department, there were huge amounts pending against a large number cf certificate Debtors and he took a firm attitude and succeeded in rpalising a good amount. There was no question of his showing inordinate and unbecoming zeal against the plaintiff. He took the same attitude and same efforts against the plaintiff as he took against other Certificate Debtors. It is not true that the plaintiff furnished bail and the defendant No. 1 put him into Hazat to coerce and to put undue pressure upon the plaintiff to pay up the Certificate dues." The further plea in the written statement is that no bail was offered by the plaintiff on 13-12-60 when he was directed to furnish a bail and defendant No. 1 had no alternative than to remand him to custody. The bail bond signed by the plaintiff's lawyer on 14-12-60 was filed at 4.15 p. m. Orders were passed to file affidavits of the sureties in accordance with Section 499(3) of the Code. Court was closed on 15-12-60 due to sad demise of the then Jail Minister and the affidavit was filed on 16-12-60 when it was accepted and orders for release of the plaintiff were passed. Defendant No. 1 did not act mala fide. All the allegations of the plaintiff to the contrary are false. The facts as to the incident said to have taken place on 27-12-60 are false. Several criminal cases were pending against the plaintiff in the court of defendant no, 1 and in the circumstances defendant No. 1 was legally justified in sending for the plaintiff and to put him under arrest in accordance with the provisions contained in Section 65 of the Code, It is false to say that the plaintiff was kept in hazat from 13th to 16th December, 1960 to coerce him to pay certificate dues. The

plaintiff is not entitled to any amount of damages. All actions of defendant No. 1 were taken bona fide and without any malice and in exercise of his judicial powers. Defendant No. 2 simply carried out the orders of defendant No. 1 which he was bound to do.

(6.) The learned Subordinate Judge who tried the suit has dismissed it holding that -

(i) The issuing of memo No. 3818 dated 3-12-60 by defendant No. 1 calling upon the plaintiff to show cause against prosecution on the petition filed by Mohri Majhi and others was not in any way in contravention of any law.

(ii) The said defendant was legally justified in sending for the plaintiff and in putting him under arrest as the plaintiff did not furnish bail bond. The allegation regarding detention of the plaintiff in prison from 13-12-60 to 16-12-60 in order to coerce him to pay up the certificate dues is not correct.

(iii) The officers who were entrusted with the service of the different processes in the criminal cases did not perform their duties properly and incorrect reports were made in relation to them.

(iv) The arrest of the plaintiff in the Court room of defendant No. 1 must be deemed to be within his territorial jurisdiction and it cannot be said to be illegal on that account.

(v) "Although defendant No. 1 has denied that he put any pressure on the plaintiff for payment of the dues in those cases yet the circumstances go to show that he did put pressure on the plaintiff for how is It that the dues in the different cases amounting to over Rs. 4000 were all on a sudden paid off on one day on 16-12-60 when the plaintiff was in jail and that too by a third person who as appears from the evidence was then on good terms with the plaintiff."

(vi) ".....that the arrest of the plaintiff on 13-12-60 was neither illegal nor without jurisdiction nor was his detention in jail from 13-12-60 to 16-12-60 unlawful."

(vii) Defendant No. 1 was within his rights to arrest him for compelling his attendance (vide order sheets of C. M. A. Case No. 24 of 1960 and C. M. P. case No. 49 of 1958).

(viii) Defendant No. I is protected under Section 1 of the Judicial Officers' Protection Act, 1850 (Central Act XVIII of 1850).

(ix) The evidence is not sufficient to establish the allegations regarding the incident said to have taken place on 27-12-60. The learned Subordinate Judge has assessed a sum of Rs. 4,000 as damages to be awarded to the plaintiff if he would have otherwise been found entitled to it. The plaintiff has come up in appeal from the decree of dismissal of his suit.

(7) At the outset, I may state that although I do not approve of all that has been said by the learned Subordinate Judge in connection with the action tsken by defendant No. 1 on the petition filed by Mohri Majhi and others, I do not consider it necessary to examine the evidence or discuss any point with reference to it. No action was taken against the

plaintiff nor was he arrested and remanded to custody on 13-12-60 in connection with the petition filed by Mohri Majhi and others, upon which a mere show cause notice had been issued against him (plaintiff). The claim of damages either on account of the allegedly false imprisonment or defamation could obviously be not related to, and substantiated upon, the action of defendant No. 1 in issuing a show cause notice against prosecution on the petition filed by Mohri! Majhi and others. This was conceded to by Mr. S. C. Ghosh, learned Counsel for the plaintiff appellant. No argument of any substance could be advanced by him to press the appeal in relation to the story of the alleged defamation on 27-12-60 in the court of defendant No. 1. No claim of any amount of damages could be substantiated with reference to the alleged incident of the 27th December, 1960. I shall, therefore, not refer to the evidence in this regard either.

(8) What remains, however, to be considered is the facts and the consequences in relation to the arrest of the plaintiff on 13-12-60 and his detention la prison from that date to 16th or 17th December, 1960.

(9) The plaintiff's case is that defendant No. 1 who was a certificate Officer of Baghmara put the plaintiff in Hazat in order to coerce him and put undue pressure on him for paying up the certificate dues. This fact Is not disputed in the written statement rather tacitly it is admitted when it is said in its 14th paragraph that when defendant No. 1 took charge as a Certificate Officer of Bagh-mara, huge amounts were due against a large number of certificate debtors and he took a firm attitude and succeeded in realising a good amount, and he took the same attitude and made the same efforts against the plaintiff as he did against others. The evidence of P. W. 7, Rabindra Kumar Chatterjee, who was the plaintiff's Mukhtear, is that on 14-12-60 when he filed the bail bond, Gupta Saheb (defendant No. 1) said to Daya Sagar Sharan (defendant No. 21 that he should bring the list of the amount due from the plaintiff and his relations, in respect of which there were certificate cases. Defendant No. 2 submitted the list which was eventually marked Ext. 2, Gupta Saheb said that bail would not be allowed until the money in respect of the certificate cases was realised. In the last hour on that very date two cheques of the amounts of Rs. 1,400 and Rs. 3,400 were produced in the court of Gupta Saheb by one Kaluram ARarwala on behalf of the plaintiff. Gupta Saheb ordered that so long the cheques would not be encashed, he would not accept the same. On 16-12-60 affidavits were asked to be sworn by the bailors. Kaluram Agarwala had to execute indemnity bond in respect of the two cheques which he had issued; the indemnity bond is Ex. 10. Bail was accepted at about 4 or 4.30 P. M. on 16-12-60 after the filing of the indemnity bond. More or less, to the same effect is the evidence of P. Ws. 8, 9 and 10. the last being the plaintiff. Their evidence finds support from the documents and seems to have been accepted by the court below also.

(10) Although some order sheets Jn connection with other mining cases were also produced and exhibited on behalf of the defendants, to wit. Exts. 8/e -- order sheet of C. M. A. 26/60, 8/f -- order sheet of C. M. P. -- 58/58 and 8/g -- order sheet of C. M. A. 16/60, nothing turns upon these order sheets as no special facts are mentioned in them nor was any pleaded or deposed to with reference to them. The two main order sheets relating to two mining cases which deserve discussion are Ext. O -- order sheet of C. M. P. ('Cr. A. Suit') No. 24 of 1960 and O/1 -- order sheet of C. M P. No. 49 of 1958. Their relative complaint petitions are Exts. J/1 and J respectively. Ext. O shows that cognizance of this case was taken on 24-2-60. The case was in respect of a minor offence and is triable as a summons case. The finding of the learned Subordinate Judge is that summons

was not served. The order sheet shows that an order was recorded on 22-9-60 that service report of summons against all the accused persons was received back after service anywhere, but the accused were absent and, there-fore, bailable warrant of arrest was directed to be issued. Warrant of arrest, however, was actually issued on 28- 10-60/29-10-60, and since the execution report was not received, warrant of arrest was re-issued on 21- 11-60 fixing 13-12-60 as the date of return. On 28-11-60 one accused surrendered and was enlarged on bail of Rs, 500. On 13-12-60 the following order was recorded. "Accused Pashupati Pandey files hazri E. R. of W/A against S. N. Pandey received unexecuted with a report that Arms force and a Magistrate may kindly be deputed for execution of W/A and process under Ss 87 and 88, Cr. P. C. I have separately written to S. D. O. in certificate matter for deputing armed forces with a Magistrate long ago. Bench clerk will send a copy of this to Deputy Commissioner for the deputation. Put up on 23-12-60." The finding of the learned Subordinate Judge -- (and his finding either on the question of service of summons or in this regard was not challenged) -- is that no attempt was made to serve the warrant of arrest on the plaintiff. I, however, do not attach much importance to this fact as at best it can lead to the conclusion that strong steps were unjustifiably directed to be taken against the plaintiff by recording the order dated 13-12-60. Nonetheless the steps taken were during the course of a judicial proceeding. The Magistrate gets absolute protection in this regard, under the Judicial Officers' Protection Act, 1850 (Central Act XVIII of 1850) But what happened after 4 p. m. on 13-12-60 is a matter of serious comment and consequence. There is no gainsaying the fact that the plaintiff was called by defendant No. 1 through the agency of defendant No. 2 and a court constable from a place near the Bar Library to his court room or to a part of it which was being used as his chamber. No fresh warrant of arrest was issued by defendant No. 1 directing any proper person to execute it. His stand is that in exercise of his powers under Section 65 of the Code he arrested the plaintiff and on his failure to file the bail of Rs. 1.000 and two sureties of the like amount, he remanded him to custody. The order which was recorded at 4.15 p. m. on 13-12-60 runs as follows--

"Sri Daya Sagar Sharan a U. D. assistant informed this Court that the accused who is also certificate debtor in many certificate cases is loitering and going away to Bar Library side. This Court deputed court constable to send for the accused who came. The accused is remanded to custody in default of bail of Rs. 1,000 with 2 sureties of the like amount Put up on the date fixed i. e. 23-12-60."

No reason is recorded In this order as to why this extraordinary and over zealous step was taken by the Magistrate to put the accused (plaintiff) under arrest in exercise of his powers under Section 65 of the Code. Even the fact of his arrest is not noted in the order sheet, merely the fact of the accused being remanded to custody for default of bail was recorded. The reference to the fact of the plaintiff being a certificate debtor in many ceitificate cases clearly shows the domi-nent object of the arrest, which was to coerce the plaintiff to pay up the certificate dues, as is so obvious from the undisputed facts relating to the payment of the certificate dues and the release of the plaintiff on bail. The action of the Magistrate, to say the least, is highly deplorable. To achieve the object of realising the certificate dues by adopting questionable and unlawful method of putting the plaintiff under arrest was unbecoming of a Magistrate who claimed to be acting as the Sub-Divisional Officer and Sub-Divisional Magistrate on 13-12-60 in absence of the permanent Sub-Divisional Officer. It will not be necessary for me in this case to lay stress upon the fact of not releasing the plaintiff on bail for 3 days as it seems to me. this part of the action of the Magistrate is in exercise of his judicial power which is absolutely protected under Central Act XVIII of

1850. No investigation can be made to find out the motive of the Magistrate in not releasing the plaintiff on bail. No facts can be entertained and no enquiry can be made in this suit to show that the learned Magistrate acted mala fide in not directing the release of the plaintiff on bail. But the very same facts become relevant for investigation to find out the motive, the propriety and the legality of the action of the Magistrate in arresting the plaintiff in exercise of his powers under Section 65 of the Code, as it appears to me that the power aforesaid or the exercise of it is administrative or executive and is not a judicial power although it may have been exercised during the pendency of a judicial proceeding.

(11) Similar is the position with reference to Ext. O/1, the order sheet of C. M. P. 49/58, In that case the accused was present on several dates. The case lingered on for quite a good number of days. Thereafter he wasabsenton 21-11-60. The order dated 21-11-60 shows that execution report of the warrant of arrest was received back intimating that the accused was evading arrest and. therefore, fresh warrant was directed to be issued with processes under Sections 87 and 83 of the Code fixing 12-12-60 as the date for return. On 12-12-60 an order of the kind which was recorded in the other case on 13-12-60 to execute the warrant with the help of an armed force was recorded in this case also. Whatever I have said above in connection with Ext O applies on all fours to the facts of Ext O/1. It is true that one may say that the Magistrate could arrest and arrested the plaintiff in the criminal cases pending against him for violation of certain provisions of the Mines Act or the Rules. The arrest by the Magistrate, however, under Section 65 of the Code would still be an executive action. On the facts and in the circumstances of this case. I am not prepared to hold that the Magistrate took an extraordinary step by sending for the plaintiff to his court and putting him under arrest in order to bring to conclusion the mining cases against him. I have: no doubt in mv mind that the only object or in any event the dominant object of putting the plaintiff under arrest in exercise of the powers under Section 65 of the Code was to coerce him to pay the certificate dues.

(12.) Exts. 8/i. 8/j. 8/q, 8/r and 8/h are the order sheets of the various certificate cases. The main order recorded in Ext 8/q on 16-12-60 runs thus:

"Received cheque No. 31078635 dated 14-12-60 of Jharia Industrial Bank Private Ltd. for Rs. 1435.41 (Rupees one thousand four hundred thirty five and Np. forty one only) against D. M. B. H. case No. 54/58-59. 21/59-60. 147/53-54, 46/58-59. 48/57-58. 107/56-57, 97/54-55. 227/50-51. 226'50-5I. Misc. No. 18 of 1960-61. 250/53-54. Misc. 42/56-57. 66/57-58, 19

59-60 send It to the Bank for encashment and put with challan."

Ext. 2 is the list of all the amounts said to be due from the plaintiff in the various certificate cases. This was in the handwriting of defendant No. 2. as is the unchallenged evidence of the nephew of the plaintiff. P. W. 8. In the first part of the list, the total amount shown due is Rs. 1,435.41 Np. and thereafter there is an endorsement on this list to this effect: -- "Paid by Ch, No. 078635 dated 14-12-60 Rs. 1,435.41 Np. on 14-12-60." In the second part of the list, after mentioning the details and the total dues of Rs. 3,248.22 Np. it is noted - "Paid Che. No. 078636 dated 14-12-60 Rs. 3,248.22 Np," The indemnity bond (Ext. 10) executed by Kaluram Heliwal who had paid the entire amount of the certificate dues by the two cheques is dated 16-12-60 and it runs as follows :--

"I, Sri Kaluram Heliwal son of Bhairo Ram Heliwal of Baghmara P. S. do hereby stand surety for the cheque No. JI 078635 dated 14-11-60 for Rs. 1,435.41 Np. and cheque No. JI 078636 dated 14-11-60 for Rs. 3,248.22 Np. presented to the Certificate Officer, Baghmara at Dhanbad in Certificate cases against Sri S. N. Pandey son of Late Shamlal Pandey of village Khenudih P. S. Baghmara and promise to pay in cash in the event of the cheque being dishonoured within a day and hence Sri S. N. Pandey will not be responsible or liable for the dues in which payment have been made by the above cheques." It is, therefore, manifest that the entire amount for which numerous certificate proceedings were said to be pending against the plaintiff and/or others were realised in the high-handed and unlawful manner by illegally arresting the plaintiff and detaining him in prison. It is here that a court of law comes under a duty for the enforcement of the rule of law. No executive action, whatever may be its object -- good or bad, can be allowed to exceed the limits of law. The Certificate Officer had no power like the one engrafted in Section 65 of the Code to arrest the plaintiff. No such provision exists in relation to the exercise of the various powers of directing arrest under the Code of Civil Procedure. I am constrained to say that defendant No. 1 in the garb of exercising his power ostensibly in the criminal cases for the alleged violation of the mining law by the plaintiff exercised it mala fide with the ulterior object of coercing the plaintiff to pay the amounts said to be due from him in the various certificate cases. The evidence of the plaintiff who has examined himself as P. W. 10 is that on his release from jail he took copies of certain papers of the certificate cases from which he came to know that he was not liable to pay the amounts which were realised from him. This evidence dees not seem to be quite correct. Yet it finds some support from the evidence of defendant No. 1 who has examined himself as D, W. 2. In cross-examination he had to admit that from the record it did not, appear that Sailaja Nanda Pandey meaning thereby the plaintiff had any liability in the two cases which in the narration of his deposition were the first two ones. The evidence of D. W. 2 that when the plaintiff came on being called by him through the constable, he asked him to furnish bail of Rs. 1,000 with two sureties and then he said that he would not furnish the bail, the Magistrate may do whatever he liked is obviously not correct. There is no such case in the written statement. In evidence the Magistrate fights shy of admitting that he arrested the plaintiff first and then asked him to furnish bail. But obviously he could not ask him. to furnish bail without arresting him. The circumstances as they appear from the records are so overwhelming that I am not prepared to believe the evidence of D. W. 2 when he says that he sent for him on 13-12-60 on the basis of the orders recorded in C. M. A. case No. 24/60 and C. M. P. case No. 49/58 because from those orders it appeared that the accused was evading arrest. It will be remarkable to accept the evidence that a Magistrate who merely worked as Sub-Divisional Magistrate on a few days when the regular Sub-Divisional Magistrate was not able to attend to his duties would be able to remember about a particular accused, call him and put him under arrest in connection with minor summons cases which would have been pending against him. Clearly, as is his case also, defendant was over zealous in realising the certificate dues somehow or the other by hook or by crook. In this case also he did succeed in realising the dues as eventually the orders recorded in the order sheets of the certificate cases show. But at what cost? A court of law cannot allow to go unnoticed the unlawful, illegal and overzealous action of the executive for the realisation of the certificate dues.

(12.) Exts. 8/i. 8/j. 8/q, 8/r and 8/h are the order sheets of the various certificate cases. The main order recorded in Ext 8/q on 16-12-60 runs thus:

"Received cheque No. 31078635 dated 14-12-60 of Jharia Industrial Bank Private Ltd. for Rs. 1435.41 (Rupees one thousand four hundred thirty five and Np. forty one only) against D. M. B. H. case No. 54/58-59. 21/59-60. 147/53-54, 46/58-59. 48/57-58. 107/56-57, 97/54-55. 227/50-51. 226'50-5I. Misc. No. 18 of 1960-61. 250/53-54. Misc. 42/56-57. 66/57-58, 19

59-60 send It to the Bank for encashment and put with challan."

Ext. 2 is the list of all the amounts said to be due from the plaintiff in the various certificate cases. This was in the handwriting of defendant No. 2. as is the unchallenged evidence of the nephew of the plaintiff. P. W. 8. In the first part of the list, the total amount shown due is Rs. 1,435.41 Np. and thereafter there is an endorsement on this list to this effect: -- "Paid by Ch, No. 078635 dated 14-12-60 Rs. 1,435.41 Np. on 14-12-60." In the second part of the list, after mentioning the details and the total dues of Rs. 3,248.22 Np. it is noted - "Paid Che. No. 078636 dated 14-12-60 Rs. 3,248.22 Np," The indemnity bond (Ext. 10) executed by Kaluram Heliwal who had paid the entire amount of the certificate dues by the two cheques is dated 16-12-60 and it runs as follows :--

"I, Sri Kaluram Heliwal son of Bhairo Ram Heliwal of Baghmara P. S. do hereby stand surety for the cheque No. JI 078635 dated 14-11-60 for Rs. 1,435.41 Np. and cheque No. JI 078636 dated 14-11-60 for Rs. 3,248.22 Np. presented to the Certificate Officer, Baghmara at Dhanbad in Certificate cases against Sri S. N. Pandey son of Late Shamlal Pandey of village Khenudih P. S. Baghmara and promise to pay in cash in the event of the cheque being dishonoured within a day and hence Sri S. N. Pandey will not be responsible or liable for the dues in which payment have been made by the above cheques."

It is, therefore, manifest that the entire amount for which numerous certificate proceedings were said to be pending against the plaintiff and/or others were realised in the high-handed and unlawful manner by illegally arresting the plaintiff and detaining him in prison. It is here that a court of law comes under a duty for the enforcement of the rule of law. No executive action, whatever may be its object -- good or bad, can be allowed to exceed the limits of law. The Certificate Officer had no power like the one engrafted in Section 65 of the Code to arrest the plaintiff. No such provision exists in relation to the exercise of the various powers of directing arrest under the Code of Civil Procedure. I am constrained to say that defendant No. 1 in the garb of exercising his power ostensibly in the criminal cases for the alleged violation of the mining law by the plaintiff exercised it mala fide with the ulterior object of coercing the plaintiff to pay the amounts said to be due from him in the various certificate cases. The evidence of the plaintiff who has examined himself as P. W. 10 is that on his release from jail he took copies of certain papers of the certificate cases from which he came to know that he was not liable to pay the amounts which were realised from him. This evidence dees not seem to be quite correct. Yet it finds some support from the evidence of defendant No. 1 who has examined himself as D, W. 2. In cross-examination he had to admit that from the record it did not, appear that Sailaja Nanda Pandey meaning thereby the plaintiff had any liability in the two cases which in the narration of his deposition were the first two ones. The evidence of D. W. 2 that when the plaintiff came on being called by him through the constable, he asked him to furnish bail of Rs. 1,000 with two sureties and then he said that he would not furnish the bail, the Magistrate may do whatever he liked is obviously not correct. There is no such case in the written statement. In evidence the Magistrate fights shy of admitting that he arrested the plaintiff first and then asked him to furnish bail. But obviously he

could not ask him. to furnish bail without arresting him. The circumstances as they appear from the records are so overwhelming that I am not prepared to believe the evidence of D. W. 2 when he says that he sent for him on 13-12-60 on the basis of the orders recorded in C. M. A. case No. 24/60 and C. M. P. case No. 49/58 because from those orders it appeared that the accused was evading arrest. It will be remarkable to accept the evidence that a Magistrate who merely worked as Sub-Divisional Magistrate on a few days when the regular Sub-Divisional Magistrate was not able to attend to his duties would be able to remember about a particular accused, call him and put him under arrest in connection with minor summons cases which would have been pending against him. Clearly, as is his case also, defendant was over zealous in realising the certificate dues somehow or the other by hook or by crook. In this case also he did succeed in realising the dues as eventually the orders recorded in the order sheets of the certificate cases show. But at what cost? A court of law cannot allow to go unnoticed the unlawful, illegal and over zealous action of the executive for the realisation of the certificate dues.

(13.) The learned Subordinate Judge has mixed up the exercise of the power of arrest under Section 65 of the Code with the fact of not enlarging the plaintiff on bail for 3 days resulting in his detention in prison. His view that neither the arrest of the plaintiff on 13-12-60 was illegal and without jurisdiction nor was his detention in jail from 13-12-60 to 16-12-60 unlawful is not correct. I, however, do not find it necessary to examine the correctness of his views in regard to the detention of the plaintiff in jail from 13-12-60 to 16-12-60. But having held that the arrest of the plaintiff by defendant No. 1 on 13-12-60 was made illegally and mala fide, I now proceed to examine as to whether it was with or without jurisdiction.

(14.) As stated above, the local limits of the jurisdiction of defendant No. 1 were the entire Baghmara Sub-Division and no part of the court precincts at Dhanbad was within the local limits of his jurisdiction. The learned Subordinate Judge has said that it would appear to be an anomalous position that the Magistrate can order the arrest of the plaintiff sitting in the court room at Dhanbad but could not take any action against him in that court room. On this apparent anomaly he has taken the view that arrest of the plaintiff in the court room of defendant No. 1 must be deemed to be within his territorial jurisdiction, I do not accept this view as correct. We asked the learned Additional Government Pleader to show us the notification prescribing the limits of the jurisdiction of defendant No. 1 when he was posted at Dhanbad as Magistrate, 1st Class, Bagh-mara Sub-Division. He could not do so, Nothing could be shown to us that the jurisdiction of defendant No. 1 extended beyond the local limits of Baghmara Sub-Division. I find no principle like the one of International Law applicable to ships on high seas, to enable me to uphold the view of the learned Subordinate Judge that the Court precinct of defendant No. 1 at Dhanbad can be treated as part of the area of Baghmara Sub-Division. That being so, it is obvious that defendant No. 1 exercised his power under Section 65 of the Code not only with an ulterior motive as held above but also beyond the local limits of his jurisdiction. It amounted to false imprisonment making defendant No. 1 liable to pay damages in tort. Defendant No. 2, however, cannot be fastened with any liability in the matter. He committed no wrong in merely calling the plaintiff from the Bar Library to the court room of defendant No. 1 in pursuance of his order. He took no part in putting the plaintiff under arrest.

(15.) At page 178 of the 14th Edition of Salmond on Torts it is said -

"The wrong of false imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him without lawful justification from exercising his right of leaving the place in which he is."

In my opinion, defendant No. 1 has committed the wrong of false imprisonment in this case.

(16.) The judgment of the Assam High Court in Anowar Hussain v. Ajoy Kumar Mukherjee, AIR 1959 Assam 28 has been upheld by the Supreme Court in Anowar Hussain v. Ajoy Kumar Mukherjee, AIR 1965 SC 1651. It has been pointed out by the Supreme Court that the Act of 1850 "protects a Judicial Officer only when he is acting in his judicial capacity and not in any other capacity." It has been observed further -

"But within the limits of its operation it grants large protection to Judges and Magistrates acting in the discharge of their judicial duties. If the act done or ordered to be done in the discharge of judicial duties is within his jurisdiction, the protection is absolute and no enquiry will be entertained whether the act done or ordered was erroneously, irregularly or even illegally, or was done or ordered without believing in good faith, that he had jurisdiction to do or order the act complained of. If the act done or ordered is not within the limits of his jurisdiction, the Judicial Officer acting in the discharge of his judicial duties is still protected, if at the time of doing or ordering the act complained of, he in good faith believed himself to have jurisdiction to do or order the act. The expression 'jurisdiction' does not mean the power to do or order the act impugned, but generally the authority of the Judicial Officer to act in the matter: Tayen v. Ram Lal, ILR 12 All 115."

It will be useful to note here the reasons for such protection from Article 1352 at page 707 of Volume 30 of Halsbury's Laws of England, 3rd Edition. The passage reads thus :--

"The object of judicial privilege is not to protect malicious or corrupt judges, but to protect the public from the danger to which the administration of justice would be exposed if the persons concerned therein were subject to inquiry as to malice, or to litigation with those whom their decisions might offend. It is necessary that such persons should be permitted to administer the law not only independently and freely and without favour, but also without fear." In the same volume at page 709 Article 1354 describes as to what proceedings are protected and Article 1355 states about the extent of protection. It is said at page 709 - "The protection of judicial privilege applies only to judicial proceedings as contrasted with administrative or ministerial proceedings; and, where a judge acts both judicially and ministerial or administratively, the protection is not afforded to acts done in the latter capacity ..... Duties, however, which are partly judicial and partly ministerial, such as the duty of admittng to bail, are not sever-able so as to admit of liability for any part of the acts done in fulfilment thereof,"

But - "Wherever protection of the exercise of judicial powers applies, it is so absolute that no allegation that the acts or words complained of were done or spoken mala fide, maliciously, corruptly, or without reasonable or probable cause suffices to found an action." Further it has been pointed out under the title "Liability of Magistrates" at page 160 of Volume 25 of Halsbury's Laws of England, 3rd Edition, that -

"Protection is afforded by common law and by statute to justices in respect of acts done in the execution of their duty as such; but this protection does not extend to cases where they have acted either maliciously and without reasonable and probable cause, or without or in excess of their jurisdiction, and in such cases they are liable to an action for damages at the suit of the party "aggrieved,"

A similar passage occurs at page 768 of Volume 38 of the Halsbury's Laws of England, 3rd Edition -

"A Magistrate or other person acting In a judicial capacity is not liable for acts done within his jurisdiction, but he is liable to an action for false imprisonment If he unlawfully commits a person to prison in a matter in which he has no jurisdiction, provided that he has knowledge, or the means of knowledge of the facts which show that he has no jurisdiction."

(17.) The relevant part of Section 1 of the Judicial Officers' Protection Act, 1850 runs thus -

"No Judge. Magistrate. Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in anv Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of ....."

(18.) In the first Instance, I am of the view that the act of arrest of the plaintiff done by defendant No. 1 was not such that the Magistrate can be said to be acting judicially within the meaning of the law engrafted in the Act of 1850; it was an administrative or executive act The act of refusing to enlarge the plaintiff on bail was a judicial act Sitting in the court room at Dhanbad and exercising powers as the Sub-Divisional Magistrate of Baghmara Sub-Division, defendant No. 1, was acting judicially within the limits of his jurisdiction in not ac-cepting the bail offered on behalf of the plaintiff for 2 or 3 days. In that regard defendant No. 1 has got the absolute protection. In the second place assuming, however, for the sake of argument that even while making the arrest under Sec-tion 65 of the Code defendant No. 1 was acting judicially, he was not so acting within the limits of his jurisdiction. Section 65 did not in terms authorise the Magistrate to arrest, the plaintiff within the court precincts situated within the Sadar Sub-Division of Dhanbad. It is neither the case of defendant No. 1 nor are there any materials to indicate that at the time he so acted, in good faith he believed himself to have jurisdiction to do the act complained of. With due care and caution, he must have been aware that his court was not at a place which was within the local limits of his jurisdiction. Even on interpreting the provision of law contained in Act XVIII of 1850 in the light of what has been said in the different passages extracted above from Halsbury's Laws of England, I have arrived at the conclusion that the Magistrate has no absolute protection in regard to his act of arrest of the plaintiff. It Is a qualified protection, and on my finding that he acted illegally, mala fide and without jurisdiction in the matter of arrest of the plaintiff, defendant No. 1 Is still liable in tort to pay damages to the plaintiff. The view I have just expressed can be lent support to by the decision of Diplock, J., as he then was, in O'Connor v. Isaacs, (1956) 1 All ER 513. While holding on the facts of that case that the plaintiff has established 8 right of

action at common law for false imprisonment against some of the defendants , the learned Judge was of the opinion that the action was barred by law of limitation. The decision was upheld by the Court of Appeal in O'Connor V. Isaacs, (1956) 2 All EH 417.

(19.) The learned Additional Government Pleader on the authority of the decision of the Supreme Court in Nana-lal Zaber v. Bombay Life Assurance Co. Ltd., 1950 SCR 391 = (AIR 1950 SC 172) submitted that even if one of the motives of defendant no, 1 was to arrest the plaintiff for realization of the certificate dues, the act of arrest being also with the object of compelling his attendance in the mining cases cannot be said to be tantamount to false imprisonment. I am unable to accept this argument. In the first place. I have held that the only object or, in any event, the dominant object was to arrest the plaintiff to force him to pay the certificate dues. In the second place even assuming that one of the motives for arrest was to bring to conclusion the mining cases, still the arrest was beyond the local limits of the jurisdiction of the Magistrate. The principle enunciated by the Supreme Court with reference to the exercise of the powers of the Directors of a company in a meeting cannot apply to the facts of the instant case.

(20.) For determining as to what should be the proper amount of damages to be awarded in this case, it will be useful to quote a passage from paragraph 850 at page 721 of the 12th Edition of Mayne and McGregor on Damages -

"The details of how the damages are worked out in false imprisonment are few: generally it is not a pecuniary loss but a loss of dignity and the like, and Is left much to the jury and their discretion. The principal heads of damage would appear to be the injury to liberty, i. e., the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings. i. e., the indignity, mental suffering, disgrace, and humiliation with any attendant loss of social status. This will all be Included in the general damages which are usually awarded in these cases ....."

No claim for special damages has been made or proved in this case. Taking into consideration all that has been said by the learned Subordinate Judge in connection with the quantum of damages Which he fixed at Rs. 4,000 and the facts in relation to which could not be challenged before us, I think the plaintiffs Stand will be vindicated and justice would be met by awarding a sum of Rs. 1,000 only as damages to him against defendant No. 1.

(21.) In the result I allow the appeal, set aside the Judgment and decree of the court below and award a decree for Rs. 1.000 only to the plaintiff against defendant No. 1 with proportion.

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Cross Citation :1956-ILR(BOM)-0-930 , 1956-CRLJ-0-1297

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : C.J.CHAGLA, Y.V.DIXIT , JJ

Criminal Appln. 690 of 1956 ; Jun 26,1956
Arunachalam Swami ……Vs…… State of Bombay

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Equality before law and equal protection of law – constitution of India Article 14 – criminal trial – Held- article 14 assures to the citizen equality not only in respect substantive law but also procedural law- the procedure is still available where these substantive right of relief and defence secured- when two persons are equally situated (para4)

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(1.) THE four petitioners before us were put up before the Presidency Magistrate. 9th Court, under Section 302 read with Section 34, Penal Code. The learned Presidency Magistrate after following the procedure laid down in Section 207a, Criminal P. C. came to the conclusion that the accused should be committed for trial and thereupon he passed an order of commitment. Before the order was passed the accused applied to the learned Magistrate that they should be permitted to lead evidence to disprove the allegations made against them by the prosecution. This application was rejected by the learned Magistrate on the ground that there was no provision in law for defence evidence. The petitioners have now come before us under Article 227 praying that we should quash the Order of commitment on the ground that the new procedure followed by the learned Magistrate under Section 207a was contrary to the Constitution inasmuch as it offended against Article 14 and also on the ground that on merits the commitment order was bad.

(2.) NOW, the Constitutional aspect of this petition raises a rather interesting question. The amendment of the Criminal Procedure Code which was effected recently by Act 26 of 1955 has made a rather redical change in the procedure to be followed in inquiries into cases triable by the Court of Session, and broadly speaking the amendment is this. Whereas under the Old Code the same procedure had to be followed in these inquiries, whether the accused was put up on a private complaint or as a result of a police report, the amendment makes a distinction in the procedure to be followed in these inquiries according as to whether the accused is put up on a private complaint or as a result of a police report. As we shall presently point out, whereas the procedure to be adopted in proceedings instituted on a police report is intended for the purpose of bringing about an expeditious end to the inquiry so that the accused should be able to stand his trial in the Court of Session as soon as possible in case he is committed, in the case of procedure to be followed in inquiries where the accused is put up as a result of a private complaint the procedure is much more elaborate and what is urged before us is that there is a discrimination as between one accused and another although they may be charged with the same offence and in the procedure that has got to be followed in the case of an accused where proceedings are instituted against him on a police report he is deprived of

important rights which arc vouchsafed to the accused in the other case, and what is urged is that the most important right that the accused is deprived of in cases falling under Section 207a where the procedure has to be followed in proceedings instituted on a police report is that he is prevented from calling evidence in his defence, and the other right which is suggested he is deprived of is a right to go to the High Court under Section 215 in order to have the order of commitment quashed.

(3.) NOW, Sub-section (4) of the new Section 207a provides :

"the Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged; and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also. "

Then Sub-section (5) gives the accused the liberty to cross-examine the witnesses examined under Sub-section (4) and the right of the prosecutor to re-examine them. Sub-section (6) provides that after the evidence referred to in Sub-section (4) has been taken and the Magistrate has considered all the documents referred to in Section 173 and has if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of the opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly. Then Sub-section (7) deals with the order of commitment and it provides:

"when, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged. "

What is pointed out is that under Sub-section (4) the only right that the Magistrate has is to take the evidence of the witnesses produced by the prosecution and further in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution. It is pointed out that this sub-section clearly prevents the Magistrate from taking the evidence on behalf of the defence, even though such evidence may be in the interests of justice. It is said that the accused may be in a position to call a witness who would conclusively prove that the accused was not guilty of the offence with which he was charged, the witness may be in the nature of an alibi witness and he may establish that at the material date the accused was not at the scene of the offence but was somewhere else, and yet it is said that the amended Code does not permit the Magistrate to take such evidence. It is further said that the accused has a right at this stage to an order of discharge if by leading evidence he can secure it and he cannot be deprived of that right. In contrast to this it is pointed out that under Section 208 and the following sections which provide for procedure to be followed in proceedings instituted otherwise than on a police report, that is, on a private complaint, the accused has been fully safeguarded by vouchsafing to him the right to call evidence in defence. Section 208 (1) casts an obligation upon the Magistrate to hear the complainant and take all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by the Magistrate. It is further pointed out that under Section 212 discretion is given to the Magistrate to examine any witness named in any list which is to be furnished after the Magistrate has framed the charge. Therefore it is pointed out that the accused under the

old procedure is permitted to lead evidence at two stages; before the framing of the charge and after the framing of the charge. The Magistrate may not frame the charge at all after hearing the evidence called by the accused and even after he has framed the charge if after hearing further evidence led by the accused he is satisfied that the accused should not be committed to the Court of Session, he can cancel the charge and discharge the accused.

(4.) IT is therefore strenuously urged by Mr. Kavelkar that the amendment of the Code deprives the accused, who has been proceeded against on a police report, of a substantive right of relief and defence, and in so depriving him Section 207a offends against Article 14 of the Constitution because this important right of defence and relief has been secured to the accused who is being proceeded against on a private complaint. Mr. Kavelkar is right when he urges that Article 14 assures to the citizen equality not only in respect of a substantive law but also procedural law, and if any procedure is set up which deprives a citizen of substantive rights of relief and defence the citizen is entitled to complain of this procedure if to persons equally situated the older procedure is still available where these substantive rights of relief and defence were secured. In the first place, it must, be borne in mind that Chap. XVIII of the Code deals with inquiries and not with trials. The object of this inquiry is to enable the Magistrate to determine whether there is a prima facie case for the committal of the accused. The Magistrate in a sense is not deciding anything at all. He is not passing any order which substantially affects the accused. He holds an inquiry and decides whether the materials placed before him are such as to make it necessary that the accused should stand his trial before the Court of Session. Therefore, when the petitioners say that they have been deprived of their right of defence and of leading evidence, in one sense it is not a justifiable complaint because whatever evidence they have to lead they can lead before the Court of Session. It is that Court in which they would be tried and it is in relation to that Court that the question has got to be asked whether in their trial in that Court they have been deprived of any substantive right of defence or relief. In the Supreme Court case on which Mr. Kavelkar relies and which had to consider cases of procedure, it will be noticed that in all those cases the accused were deprived of certain important rights in the trial of the cases against them. In the matter before us we are not dealing with trial, but we are dealing with an inquiry which is antecedent to the trial. It should also be borne in mind that the amendment of the Code has been brought about with the express purpose of ensuring a speedy trial and to prevent harassment to the accused. All cases to which Chap. XVIII applies are in their very nature serious cases and serious cases normally are investigated into by the police and proceedings are instituted on a police report. There are cases where a complainant may put a complaint on the file of the criminal Court even with regard to a case which should normally be investigated by the police. Even so the Magistrate has the power to refer the complaint for investigation to the police and if on that investgation the police makes a report then again the case would fall under the provisions of Section 207a. But Mr. Kavlekar is right that even so some cases may remain where the police mayrefuse to take up the matter and the case may proceed on a private complaint. Ordinarily such cases must be those about which the police feel that either they are frivolous or they are actuated by private vendetta and there are not sufficient materials to justify a police investigation. It is in these very cases that the accused re-quire proper protection and the policy of the law is not concerned if there is delay in disposal of such private complaints. It is because of this that the old procedure is retained with regard to an inquiry instituted as a result of private complaints. That procedure makes possible a very elaborate inquiry, formal evidence is called by the accused and a consideration by the Magistrate both of the evidence led by the prosecution and the evidence led by the accused. But with regard to the right of the accused, to call

evidence, although there is no specific provision in Section 207a itself, we refuse to countenance the suggestion made by Mr. Kavlekar that in the interest of justice even if the Magistrate wanted to hear evidence called by the accused he is precluded from doing so. Indeed that is the view taken by the learned Magistrate in the matter before us. In the first place, it must be borne in mind that when Sub-section (4) of Section 207 A speaks of "other witnesses for the prosecution," it assumes that all material witnesses are and must be witnesses for the prosecution. The law is well settled that it is not open to the prosecution or to the police investigating an offence only to place before the Court, witnesses who support the prosecution story. If there are other material witnesses who support the defence of the accused, it is equally the duty of the prosecution to call them. Undoubtedly there may be witnesses supporting the accused whom the prosecution may consider untrustworthy, in which case there would be no obligation on the prosecution to treat them as prosecution witnesses. Therefore the situation would rarely arise where a material witness who would support the defence would not be called by the prosecution under the provisions of Section 207a itself. But we must contemplate a case where for some reason or other the prosecution does not choose to call a witness who is material and who supports the accused. Is it suggested that there is no power in the Magistrate to call such a witness? In our opinion, the clear answer to this conundrum placed before us by Mr. Kavlekar is Section 540. That is a very wide section and confers power upon every Criminal Court at any stage of inquiry, trial or other proceeding under the Code to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. Therefore, it is obligatory upon the Court to summon a person if his evidence is necessary for the just decision of the case, and if the accused makes an application to call a particular witness and if that witness is a material witness and it would help the Magistrate to come to a just decision then undoubtedly under Section 540 not only the Magistrate would have the discretion to call him, but there would be a duty upon him to summon that witness and examine him. Therefore, in our opinion, the learned Magistrate was wrong when he rejected the application of the petitioners to call evidence on the ground that there was no provision in law for a defence witness. He should have considered the nature of the evidence and should have exercised his discretion under Section 540 and if he had come to the conclusion that any of the witnesses was essential to the just decision of the case then it was his duty to summon such witness. (5.) IT is then said that the accused in this case has been deprived of the right to approach the High Court under Section 215. Under that section it is provided:

"a commitment once made under Section 213 by a competent Magistrate or by a civil or Revenue Court under Section 478, can be quashed by the High Court only, and only on a point of law. "

Therefore, this section provided a certain limitation upon the power of the High Court in the case of commitment orders passed under Section 213. If an order of commitment was passed under Section 213 then it could be quashed only by the High Court and only on a point of law. The result of enacting Section 207a is that an order of commitment passed under this section does not fall under Section 215 and the argument put forward by Mr. Kavlekar is that however erroneous in law the order of commitment might be under Section 207a, the accused would have no right to approach the High Court under Section 215. Now, if Section 215 is a limitation upon the power of the High Court then that limitation only applies to orders made under Section 213. They do not apply to an order made under Section 207a. Therefore, the ordinary power of the High Court to revise any order passed by a criminal Court subordinate to it or the power of the High Court under

Section 531a remains unaffected as far as the orders of commitment made under Section 207a are concerned. Apart from these two sections the accused has always the right to approach the High Court "under Article 227 of the Constitution. It may perhaps be difficult to understand why this distinction was made in the case of an order of commitment passed under Section 213 and one passed under Section 207a. But it may be that it confers a wider power upon the High Court with regard to orders of commitment passed under Section 207a and the reason for conferring this wider power may. be that as orders of commitment under Section 213 are passed after elaborate inquiry and they would be passed rather rarely by the Magistrate who would realise that he is dealing with a serious case which has not been taken by the Police but is being proceeded with on a private complaint, that in such cases ordinarily the order of commitment should not be set aside except on a point of law and the power should be confined to the High Court. Therefore, as far as the present accused are concerned they should have no grievance with regard to their right to approach the High Court being affected by the amendment to the Code. If their rights are affected at all they are affected not to their prejudice but to their advantage, and it is impossible to contend that by reason of Section 215 he has no right to approach the High Court at all, however erroneous the order of commitment the Magistrate may pass. (6.) MR. Kavlekar has made an appeal to us that arguments of expediency and despatch should not influence us in deciding against the petitioners if their substantial rights are affected by the amendment introduced to the Criminal Procedure Code. We entirely agree that the Legislature in the interest of quick decision of cases and in order to see that arrears do not mount up in criminal Courts cannot institute a procedure which although it gives an expeditions trial to the accused deprives him of any substantial rights. But it is certainly open to the Legislature to devise a procedure which in certain important class of cases brings about the desirable result of doing away with unnecessary elaborate inquiry and brings the accused to trial as expeditiously as possible. But the procedure devised by the Legislature must always conform to this principle that he should have the same important rights of defence and relief as any other accused who would be entitled to a more elaborate procedure. In our opinion, on both the grounds urged by Mr. Kavlekar, viz. , the right of calling defence evidence and the right to approach the High Court, which are both important and substantive rights, no prejudice whatever is caused to the accused before us in contradistinction to an accused person who though charged with the same offence is being proceeded against at the instance of a private complaint and not on a police report. (7.) IT is then urged by Mr. Kavlekar that there Is a clear inconsistency between the provisions of Section 207a, Sub-section (6) and Section 162. As already pointed out Sub-section (6) of Section 207a requires the Magistrate to consider all the documents referred to in Section 173 and after examining the accused and after giving the prosecution and the accused an opportunity of being heard he may pass an order of discharge if he comes to the conclusion that the evidence and documents do not disclose any ground for commitment of the accused. When we turn to Section 173, among the documents referred to in that section, are the documents referred to in Sub-section (4) and those documents are a copy of the report forwarded under Sub-section (1) of Section 173 and of the first information report recorded under Section 154 and of all other documents of relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under Section 164 and the statements recorded under Sub-section (3) of Section 161 of all the persons whom the prosecution proposes to examine as its witnesses. It is said by Mr. Kavlekar that the documents which the Magistrate has to consider under Section 207a are not documents referred to in Sub-section (4) of Section 173, but they are those documents which are referred to in other parts of Section 173 which the police have to forward to the

Magistrate. Sub-section (4) is a new sub-section and that confers upon the accused a very important right. That right is that he is entitled to receive copies from the police of all the documents mentioned in this sub-section and therefore Mr. Kavlekar contends that as this sub-section deals with documents, to be sent to the accused they are not the documents which the Magistrate has got to consider under Section 207a (6). In our opinion, that contention is entirely untenable because Section 207a (6) requires the Magistrate to consider all the documents referred to in Section 173 and among the documents referred to in Section 173 are undoubtedly documents mentioned in Sub-section (4) of Section 173. This argument is pressed by reason of the contention put forward with regard to the true construction of Section 162. It is urged that the policy of the law always has been that the statements made of witnesses to the police and recorded under Section 161 (3) should not be used for any purpose except the limited purpose mentioned in the proviso to Section 162 (1) and that limited purpose is the purpose of contradicting the witness in the manner provided by Section 145, Evidence Act. It is said that if the Magistrate were to be sent statements recorded by the police under Section 161 (3) and if he were given the right to consider these statements under Section 207a (6), then the policy of the law would be defeated and the Magistrate will be making use of statements which the law has always been anxious not to have treated as evidence in the case. (8.) NOW, there are various answers to this difficulty raised by Mr. Kavlekar. In the first place, under Section 207a (3) the statements of witnesses recorded by the police under Section 161 (3) do not become evidence. The Magistrate only considers them for the purpose of either discharging the accused or passing the order of committal. It is further quite obvious that the reason why the Magistrate has got to consider the statements is in the interests of the accused himself. The Legislature did not want the Magistrate to commit the accused merely on the oral testimony of witnesses produced by the prosecution. The Legislature wanted the Magistrate to test that evidence in the light of what these very witnesses had stated to the police earlier and nearer the point of time when the offence was committed, and if the Magistrate on considering these statements felt that the oral evidence given by the witnesses was untrustworthy and unreliable it would be open to the Magistrate to discard or disregard the oral evidence and to discharge the accused. Therefore, in our, opinion, the policy of the law with regard to these statements is in no way being defeated by the Magistrate being asked to consider these statements. But apart from the question of policy, when we look at the strict language of Section 162 itself, the prohibition with regard to these statements is qualified by the language used by the Legislature "save as hereinafter provided" and the rather curious contention put forward by Mr. Kavlekar is that that exception is only to be found in proviso to Section 162 (1) and not to any of the provisions of the Code. It is impossible to accept that contention. "hereinafter" may be either in the latter part of the section or anywhere else in the Code. The Legislature has not seated that the exception must be hereinafter in the section itself, and if there is an exception provided in Section 207a that is an exception which is hereinafter provided in relation to Section 162. We do not understand why the exception provided in Section 207a (6) should be disregarded or overlooked. In any case, our duty is to reconcile Section 162 (1) with Section 207-A (6) and there cannot be the slightest doubt that whatever the Legislature might have provided in Section 162 (1) it was the clear intention of the Legislature that the Magistrate must look at these statements, and consider them for the purpose of passing his commitment order under Section 207a. If that was the clear intention of the Legislature, it could not be said that the Legislature did not wish to constitute that as an exception to Section 162 (1). (9.) TURNING to the merits of the case, there is very little that can be said in favour of the petitioners. We would have set aside the order of commitment passed by the learned Magistrate if we have, felt that he

had erroneously refused to permit the accused to lead evidence in their defence. The position with regard to this evidence is that the accused were called upon to make a statement under Section 207a (6) and the answer they gave was that they would make their statement in the Court of Session. They were asked to give a list of persons whom they wished to summon to give evidence in their trial in the Court of Session, and their answer was that they would call their witnesses, if necessary, in the Court of Session. Therefore, in their written statements the accused never foreshadowed any defence, nor did they suggest that they would want to call any evidence nor substantiate that defence. They reserved their defence for the Court of Session and apparently they also reserved their right to call evidence in the Court of Session. This application which was subsequently put in seems to us to have been put in solely for the purpose of getting this important constitutional point decided by the High Court. (10.) AS regards the order of commitment passed by the learned Magistrate, Mr. Kavlekar has offered certain criticisms. Now, in all the orders of commitment one must always bear in mind the general principles applying to these orders. The Magistrate is not supposed to weigh evidence and to decide as to whether the accused is innocent or guilty. That is the function of the Jury when the case goes to the sessions. It is not even his duty to consider whether a conviction is probable. Even that is the function of the jury and the Magistrate is trespassing upon the province of the jury if he were to debate in his mind whether a conviction is probable. All that he has to consider is whether on the evidence led a conviction is possible; whether reasonable persons like the persons who constitute the jury are likely to take the view on the evidence led that the accused was guilty. It is true that we have laid down that the Magistrate should not waste the time of the jury if the evidence in his opinion is so worthless that no reasonable men would accept it as true. But subject to that the Magistrate is only concerned with deciding whether there is -- to use a well-known English legal expression -- sufficient evidence to go to the jury. If there is sufficient evidence to go to the jury then whether that evidence should be believed or not is a matter for the jury and not for the Magistrate. From this point of view it is difficult to say why the order passed by the Magistrate cannot be supported. The Magistrate, in the first place, has dealt with the evidence of one Pachiammal who was standing in front of her room and who saw all the four accused coming there and asking for Dorraj the deceased, and she says that they were all armed with weapons and she describes the weapons which the accused had. She told the accused that Dorraj was not at home and then they all searched for him. Dorraj was in the room of one Peermal. He came out of the room and started running and all the accused chased him with the weapons in their hands, and very soon after this the dead body of Dorraj was found lying at a distance of 100 yards from the cliawl of Pachiammal. It is true that she is not an eye-witness to the murder, but she is an extremely important witness and she is a witness whose evidence if accepted would go a long way to establish the guilt of the accused. Then accused 1 and 2 were arrested on 9-2-1956 and the shirt of accused 1 and the shirt of accused 2 and the underwear he was wearing had blood stains. Then accused 2 made a statement and took the police to an open place behind a certain place in Dharavi and dug out a sword and a chopper from under a heap of refuse which the police took charge of and both these were bloodstained. Mr. Kavlekar has drawn our attention to a discussion by the Magistrate of the evidence of certain witnesses who although they did not identify the accused in the inquiry before him had identified him at an identification parade, and Mr. Kavlakar says that this evidence is irrelevant and the learned Magistrate has relied on this evidence in the order to commit the accused to the Sessions. We express no opinion as to whether this evidence is relevant or not. The proper time for considering this would be when the evidence is led before the Sessions Court. At this stage all that we are concerned with is to consider whether on the evidence led by the

Magistrate it could be said that there was no case to go to the jury. In our opinion, it is impossible to put forward that contention. Therefore, even on the merit, the commitment order must be upheld.
(11.) THE result is that the petition fails and must be dismissed.
(12.) PETITION dismissed.....
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Cross Citation :1976 CRI. L. J. 641 = AIR 1976 SUPREME COURT 859

SUPREME COURT OF INDIA

(From : AIR 1971 Ker 248)
Coram : 3 M. H. BEG, P. N. BHAGWATI AND R. S. SARKARIA, JJ. (Full Bench)

Criminal Appeals Nos. 118, 195 and 196 of 1971, D/- 30 -1 -1976.
Criminal Appeal No. 118 of 1971; S. Abdul Karim, Appellant v. M. K. Prakash and others, Respondent.

Criminal Appeals Nos. 195 and 196 of 1971; K. P. Ramaswami (In C. A. No. 195 of 1971); A. P. Parukutty Moopilamma and another (In C. A. No. 196 of 1971), Appellants v. M. K. Prakash and others, Respondents.
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Contempt of Courts Act (32 of 1952), S.3 - CONTEMPT OF COURT - Criminal Contempt committed by judicial officer - Standard of proof - Revision petition against interim order by Magistrate was pending before High Court - No stay was granted - the Magistrate instead of waiting result of order by High Court passed order in favour of to respondents - A petition in the High Court complaining that R-l, R-2, R-3, R-4 and R-5 had committed contempt of the High Court within the meaning of Section 3 of the Contempt of Courts Act, 1952 and prayed that the respondents be punished for committing that contempt - The High Court found them (including R-3, the Magistrate) guilty of contempt of Court. On appeal to Supreme Court —

> **Held, the Magistrate was aware that P's revision petition against his interim orderwas then pending in the High Court. In such a situation, the prudent course for him was to postpone the making of any final order in regard to the subject matter till the final disposal of the revision petition by the High Court. It would also have been proper for him to issue notice to 'P' and give an opportunity of being heard before making any order-the Magistrate had at the most committed only a technical contempt**

of High Court, in absence of any mens rea penal action was not called for. (Para 32,33)

Wrong order or even an act of usurpation of jurisdiction committed by a judicial officer, owing to an error of judgement or to a misapprehension of the correct legal position, does not fall within the mischief of "criminal contempt". So long as a judicial Officer in the discharge of his official duties, acts in good faith and without any motive to defeat, obstruct or interfere with the due course of justice, the courts will not, as a rule, punish him for a "criminal contempt". (Para 23)

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Cases Referred : Chronological Paras

AIR 1969 SC 189 : 1969 Cri LJ 401 20, 24, 33

Mr. A.S. Nambiar, Advocate, for Appellant (In Cri. A. No. 118 of 1971); M/s. Kunhiraman Menon and A.S. Nambiar, Advocates, for Appellants In Cri. A. Nos. 195 and 196 of 1971.

Judgement

Judgement of the Court was delivered by

R. S. SARKARIA, J.:- These three appeals arise out of a common judgement of the High Court of Kerala holding the appellants guilty of contempt of court.

2. S. Abdul Karim, the appellant in Criminal Appeal 118 of 1971, was, at the material time, a Munsif-Magistrate posted at Perambra. He was Respondent No. 3 in the contempt petition filed in the High Court and will hereafter be referred to as R.3.

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3. A.P. Parukutty Mooppilamma and A.P. Achuthankutty Nair, appellants in Cr. Appeal No. 196 of 1971 were respondents 1 and 2 in the original petition before the High Court, and will be hereafter be called R-1 and R-2. The appellant K.P. Ramaswami in Criminal Appeal No. 195 of 1971 was Respondent 4 before the High Court. He will, for short, be called R-4.

4. M.K. Prakash, Respondent No. 1 in all these appeals before us, was the petitioner in the contempt petition before the High Court. He will hereafter be called as 'P'.

5. The facts are these :

R-1 is the owner of the Olathooki Ariyalakkan Malavaram in Kayanna Amsom which is managed for and on her behalf by her son, R-2. On March 28, 1969 R-1 presented a petition through R-2, to the Superintendent of Police, Kozhikode alleging that the accused persons (P and his men) were likely to trespass into the Olathukki Arialakkam Malavaram to remove her timber. It was alleged that 'P' had collected a large number of persons and equipped them with dangerous weapons, unlicensed guns, swords etc; that the sheds constructed by the petitioner and occupied by his workers and watchmen were being attacked and there was an apprehension that P and his men would demolish the sheds. The Superintendent of Police appears to have forwarded this petition to the Police Station Kayana where, on its basis, a case under Sections 143, 447 and 506, Penal Code was registered against 'P' and others.

6. The Sub-Inspector in-charge of the Police Station, went to the spot and took into possession the disputed timber comprising of 587 logs and entrusted the same on a kychet to two strangers. On April 22, 1969, R-1 made an application, Ex. P-3, before the Magistrate (R-3) praying that the seized logs be handed over to him. Thereafter, 'P' also made an application to the Magistrate claiming the timber to be his property and prayed for delivery of its possession to him. The Magistrate thereupon issued notice to the Police who made a report. After hearing the Counsel of the rival claimants and perusing the

police report (Ex. P-17) and other material, the Magistrate on April 28, 1969, passed an order, directing the Forest Range Officer to keep the logs in his custody pending further investigation by the Police. Against this order, 'P' filed Cr. Revision Petition No. 176 of 1969 in the High Court. No interim order directing the Magistrate to stay further proceedings or defer further action regarding the delivery of the disputed timber was issued by the High Court.

7. While P's Revision application was pending in the High Court, the Police Officer, R-4, after completing the investigation, obtained the opinion of the Assistant Public Prosecutor on September 20, 1969 and submitted a Final Report on September 24, 1969 to the Magistrate (R-3). The material part of this Final Report runs as under :

"On 16-7-69 a petition from the complainant was received alleging that the investigation conducted by my predecessor was one-sided and biased against him and he had produced certain documents to support his contention that the property belongs to him and which were not considered by my predecessor. Based on this petition I continued the investigation and in the course of my investigation. I questioned the Divisional Forest Officer, Calicut and the Forest Range Officer, Kuttiady. They stated that the permit issued to M.K. Prakash in Kalpaidiyan Thirumudiyan Malavaram was stayed by the Government and hence not operated upon till now. They also stated that the 587 logs of timber seized by my predecessor were from Olathukku Arialakkan Malavaram in the possession and ownership of the mother of the complainant and those logs were cut by Smt. A.R. Parukutty Amma's workmen and for which proceedings have been taken against them under the M. P. P. F. Act. To the same effect the Range Officer Kuttiady had filed an affidavit before the High Court in O. P. 2045/69 filed by the accused in this case. In the said O. P. the accused had questioned the validity of the Government Order allowing Smt. Parukutty Amma to remove timber cut from the

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permitted and non-permitted area of Olakhukki Ariakakkan Malavaram and the High Court had upheld the order of the Government and the complainant's mother was allowed to transport all timber cut from the Malavaram, both from the permitted and non-permitted area. According to the Divisional Forest Officer there is no Malavaram known as Kalpaidiyan Thirumudiyan Malavaram in Pilliperuvanna Amsom as per the Registration Manual. I also questioned the complainant and his workmen and they stated that there was no trespass as such by the accused or his henchmen. They did not enter the Malavaram, nor have they intimidated any of them and as such no offence has been made out under Section 447 or 506(1) I.P.C.

Under the above circumstances, it is clear that Shri M.K. Prakash accused in this case was not allowed to operate his permit and the 587 logs of timber seized by my predecessor were cut by the complainant's mother and the same belong to her. These logs are now in the custody of the Range Officer, Kuttiady as per the order of the Munsiff Magistrate Perambra and the same may be ordered to be released to the mother of the complainant and the case is referred as mistake of fact."

8. Upon this report the Magistrate (R.3) passed this order :

"Notice given. Case referred as mistake of fact. Further action dropped. Return timber logs to complainant."

SD/- M. M. 26-9-1969."

9. In pursuance of this order, the Magistrate issued a letter (Ex. P-10) dated September 26, 1969, to the Forest Range Officer Kuttiady, directing him that 587 logs seized by the Inspector of Police, Quilandy, then in his custody, be urgently released to R-1 (the mother of the complainant).

10. In compliance with the order of the Magistrate, the Range Officer symbolically handed over the charge of the timber to R.1.
11. On the preceding facts, 'P' on November 26, 1969, made a petition in the High Court complaining that R-1, R-2, R-3, R-4 and R-5 (Sri P.K. Appa Nair, Advocate) had committed contempt of the High Court within the meaning of Section 3 of the Contempt of Courts Act, 1952 and prayed that the respondents be punished for committing that contempt. The High Court issued notice to R-1 to R-5 who filed affidavits in reply.
12. The Magistrate (R-3) stated that he had passed the order directing delivery of possession of the disputed timber to R-1 in the bona fide discharge of his official duty, after accepting in good faith, the final report made by the police in which it was indicated that its notice had been given to the complainant, and a copy of such notice was also enclosed. He further averred :
"The purchase of the petitioner's rights by the 1st Respondent referred to in the F.I.R. and Ex. P-3 petition was not denied by the petitioner. On the other hand, his counsel during the hearing of Exts. P-3 and P-4 petitions had admitted the same even though he had a case that the petitioner was duped to sign the same and receive part of the consideration. Under the circumstances, I had no reason to reject P-6 report, it was accepted in its entirety and final orders were passed bona fide directing return of the logs to the complainant. The criminal revision 176 of 1969 itself is only against Ext. R order directing entrustment of the logs to the Forest Range Officer pending further investigation. The order in revision that may be ultimately passed by the Hon'ble Court can have reference only to what should be done with the logs pending investigation. The order in revision would not and cannot relate to the disposal of the logs after the completion of the investigation. It is therefore wrong to suggest that the final order is calculated to overreach the possible orders in the pending Cr. Revision Petition."
13. In his affidavit, the Magistrate emphasised that in Cr. Revision 176 of 1969, the High Court had not issued any interim order staying further proceedings.
14. R-1, R-2, R-4 and R-5, also, in their reply affidavits denied the allegations made against them by 'P' in the contempt petition.
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15. The Advocate-General assisted the High Court and filed a statement of facts on February 16, 1970.
16. After considering the replies, a memoranda of charges was drawn up against R-1 to R-5 on February 10, 1970. The material part of the charges served on R-3 ran as under :
"That you, on receipt of the final report, even without giving notice to the petitioner, not only passed an order on 26-9-69 on the final report directing the return of the timber logs to the complainant but also wrote a letter (copy of which is Ext. P-10) to the Forest Range Officer, Kuttiadi, directing him urgently to release the timber logs to the 1st respondent - thereby effectively defeating whatever order the Honourable High Court may finally pass in Criminal Revision Petition 176 of 1969 and Criminal Miscellaneous Petition 309/69, and that in consequences of your order the timber logs were actually handed over to the 1st respondent;
That in so doing :
(a) you have acted unjustly, oppressively and irregularly in the execution of your duties, under colour of judicial proceedings, wholly unwarranted by law and procedure;
(b) you have also permitted the process of your court to be abused by the other respondents and thereby diverted the due course of justice and
(c) you have also impeded the course of justice by defeating the final orders that are liable to be passed by the High Court in Criminal Revision Petition 176/69 and Cr. Misc. Petition

309/69; thereby committing gross contempt of the Honourable High Court, to which you are subordinate."
17. The Magistrate (R-3) submitted a further counter-affidavit denying the charges.
18. The High Court rejected the Magistrate's explanation and found him guilty of contempt on grounds which may be summarised as below :
(1) "The case between the petitioner and the 1st and the second respondent had gained certain amount of notoriety not only in the area but also in the State". Allegations were being made "that even the then Minister of Forests was unjustly favouring R-1 and R-2". The case before the Munsiff-Magistrate would naturally have attracted quite a good deal of public attention.
(2) R-3 permitted R-1 and R-2 to approach and influence him. This inference was available from the circumstance that in his affidavit, R-3 has said that an order dated May 2, 1969, passed by the High Court in C.M.P. 5869/69 in O.P. 2405/69 was shown to him and the certified copy of this order was obtained from the High Court only by R-1. The copy must therefore have been shown to the Magistrate by R-1 or her Advocate or by R-2 or his agents. "This could not have been in the open court. There was no posting of the case to 26-4-1969."
(3) (a) R-3 was aware that Criminal Revision 176/69 and Cr. M. P. 309/69 against his earlier order, was pending in the High Court which was "seized of the matter of determining the question of custody of the timber. His explanation that he felt that he was free to pass an order because only the question of interim custody was involved in Cr. Rev. Petition No. 176 of 1969…… was puerile".
(3) (b) R-3 passed the order on the Final Report, directing the release of the logs, without caring to issue notice to the petitioner (P).
(4) In the letter Ex. P-10, dated 26-9-1969, the Magistrate wrote to the Range Officer that the logs should be released to R-1, urgently. "This is a very strange procedure, unheard of, and reveals an anxiety on the part of the Munsiff-Magistrate to help R-1 and R-2. The urgency can only be to circumvent any possible orders of stay that may be passed by (the High) Court".
19. We have heard R-1 and the Counsel for the other appellants. R-1 has argued his case in person because, according to him, he has no funds to engage a Counsel. His submissions are straight and simple. He has reiterated what he had stated in his further affidavit filed in reply to the memorandum of charges in the High Court.
20. In sum, his defence is that in all the proceedings relating
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to the disposal of the disputed timber, including the making of the order dated September 26, 1969, the issuing of the letter, Ex. 10, of the same date, and in failing to issue notice to 'P', he acted in the bona fide discharge of his duties; that even if what he did or omitted, was wrong, it was no more than an honest error of judgement on his part. In particular, it is submitted that ground No. 1(1) is not based on any cogent or legal evidence but on mere rumours and hearsay and it is too vague and general; that even so, it was not incorporated in the charges against him. It is further maintained that the inferences of ulterior motives on the part of the appellant vide grounds (2) and (4) drawn by the High Court were wholly unjustified. It is contended that the approach of the High Court, is not in consonance with the law laid down by this Court in Debabrata Bandopadhyay v. State of West Bengal, AIR 1969 SC 189.
21. Before dealing with the contentions canvassed by the appellant, it will be useful to recall the law on the point.
22. Clause (c) of Sec. 2 of the Contempt of Courts Act, 1971 merely codifies the definition of "criminal contempt" which had previously been crystallised by judicial decisions. It

defines 'criminal contempt' to mean publication of any matter, or the doing of any other act which

"(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings;

(iii) interferes or tends to interfere, or obstructs or tends to obstruct, the administration of justice in any other manner."

23. The broad test to be applied in such cases is, whether the act complained of was calculated to obstruct or had an intrinsic tendency to interfere with the course of justice and the due administration of law. The standard of proof required to establish a charge of 'criminal contempt' is the same as in any other criminal proceeding. It is all the more necessary to insist upon strict proof of such charge when the act or omission complained of is committed by the respondent under colour of his office as a judicial officer. Wrong order or even an act of usurpation of jurisdiction committed by a judicial Officer, owing to an error of judgement or to a misapprehension of the correct legal position, does not fall within the mischief of "criminal contempt". Human judgement is fallible and a judicial Officer is no exception. Consequently, so long as a judicial Officer in the discharge of his official duties, acts in good faith and without any motive to defeat, obstruct or interfere with the due course of justice, the courts will not, as a rule, punish him for a "criminal contempt". Even if it could be urged that mens rea, as such, is not an indispensable ingredient of the offence of contempt, the courts are loath to punish a contemner, if the act or omission complained of, was not wilful.

24. In Debabrata Bandopadhyaya's case AIR 1969 SC 189 (supra), Hidayatullah C.J. speaking for the Court elucidated the position, thus :

"A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgement and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemner must be punished. It must be realised that our system of courts often results in delay of one kind or another. The remedy for it is reform and punishment departmentally. Punishment under the law of contempt is called for when the lapse is deliberate and is in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged."

25. The judgement of the High Court is to be tested in the light of the above enunciation.

26. The main ground, as already noticed, which greatly influenced the decision of the High Court was that this case between the parties

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had gained a certain amount of notoriety and allegations were being openly made that the then Minister for Forests was out to favour R-1 and R-2 against 'P'. This was a very vague, indefinite and nebulous circumstance which had no better status than any other general rumour, gossip or talk in the town. Courts have to guard against cognisance of such rumours and general allegations as they prejudice an objective treatment and a fair determination of the problems before them. In the instant case the prejudice generated by this creeping circumstance has unmistakably vitiated the approach of the High Court. It has hindered a correct appreciation of the submissions made by R-3 in reply to the charges. In his counter-affidavit R-3 stated :

"In the final report filed by the 4th respondent which is marked in these proceedings as P-6, there is reference to an order passed by this Honourable Court allowing the 1st

respondent to remove the cut timber. The order aforesaid is the order dated 2-5-1969 in C. M. P. 5869/1969 in O. P. 2405/1969, wherein it is said that it is necessary that the timber should be removed from the place as early as possible. A certified copy of this order was also shown to me and that was the reason why I wrote Ext. P-10 letter to release the cut logs without delay. The reason that prompted me to pass the final orders are therefore (1) there was no stay of further proceedings pending Crl. R. P. 176/1969; (2) the Crl. R. P. itself related only to Ex. R. order for custody pending further investigation, and can have no reference to the ultimate result of investigation; (3) it was admitted before me that the 1st respondent had purchased the alleged rights of the petitioner and part of the consideration was already paid, even though he had the case that the assignment is not valid, and (4) this Honourable Court had in C. M. P. 5869/1969 aforesaid directed the speedy removal of the timber from the place by the 1st respondent."

27. In our opinion, the above reply given by the Magistrate was at least sufficient to dispel the suspicion that in making the order, dated September 26, 1969 in regard to the delivery of the timber to R-1 he was actuated by a motive to impede or obstruct or defeat the course of justice. The notoriety of the case looming large in their minds, the learned Judges of the High Court without due consideration rather hastily rejected the explanation of the Magistrate that he had directed (vide his letter Ex. P-10), urgent delivery of the timber to R-1 because on seeing the copy of the High Court's order, dated May 2, 1969, which was shown to him, he was of the opinion that such a course was indicated therein. The point of substance was, whether such an order was made by the High Court and had been shown to the Magistrate before he made the order for urgent delivery of the timber. It was immaterial if certified copy of that order was shown to the Magistrate by R-1 or her Counsel or her agent.

28. Ex. R-1 is a certified copy of that order dated May 2, 1969 which was passed by the High Court in C. M. P. No. 5869 of 1969 in O. P. 2405 of 1969, M.K. Prakash v. R-1 to R-4. C. M. P. 5869/69 was a petition made by 'P' before the High Court praying that the operation of the order of the then Respondent 1 be stayed and the other respondents, including the Magistrate, be directed not to cause the removal of the felled trees pending disposal of the original petition.

29. After hearing arguments of the Counsel for the parties, the High Court made an order, the material part of which reads as under :

"As the rainy season is fast approaching it is necessary that the timber should be removed from the place as early as possible. Otherwise, the same would be lost to all concerned. It is seen from the counter-affidavit of the 4th respondent that she had already given an undertaking to the Government to pay the compounding fee, if any that may be fixed by the Forest Authorities. In the circumstances it appears to be only just to vacate the order of interim injunction passed on this petition. Accordingly the order of interim injunction passed on this petition is vacated and this petition is

@page-CriLJ648

dismissed but in the circumstances without costs."

30. On reading a copy of this order, and hearing the persuasive arguments of the party or her Counsel, the Magistrate might have honestly, albeit wrongly, formed the opinion that there was no need to give notice to the other party ('P') and that it was necessary to direct the Forest Officer to deliver the timber in question urgently to R-1. We are therefore unable to agree with the High Court that by his letter Ex. P-10, the Magistrate directed urgent delivery of the logs to R-1 because "there was an anxiety on his part to help R-1 and R-2 and to circumvent any possible orders of stay that may be passed by the High Court". If the Magistrate had read the High Court's order, dated May 2, 1969, before

making this order of urgent delivery and this fact has not been disputed then his explanation cannot be dubbed as wholly "puerile. "

31. Rather, the order dated May 2, 1969, whereby P's request for ad interim stay or injunction with regard to these logs was declined by the High Court, could have induced the Magistrate to go ahead with the making of the ex parte final order in regard to the delivery of the logs to R-1.

32. It is true that the Magistrate was aware that P's criminal revision petition against his interim order, dated April 28, 1969, was then pending in the High Court. In such a situation, the prudent course for him was to postpone the making of any final order in regard to the delivery of this timber till the final disposal of the revision petition by the High Court. It would also have been proper for him to issue notice to 'P' and give an opportunity of being heard before making any order. That would have been the ideal. But the point for consideration is whether the Magistrate deliberately did not follow this prudent course or whether he misdirected himself owing to an error of judgement. The stark circumstances viz. - that the High Court had declined to issue any interim injunction or stay order in favour of 'P' in the criminal revision pending before it; that there was an observation in the High Court's order, dated May 2, 1969, stressing the need for speedy removal of the cut timber and the possibility of its being damaged by the incoming rainy season; that he was labouring under the impression, though wrongly, that the order, dated April 28, 1969, was merely an interim order which had exhausted itself on the completion of the police investigation and the presentation of the Final Report by the police in which there was a positive finding that the timber belonged to R-1 and R-2 and they were entitled to its restoration - taken in their totality, go to show that in making the wrong order regarding delivery of the timber, the Magistrate was not actuated by any improper motive or deliberate design to thwart, impede, obstruct or interfere with the course of justice or to circumvent or defeat the proceedings in revision pending before the High Court.

33. In the absence of any mens rea, the Magistrate had at the most committed only a technical contempt of the High Court. In such a case, as was pointed out by this Court in Debabrata Bandopadhyay's case AIR 1969 SC 189 (supra), penal action was not called for.

34. We therefore allow R-3's appeal and set aside his conviction and sentence.

35. No conviction for contempt of court has been recorded against the appellants in the companion appeals by the High Court. All that we would say in their (R-1 and R-2) cases is that the High Court has made rather sweeping observations with regard to their civil rights which might prejudice them in establishing their claims by a regular suit. They shall therefore not be taken into account by any court before which the dispute with regard to this timber may come up for adjudication in due course. Similarly, any adverse remarks made against the Police Officer (R-4) will not by themselves be taken conclusive as to his conduct in handling this case. Subject to these observations we dismiss Criminal Appeals Nos. 195 and 196 of 1971.

Order accordingly.

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Cross Citation :2007-AIR Bom R-3-219 , 2007-BCR-3-279

HIGH COURT OF BOMBAY

Hon'ble Judge : B. R. Gavai, J.

Kishor Bhikansingh Rajput ..Vs..Preeti Kishor Rajput
Writ Petition 7502 of 2006 Of Feb 07,2007

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JUDICIAL PROPRIETY – Whenever petition relating to the subject matter is pending before Higher Courts and even if no stay is granted in the case then also it is matter of propriety that the Judges of lower courts should stay their hands away and wait till further orders to be passed by High Court – The order passed by family court during pendency of petition before High Court is illegal and therefore quashed.

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(1.) RULE made returnable forthwith. Heard by consent.
(2.) BY way of present petition, the petitioner challenges the order dated 15th September, 2006 passed by the learned Judge of the Family Court, Aurangabad, below exhibit 44 in Petition No. B-2 of 2005 by which the application of the present petitioner for framing additional issues has not only been rejected but the amendment which has been granted earlier is disallowed and the order dated 25th, September 2006 below exhibit 45 by which the application for adjournment came to be rejected.
(3.) THE petitioner / husband has filed a petition for dissolution of marriage. After filing of the petition, since according to the petitioner, he came to know about the fact of earlier surviving marriage of the respondent with somebody else, he filed an application for amendment. The same was allowed by the learned Judge of the Family court vide order dated 3rd March, 2006. Thereafter, the respondent / wife has also amended the written statement so as to incorporate the amended pleadings.
(4.) THEREAFTER, the present petitioner filed an application for framing additional issues in view of the amended pleadings. The same came to be rejected by order dated 15th September, 2006. By the said order, the amendment which has been granted earlier, has also been disallowed. Thereafter, when the matter was fixed on 25th September, 2006, the petitioner filed an application for adjournment on the ground that the petitioner had filed a petition challenging the order dated 15th September, 2006. However, the learned trial court rejected the said application on the ground that already last chance was granted to the petitioner. Vide order of the same date, the petition of the present petitioner has been dismissed in default. Being aggrieved thereby, the present petition.
(5.) MR. B. L. Sagar Killarikar, learned counsel appearing on behalf of the petitioner, submits that the procedure adopted by the learned Family Court is totally perverse. He

submits that the amendment which was earlier granted and incorporated, cannot be disallowed. He further submits that the issue sought to be framed was necessary for adjudication the dispute between the parties.

(6.) MR. S. S. Kazi, learned Counsel appearing on behalf of the respondent, submits that the petitioner is trying to protract the proceedings by taking adjournments after adjournments. He submits that the respondent is a poor lady and therefore, she has to suffer the prejudice due to the delay in the proceedings.

(7.) PERUSAL of the record would reveal that the procedure adopted by the learned family Court is totally unknown to law. Once amendment was allowed, it is difficult to understand under what provision the learned Family Court has disallowed the said amendment by a subsequent order while considering the application of the present petitioner for framing additional issue. The approach adopted is totally perverse. From the perusal of the pleadings, it can also be seen that the additional issue which was sought to be framed was necessary in view of the amended pleadings.

(8.) NORMALLY, when this Court is ceased of the matter, it is expected of the subordinate courts to stay their hands away. It is difficult to understand as to what was an alarming urgency to proceed further and dismiss the petition when the learned judge of the Family Court was very well aware that the order dated 15th September 2006 was challenged before this Court by the present petitioner. No doubt, that the learned Family Court is right in observing that there was no stay by this Court. But as a matter of propriety and when the learned Judge was very much aware about pendency of the petition before this Court, the learned Judge ought to have stayed his hands away and waited till further orders to be passed by this Court. In that view of the matter, I am inclined to allow the petition.

(9.) IN the result, the Writ Petition is allowed. The impugned orders dated 15th September, 2006 and 25th September, 2006 passed by the learned Judge of the Family court, Aurangabad, below Exhibits 44 and 45, in Petition No. B-2 of 2005, rejecting application for framing additional issue and dismissing the petition in default, respectively, are quashed and set aside. It is needless to state that the amendment which was granted earlier shall stand restored. The application of the present petitioner for framing additional issue stands allowed. The order of dismissal of petition in default stands quashed and set aside. The Petition No. . B-2 of 2005 is restored to the file of the Family Court, aurangabad. However, it is made clear that hereafter, the parties shall not seek adjournments on unnecessary counts and shall, cooperate with the learned Family Court in expeditious disposal of the petition. The parties are directed to present themselves before the learned Family Court on 15th February, 2007 and thereafter the learned Family court shall proceed with the petition.

(10.) RULE is made absolute in the above terms with no order as to costs.

Petition allowed.

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Cross Citation :2002 LAWS(BOM) -3-26, MHLJ-2002-2-830

HIGH COURT OF BOMBAY

Coram :- A.B.Palkar J.
Decided on March 06, 2002
Criminal Writ Petition 1582 of 1998
Vaidya Kuldip Laj Kohil …. Vs ….State of Maharashtra

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Code Of Criminal Procedure. 1973:- S.190 – Illegal cognizance by Magistrate – The complaint disclosed no offence but the Magistrate going out of the way and for extraneous consideration issued process against the accused – The order of Magistrate does not show that how he come to the conclusion that how and what offence disclosed - observation by Magistrate that it is a case for full fledged trial is illegal - it appears that for some reasons not on record the learned Magistrate took cognizance of offence without having been himself satisfied that any offence was in fact committed. The order of learned Magistrate if read in its entirety, clearly shows that the Magistrate was aware that complaint discloses no offence and in spite of having become aware, he issued the process for reasons which can only be extraneous – proceeding quashed – Accused granted compensation of Rs. 10,000/-

What was expected of the learned Magistrate was to find out whether any offence is made out in the complaint. The entire order of learned Magistrate does not even remotely indicate how he came to the conclusion that offence is disclosed. He has observed that at this stage main allegation is that documents produced before the selection committee of the M. P. S. C were false and the matter can be decided only after a trial. This reasoning of the learned Magistrate shows that he was not at all convinced that any offence is made out. The learned Magistrate in his order simply stated that it is a fit case for full fledged trial which reasoning is incomprehensible and it appears that for some reasons not on record the learned Magistrate took cognizance of offence without having been himself satisfied that any offence was in fact committed. The order of learned Magistrate if read in its entirety, clearly shows that the Magistrate was aware that complaint discloses no offence and in spite of having become aware, he issued the process for reasons which can only be extraneous.

The order not only suffers from non-application of mind but clearly shows that it is passed for some extraneous considerations. As a Senior Additional Chief Metropolitan Magistrate he is expected to know what is the effect of summoning a person as accused to Criminal Court. The learned Magistrate did not give any reason for differing from the Police Report.

The Court lend necessary assistance to the complainant to abuse the process of law by passing a vague order consciously. It is not a case of some order passed hurriedly due to pressure of work. The learned Magistrate has passed an order running in seven pages which does not speak of a single sentence as to how and what offence is committed. I am convinced that the learned Magistrate also found that no offence is disclosed even thereafter going out of way he wanted to help the complainant. The process of law was misused not only by the complainant but also by the learned Magistrate. It is a clear case of misuse of judicial power by the Court.

So far as complainant is concerned, he has intentionally resorted Criminal Court and used the process of law to take revenge by filing false and frivolous complaint. He must be saddled with costs, which I quantify to Rs. 10,000/- to be paid to the petitioner by the 2nd respondent.

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Final Verdict :- Petition allowed

Advocates :- A.P.Mundaragi , Ashutosh Gangal , N.B.Soman , Jahangir Khan , K.K.Kapur , R.V.Gangal

JUDGEMENT

1. PETITIONER is professor and head of the department in the department of Kaya Chikitsa in R. A. Podar Ayurvedic College, Mumbai while respondent No. 2 is Reader in the same department. Respondent No. 2 had challenged the appointment of petitioner as Reader in Kaya Chikitsa before Maharashtra Administrative Tribunal (MAT) in Original Application No. 843 of 1996 which came to be dismissed on 12-9-1996. Thereafter respondent No. 2 filed writ petition being Writ Petition No. 1602 of 1998 through Maharashtra Under Privileged Teachers Association of which respondent No. 2 is member, before the High Court for the same reliefs. The said writ petition was disposed of as withdrawn vide order dated 20-8-1998 and thereafter respondent No. 2 filed another application being Application No. 555 of 1998 before MAT challenging selection and appointment of petitioner. During the pendency of that matter respondent No. 2 filed present complaint suppressing the above stated material facts.

2. PETITIONER applied for the post of Reader in Kaya Chikitsa in 1988 as he possessed the required qualification. The prescribed qualification being 3 years teaching experience in recognized institute. Since petitioner possessed the qualification, he applied through the M. P. S. C. for the aforesaid post and in due course after following the procedure prescribed,

he was selected for that post and appointed as Reader in Kaya Chikitsa in R. A. Podar Ayurvedic Medical College, Worli, Mumbai in February, 1990.
According to the petitioner he has the required medical qualification and a good academic career. Respondent No. 2 was senior in service to petitioner as a Reader in the department of Kaya Chikitsa. However, petitioner came to be selected for the post of Professor and joined in 1997. Respondent No. 2 having failed in the selection process approached before the Maharashtra Administrative Tribunal (MAT) after lapse of six years by filing Original Application No. 843 of 1996 and thereafter one original application was summarily dismissed. In the complaint respondent No. 2 has made out a case that he was initially appointed as Demonstrator and thereafter selected as a lecturer in Kaya Chikitsa by M. P. S. C. and was appointed accordingly and in the year 1988 he has promoted by the Department to the post of Reader in Kaya Chikitsa. Petitioner accused was previously working as a Medical Officer in Mahatma Gandhi Institute of Medical Sciences (Allopathie) at Sevagram, Wardha and was appointed as "reader" in R. A. Podar College in Kaya Chikitsa by the Government of Maharashtra by its order dated 16-10-1989 in pursuance of his selection through M. P. S. C. According to the respondent, petitioner was working in the employment as Medical Officer at Mahatma Gandhi Institute of Medical Science (Allopathie) and was not qualified for the post of Reader in R. A. Podar Ayurvedic College, Mumbai. However, he was selected as Lecturer on that basis and at that time he had not produced any certificate showing that he was working as a Lecturer in the specific subject Kaya Chikitsa for three years which was an essential qualification and a condition precedent for appointment as Reader. Thus according to the respondent in the absence of required certificate from the recognized Ayurvedic Institute, petitioner came to be appointed in Ayurvedic College as a Reader in the subject of Kaya Chikitsa. The certificate of Mahatma Gandhi Institute of Medical Science is not a proper certificate as it is not a recognized Ayurvedic Institute under section 27 of the Maharashtra Medical Practitioners Act, 1961, and on the basis of such a certificate, the petitioner could not have been selected. Thus the petitioner was appointed as a Reader on the basis of a false and fraudulent information and documents. Despite the illegal selection, petitioner continues in service as he has approaches in the department. It is significant to note that in the complaint, it is stated by the respondent that he did not take any action in the matter for the period of about 9 to 10 years or so as he was expecting the Government to act.
In the year 1996, two posts for Professor were advertised and the respondent applied along with the petitioner. Petitioner came to be selected whereas respondent was not selected for that post when in fact respondent was senior having 19 years experience and petitioners experience was only of 6 years and therefore he filed complaint alleging offence under sections 420, 463 and 471 of Indian Penal Code against the petitioner. Learned Magistrate without recording even the verification statement of the complainant forwarded the complaint for investigation under section 156 (3) of Civil Procedure Code. After investigation into the complaint, the Police gave report to the learned Magistrate that no offence whatsoever was disclosed. The certificate produced by the petitioner was found genuine and there was no forged document produced by the petitioner before the M. P. S. C. However, thereafter learned Magistrate directed further investigation which was also conducted and again report was submitted to the same effect to the learned Magistrate. Learned Magistrate rejected the report and passed impugned order issuing process for offence under aforesaid sections.
3. IN reply one Shri Rameshchandra R. Padmavar, Director of Ayurved, Worli, Mumbai filed affidavit wherein, it is clearly stated that the selection of petitioner was proper. The investigation conducted by the police was also to the said effect that there was no offence

and investigation was conducted in proper manner. The certificates produced by the petitioner was verified from M. P. S. C. as found to be genuine.
One Shri Shankar B. Surve, Assistant Inspector has also filed an affidavit that a report was already submitted to the Magistrate that no offence was disclosed. All the documents produced before the M. P. S. C. by petitioner were found genuine. Petitioner had therefore not cheated anybody and had not committed any offence.
4. MR. Mundergi, the learned Counsel for the petitioner seriously contended that in this case, the learned Magistrate should not have issued process under any of the provisions of Indian Penal Code as complaint discloses no offence. The investigation was conducted by the police as per the directions of the learned Magistrate. Report submitted was that no offence whatsoever is disclosed. In spite of the adverse police report without giving any independent reasons as to how offence was disclosed, the learned Magistrate issued the process. The learned Magistrate has not given any reason as to why he has come to the conclusion that offence is disclosed either from the complaint or from the investigation papers submitted by the police. After narrating facts stated in the complaint and the concerned provisions of law, the learned Magistrate proceeded to observe in para 6, it appears that the main allegation is that the accused got himself selected through M. P. S. C. for the post of Reader in Kaya Chikitsa when he did not have the requisite qualification. The main allegation is that he managed and obtained some certificate showing as if he has full fledged experience in Ayurvedic subject in Kaya Chikitsa and got himself selected through M. P. S. C. by misleading the selection committee and misleading the Government of Maharashtra. It is noteworthy to mention that the M. P. S. C. does not claim to have been mislead by any certificate and it is also not found after investigation that any certificate produced by the petitioner was false. Even presuming for sake of argument that the petitioner was having certificate from the institution which according to respondent was not a proper institution to issue certificate, it was matter for the M. P. S. C. Even the Maharashtra Administrative Tribunal has upheld the selection of petitioner for the post. It was challenged after a lapse of more than 6 years. Petitioner and respondents were working in the same institution. What was expected of the learned Magistrate was to find out whether any offence is made out in the complaint. The entire order of learned Magistrate does not even remotely indicate how he came to the conclusion that offence is disclosed. He has observed that at this stage main allegation is that documents produced before the selection committee of the M. P. S. C were false and the matter can be decided only after a trial. This reasoning of the learned Magistrate shows that he was not at all convinced that any offence is made out. The learned Magistrate in his order simply stated that it is a fit case for full fledged trial which reasoning is incomprehensible and it appears that for some reasons not on record the learned Magistrate took cognizance of offence without having been himself satisfied that any offence was in fact committed. The order of learned Magistrate if read in its entirety, clearly shows that the Magistrate was aware that complaint discloses no offence and in spite of having become aware, he issued the process for reasons which can only be extraneous.
The order not only suffers from non-application of mind but clearly shows that it is passed for some extraneous considerations. As a Senior Additional Chief Metropolitan Magistrate he is expected to know what is the effect of summoning a person as accused to Criminal Court. The learned Magistrate did not give any reason for differing from the Police Report. There was no allegation of forgery. The allegation was that petitioner did not possess the required qualification as he was not having experience of working in any Ayurvedic Institution. The certificate issued by Sevagram Hospital was not even suspected. Whether such certificate can be accepted was for the M. P. S. C. to decide. Their decision was challenged before MAT after an abnormally long period of time and the challenge met with

summary dismissal. A writ petition on same lines filed in High Court was also dismissed. Thereafter to cause harassment to the petitioners recourse was taken to Criminal Court. The Court lend necessary assistance to the complainant to abuse the process of law by passing a vague order consciously. It is not a case of some order passed hurriedly due to pressure of work. The learned Magistrate has passed an order running in seven pages which does not speak of a single sentence as to how and what offence is committed. I am convinced that the learned Magistrate also found that no offence is disclosed even thereafter going out of way he wanted to help the complainant. The process of law was misused not only by the complainant but also by the learned Magistrate. It is a clear case of misuse of judicial power by the Court.

So far as complainant is concerned, he has intentionally resorted Criminal Court and used the process of law to take revenge by filing false and frivolous complaint. He must be saddled with costs, which I quantify to Rs. 10,000/- to be paid to the petitioner by the 2nd respondent.

5. PETITION is allowed. Order of learned Magistrate dated 29-10-1998 passed in Misc. Application No. 18/misc. /1997 (C. C. 2158/s/1998) is quashed and set aside. The complaint filed by respondent No. 2 is dismissed. Respondent No. 2 shall pay Rs. 10,000/- as costs to the petitioner for filing such total false and frivolous complaint causing mental agony and torture to the petitioner.

Petition allowed.

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Cross Citation :AIR 1995 SUPREME COURT 1729 = 1995 AIR SCW 2706

(From : Madhya Pradesh)

Coram : 5 A. M. AHMADI, C.J.I., J. S. VERMA, P. B. SAWANT, B. P. JEEVAN REDDY AND N. P. SINGH, JJ.

(CONSTITUTION BENCH)

Civil Appeal No. 5061 of 1993, with 5062 of 1993, with 5511 of 1995 (arising out of S.L.P. (C) No. 17232 of 1993) and 7486 of 1993, D/- 12 -5 -1995.

"Sarwan Singh Lamba v. Union of India"

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(B) Constitution of India, Art.141 - SUPREME COURT - PRECEDENT - Obiter dictum by Supreme Court - Is expected to be obeyed and followed. (Para 19)

(D) Constitution of India, Art.226, Art.14 - ADMINISTRATIVE TRIBUNAL - NATURAL JUSTICE - Powers of Court - Drawing its own conclusions by Court on basis of the notings in files without giving parties, against whom inferences were drawn any opportunity to explain the same - Violative of basic rule of natural justice.

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JUDGEMENT

AHMADI, C.J.I. :- This group of cases arise out of the judgment/order dated 29-7-1993 in Miscellaneous Petition No. 1102/91 passed by High Court of Madhya Pradesh (Indore Bench). The three petitioners before the High Court were working on the post of

Inspectors in the Police Department of Madhya Pradesh. They sought to challenge the Constitution of the State Administrative Tribunal (in short 'SAT') as well as the appointments of the Vice-Chairman and members of the Tribunal as the Government had not complied with the direction of this Court given in the case of S.P. Sampath Kumar v. Union of India (1987) 1 SCC 124 : AIR 1987 SC 386 to amend the Administrative Tribunals Act, 1985 (hereinafter alluded to as 'the Act') as suggested by it and had not made the appointments after selection by a High Powered Selection Committee as directed by the Court. They stated that they could not obtain a copy of the appointment letter of the aforesaid persons. They prayed for Writ of Quo Warranto to show under what authority they were functioning and or a declaration that the constitution of SAT was null and void. The respondents Nos. 3 to 6 were Members of the SAT and respondent No. 7 was its Vice-Chairman. The respondent Nos. 1 and 2 were the Union of India and the State of Madhya Pradesh, respectively. The High Court quashed the appointments of the respondents Nos. 3 to 7 by the impugned judgment dated 29-7-1993. The respondents Nos. 3 to 6 jointly challenge the judgment in Civil Appeal No 5061 of 1993. The appeal filed by the respondent No 7 is Civil Appeal No. 5062 of 1993. The Union of India also challenges the judgment in Civil Appeal No. 7486 of 1993. The Industrial and Labour Bar Association, Bhopal and another who claim to have been intervenors before the High Court have come up with a special leave petition (Civil) No. 17232 of 1993. We grant them special relief.

2. Shri R. P. Kapoor, whose appointment as Vice-Chairman and S/Shri Dr. Narinder Nath Veermani R. M. Rajwade, G. S. Patel and S. S. Lamba whose appointments as Members were set aside by the High Court are referred to in this judgment as the appellants whereas the three police officers who filed the writ petition before the High Court are being referred to as the original petitioners.

3. The main reason for setting aside the appointments was the alleged failure on the part of the Government to select the candidates for the posts of members and Vice-Chairman of the Tribunal through a High Powered Selection Committee as directed by this Court in S. P. Sampath Kumar's case (AIR 1987 SC 386), (supra) and in the review petitions filed subsubsequently, vide (1987) Supp SCC 734 and 735. By the judgment in S. P. Sampath kumar's case, (supra) certain directions were issued to the Union of India to introduce legislative changes to cure the defects in the procedure for appointment of the Chairman, Vice-Chairman and Members of the Tribunal. An amendment was made in Section 6 of the Act purportedly in compliance with the direction of this Court. The High Court of Madhya Pradesh has held that the amendment was not in conformity with the direction of this Court and did not suffice to ensure the validity of the appointments challenged in the writ petition before it. The appeals were heard by a bench of this Court consisting of M. M. Puchhi, S.C. Agrawal, B.P. Jeevan Reddy, JJ. By an order dated 3-5-1994 the Court referred the matters to the Constitution Bench on the observation that they raised questions of general importance involving the interpretation of the provisions of Section 6, as amended by Act 51 of 1987 as well as the validity of the appointments made in accordance with the said provisions and the issues affect the constitution of the CAT and the SAT.

4. On the pleadings and submissions made before the High Court the points arising for determination came to be formulated in paragraph 7 of the judgment. These comprised preliminary objections as to (i) bar of jurisdiction in view of Section 28 of the Act (ii) propriety of entertaining such a petition by disgruntled litigants in the guise of public interest litigation and (iii) locus standi of the petitioners. The other technical objection raised was in regard to the scope of a petition seeking a writ of quo warranto. None of these objections was pressed before us. The High Court next considered the ambit and import of the observations made by this Court in S.P. Sampath Kumar's case (AIR 1987 SC

386), and in the subsequent orders emanating from that decision. Based on the import of the said observations the High Court went into the question whether the appointments of the Vice-Chairman and Members were validly made. The High Court on appreciation of the decision in S.P. Sampath Kumar and related cases came to the conclusion that the appointment of a High Powered Committee was a sine qua non under the said decisions and the mere fact that the Chief Justice of India had approved the appointments on the administrative side would not render the appointments valid. Detailing the procedure followed in the matter of selection, the High Court after referring to the notings in the department file held the same to be arbitrary and discriminatory and even went to the length of describing the same as 'murky,' 'self-motivated' and 'biased' and in total violation of the procedure prescribed by the Government of India under its order of 15th April, 1991 and consequently quashed the appointments. The petitions were allowed with cost quantified at Rs. 2,500/-.

5. The main question is whether the mode of selection and appointment of the Chairman, Vice-Chairman and Members of the Tribunal as prescribed by the amendment of 1987 is valid? The Amendment Act of 1987 followed the judgment of this Court in S.P. Sampath Kumar's case (AIR 1987 SC 386), (supra) in which certain infirmities were pointed out in the Administrative Tribunals Act, 1985, (hereinafter referred to as 'the Act') and certain directions were given for introducing legislation to cure those defects. What this Court was required to consider in that case was whether constitution of the Administrative Tribunals under the Act, which excluded the jurisdiction of the High Courts, was inconsistent with the concept of judicial review, a basic feature of the constitution. Recalling the law laid down in Minerva Mills, Ltd. v. Union of India, AIR 1980 SC 1789, Bhagwati, J., said : (AIR 1986 SC 386 at P. 386).

"...judicial review is a basic and essential feature of the constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision that though judicial review cannot be altogether abrogated by parliament by amending the Constitution in exercise of its constituent power, Parliament can certainly, without in any way violating the basic structure doctrine, set up effective alternative institutional mechanisms or arrangements for judicial review. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court..."

6. Referring to Article 323-A, the learned Judge observed: (at P.389 and 390 AIR)

"If this constitutional amendment were to permit a law made under clause (1) of Article 323 A to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure doctrine and hence outside the constituent power of Parliament. It must, therefore, be read as implicit in this constitutional amendment that the law excluding the jurisdiction of the High Court under Articles 226 and 227 permissible under it must not leave a void but it must set up another effective institutional mechanism or authority and vest the power of judicial review in it. Consequently, the impugned Act excluding the jurisdiction of the High Court under Articles 226 and 227 in respect of service matters and vesting such jurisdiction in the Administrative Tribunal can pass the test of constitutionality as being within the ambit and coverage of clause (2) (d) of Article 323-A, only if it can be shown that the Administrative Tribunals set up under the impugned Act is equally efficacious as the High Court so far as the power of judicial review over service matter is concerned. We must, therefore, address ourselves to the question whether the Administrative Tribunal established under the

impugned Act can be regarded as equally effective and efficacious in exercising the power of judicial review as the High Court acting under Articles 226 and 227 of the Constitution."
7. The majority judgment in S.P. Sampath Kumar's case (AIR 1987 SC 386) (supra) delivered by Misra, J. also expressed the same view in these words : (at P. 396 of AIR)
"What, however, has to be kept in view is that the Tribunal should be a real substitute for the High Court - not only in form and de jure but in content and de facto. As was pointed out in Minerva Mills (AIR 1980 SC 1789) the alternative arrangement has to be effective and efficient as also capable of upholding the constitutional limitations."
8. The next step was to consider how to ensure that the Tribunal was a 'real substitute' of the High Court. It was observed that the things to be examined were whether the judges of the Tribunal were equally efficient/trained and equally independent as those of the High Court. Said Misra, J. :- (AIR 1987 SC 386 at P. 396).
"Disciplined, independent and trained judges well versed in law and working with all openness in an unattached and objective manner have ensured dispensation of justice over the years. Aggrieved people approach the Court - the social mechanism to act as the arbiter - not under legal obligation but under the belief and faith that justice shall be done to them and the State's authorities would implement the decision of the Court. It is, therefore, of paramount importance that the substitute institution - the Tribunal - must be a worthy successor of the High Court in all respects. That is exactly what this Court intended to convey when it spoke of an alternative mechanism in Minerva Mill's case." (AIR 1980 SC 1789).
9. The Court then proceeded to examine the competence and independence of the Members, Vice-Chairman and Chairman of the Tribunal. The Court struck down Section 6(1) (c) of the Act which prescribed that a person who for at least two years held the post of a Secretary to the Government of India or other equivalent post will also qualify to be the Chairman of the Tribunal. This has no bearing on the facts of the present case. What is relevant for us is how the Court viewed the question so as to ensure independence of the Members as well as of the Chairman and Vice-Chairman of the Tribunal. The Act already had a provision that the judicial members would be appointed only in consultation with the Chief Justice of India but for the Administrative members as well as for the Chairman and Vice-Chairman, no such provision was made, thereby giving unfettered discretion to the Government to make such appointments. It is in this context that the Court laid down the mode of their selection. To quote from the judgment of Misra. J. :- (at P. 397 of AIR)
"We do not want to say anything about Vice-chairman and members dealt with in sub-sections (2), (3) or (3-A), because so far as their selection is concerned we are of the view that such selection when it is not of a sitting judge or retired judge of a High Court should be done by a high powered committee with a sitting judge of the Supreme Court to be nominated by the Chief Justice of India as its Chairman. This will ensure selection of proper and competent people to man these high offices of trust and help to build up reputation and acceptability."
10. The Court desired amendments to bring the provisions in accordance with the observations made in the judgment and hoped that the amendments would be brought about by 31-3-1987.
11. Bhagwati, J. in his judgment considered the method of appointment of the Judges of the High Court, i.e. appointment by the Government in consultation with the Chief Justice of India and observed (AIR 1987 SC 386 at P. 392):-
"Obviously, therefore, if the Administrative Tribunal is created in substitution of the High Court and the jurisdiction of the High Court under Articles 226 and 227 is taken away and vested in the Administrative Tribunal, the same independence from the possibility of executive pressure or influence must also be ensured to the Chairman and members of the

Administrative Tribunal. Or else the Administrative Tribunal would cease to be equally effective and efficacious substitute for the High Court and the provisions of the impugned Act would be rendered invalid. I am, therefore, of the view that the appointment of Chairman, Vice-Chairman and Administrative members should be made by the concerned Government only after consultation with the Chief Justice of India and such consultation must be meaningful and effective....".

12. The method suggested by Misra, J. was also accepted by Bhagwati, J. as alternative for ensuring independence of the Chairman, Vice-Chairman and Members of the Administrative Tribunals but with a little modification. Bhagwati, J. advised setting up of a High Powered Selection Committee "headed by the Chief Justice of India, or a sitting judge of the Supreme Court or concerned High Court nominated by the Chief Justice of India." Said the learned Judge: (at P. 392 of AIR)

"Both these modes of appointment will ensure selection of proper and competent persons to man the Administrative Tribunal and give it prestige and reputation which would inspire confidence in the public mind in regard to the competence, objectivity and impartiality of those manning the Administrative Tribunal. If either of these two modes of appointment is adopted, it would save the impugned Act from invalidation. Otherwise, it will be outside the scope of the power conferred on Parliament under Article 323-A. I would, however hasten to add that the judgment will operate only prospectively and will not invalidate appointments already made to the Administrative Tribunal."

13. The amendment that has been brought about is Section 6(7), by Act 51 of 1987 is to the effect that the appointments to the post of Chairman, Vice-Chairman and Members shall not be made except after consultation with the Chief Justice of India.

14. It needs to be mentioned here that the Central Government, in view of the discrepancy in the views expressed by the two learned judges, sough clarification by filing a review petition which was decided by an order dated 5-5-1987 reported in (1987) Supp. SCC 734. The Court ordered:

"Having considered the matter carefully we are of the opinion that in the case of recruitment to the Central Administrative Tribunal the appropriate course would be to appoint a High Powered Selection Committee headed by a sitting Judge of the Supreme Court to be nominated by the Chief Justice of India, while in the case of recruitment to the State Administrative Tribunals, the High Powered Selection Committee should be headed by a sitting Judge of the High Court to be nominated by the Chief Justice of the High Court concerned."

15. The Central Government yet again filed review petitions Nos. 520-23 of 1987 seeking modification of the Court's order to the effect that consultation with the Chief Justice of India alone be prescribed as sufficient because selection by a High Powered Selection Committee was likely to be time consuming. The review petitions also prayed for extension of time for bringing about the amendments. It appears from the order reported in (1987) Supp. SCC 737 that the Court did not make any order on the prayer for modification of the order although it granted extension of time prayed for. To questions that confront us at this stage are:

(a) Whether the direction to set up a High Powered Selection Committee was mandatory or simply advisory in nature; and

(b) Whether non compliance of the direction in making the amendment vitiates the amendment:

16. The judgment, carefully read, clearly indicates that the direction for setting up a High Powered Selection Committee was merely advisory and not mandatory in character. The Act originally provided that the judicial members were to be appointed after consultation with the Chief Justice of India. Neither Bhagwati, J. nor Misra, J. has found fault with it.

Bhagwati, J. indicated that since their is no such provision for the selection / appointment of the Chairman, Vice-Chairman and Administrative Members, there was a risk that they would not be independent of executive influence. Hence Bhagwati, J. suggested that the Chairman, Vice-Chairman and Administrative Members should also be appointed only after consultation with the Chief Justice of India. Misra, J. suggested appointment of the High Powered Selection Committee for all including the judicial members without indicating why selection after consultation with the Chief Justice of India was not acceptable. Obviously, Misra, J. did not discard the method of selection of judicial members after consultation with the Chief Justice of India. Nor did Bhagwati, J. Even in the orders passed on the review petitions no observation against appointments after consultation with the Chief Justice of India was made.

17. The Court was confronted with the problem of ensuring independence of the personnel of the Tribunal. There could be several ways of ensuring such independence. Bhagwati, J. mentioned two such methods while Misra, J. advocated one. In the review petition again the Court altered the constitution of the High Powered Selection Committee by saying that it should be headed by a Supreme Court Judge when selecting the members of the Central Administrative Tribunal but by a High Court judge when selecting the members of the State Administrative Tribunals. Coming to selection of the Members of the High Powered Selection Committee itself, the Court did not make any suggestion or order. It cannot be disputed that many other methods for selection to ensure independence of the personnel of the Tribunal could be suggested. The Court itself considered some of the possible modes and preferred the one mentioned in the order in review reported in (1987) Supp. SCC 734. In the subsequent review petition in which the Government again wanted only consultation with the Chief Justice of India to be accepted as the method of selection of the candidates the Court did not reiterate the previous decision. Nor did it say that the appointment after consultation with the Chief Justice of India was not acceptable. It ordered as under:

"In view of what has been stated before us by the learned Attorney General of India, we extend the time granted to the Union of India up to January 31, 1988 for introducing necessary changes in the statute through legislative enactment in Parliament or by issuing a Presidential Ordinance. We trust it will not be necessary now for the Union of India to seek any further extension of time as this matter has been pending for a long time. The civil miscellaneous petitions are disposed of accordingly."

18. On behalf of the Union of India it is submitted that the previous order regarding the High Powered Selection Committee stood modified by this order and the Government accordingly introduced the Amending Act any to make provision for consultation with the Chief Justice of India. Although it cannot be said that the prayer of the Union of India to introduce the provision to consult the Chief Justice of India in preference to the High Powered Selection Committee was allowed by the Court. It can be perceived that the Court itself did not reject the prayer or reiterate the previous suggestion. That means the view expressed in the order dated 5-5-1987* stood unaltered.

* reported in (1987) Supp SCC 774

19. Now we come to the next question, viz., whether non-compliance with the direction regarding the High Powered Selection Committee vitiates the amendment. Normally even an obiter dictum is expected to be obeyed and followed. In our view further discussion would be purely academic for the simple reason that without amending Section 6(7), the dicta of the Court has in fact been made effective by the appointment of High Powered Selection Committees both at the Central level as well as the State levels with minor modifications. Since these Committees are now expected to make the choice of candidates whose names may be recommended to the Chief Justice of India for final approval, the

order of 5-5-1987 is fully complied with. Of course, names may be suggested to the Committee by any source but the ultimate decision has to be taken by the Committee and if the Chief Justice of India is not personally heading the Committee, the final decision would have to be taken by him on the recommendation of the Committee. It would, thus, be seen that without amending Section 6(7), the Government has given effect to the Court's view expressed in the order dated 5-5-1987 which renders the challenge academic and unnecessary to examine.

20. The next question is what was the scope of the enquiry before the High Court? In para 2 of the impugned judgment the High Court has disclosed that the petitioners challenged the validity of the appointments of the appellants as they were made in violation of the direction of this Court given in S.P. Sampath Kumar's case (AIR 1987 SC 386). The petitioners added at the time of hearing, as can be seen from para 4 of the impugned judgment, a plea that instead of selection, the appointments were made by nomination without considering all eligible and available candidates so that the best amongst them could be selected.

21. The Government of India as well as the Government of Madhya Pradesh placed before the High Court the files relating to the impugned appointments. The High Court has gone into a detailed analysis of how the proposal for appointment of the appellants was mooted and how the same was processed right up to the then Chief Justice of India. The High Court observed that the entire procedure was fraudulent not only because of the Government's failure in bringing about a proper amendment but also because of the failure on the part of Government of Madhya Pradesh to select the candidates through a Selection Committee appointed by the Government of India on 15-4-1991. Admittedly, intimation thereof was given to the State Governments by letter dated 19-4-1991. The High Court further observed that even the appointment of the Selection Committee was not in accordance with the order of this Court which provided for appointment of a High Powered Selection Committee. However, the Selection Committee constituted by the Government of India comprised only the Chief Justice of the High Court, the Chief Secretary and the Law Secretary.

22. The High Court on an analysis of the various notes on the Government files observed that the appellants R.P. Kapur and G.S. Patel used their own influence as Chief Secretary and Law Secretary to get themselves appointed on the State Administrative Tribunal and, therefore, their appointments were fraudulent. The appellants pointed out that the High Court committed serious errors in appreciating how the selection process moved. In fact when the High Court examined the files of the Government, the hearing had concluded on 16-12-1992 and the appellants had no opportunity to explain the various notes on the files since the same were produced in Court on 29-7-1993. This itself was against the rules of natural justice. Moreover, the applicants did not allege that the appointments had been secured by the appellants by practising fraud on the Government and were, therefore, bad. Was it open to the High Court to enter upon an enquiry of this nature within the ambit of the writ jurisdiction?

23. It is not in dispute that all the appellants were duly qualified and eligible for the posts against which they had been appointed. There is no allegation that any of them was not suitable for any reason whatsoever. All of them had been appointed after consultation with the then Chief Justice of India. There was no violation of any law in the process of their appointments.

24. The judgment in S.P. Sampath Kumar's case (AIR 1987 SC 386) was delivered in 1987. In that very year, the Act had been amended in compliance with the judgment. The Selection Committee was appointed only on 15-4-1991. This was communicated to the State Government on 19-4-1991. In the order dated 15-4-1991, as quoted in the

impugned judgment, there is no reference to the judgment of this Court. As such although it can be said that this order of appointment of the Selection Committee must have been inspired by the judgment, it cannot be said that this was solely in obedience to the order of this Court. It is clear, as observed by the High Court, that the Selection Committee was not a High Powered Committee. As such failure to process the appointments through the Selection Committee will not mean non-compliance with any order of this Court or of any statutory provision. We must not lose sight of the fact that the Government of India itself, despite such order of appointment of Selection Committee, approved the proposals for appointment. In fact the appointments of the appellants other than that of R.P. Kapur had already been approved by the Chief justice of India before the appointment of the Selection Committee was communicated to the State Government. On 15-4-1991 itself the file with the proposal of the appointments was sent to the Chief Justice of India with the approval of the Prime Minister mentioning further that in view of the Supreme Court order of 9-4-1991 in Writ Petition No. 497 of 1990 Shailendra Kumar Gangrade v. Union of India, for making appointments in State Administrative Tribunal within four weeks time, the matter was urgent. The then Chief Justice of India accorded his approval on 18-4-1991 to the appointments of Messrs Lamba, M.N. Virmani, G.S. Patel and Rajwade. It would not be proper to say that because on 15-4-1991 the Government of India constituted the Committee for selection which was not even communicated to any State Government till 19-4-1991, the approval granted by the then Chief Justice of India be set at naught and the whole process of selection/nomination be redone.

25. So far as appellant R.P. Kapur is concerned, the Selection Committee could not be ignored. His name was proposed by the Chief Minister himself on 27-4-1991. The proposal was approved by the Government on 30-4-1991. Subsequently, however, the Secretary, General Administrative Department, noted that the proposal had to be sent to the Selection Committee. It was further noted by him on the file that the Chief Secretary himself being the candidate proposed could not be associated with the Selection Committee. The Committee, therefore, of necessity comprised only of the Chief Justice of the High Court of Madhya Pradesh and the Law Secretary. The Chief Justice approved the name of R.P. Kapoor when the file was presented to him by the Law Secretary himself. The Law Secretary's note itself mentions constitution of the Committee as also his own approval to the proposal to appoint R.P. Kapoor as the Vice-Chairman. The High Court, in the impugned order has observed that the Chief Justice was not told about the appointment of the Selection Committee. This is, however, not borne out from any record. It has to be presumed that in the usual course of business the Chief Justice had gone through the entire file before according his approval to the proposal to appoint R.P. Kapoor as the Vice-Chairman of the State Administrative Tribunal, Madhya Pradesh. Out of the three members of the Selection Committee, one, being the candidate himself, could not participate in the selection process. The other two, namely, the Chief Justice of the High Court and the Law Secretary approved the name of R.P. Kapoor. It cannot be said that merely because the name of R.P. Kapoor was mooted by the Chief Minister, the subsequent approval by the members of the Selection Committee was bad. It may be said at the cost of repetition that there is no averment that there was anyone more suitable than R.P. Kapoor for the post of the Vice-Chairman who was deliberately ignored by either the Chief Minister or the Selection Committee or the State Chief Justice. Nor is there any averment that for some reason R.P. Kapoor should not have been appointed the Vice-Chairman of the Administrative Tribunal. The finding of the High Court that the appointments of R.P. Kapoor and G.S. Patel were vitiated because their appointments were the result of their own machination cannot be upheld. Nor can it be said that their appointments were fraudulent or otherwise vitiated. This High Court seems to have read

too much from the notes on the file and, with respect, has drawn unsustainable and wholly unwarranted inference based on, if we may say so, suspicion.

26. Before we part we would like to make a few general observations. As has been pointed out earlier long after the hearing had concluded the Court had called for the files which were produced on 29-7-1993. The Court inspected the files and has drawn its own conclusions on the basis of the notings without giving the parties, the appellants, against whom the inferences were drawn any opportunity to explain the same. This was clearly in violation of the basic rule of natural justice. The Court should have been extra cautious since it was casting serious aspersions against the appellants, particularly, R.P. Kapoor. As we shall briefly point out, the conclusion that "the appointments... are result of murky self motivated machinations" and are, therefore, "vitiated by bias," is not borne out from the material relied on by the High Court. In the first place in must be remembered that the original petitioners had filed writ petitions in the High Court wherein they had sought an interim order against their repatriation to their parent department. On the constitution of the Tribunal their writ petitions were transferred to the Tribunal. The Government had moved an application for vacating the interim order and apprehending that the stay may be vacated, they challenged the constitution of the Tribunal. The idea was to paralyse the Tribunal and prevent it from hearing their petitions for otherwise ordinarily the litigant would like that his case proceeds. In the circumstances it is difficult to say that the petitioners were actuated by considerations of public interest. Secondly, it is not in dispute that all the Members/Vice-Chairman were eligible for appointment, in that, they were fully qualified. Thirdly, it must be remembered that the proposal for the appointment of Members had been initiated much 15-4-1991 and had been cleared by the State functionaries long before that date and by the then Chief Justice of India before the decision was communicated by the Central Government to the States on 19-4-1991. It is legitimate to assume that the proposal must have been thoroughly scrutinised by the Chief Justice of India before he gave his approval to the same. Fourthly it is necessary to notice that R.P. Kapoor was on deputation to the Government of India since 1980 and he was repatriated to the State in 1990 and, therefore, in the absence of positive evidence of his interference it would not be correct to attribute motives to him for the State Government's decision to shift the seat of Vice-Chairman to Bhopal on 4-1-1989. Actually in 1989 he was stationed at Hyderabad. Similarly much has been read into the note, discuss, made on 6-3--1991. As explained by R.P. Kapoor in his submissions before this Court that he desired to discuss the matter as he had some doubt in regard to the vacancy position which, as the subsequent note of the Secretary, GAD., would show, turned out to be correct. So also much ado has been made about the Law Secretary personally carrying the file to Patna where the Chief Justice of Madhya Pradesh was then camping. There was urgency for the clearance of the file because of the time-frame set by judicial orders. It is wrong to read in this visit any oblique motive. The Law Secretary in his capacity as a member of the Committee was deputed to go to Patna so that he may be able to apprise the Chief Justice of the proposal and explain any matter on which the latter would need clarification. It is wrong to infer that the Law Secretary felt obliged to R.P. Kapoor because the latter had not recommended the former's name but the recommendation had come from the then Chief Minister. Even if in normal course of business R.P. Kapoor had in fact recommended his name as a part of his duty, that should not make any difference. Besides, it is clear from the affidavit of the Ex-Law Secretary that he knew that his appointment was cleared by the Government of India long before he proceeded to Patna. There was, therefore, no question of his being under the influence of R.P. Kapoor so as to affect his independent judgment. It is indeed true the R.P. Kapoor in his capacity as Chief Secretary forwarded the file to the Chief Minister on 11-4-1991 proposing his name as Vice-Chairman which

was returned by the Chief Minister to the Secretary, GAD, on 27-4-1991. Did forwarding of the file amount to 'active association' with the process of appointment? The fact that under the Rules of Business framed under Article 166 of the Constitution, it is not disputed that the normal channel of submission was through the Chief Secretary. Two options were, therefore, available to R.P. Kapoor; either he as a part of his duty forward the file or refuse to endorse the file. There is nothing else on record to show his active participation therefore. So far as Secretary, GAD, is concerned, he marked the file to the Chief Secretary as per the Rules of Business. There was nothing else he could have done. The Chief Secretary could have avoided to endorse the file but to do so also he would have been required to say so. He chose to quietly forward the file to the Chief Minister without his own comment. It seems to us that the High Court read too much in this action of the Chief Secretary in describing the ultimate appointment as fraudulent. After all when the name of a Chief Secretary about to retire is proposed for appointment, it is impossible to think that the Chief Secretary would not know about it, if the Chief Secretary pretends ignorance, no Court will accept the same as correct. Therefore, even if the Chief Secretary had not endorsed the file, it would not have made any difference. It was ultimately for the Chief Minister to take a decision which was to be approved by the governor as well as the Chief Justice of India. There is no hint on record to infer that he had in any manner influenced the decision of these functionaries. Therefore, merely because he forwarded the file to the Chief Minister which he was required to do as per the extant Rules of Business that ought not to be construed as an act to influence the decision of the aforesaid functionaries. Even without singing the file in normal course of business, he could have done the 'goading and egging' while pretending total ignorance. We are, therefore, of the view that the High Court read too much in this act of the Chief Secretary R.P. Kapoor. This suspicion of the High Court unfortunately coloured its vision resulting in it viewing each ad every action leading to his appointment with suspicion. These, in brief, are a few aspects of the case which we have highlighted to demonstrate how the High Court fell into an error and misdirected itself causing miscarriage of justice. We must undo this injustice by allowing this appeal and setting aside the impugned judgment and order of the High Court and giving appropriate directions as under.

27. The appellants should be allowed to resume their office. Hence we direct that the appellants, as far as possible, be allowed to resume their office unless any one or more of them has or have retired. In case any of them have since attained the age of retirement, the State will treat them as on duty up to the date of retirement and work out their retrial benefits accordingly. All the appellants shall be entitled to arrears of pay and allowances from the date of judgment of the High Court up to the date of resumption of duty or date of retirement. The appeals succeed accordingly and the original writ petition will stand dismissed.

28. We are satisfied beyond any manner of doubt that the petitions filed by the three police Inspectors were, to say the least, motivated with a view to deriving personal benefits and not in public interest. Their idea was to paralyse the working of the Tribunal and benefit from the delay at the cost of other litigants. Otherwise how were they concerned with the legality of their appointments? This, in our view, is a glaring case of abuse of the process of the Court in the name of public interest. Can such petitioners be allowed to get away unscathed? We think they must be saddled with exemplary costs. We, therefore, direct that each petitioner shall pay a sum of Rs. 15,000/- by way of costs. The amount of cost may be recovered from the provident fund/gratuity or any other future monetary benefit including pension or in ordinary course by executing the order.

Appeal allowed.

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Cross Citation :2011 (4) AIR Bom R 238

BOMBAY HIGH COURT

Hon'ble Judge(s) : SHRI HARI P. DAVARE, J.

Maharashtra Govt., through G. B. Gore, Food Inspector, Nanded

....Vs.... Rajaram Digamber Padamwar & Anr.

Criminal Appeal No. 264 of 2000, D/- 8-4-2011..

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Judicial Discipline – Judgement of another High court – Observations of trial Magistrate that the judgement of Kerala High Court is not binding on him – Further observing the legality and correctness of the judgement of another High Court is against the judicial discipline and propriety – Registrar General directed to take suitable action against concerned Judge. (Paras 42, 43, 44, 45)

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Cases Referred: Chronological Paras

2004 FAJ 465	31,34
1998 All MR (Cri) 953	30,33
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1991(1)FAC6	43

V. D. Rakn, A.P.P., for the Appellant; P. V. Mandlik, Sr. Counsel i/by A. S. Gandhi, for Respondents.

JUDGMENT

1. This appeal is directed against the judgment and order of acquittal, dated 14-3-2000, rendered by the Judicial Magistrate, First Class, Kandhar, in R.C.C. No. 284 of 1995, thereby acquitting the respondent No^ 1 i.e. original accused No. 1 Rajaram Digamber Padamwar for the offences under Section 7(1) r/w Section 2(ia)(a) punishable under Section 16(l)(a)(ii) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as, 'the said Act') and also acquitting respondent No. 2 i.e. original accused:? MohammadSalim Haji Harun for committing breach of provision of Section 7(v) of the said, Act and Rule of the Prevention of Food Adulteration Rules, 1955 (Jiereinafter referred *« as, 'the said Rules') punishable under Section 16 (l)(a)(i) of the said Act.

2. Briefly stated, the case of the prosecution is as follows:—

It is alleged that on 27-4-1994 at about 12.45' p.m., accused No. 1 sold the packets of adulterated turmeric powder of 'Taja Brand' td.-PW1 Food Inspector M. S. Patil

at Kandhar. and after verification,of chemical analysrs: thereof, the said turmeric power found to be adulterated, and assiaeh thereby accused No. 1 has contraveneditfiarprovisions of Section 7(1) r/w Section 2 (ia) (a) and thereby committed an offenee'panishable under SectigaJ 16(l)(a)(ii) of the/said Act. It is also alleged: that respondent No. 2 i.e. accused No. 2 has manufactured the said adulterated turmeric powder and distributed and sold it in packets in the market, more particularly through respondent No. 1 and contravened the provisions under Section 7(v) of me said Act and Rule 44H of the said Rules punishable under Section 16(lXa)(i) of the said Act. Accordingly the allegations against accused No. 1 are in respect of storage and selling of adulterated turmeric powder of Taja Brand and the allegation against respondent No. 2 is that he is the manufacturer of the adulterated turmeric powder of 'Taja Brand', and therefore, they have committed the offences as aforestated.

3. Moreover, the complainant Food Inspector i.e. PW2 G. B. More is claimed to have sent all the papers to the Joint Commissioner, Food & Drugs Administration, Aurangabad under Section 20 of the Act and obtained the consent through the Assistant Commissioner, Food and Drugs Administration, Nanded for filing criminal case against the accused persons, and accordingly, complaint was filed against the accused before the Court on 16-10-1995. It was registered as R.C.C. No. 284 of 1995. The said complaint discloses the name of the witnesses, such as (1) M. S. Patil, Food Inspector, Food and Drugs Administration, BukUiana; (2) Milind Suryakant Mahajan, r/o ShivajiChowk, Kandhar; (3) G. G. Joshi, Assistant Commissioner, Food and Drugs Administration, M. S., Nanded; and (4) S. B. Kamble, Public Analyst, District Health Laboratory, Nanded. Thereafter, summons came to be issued against the accused persons and they appeared hi the case. Thereafter, evidence before charge was recorded before the Court and the prosecution examined in all two witnesses and the Trial Court framed the charge against the accused at Exhl'&3 on 13-7-1998. The accused pleaded not guilty to the charges levelled against them and claimed to be tried.

4. To substantiate the charges levelled against the accused and to prove the guilt against them, the prosecutktt examined inasmuch as five witnesses, as mentioned below: PW1 Madhukar Sopan Patil, Food Inspector PW2 Gulab Babaraoji Goft, Food Inspector, complainant

PW3 Subhash Balkishan Kamble, Junior Scientific Officer, Public Analysis, Solapur.

PW4 Milind SuryakantMahajan, panch witness in respect of panchanama Exh. 29

PW5 Gajanan Govind Joshi, Assistant Commissioner, Food and Drugs Administration, Nanded

5. The defence of the accused is of total denial, which was reflected through the cross-examination and their statements under Section 313 of the Code of Criminal Procedure. After scrutinizing and assessing the oral and documentary evidence on record and considering the rival submissions advanced by the learned counsel for the parties, the Trial Court acquitted respondent Nos. 1 and 2 from the charges levelled against them, by judgment and order, dated 14-3-2000.

6. Being aggrieved and dissatisfied by the aforesaid judgment and order of acquittal, the appellant/State has preferred the present appeal praying for the quashment thereof.

7. Before adverting the submissions advanced by the learned counsel for the parties, it is necessary to scrutinize the material oral and documentary evidence, adduced and produced by the prosecution, and in the said context, at the outset, coming to the deposition of PW1 Madhukar Sopan Patil, Food Inspector, he stated that on 27-4-1994 at 12.45 p.m. he visited the provision shop of M/s. Rajaram Shankar Padamwar, Shivaji Chowk, Kandhar along with his assistant and PW4 panch Mi lind Mahajan and disclosed his identity to the shop keeper and ensured about the owner of the shop and the said shop keeper stated that he himself was me owner of the shop and thereupon he showed the licence and PW1 Madhukar Patil noted the facts of the licence in his note sheets, which are produced at Exh. 25 and copy thereof bearing signature of panch was given to the said shopkeeper i.e. accused No. 1. PW1 Patil also stated that he noticed that there were 60 packets of chilly powder manufactured by Janta Seva Mirch Masaley and each packet contained 50 gms. chilly powder. There were about 100 packets of turmeric powder produced by M. S. Food Product, Nanded under the name and style as, 'Taja', and each packet contained 50 grms. turmeric powder, having batch No. 16 and manufacturing date of March, 1994 and the maximum retail price printed on each packet was Rs. 2/-, as well as name and address of the manufacturer was printed thereon.

8. PW1 Patil stated to accused No. 1 that he intended to purchase 12 packets of chilly powder as well as 12 packets of turmeric powder for analysis, and accordingly, accused No. 1 sold him 12 packets of chilly powder and 12 packets of turmeric powder, respectively, and PW1 paid price thereof and accused No. 1 issued bill about the purchased goods and said bill is produced at Exh. 26. Thereafter PW1 Patil issued notice under Section 14A of the Act to accused No. 1 with intention to collect the information from whom he has purchased the said goods. Thereupon, accused No. 1 stated that he did not possess the bills of purchased goods, but he assured that he would produce the original bill in his office and the office copy of the said notice is produced at Exh. 27. PW1 issued notice under Form No. 6 informing accused No. 1 that he purchased the above goods for analysis as required under the said Act and produced the office copy thereof at Exh.28. He also stamped the specimen of seal which was utilized for purchase of packets of chilly powder and turmeric powder.

9. The purchased chilly powder was found to be of standard quality during analysis.

10. As regards the turmeric powder, PW1 Patil stated that he divided 12 purchased packets of turmeric powder in equal three parts and packed four packets in dry clean and empty plastic pack and prepared three samples accordingly, which were labelled with the signatures of panch witness and signature of PW1 Patil and sealed as per the usual procedure and panchanama of the aforesaid things was prepared on the spot and the said packets were seized thereunder. The signature of accused N_{QT} 1 was obtained thereon andPWl Patil also signed thereon and carbon copy of the pan-chanama was supplied to accused No. 1 and thfe said panchanama is produced at Exh. 29. Thereafter, PW1 Patil sent one sealed packet along with copy of Form No. 7 in a seal packet to |he Public Analyst, Public Health Laboratory, Nanded on 28-4-1994 by hand delivery, and produced the office copy of Form No. 7 at Exh. 30. On 28-4-1994, he sept copy of Form No. 7 along with specimen impression of seal used to steal the sample and covering letter, to the Public Analyst, Nanded and produced the office copy of letter at Exh. 31. He also sent the remaining two parts of the sample along with two copies of Form No. 7 along with the covering letter to the Local Health Authority-Assistant Commissioner, Food and Drugs Administration, Nanded, and produced copy thereof at Exh. 32. He also sent specimen

impression of a seal used for the seal of samples along with covering letter to Local Health Authority, Food and Drugs Administration, Nanded in a separate seal packet on 28.4.1994 and produced office copy thereof at Exh. 33.

11. Accordingly, PW1 Patil stated that he received the samples at Exhs. 34 and 35 and also received receipts from the Local Health Authority about the receipt of sample, which are produced at Exhs. 36 and 37. Thereafter, since he was transferred, he handed over the charge and the documents and papers to Shri Umrani, Food Inspector, Nanded.

12. During cross-examination, he stated thajt he does not remember whether he has taken samples from other shop keepers. He also stated that he called only one panch witness and accused No.l was present in the shop and he purchased samples simultaneously i.e. chilly powder manufactured by Janta Seva M icha Masalla and turmeric powder manufactured by M/s. Food Products under 'Taja' brand. He stated that he purchased 12 packets of turrneric powder each containing 50 gram, turmeric powder, which was kept on a rack by the accused and which was personally delivered by accused No. 1 and said packets were packed as it is and there was no leakage and same were shown to PW4 panch Milind Mahajan.

13. Moreover, he stated that he has not mentioned on every form that he narrated the contents of form in Marathi to accused No. 1. He further stated that he kept four turmeric powder packets in another polythene bag as it is. So also, he kept other packets in another polythene bag in three sets thereof, since he possessed polythene bags for packing the samples officially. It is stated in the pan-chanama that samples were packed in a clean and dry polythene bags. Hence, suggestion was given to, him that the polythene bags which ' were possessed by him were not clean and dry, but he denied the same. He further stated that be drew the panchanama after sealing of the purchased articles and returned to Nanded on the same day and deposited the samples at' Public Health Authority, Nanded. He also stated that he deposited duplicate copy of Form No. 7 along with specimen signature in the office of Public Analysis, Nanded separately and obtained the receipt of deposit of samples and deposit of specimen seal separately. The suggestion was given to him that the analysis report issued by the Public Analyst is false, but same was denied by him. PW1 Patil admitted that accused No. 1 never submitted the bill of purchased goods of turmeric powder before him.

14. Coming to the deposition of PW2 Gulab Babaraoji Gore complainant, who stated that he was working as Food Inspector at Nanded since 1994 and received the case papers from Food Inspector Umrani in a charge on 4-8-1994 and demanded the original bill of turmeric powder purchased by accused No.l from accused No. 2. Accordingly, the accused produced original bill dated22-4-1994, which is marked Exh. .40. Thereafter, he stated that notice was issued to accused No. 2 reflecting the fact that sample of turmeric powder was collected from accused No. .1 for analysis, which was supplied by accused No. 2 and copy of the said notice is produced at Exh. 4 J. He also stated that he sent copy of Form No. & dated 27-4-1994 to accused No. 2 along wjjh notice dated 20-5-1994 and same was served upon hjjn <*nd he produced the acknowledgment thereof at Exh. 42. He further stated that he perused the analysis report dated 30-5-1994 and found that the sample analysed was of sub-standard and the said analysis report is produced at Exh. 43.

15. He also deposed diat he received letters about collection of information from Licensing Authorities in respect of issuance of license to accused No. 1, which are

produced at Exhs. 44 and 45. Moreover, additional information was demanded from accused Nos. 1 and 2 through letters and office copies thereof are produced at Exhs. 46 and 47. Accordingly, accused No. 1 submitted his information on 16-7-1994 and same is produced atExh. 48. Moreover, accused No. 1 also produced photo copy of renewal of his license. Besides, the Licensing Authorities also supplied the information about accused Nos. 1 and 2. which are produced at Exhs. 49 and 50. He further stated that he submitted his report and sought permission for filing complaint against accused Nos. 1 and 2 from the Joint Commissioner, Food and Drugs Administration, Aurangabad. Accordingly, he received die consent letter to file complaint against accused Nos. 1 and 2 on 14-8-1995, which is produced atExh. 51. Pursuant to the said consent letter, he lodged the complaint against accused Nos. 1 and 2 on 16-10-1995. He also stated that he issued notices under Section 13(2) of the said Act to the Local Authority.

16. During cross-examination, he stated that he perused the public analysis report and percentage of rice starch is not shown in the said report. Hence, he volunteered that there is no need to mention exact percentage of rice starch as per Rule 44H of the said Rules. He also admitted that he has not sent notice as required under Section 13(2) of the said Act to die accused. He also stated mat he does not know as to whether the said notice was served upon the accused.

17. That takes mfc to the deposition of PW4 Milind Suryakant Mahajan, who deposed that on 27-4-1994, PW1M. S. Patil, Food Inspector called him to act as Panch at the shop of accused No. 1 Rajaram, andPWl M. S. Patil purchased 12 packets of turmeric powder weighing each of 50 grams and same were divided into three parts. He also stated that same were packed in brown paper and Food Inspector prepared three packings thereof and sealed the same with the help of wax and thread. He also stated that said Food Inspector might have paid Rs. 25/- for the said packets. He further stated that the Food Inspector obtained his signature and panchanama was shown to him andhe. further stated that the contents thereof were; read over to him and he: admitted it to be true., which was marked Exh. 29. He also identified accused Rajaram before the Court.

18. In cross-examination, he stated that he perused the packing of sample as well as personally verified the packets of turmeric powder purchased by the Food Inspector and same were packed in a plastic bag and brand thereof was, 'Taj Brand' and seal thereof were intact. He further stated that accused No. 1 informed' the Food Inspector mat the Company has supplied the packings of turmeric powder to him and he sold it in retail as it is. He admitted that he did not notice the fact of breaking of seal of packets of turmeric powder. He also stated that the Food Inspector prepared packings of each sample before him. Hence suggestion was given to him that the Food Inspector prepared the panchanama for samples before his arrival, but same was denied by him.

19. Turning to the deposition of PW3 Subhash Balkishan Kamble, Junior Scientific Officer, Public Analyst's Office, Solapur, who stated that he was posted at Nanded office from November, 1993 till December, 1997 and on 28-4-1994 he received sample of turmeric powder-and duplicate copy of Form No. 7 along with specimen seal, from PW1 M. S. Pati 1. He stated that he tallied the specimen seal with the seal affixed oh the container and found that sample was fit for analysis. Thereafter he got analysed the tufmetibpowder from the Chemist, namely P. B. Halkunde in their Laboratory and they noric'ed'rifce starch and common salt in turmeric pfofwtfer. However, they found that there was salt of 2.31 per cent, adulterated in turmeric powder: However, he could not calculate the exact

percentage of adulterated rice starch and stated that there is no specific method to find out percentage of rice starch if adulterated in turmeric powder. Accordingly, he prepared the analysis report and prepared four copies thereof and sent the same to die office of Food and Drugs Inspector, Nanded and copy thereof is produced at Exh. 43. He further stated that adulteration of any foreign substance in turmeric powder is prescribed under Rule 44H-Gftl»e said Rules, as well as he stated that he 'found that the analysed sample was adulterated one.

20. During cross-examination he admitted that, he analysed the sampte after 14 days of its'receipt, but till then the said sample was kept in the custody of Chemist. He also stated that be possessed the form on which the re-sult of analysis of sample is noticed. However, he could not state as to whether it is mentioned on me form of analysis mat samples analysed were found in tact before its analysis. As regards analysis, he stated that he opened the sample on 28-4-1994 and found four packets of turmeric powder packed in a container, and thereafter he handed over two packets out of four for analysis purpose. Accordingly, he received its report from Chemist on 11-5-1994, but he could not state on which date which chemical test was completed. As regards the said reports, he stated that the same were upto the permitted level except starch test and the turmeric powder contained starch. He also stated that microscopic test was carried out in this particular case and same was mentioned in the report. He further stated that he noticed kinds of rice starch and turmeric powder under the microscope, but stated that they did not conduct any other chemical test to bifurcate the rice starch and turmeric powder. He further stated that on the basis of results, test report was submitted by the Chemist. However, he could not state how much other samples were analysed by the Chemist during the analysis of turmeric sample simultaneously. Hence, suggestion was given to him that there was possibility of adulteration of foreign substance in their laboratory, but same was denied by, him. Suggestions were also given to him that there was mistake on the part of the Chemist at the time of .analysis of sample and the said Chemist analysed the sample negligently, but same were denied by him.

21. That takes me to the testimony of PW5 Gajanan Govind Joshi, Investigating Officer, who was serving as Assistant Commissioner, Food and Drugs Administration, Nanded at the relevant time i.e. on 26-7-1993 and PW1 M. S. Patil was working as Food Inspector in his office. He stated that PWI M. S. Patil, was Food Inspector handed over two sealed packets to him on 28-4-1-994 and in one packet out of the same, there were sealed counterpart, of the samples, taken, and in addition to .that there were twacopies of Form No. 7; whereas in the second .Racket, two specimen seal impressions of the seal used for sampling and a covering letter were found. He further stated that after receipt of the above two packets from M. S. Patil, Food Inspector,' he gave two separate receipts on the same day i.e. 28-4-1994 and said receipts are produced at Exhs. 36 and 37, respectively. He admitted that the said receipts bear his signatures.

22. It is recited in his deposition that the Public Analyst, Nanded had given a report on 30-5-1994, but it does not reflect what was sent to Public Analyst, District Health Laboratory arid it was received oil 3-6-1994 and one of the copies of the said report was handed over to the Food Inspector Patil and copy thereof is produced at Exh. 43. Moreover, original report was also filed before the Court, which bore his signature and date, which is marked Exh. 88. Thereafter the Food Inspector communicated him fri respect of filing of present case against the accused on 17-10-1995, which is produced along with list Exh. 85 at Sr. No. 4, and which is marked Exh. 89, which bore the signature of Food Inspector

Gore and his signature in token of receipt thereof. Accordingly, an'ifftimation was given to the accused in respect of filing of case against them in the Court by letter dated 18-10-1995 and the said letter/iiotice, along with copy of the report of Public Analyst, District Health Laboratory, was Self 'by R.P.A.D., as well as separate letter was sent to each of the accused and office copy, thereof dated 18-1- 1995 is filed by him off/record, which is marked Exh. 90. He also produced postal receipts of R.P.A.D. showing that the said letters were sent to the accused by R.P. A.D. and marked Exh. 91. The said letter was received by accused No. 1 and his postal acknowledgment is produced on record mid marked Exh. 92. However, the letter sentto accused No. 2 was returned back without service to him and same is produced on record and marked Exh. 93 and same was received back by the Investigating Officer on 31-10-1995,

23. During cross-exa'hima'tion, he admitted that he has not made it *s&te* that signature appearing on the acknowledgment receipt Exh. 92 was of accused No; 1; as well as he cannot say whether the signature on Exh. 92 was not of accused No. 1. He afso further stated cordance with Rules 14 to 17 of the said Rules and the sample was taken in a polythene bag and not in a clean bottle or jar as contemplated and the said short comings vitiated the prosecution case and the Trial Court has rightly acquitted the accused persons and there are no extra ordinary reasons to interfere therein, and hence, urged that present appeal be dismissed and acquittal rendered by the Trial Court be upheld.

33. I have perused the oral and documentary evidence adduced and produced by the prosecution, as well as perused the impugned judgment and order dated 14-3-2000 and considered the submissions advanced by the learned counsel for the parties anxiously, as well as perused the observations made and ratios laid down in the judicial pronouncements cited by the learned counsel for the respondents carefully and it is evident that Rule 44H of the said Rules in respect of restriction on sale of common salt has been deleted with effect from 30-9-200Qas per G.S.R. No. 716(E), dated 13-9-2000. Moreover, as canvassed by the learned Senior counsel for the respondents, as regards compliance of Section 10(2) of the said Act, there is no evidence to show that the samples were taken from the turmeric powder for the sale, as well as the procedure in accordance with Section 11 pf the said Act was complied with by,,the Food Inspector M-S. Patil. Moreover, it is evident from the evidence that PW1 M.S. Patil Food Inspector has not taken bulk quantity of turmeric powder for sample purpose. It is also evident from the evidence on record that Food Inspector, M. S. Patil while sampling separated 12 packets in three equal parts i.e. four packets each containing turmeric powder therein and he did not collect the turmeric powder from the said, 12 packets together and did not separate the said quantity of turmeric powder in three parts for analysis purpose and the said such separation of 12 packets Itself in three parts as samples for analysis purpose is not permissible, which leads to jibe position that sampling was not doneby PW1 Food Inspector M. S. Patil properly Which certainly causes' prejudice to the respondents/accused and since the sampling of the'turmeric powder itself is faulty, there is substance in the submissions advanced by the learned Senior Counsel Shri Mandlik for the respondents. In the said context, reliance can very well be placed on the judgment of Division Bench of. this Court in, the case of State of Maharashtra v. Lakhmi-chand Suganchand Agrawal & others, reported at 1998 All MR (Cri) 953 (supra).

34. Moreover, it is also apparent from the evidence on record that PW2 M. S. Patil Food Inspector has not taken the sample in bottle or jar or container, but took the sample in a polythene bag and sent to the Public Analyst, which is not permissible and such taking

of sample in polythene bag amounts to violation of mandatory provision of Rule 14 of the said Rules, and therefore, conviction cannot be based against the respondents on such defective sampling and the view adopted by th$ learned single Judge of Patna High Court (in the case of Binod Kumar v. State of Bihar; reported at 2004 FAJ 465, (supra) supports the said proposition.

35. So also, the submissions made by the learned Senior Counsel Shri Mandlik for the respondents that the prosecution has not complied with the mandatory provisions of Rules 14 to 17 of the said Rules in respect of sealing, fastening and dispatching of samples, as well as PW1 M. S. Patil Food Inspector has not complied with Section 11 of the said Act in respect of procedure tobe fbltewed by the Food Inspectors cannot be overlooked while assessing the evidence on record;

36. As regards the compliance of Section 13(2) of the said Act, after receiving the report of Public Analyst, the reasoning adopted by the learned Trial Judge that notice thereof was properly served upon accused No. 1 and the defence of violation of mandatory provision under Section 13(2) of the said Act i.e. serving of notice to accused'No. 1 is not available to accused No. 1, appears to be proper. In the said context, it is material to note that accused No. 1 has submitted the bill of pur-chise of packets of turmeric powder from accused No. 2, which is produced at Exh. 40 andit has come in the evidence of (PW2) that accused No. i has product tfie[1] original bifl dated 22-4-1994 along with letter dated 18-5-1984 Exh.39 and the said lBtt^lsaddiessed tortile Assistant CommissiOiidF, Food and Drugs Administration.(M.S.), Nanded and it is admitted fact that PW1 M. S. Patil Food Inspector visited the shop of accused No. 1 on 27-4-1994 and purchased 12 packets of turmeric powder from his shop. Hence, con-sidering the said aspect, it is amply clear that accused No. 1 purchased the said packets of turmeric powder from accused No. 2 on 22-4-1994 as per bill Exh. 40, which were consequently purchased by PW1 M. S. Patil Food Inspector from accused No. 1 on 27-4-1994 for analysis purpose, and accordingly, since accused No; 1 purchased the packets of turmeric powder from accused No. 2 as per printed bill Exh.40, accused No. 1 has been absolved from the liability, since accused No. 2 is the manufacturer of the said turmeric powder,

37. As regards the report of Public Analyst in accordance with Section 13 of the said Act, PW3 Subhash Kamble, Junior Scientific Officer categorically stated in his deposition that he .got analysed the, turmeric powder from the Chemist in the Laboratory, namely P. B. Halkunde, who is subordinate to him and lie received the test report from the said Chemist on 11-5-1994. However, he could not state on which day which chemical test was completed: Pertinently, although PW3 Subhash Kamble admitted in his testimony that said P. B. Halkunde, Chemistis alive, the said material witness, who, in fact, carried out the analysis of the turmeric, powder, was not examined by the prosecution. It is important to note that PW3 Subhash Kajnpte admitted in his deposition that he prepared analysis report on the basis of result of test reports submitted by Chemist, but he cannot state howmuch other samples were analysed by the Chemist during the analysis of turmeric powder sample simultaneously. Therefore, it is significant to note that PW3 Subhash Kamble has no personal knowledge; whereas P. B. Halkunde, Chemist, who carried,out the analysis of the sample of turmeric powder, although was alive, was.., withheld and not examined by the prosecution and the said inaction on the part of the pros, ecution sustain,S|fatal blow to the case of the prosecution.

38. As regards compliance of Section. 113(2) of the said Act in respect of accused

No. 2, it appears that accused No. 2 was not served at all and Form No. 7 was not sent along with the sample by the Food Inspector, and the said fact is evident from the R.P.A.D. Packet Exh. 93, and therefore, the liability of accused No. 2, who is the manufacturer of the said turmeric powder, is also absolved in view of non-compliance of Section 13(2) of the said Act.

39. Coming to the report of the Public Analyst Exh.88, apparently there is substance in die submissions made by the learned Senior Counsel Shri Mandlik for die appellant that all the ingredients of turmeric powder shown . therein are within the permissible limits prescribed under Rule A.05.20.01 pertaining to turmeric (Haldi) powder, which conforms the prescribed standards in respect of moisture, total ash, ash insoluble in dilute HCI, test for lead chromate and total starch, as mentioned in para No. 28 herein above. Besides, it can-' not be ignored that although microscopic examination was not prescribed under the Act, PW5 Gajanan Joshi admitted that such microscopic examination was carried out.

40. Moreover, there is'also substance in the submission made by learned Senior Counsel regarding the sodium contents in the sample of turmeric powder, which[1] is within the limits as prescribed by the afore said Rules, since the sodium chloride contained 2.31 per cent, i.e. salt, which is not hazardous to human be- ing, and hence, it is amply clear that me sample of turmeric powder doeStibt come within the mischief of alleged charges against the ac- cused.

41. Having the comprehensive view of the matter, I am inclined to accept the submis sions advanced by the learned Senior Counsel Shri Mandlik that the prosecution has failed to make out any case for adulteration, and as dis- cussed herein above, PW1M. S. Patil has failed to follow the procedure, which was required to be followed whiletaking the samples in ac- cordance with Rules 14 to 17 of the said Rules and more particularly, the sample which was taken by him in polythene bag and not in clean bottle or jar, as contemplated in the afore said Rules, vitiates the prosecution case, and the Trial Court has rightly acquitted the accused . persons. Besides that, aner scrutinizing and analysing the evidence, the view adopted by the Trial Court while acquitting the accused persons is a possible view, and same does not appear to be perverse, and therefore, no interference therein is called for in the present appeal, and hence, there is no substance in the present appeal and same is devoid of any merits, and therefore, same deserves to be rejected.

42. Before departing, it is inevitable to make mention that, the learned A.P.P. while making the arguments before the learned Trial Judge cited the Ruling of Kerala High Court in the case of Food Inspector v. James, (reported in Prevention of Food Adulteration Cases) at 1998 (1) P.320, and while discussing the observations made in the said Ruling, the learned Trial Judge has observed in para No. 31 of the impugned judgment that:

"With great respect, I do not agree with the 'view taken' and observations made by Their Lordships in the above case law. Moreover, the said case law is admittedly of Kerala High Court and the same is not binding on this Court."

43. Moreover, while making submissions before the learned Trial Judge, learned A.P.P. also cited Ruling in the case of Rambhai v. State of Madhya Pradesh (Reported in Prevention of Food Adulteration Cases) at 1991 (1) P. 6, as stated in para 34 of the impugned judgment, but the learned Trial Judge, after considering the said ratio laid down in the said Ruling, observed in para No. 35 6T the impugned judgment that: "After going through the

observations made by Their Lordships in the above case law, I am of the opinion that though the Ruling is applicable to the present case, however, according to me, with great respect the view taken in the observations of the Ruling is not correct."

44. It manifestly appears from the text and tenor of the observations made by the learned Trial Judge in para Nos. 31 and 35 of the impugned judgment that same do not conform with the judicial discipline and propriety, and apparently amount to disrespect, and therefore, the Registrar General is directed to take suitable action against the concerned Judge, if he is in Judicial Service.

45. In the result, present appeal, which is sans merits, stands dismissed and office to take necessary steps to initiate suitable action against the learned Trial Judge, if he is in Judicial Service, as per the afore said directions. Office to send a copy of the impugned judgment, dated 14-3-2000 and also copy of the present judgment to the Registrar General for the necessary compliance

…**Appeal dismissed.**

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Cross Citation : AIR 2000 SUPREME COURT 1729 = 2000 AIR SCW 1561

SUPREME COURT OF INDIA

Coram : 2 V. N. KHARE AND Y. K. SABHARWAL, JJ.

Civil Appeal No. 883 of 1993* with C.A. Nos. 2456 and 2457 of 2000 (with C.C. No. 2243 of 1995 @ SLP (C) Nos. 6070 of 2000 and 23174 of 1995), D/- 5 -4 -2000.

Government. of A.P. and another v. B. Satyanarayana Rao (dead) by L.Rs. and others, Respondents.

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PRECEDENT - Precedents - Rule of per incuriam - When applies -Rule of per incurium can be applied where a Court omits to consider a binding precedent of the same Court or the superior Court rendered on the same issue or where a Court omits to consider any statute while deciding that issue. (Para 8)

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Cases Referred : Chronological Paras

State of A. P. v. V. Sadanandam, AIR 1989 SC 2060 : 1989 Lab IC 2024 : 1989 Supp (1) SCC 574 7, 8, 9, 10

K. Ram Kumar, G. Seshagiri Rao, H. S. Gururaja Rao, S. Muralidhar, L. Nageswara Rao and S. Udaya Kumar Sagar, Advocates, for Appearing Parties.

* From Judgement and Order of the Andh. Pra. Administrative Tribunal, Hyderabad in R.P. No. 1586 of 1986, D/- 26-3-1987.

JUDGMENT :- Permission to file S.L.P. granted. Impleadment application allowed.

2. Delay condoned.

3. Leave granted.

4. The short question that arises in these appeals is whether the post of Regional Transport Officer in the Department of Transport can be filled in by transfer of Section Officers of the Secretariat and Superintendents of the Office of the State Transport Authority. The recruitment to the posts of Regional Transport Officers are governed by the rules known as Andhra Pradesh Transport Services Rules framed under Article 309 of the Constitution (hereinafter referred to as the rules). Rule 3(a) provides the method of recruitment to the post of Regional Transport Officer. Rule 3(a) reads as under :-

Category IV : Regional Transport Officer-

1. By direct recruitment.

2. By promotion from among Motor Vehicles Inspectors.

3. By recruitment by transfer from among:

(i) Superintendents of the Office of the State Transport Authority.

(ii) Superintendents of the Subordinate Offices; and

(iii) Section Officers of the Secretariat except Law, Finance and Legislature Departments.

5. Rule 3(a) further provides that the first vacancy in the post of Regional Transport Office is to go to the Motor Vehicle Inspector. The second vacancy is meant for Superintendents of the Office of the State Transport Authority. The third vacancy is to go to Motor Vehicles Inspectors. The fourth vacancy is earmarked for Section Officers of the Secretariat. Fifth

vacancy is for Superintendents of subordinate offices of the Multizone. Sixth vacancy is for Motor Vehicles Inspectors. Seventh vacancy is meant for Superintendents of subordinate offices of the Multizone. It is against second and fourth vacancies, the employees working as Superintendents in the Office of the State Transport Authority and as Section Officers in the Secretariat were appointed as Regional Transport Officers by transfer. The said appointments were challenged by the employees working in the office of the Regional Transport Offices.

6. The Andhra Pradesh Administrative Tribunal found that the appointments of Superintendent in the office of State Transport Authority and Section Officers working in the Secretariat to the posts of Regional Transport Officers are contrary to the Presidential Order of 1975. Consequentially, their appointments were set aside. It is against the said order and judgment the appointees whose appointments were set aside and State of Andhra Pradesh are in appeal before us.

7. Learned counsel for the appellant urged that this matter stands concluded by a decision of this Court in the case of State of A. P. v. Sadanandam, 1989 Supp (1) SCC 574 (576) : (AIR 1989 SC 2060 : 1989 Lab IC 2024) wherein it was held that overriding power has been given to the State Government under paragraph 5(2) of the Presidential Order in express terms in recognition of the principle that public interest and administrative exigencies has precedence over the promotional interest of the members of the local cadres and zones and therefore, the State Government by order of transfer can fill the vacancies on the posts in different zones, as contemplated under the Rules.

8. Learned counsel for the respondent attempted to convince us that the decision in the case of State of A. P. v. V. Sadanandam, (AIR 1989 SC 2060 : 1989 Lab IC 2024) (supra) has to be ignored on the principle of per incuriam as certain relevant provisions of the Rules were not considered in the said case, and in any case this case requires to be referred to a larger Bench of three Judges. Rule of per incuriam can be applied where a Court omits to consider a binding precedent of the same Court or the superior Court rendered on the same issue or where a Court omits to consider any statute while deciding that issue. This is not the case here. In State of A. P. v. V. Sadanandam (supra) the controversy was exactly the same as it is here and this Court after considering paragraph 5 of the Presidential Order of 1975 held that the Government has power to fill a vacancy in a zone by transfer. We, therefore, find that rule of per incuriam cannot be invoked in the present case. Moreover, a case cannot be referred to a larger Bench on mere asking of a party. A decision by two Judges has a binding effect on another co-ordinate Bench of two Judges, unless it is demonstrated that the said decision by any subsequent change in law or decision ceases to laying down a correct law. We, therefore, reject the arguments of learned counsel for the respondents.

9. Learned counsel for the respondents then urged that in any case para 5(2) of the Presidential Order does not permit the recruitment by transfer and the only power of the State Govt. under para 5(2) of the Presidential Order is to pass simpliciter order of transfer on an equivalent post. This very argument was also advanced in the case of State of A. P. v. Sadanandam, (1989 Supp (1) SCC 574 : AIR 1989 SC 2060 : 1989 Lab IC 2024 (supra). The relevant para 15 (of Supp SCC) : (Para 14 of AIR, Lab IC) is extracted below :

"In the first place, we must point out that the Tribunal has failed to construe para 5(2) of the Presidential Order in its proper perspective and give full effect to the powers conferred thereunder on the State Government to make provisions contrary to the scheme of local cadres prescribed under para 5(1). The words of sub-para (2) of para 5 viz., 'nothing in this order shall prevent the State Government from making provision for' sets out the overriding powers given to the State Government under sub-para. Such overriding powers have been given to the State Government in express terms in recognition of the principle

that public interest and administrative exigencies have precedence over the promotional interests of the members belonging to local cadres and zones. Since para 5(2) also forms a part of the Presidential Order, it forms part of the scheme envisaged for creating local cadres and zones. The Tribunal was, therefore, in error in taking the view that if the State Govt. was to exercise its powers under para 5(2) and make provision for promotion of U.D. Assistant in the Directorate and Assistant Section Officers in the Secretariat to be transferred to posts in zones I to IV, it will be the very negation of the creation of cadres and zones under para 5(1) and it will be destructive of the scheme underlying the Presidential Order. In fact the Tribunal has realised the operative force of para 5(2) to some extent but it has failed to give full effect to its realisation of the scope of Section 5(2).

@page-SC1731

In para 12 of its judgment in R. P. No. 1595/1983 the Tribunal has stated that since the amended rule refers to para 5(2) of the Presidential Order 'it will no longer be open to the petitioners to attack the amendment as was done in respect of the earlier amendment in the previous R.P.'. The Tribunal has thus noticed that the amended rule has been brought about by the Government in exercise of its powers under para 5(2) but it has failed to draw the logical inference following therefrom."

10. Following the decision in the case of State of A. P. v. Sadanandam, (AIR 1989 SC 2060 : 1989 Lab IC 2024) (supra), we reject the arguments of counsel for the respondents.

11. For the aforesaid reasons these appeals deserve to be allowed. We accordingly set aside the judgments and orders under appeal. The appeals are allowed. There shall be no order as to costs. Appeal allowed.

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Cross Citation :2004 ALL MR (Cri) 1802

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

D. B. BHOSALE, J.

M/s. Shri Srinivasa Cut Pieces Cloth Shop, Rajahmundri, (A.P.) & Anr.

Vs.

State of Maharashtra & Anr.

Criminal Writ Petition No.1591 of 2003

12th March, 2004.

Shri . SUBHASH JHA with Mr. BHARAT VAISHNAWA i /b M/s. Bharat Vaishnawa & Co., for the Petitioners.

Shri . B. R. PATIL, P.P. for Respondent State .

Shri . A. R. DHANUKA, Advocate for Respondent No.2.

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(A) Precedents - Courts of co-ordinate jurisdiction should have consistent opinions in respect of identical set of facts or on a question of law - If this rule is not followed instead of achieving harmony in the judicial system, it will lead to judicial anarchy - Hence like questions should be decided alike, otherwise on same question of law or same set of facts different persons approaching a court may get different orders – Supreme Court judgment in Hari Singh case followed. (Para [13])

(B) Constitution of India , Art.226 - Criminal P.C. (1973), S.482 - Quashing of proceedings under S.420, IPC - Court can quash proceedings even if discharge application is either not filed or is pending, if no offence is disclosed by the complaint - On facts held issue of process and further proceedings could not be sustained and the dispute was of a civil nature.

The High Court has sufficient powers to quash the criminal prosecution if it finds that initiation or continuance of the criminal proceedings amounts to abuse of the process of Court or quashing of the proceedings would otherwise serve the ends of justice, when no offence is disclosed by the complaint. This Court in a given case, can indubitably exercise the power under Section 482 of Code even if the discharge application is either not filed or is pending before the Trial Court, when the complaint does not make out any case against the accused and that no useful purpose is likely to be served by allowing the continuance of the criminal prosecution. The very purpose of exercising such power is to avoid agony of undergoing a criminal trial. It is also not comfortable thought for the petitioners to be told that they could appear before the Court, particularly which is at a far off place outside their State, seek their release on bail and then to either move an application for discharge or for recalling of the process or face trial when the complaint makes out no case against them or a dispute is of a civil nature. (Para [11])

In this case, the transaction between the complainant and the petitioners was purely a case of supplying the goods on credit and that the petitioners did not pay the value of the goods to the complainant. Moreover, the complaint, was also vague. It did not give particulars, such as dates of transactions, bill numbers, vouchers etc. The complainant had also not made any reference in the complaint, regarding the earlier transactions with the petitioners. Even in the reply affidavit the complainant has not given any particulars or controverted the statements made by the petitioners in the petition. The Magistrate is expected to be very careful while issuing the process in the complaint, particularly when the averments therein are vague and prima-facie do not disclose any offence or that the dispute reflected in the complaint is of a civil nature. The party to the criminal proceedings cannot be made to undergo the agony of trial which may take a number of years to end. In the present case, the dispute between the parties was of civil nature. It was purely a case of supplying goods on credit by the complainant and that the accused was not paying the value of the goods supplied to the complainant. Hence issue of process and further proceedings are liable to be quashed. (Paras [13 , 15])

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JUDGMENT :- Rule. Rule returnable forthwith. Mr. B. R. Patil, Learned Public Prosecutor, waives service for Respondent No.1 State.

Mr. Dhanuka, Learned Counsel waives service for Respondent No.2-Complainant. Heard finally by consent of the learned counsel for the parties.

Petitioners pray that (a) That, this Hon'ble Court may be pleased to issue writ of certiorary or any other writ, order or direction, calling for papers and proceedings of the complaint/case No.147/S of 1997 (Old No.171/S/95) pending in the court of Metropolitan Magistrate's 32nd Court at Bandra, Mumbai, and after going through the legality or otherwise of the said case and process issued therein by the Learned Magistrate, this Hon'ble Court be pleased to quash and set aside the said proceedings and process issued therein; (b) That, pending the hearing and final disposal of the petition, the proceedings in the Case No.184/S/1997 (Old No.247/S/95) pending in the Court of Metropolitan Magistrate's 32nd Court, Bandra, Mumbai, be stayed; (c) That, ad-interim and interim reliefs in terms of prayer (b) above be granted; etc.

2. This writ petition was heard along with twenty six other writ petitions filed by different petitioners invoking the inherent powers of this Court under section 482 of the Code of Criminal Procedure (for short: 'the Code') read with Article 227 of the Constitution of India (for short, 'the Constitution') for quashing of the proceedings bearing Criminal Complaint/Case No.147/S of 1997, pending in the Court of the Metropolitan Magistrate. The facts in all the petitions are not only similar but they are also identical. The only difference in all the petitions is that of the names of the petitioners and the amounts involved. In view of this, the judgment in the instant writ petition would cover all other twenty-six writ petitions and they would also stand disposed of in accordance with this judgment.

3. The factual matrix revealed that petitioner No.2 is a trader from Andhra Pradesh and carries on business in the name and style of M/s. Shri Srinivasa Cut Pieces Cloth Shop-Petitioner No.1, situate at Rajahmundri. Respondent No.2 (for short: 'the Complainant') has filed the complaint against the petitioners and 28 others stating that he is the proprietor of Sai Syntax having his office in Mumbai. According to the complainant, the petitioners represented to him that they are dealing in textile goods/fabrics and that they intended to procure textile goods from the complainant through their agent M/s. S.K.V. Enterprises, Vijayawada . They further represented that they would pay interest at the rate of 24% per annum on delayed payment beyond 45 days and/or value of the goods would be paid within the stipulated period from the date of the invoice. It is further alleged that 45 days of they induced the Complainant to part with the textile goods on the aforesaid conditions and did not pay the value of the goods. The case of the complainant is that the petitioners had no intention of making the balance payment of the textile goods supplied by him and hence they have committed an offence punishable under Section 420 of the Indian Penal Code (for short 'I.P.C.'). The Petitioners, according to the complainant, caused wrongful loss of Rs.3 ,251 /- to them. The Complainant claims that he had called upon the Petitioners to make the payment, but they failed to do so and, therefore, a notice dated 21.2.1995 was sent through an Advocate. Thus, according to the complainant, the Petitioners, in furtherance of a common intention of cheating, induced the complainant to part with textile goods knowing fully well that they would not be able to clear the outstanding bills and have thereby caused a wrongful loss of Rs.3 ,251 /- to the complainant.

4. On the order hand, according to the petitioners they had dealings with the complainant during the period commencing from August, 1991 to March, 1993. They used to purchase the textile goods from the complainant through their agent at Vijaywada, M/s. S.K.V. Enterprises. They have categorically stated in the petition that during the aforestated period, under the various bills, they had purchased textile goods and made

payments to the said agents and/or to the complainant by demand drafts/ cheques and occasionally in cash. It is also stated in the petition that the last such dealing with the complainant was on 10.3.1993 when, according to the petitioners, after making up accounts, they had made payments of all the outstanding dues to the complainant and nothing remained due and payable by them to the complainant. The particulars of the payment made by the petitioners are also given in the petition and that they have craved leave to refer to and rely upon the bills, receipts, bank statement, counterfoils of cheques and account book in respect of their dealings with the complainant. In paragraph 3(e) and (f), the petitioners have made a categoric statement that the complainant has filed over 125 cases against the traders from Vijaywada, Rajahmundri, Visakhapatnama, Trichy, East Godawari in Andhra Pradesh and in all these cases the complaint in stereotype. It is further stated that in all the complaints there are only 11 paragraphs, the averments, comma, fullstops are identical except that the names of the accused and the amounts are different. All the complaints are identical and there is no difference of any nature whatsoever in all 125 cases filed by the complainant.

5. It is in this backdrop, the petitioners have invoked the inherent powers of this Court seeking quashing of the criminal case pending since 1995 in the Court of the Metropolitan Magistrate at Bombay .

6. I have heard the learned counsel for the parties for quite sometime, perused the contents of the petition and annexures thereto and the reply affidavit filed by the respondents. The learned counsel for the parties have placed reliance upon several judgments of the Apex Court in support of their contentions.

7. Mr. Jha, learned counsel for the petitioners, at the outset, placed heavy reliance upon the order passed by this Court in Criminal Writ Petition No.95 of 1996 which came to be disposed of on 24.4.1997. In his submission, the complaint involved the Criminal Writ Petition No.95 of 1996 and the complaint in the instant writ petition are identical. In other words, the Criminal Case No.230/S/95, which was the subject matter of Criminal Writ Petition No.95 of 1996 is one out of 125 cases filed by the complainant against the traders from Andhra Pradesh. The complaint in the said case and the complainant in the instant case is identical. Both these complaints have 11 paragraphs and the averments, comma, fullstop are identical except the names and the amounts mentioned in these two complaints. The said writ petition was allowed by order dated 24.4.1997 and Criminal Case No.230/S/95 was quashed. He, therefore, submitted that the instant writ petition is squarely covered by the order passed by this Court in Criminal Writ Petition No.95 of 1996 and, therefore, deserves to be allowed.

8. Mr. Jha further submitted that the complainant has deliberately suppressed material facts while filing the complaint and it was filed only with a view to harass the traders from outside state and extract amounts which were not due from them. The complaint is vague as it does not make reference to the bill numbers and the vouchers. There is also no reference to the earlier dealings and the payments made by the petitioners from time to time either by cheques or by demand drafts or in cash. According to Mr. Jha, even if it is assumed that the amounts were still outstanding, the only remedy available to the petitioners was to file a civil suit and not the criminal cases inasmuch as the nature of dispute is wholly of civil nature. It was also submitted that this is a fit case where this Court should exercise the inherent powers under section 482 of the Code read with Article 227 of the Constitution to quash the said criminal proceedings. In support of his submission, he placed heavy reliance upon the following judgments of the Apex Court (i) State of Haryana Vs. Bhajanlal, AIR 1992 SC 504, (ii) Madhavrao Scindia Vs. Sambhajirao Chandrajirao Angre, (1988)1 SCC 692, (iii) Pepsi Foods Ltd. Vs. Special Judicial Magistrate & Ors., (1998)5 SCC 749 : [1998 ALL MR (Cri) 144 (S.C.)] (iv) Hari

Singh Vs. Haryana (1993)3 SCC 114, and (v) Dist. Manager APSRTC Vs. K. Sivaji, (2001)2 SCC 135.

9. On the other hand, Mr. Dhanuka, learned counsel for the complainant, submitted that the order passed by this Court in Criminal Writ Petition No.95 of 1996 dated 24.4.1997 cannot be relied upon or taken recourse to, to allow the instant petition, in view of the fact that the said order was passed ex- parte. In view of this submission of Mr. Dhanuka, I heard him on merits at length. Mr. Dhanuka further submitted that this writ petition deserves to be dismissed on the ground of delay and on the ground that the discharge application, that was filed by the petitioners before the learned Magistrate, came to be dismissed as not pressed on 28.8.2003. Mr. Dhanuka further submitted that the complaint, prima-facie, discloses the offence under Section 420 of IPC. In support of this submission, he invited my attention to the averments in the complaint and in particular paragraph Nos.3 and 6 to contend that the petitioners induced the complainant to part with textile goods and thereby caused wrongful loss to him and wrongful gain to them. The inherent powers under section 482 of the Code, according to Mr. Dhanuka, cannot be exercised to stifle legitimate prosecution. Mr. Dhanuka further submitted that the inherent powers under section 482 of the Code is only an exception and not the rule and that the said power has to be used very sparingly and that the instant case is not a fit case to exercise the powers and quash the criminal proceedings. He further submitted that this Court cannot assume the role of trial Court and embark upon an enquiry as to the reliability of the material on record. He further submitted that the sale of goods on condition of payment of price on delivery, and in turn non-payment of the price thereof amounts to cheating. He also submitted that the complainant would not have any objection if the petitioners were given liberty to file a fresh application for discharge before the trial court as that would be proper course to follow. In short, according to Mr. Dhanuka, whether a dispute is of civil nature or not, could be decided only after recording of evidence and the petitioners would have an opportunity to prove their case at the trial. Though in paragraph 7 of the reply affidavit the complainant has stated that the facts of the present case are entirely different from the facts of Criminal Case No.230/S/95 which has been quashed by this Court in Writ Petition No.95 of 1996, Mr. Dhanuka fairly conceded that the contents of the complaint in the instant case and that of the Criminal Complaint No.230/S/95 are identical and the difference is only of name and the amounts. Mr. Dhanuka placed heavy reliance upon the following judgments of the Apex Court in support of his contentions (i) State of Karnataka Vs. M. Devendrappa & Anr., (2002)3 Supreme Court Cases 89, (ii) State of Himachal Pradesh Vs. Krishnan Lal Pradhan & Ors., AIR 1987 Supreme Court 773, (iii) Mahadeo Prasad Vs. State of West Bengal, 1954 Cri.L.J. 1806 (SC), (iv) Union of India Vs. Prakash P. Hinduja and Anr., 2003(6) S.C.C. 195 : [2003 ALL MR (Cri) 1578 (S.C.)], (v) State through Special Cell, New Delhi Vs. Navjot Sandhu alias Afshan Guru and Ors., 2003(6) SCC 641 and (vi) M. Krishnan Vs. Vijay Singh and Anr., AIR 2001 SC 3014.

10. I have heard the learned counsel for the parties and with their assistance, I have carefully gone through the petition and the annexures thereto as also the reply affidavit filed by the complainant. The Apex Court , in a catena of judgments, has considered the ambit of the inherent powers of the High Court under section 482 of the Code read with Article 227 of the Constitution to quash the criminal proceedings. The Apex Court in Pepsi Foods Ltd., (supra) has clearly held that though the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court under section 482 of the Code or Article 227 of the Constitution to have the proceedings quashed against him when the complaint does not make out any case against him and still he has to

undergo the agony of a criminal trial. In paragraph 30 of the report, the Apex Court has observed that it is not comfortable thought for the appellants to be told that they could appear before the Court which is at a far off place in Ghaziapur in the State of Uttar Pradesh, seek their release on bail and then to either move an application under Section 245(2) of the Code or to face a trial when the complaint and the preliminary evidence recorded makes out no case against them.

(a) Similarly, in Madhavrao Scindia (supra), the Apex Court has observed that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bias (sic) and therefore, no useful purpose would be served by allowing a criminal prosecution to continue, the court may, while taking into consideration the special facts of a particular case also quash the proceedings, even though it may be at a preliminary stage.

(b) The Apex Court in Bhajanlal and Ors. (supra) has enumerated categories of the cases where the High court may in exercise of the powers under Articles 226 and 227 of the Constitution or under Section 482 of the Code may interfere in the proceedings relating to cognizable offences to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It has also noted that such powers should be exercised sparingly and that too in the rarest of rare cases.

(c) In Union of India Vs. Prakash P. Hinduja & Anr. (supra), relied upon by the complainant, the Apex Court, while considering the ambit of the power under Section 482 of the Code, has held that the inherent power can be exercised to quash the criminal proceedings on the following grounds: (i) where the allegations made in the FIR or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, (ii) where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused, (iii) where there is an express legal bar engrafted in any of the provisions of the Code of Criminal Procedure or the Act concerned to the institution and continuance of the proceedings. The Apex Court has also noted that such power has to be exercised in a rare case and with great circumspection. However in that case, since the High Court has not examined the nature of the allegations made in the FIR or the evidence by which the prosecution sought to establish charge against the accused during trial, allowed the appeal by setting aside the judgment and order of the High Court quashing the criminal prosecution.

(d) In Navjot Sandhu alias Afshan Guru and Ors. (supra), the Apex Court was considering the case of five terrorists who attacked the Parliament. In that case, it is observed that the inherent power is to be used only in cases where there is an abuse of the process of the court or where interference is absolutely necessary for securing the ends of justice. It is further held that the inherent power must be exercised very sparingly in cases which require interference would be few and far between. The most common cases where inherent jurisdiction is generally exercised is where criminal proceedings are required to be quashed because they are initiated illegally, vexatiously or without jurisdiction and while doing so it must be remembered that the inherent power is not to be resorted to if there is a specific provision in the Code or any other enactment for redress of

the grievance of the aggrieved party. This judgment of the Apex Court in my opinion would not help the complainant, keeping in view the facts of the instant case.

(e) In yet another case M. Krishna (supra), the Apex Court has observed that the inherent powers for quashing the proceedings at the initial stage can be exercised only where the allegations made in the complaint or the first information report, even if taken at their face value or accepted in their entirety, do not prima facie disclose the commission of an offence.

(f) In the State of Karnataka Vs. M. Devendraappa and Anr. (supra), yet another case relied upon by the complainant, it is held that in exercise of the powers Court would be justified to quash any proceeding if it finds that initiation/constitution of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. It is further held that when no offence is disclosed by the complaint, the Court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto. In this case, the Apex Court has also noted that the High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issue involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material, and no hard and fast rule can be laid down in regard to cases in which the High Court should exercise its extraordinary jurisdiction of quashing the proceeding at any stage. The reliance placed on the Judgment of the Apex Court in State of Himachal Pradesh Vs. Krishnalal Pradhan (supra), in my opinion, is misplaced.

11. It is thus clear that this Court has sufficient powers to quash the criminal prosecution if it finds that initiation or continuance of the criminal proceedings amounts to abuse of the process of Court or quashing of the proceedings would otherwise serve the ends of justice, when no offence is disclosed by the complaint. This Court in a given case, can indubitably exercise the power under Section 482 of Code even if the discharge application is either not filed or is pending before the Trial Court, when the complaint does not make out any case against the accused and that no useful purpose is likely to be served by allowing the continuance of the criminal prosecution. The very purpose of exercising such power is to avoid agony of undergoing a criminal trial. It is also not comfortable thought for the petitioners to be told that they could appear before the Court, particularly which is at a far off place outside their State, seek their release on bail and then to either move an application for discharge or for recalling of the process or face trial when the complaint makes out no case against them or a dispute is of a civil nature.

12. This Court in Criminal Writ Petition No.95 of 996 by order dated 24.4.1997, had quashed criminal case No.230/S/95 filed by the complainant against one of the similarly placed traders from Andhra Pradesh. In paragraphs 2 and 3 of the judgment, this Court held thus:-

'2. The first Respondent is the complainant. He filed a private complaint against the petitioners alleging an offence of cheating under section 420, IPC. The allegations in the complaint are that the complainant had delivered textile goods on credit to accused persons, that the accused have not paid the value of the same inspite of repeated demands and the notice. It is, therefore, alleged that the accused have committed an offence of cheating. The learned Magistrate issued process under section 420 of IPC. Being aggrieved by that order, the accused have come up with the present petition.

3. After perusing material on record, I am satisfied that issue of process cannot be sustained and the dispute is of civil nature. This is purely a case of supplying goods on

credit and the accused have not paid the value of goods to the Complainant. But the defence is that the accused had paid the amount. Even, if we ignore the defence , as per the allegations in the complaint, it is only a case of accused not paying the value of the goods, which they had received on credit. It is purely a civil dispute and does not amount to offence of cheating. The learned Magistrate has not applied his mind to the facts of the case, but has mechanically issued process. It is a sheer abuse of process of the court if the civil dispute is allowed to be tried in a criminal forum. Hence issue of process is liable to be quashed.'

13. It is true that this Court while disposing of the aforestated criminal writ petition, neither the petitioner nor the respondent was present. However, it is apparent from the order that the learned Single Judge had perused the entire record and after satisfying that the dispute was of a civil nature, quashed the proceedings. On perusal of the complaint and the averments in the petition, I find no reason to take a different view in the matter than the one that has been taken by the learned Single Judge in Criminal Writ Petition No.95 of 1996. It is apparent that the transaction between the complainant and the petitioners was purely a case of supplying the goods on credit and that the petitioners did not pay the value of the goods to the complainant. Moreover, the complaint, in my opinion, is also vague. It does not give particulars, such as dates of transactions, bill numbers, vouchers etc. The complainant has also not made any reference in the complaint, regarding the earlier transactions with the petitioners during the period commencing from August, 1991 to March, 1993. Even in the reply affidavit the complainant has not given any particulars or controverted the statements made by the petitioners in the petition and in particular the contents of paragraphs 3 and 4 thereof. In view of this, I have no hesitation in agreeing with the view taken by the learned Single Judge in Writ Petition No.95 of 1996, as a matter of fact, the well settled basic principle which has to be kept in view, in an eventuality, such as in the present case, is that the Courts of co-ordinate jurisdiction should have consistent opinions in respect of an identical set of facts or on a question of law. If courts express different opinions on the identical set of facts or question of law while exercising the same jurisdiction, then instead of achieving harmony in the judicial system, it will lead to judicial anarchy. It is a very sound rule and practice that like questions should be decided alike, otherwise on same question of law or same set of facts different persons approaching a Court can get different orders. This basic principle is enunciated by the Apex Court in Hari Singh Vs. State of Hariyana (supra). Keeping this in view and as I have already expressed that I do not find any justifiable reason to take a different view from the one which has been taken by the learned Single Judge in Criminal Writ Petition No.95 of 1996, this petition deserves to be allowed for the self same reasons.

14. Mr. Dhanuka, learned counsel for the complainant with vehemence at his command, submitted that bare look at the complaint shows that the offence under section 420 of IPC is made out. In support of his contention, he invited my attention to paragraphs 3 and 6 of the complaint in particular and submitted that it has been clearly mentioned in paragraph 3 that but for the representation and inducement on the part of the petitioners, the complainant would not have parted with textile goods and that the petitioners, right from the very inception, had no intention of making the balance payment. On the other hand, Mr. Jha, learned counsel for the petitioners, submitted that merely because the ingredients of section 420 of IPC reflect in the complaint in the form of the wording of the section would not mean that the offence under that provision is made out. I have perused the complaint minutely. The complainant has stated in the complaint that he was induced by the petitioners to part with the textile goods. While saying so the complainant has suppressed several facts. There is no reference in the complaint that the

petitioners were dealing with him since more than 2-3 years prior to the last transaction which invited the complaint under section 420 of IPC. The transaction referred to in the complaint was not an isolated transaction, as tired to suggest in the complaint. Moreover, it does not give the particulars of the transaction.

15. I am of the considered view that merely because the ingredients of a particular offence reflect in the complaint, in the form of the wordings of the section, that, by itself, would not be sufficient to constitute an offence and to hold that prima facie case has been made out. In other words, merely because, the complaint states that the accused cheated him and dishonestly induced him to deliver a property to any person without there being a reference to other particulars in the complaint or a reference to the earlier transactions between them, such wording of the complaint by itself would not constitute an offence under section 420 of IPC. The Magistrate before whom the complaint is filed is expected to apply his mind to the facts of the case and the law applicable thereto. He has to examine the nature of the allegations made in the complaint before issuing a process or the summons to the accused. The Magistrate is expected to be very careful while issuing the process in the complaint, particularly when the averments therein are vague and prima-facie do not disclose any offence or that the dispute reflected in the complaint is of a civil nature. The party to the criminal proceedings cannot be made to undergo the agony of trial which may take a number of years to end. In the present case, I am satisfied that the dispute between the parties was of civil nature. It was purely a case of supplying goods on credit by the complainant and that the accused was not paying the value of the goods supplied to the complainant. Even if the defence as disclosed in the petition is ignored, it is only a case where the goods were delivered on credit and the value of the goods was not paid by the accused. It is in this backdrop, I find no merit in the submissions of Mr. Dhanuka, learned counsel for the complainant.

16. In the result, this petition is allowed. The issue of process and further proceedings in Criminal Complaint/Case No.147/S of 1997 are hereby quashed. However, this order is without prejudice to the rights of the complainant to recover whatever amount due to him from the accused by approaching the Civil Court in accordance with law.

Authenticated copy of this order may be made available to the parties.

Petition allowed.

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01 Oct 2013

SUPREME COURT OF INDIA

Bench: K.S. Radhakrishnan, Pinaki Chandra Ghose, JJ

CRIMINAL APPEAL NOS. 1590-1591 OF 2013

(@ Special Leave Petition (Criminal) Nos.6652-6653 of 2013)

Anil Kumar & Ors. ¦.. Appellants

Versus

M.K. Aiyappa & Anr. ¦.. Respondents

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Section 156(3) Cr.P.C.- requirement of application of mind by the Magistrate before exercising jurisdiction under Section 156(3) Cr.P.C. – Held, The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted

We may first examine whether the Magistrate, while exercising his powers under Section 156(3) Cr.P.C., could act in a mechanical or casual manner and go on with the complaint after getting the report. The scope of the above mentioned provision came up for consideration before this Court in several cases. This Court in Maksud Saiyed v. State of Gujarat and Others (2008) 5 SCC 668 examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where a jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C., the Magistrate is

required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.

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J U D G M E N T

K.S. RADHAKRISHNAN, J.

1. Leave granted.

2. We are in this case concerned with the question whether the Special Judge/Magistrate is justified in referring a private complaint made under Section 200 Cr.P.C. for investigation by the Deputy Superintendent of Police " Karnataka Lokayukta, in exercise of powers conferred under Section 156(3) Cr.P.C. without the production of a valid sanction order under Section 19 of the Prevention of Corruption Act, 1988.

3. The Appellants herein filed a private complaint under Section 200 of Cr.P.C. before the Additional City Civil and Special Judge for Prevention of Corruption on 9.10.2012. The complaint of the Appellants was that the first respondent with mala fide intention passed an order dated 30.6.2012 in connivance with other officers and restored valuable land in favour of a private person. On a complaint being raised, the first respondent vide order dated 6.10.2012 recalled the earlier order. Alleging that the offence which led to issuance of the order dated 30.6.2012 constituted ingredients contained under Section 406, 409, 420, 426, 463, 465, 468, 471, 474 read with Section 120-B IPC and Section 149 IPC and Section 8, 13(1)(c), 13(1)(d), 13(1)(e), 13(2) read with Section 12 of the Prevention of

Corruption Act, a private complaint was preferred under Section 200 Cr.P.C. On receipt of the complaint, the Special Judge passed an order on 20.10.2012 which reads as follows :-

â€œOn going through the complaint, documents and hearing the complainant, I am of the sincere view that the matter requires to be referred for investigation by the Deputy Superintendent of Police, Karnataka Lokayukta, Bangalore Urban, under Section 156(3) of Cr.P.C. Accordingly, I answer point No.1 in the affirmative.

Point No.2 : In view of my finding on point No.1 and for the foregoing reasons, I proceed to pass the following :

ORDER

The complaint is referred to Deputy Superintendent of Police â€" 3 Karnataka Lokayukta, Bangalore Urban under Section 156(3) of Cr.PC for investigation and to report.â€�

4. Aggrieved by the said order, the first respondent herein approached the High Court of Karnataka by filing Writ Petition Nos.13779-13780 of 2013. It was contended before the High Court that since the appellant is a pubic servant, a complaint brought against him without being accompanied by a valid sanction order could not have been entertained by the Special Court on the allegations of offences punishable under the Prevention of Corruption Act. It was submitted that even though the power to order investigation under Section 156(3) can be exercised by a Magistrate or the Special Judge at pre- cognizance stage, yet, the governmental sanction cannot be dispensed with. It was also contended that the requirement of a sanction is the pre-requisite even to present a private complaint in respect of a public servant concerning the alleged offence said to have been committed in discharge of his public duty.

5. The High Court, after hearing the parties, took the view that the Special Judge could not have taken notice of the private complaint unless the same was accompanied by a sanction order, irrespective of whether the Court was acting at a pre-cognizance stage or the post- cognizance stage, if the complaint pertains to a public servant who is alleged to have committed offences in discharge of his official duties. The High Court, therefore, quashed the order passed by the Special Judge, as well as the complaint filed against the appellant. Aggrieved by the same, as already stated, the complainants have come up with these appeals.

6. We have heard the senior counsel on either side. Shri Kailash Vasdev, learned senior counsel appearing for the appellants, submitted that if the interpretation of the High Court

is accepted, then the provisions of Section 19(3) of the PC Act would be rendered otiose. Learned senior counsel also submitted that, going through the above mentioned provision, the requirement of sanction under Section 19(1) is only procedural in nature and the same can be cured at a subsequent stage of the proceedings even after filing of the charge-sheet and hence the requirement of â€œprevious sanctionâ€ is merely directory and not mandatory. Reliance was placed on the judgments of this Court in R. S. Nayak v. A.R. Antulay (1984) 2 SCR 495 and P. V. Narasimha Rao v. State (CBI/SPE) (1998) 4 SCC 626. Learned senior counsel further submitted that the High Court also committed an error in holding that the sanction was necessary even while the Court was exercising its jurisdiction under Section 156(3) Cr.P.C. Learned senior counsel submitted that the order directing investigation under Section 156(3) Cr.P.C. would not amount to taking cognizance of the offence. Reference was made to the judgments of this Court in Tula Ram and Others v. Kishore Singh (1977) 4 SCC 459 andSrinivas Gundluri and Others v. SEPCO Electric Power Construction Corporation and Others(2010) 8 SCC 206.

7. Shri Uday U. Lalit, learned senior counsel appearing for the respondents, on the other hand, submitted that the question raised in this case is no more res integra. Reference was made to the judgment of this Court in Subramanium Swamy v. Manmohan Singh and another (2012) 3 SCC 64. Learned senior counsel submitted that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duties. The purpose of obtaining sanction is to see that the public servant be not unnecessarily harassed on a complaint, failing which it would not be possible for a public servant to discharge his duties without fear and favour. Learned senior counsel also placed reliance on the judgment of this Court in Maksud Saiyed v. State of Gujarat and Others (2008) 5 SCC 668 and submitted that the requirement of application of mind by the Magistrate before exercising jurisdiction under Section 156(3) Cr.P.C. is of paramount importance. Learned senior counsel submitted that the requirement of sanction is a prerequisite even for presenting a private complaint under Section 200 Cr.P.C. and the High Court has rightly quashed the proceedings and the complaint made against the respondents.

8. We may first examine whether the Magistrate, while exercising his powers under Section 156(3) Cr.P.C., could act in a mechanical or casual manner and go on with the complaint after getting the report. The scope of the above mentioned provision came up for consideration before this Court in several cases. This Court in Maksud Saiyed case (supra) examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where a jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C., the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the

matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.

9. We will now examine whether the order directing investigation under Section 156(3) Cr.P.C. would amount to taking cognizance of the offence, since a contention was raised that the expression â€œcognizanceâ€ appearing in Section 19(1) of the PC Act will have to be construed as post-cognizance stage, not pre-cognizance stage and, therefore, the requirement of sanction does not arise prior to taking cognizance of the offences punishable under the provisions of the PC Act. The expression â€œcognizanceâ€ which appears in Section 197 Cr.P.C. came up for consideration before a three-Judge Bench of this Court in State of Uttar Pradesh v. Paras Nath Singh (2009) 6 SCC 372, and this Court expressed the following view:

â€œ6. .....And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, â€˜no court shall take cognizance of such offence except with the previous sanctionâ€™. Use of the words â€˜noâ€™ and â€˜shallâ€™ makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. According to Blackâ€™s Law Dictionary the word â€˜cognizanceâ€™ means â€˜jurisdictionâ€™ or â€˜the exercise of jurisdictionâ€™ or â€˜power to try and determine causesâ€™. In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if

it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

xxx xxx xxx

In State of West Bengal and Another v. Mohd. Khalid and Others (1995) 1 SCC 684, this Court has observed as follows:

"It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

10. The meaning of the said expression was also considered by this Court in Subramanium Swamy case (supra). The judgments referred to herein above clearly indicate that the word cognizance has a wider connotation and not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3) Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 Cr.P.C. and the next step to be taken is to follow up under Section 202 Cr.P.C. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage.

11. A Special Judge is deemed to be a Magistrate under Section 5(4) of the PC Act and, therefore, clothed with all the magisterial powers provided under the Code of Criminal Procedure. When a private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under Section 190 Cr.P.C. or proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156(3) Cr.P.C. The Magistrate, who is empowered under Section 190 to take cognizance, alone has the power to refer a private complaint for police investigation under Section 156(3) Cr.P.C.

12. We may now examine whether, in the above mentioned legal situation, the requirement of sanction is a pre-condition for ordering investigation under Section 156(3)

Cr.P.C., even at a pre-cognizance stage. Section 2(c) of the PC Act deals with the definition of the expression â€œpublic servant and provides under Clauses (viii) and (xii) as under:

â€œ(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty.

(xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority.

The relevant provision for sanction is given in Section 19(1) of the PC Act, which reads as under:

19. Previous sanction necessary for prosecution.â€”(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction"

a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

b) in the case of a person who is employed in connection with the affairs of a State and is not removeable from his office save by or with the sanction of the State Government, of that Government;

c) in the case of any other person, of the authority competent to remove him from his office.

Section 19(3) of the PC Act also has some relevance; the operative portion of the same is extracted hereunder:

Section 19(3) " Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

a) no finding, sentence or order passed by a special judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of, or any error, omission or irregularity in the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;

b) xxx xxx xxx

c) xxx xxx xxx

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

14. Further, this Court in Criminal Appeal No. 257 of 2011 in the case of General Officer, Commanding v. CBI and opined as follows: â€œThus, in view of the above, the law on the issue of sanction can be summarized to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio.

15. We are of the view that the principles laid down by this Court in the above referred judgments squarely apply to the facts of the present case. We, therefore, find no error in the order passed by the High Court. The appeals lack merit and are accordingly dismissed.

1999(0)ALLMR(CRI)8; 1999(0)CRLJ554; 1999(1)MHLJ377;

BOMBAY HIGH COURT

(Before T K Chandra Shekhara Das, JJ.)
Dated 10/12/1998

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Code of Criminal Procedure, 1973 S.482 S.2O2 S.200 Indian Penal Code, 1860 S.506(2) S.386 S.452 S.451 Complaint case has to be decided urgently - issue Of process - Validity - Process issued after over one year of complaint splitting the offences - Held, Section 200 does not permit the Magistrate to wait for such a long time on a complaint filed by the complainant under Section 200 I.P.C.It should bear in mind that Section 200 cr.P.C.Is an alternative protection for a citizen who suffers, against the reluctant attitude of the police either to entertain his complaint or a police officer May be baised against the accused.In that circumstances, a complaint filed under Section 200 should be Acted with a sense of urgency.Here, an year has been taken.The complaint was filed on 5-2-90 and verification has been taken for the reasons best known to the Magistrate only on 6-3-1990 and the Actual verification process started on 5-6-1990 and again evidence was called for on 2-2-1991.Ultimately, the endorsement was made by the advocate on 2-4-1991 and the order was passed for issuing summons against the petitioner on 2-4-1991.The time spent by the Magistrate is not in the ordinary course of business of the Court.Such delay is not admissible in the light of the provisions of Sections 200, 202, 203, and 204 of cr.P.C.The Magistrate cannot split offences according to the wishes of the complainant as is done in this case.The procedure adopted by the Magistrate is clearly an instance of mis-carriage of justiceand liable to be Quashed.

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Acts Referred :

Code of Criminal Procedure, 1973 , Sec. 200, Sec. 202, Sec. 482, Indian Penal Code, 1860 , Sec. 386, Sec. 451, Sec. 452, Sec. 506(2),

Counsel :

Usha Kejarival : G.B.Terdelkar

JUDGEMENT

[1] This matter arises out of the issue of process by the additional chief metropolitan Magistrate, borivli, Bombay in case no.58/s/91 filed by the first respondent against the petitioners.lt is alleged in the complaint that the petitioners have committed offences under Sections 386, 451, 352, 419, 506 (ii) read with Section 34 of the I.P.C.For the purpose of the case I do not think it is necessary to go into the every details contained in the complaint.Along with the complaint the names of 10 witnesses were shown and about 8 items of documents were also

produced.The complaint was filed on 5-2-1990 and it was posted for verification on 6-3-1990.It appears that on 6-3-1990 verification was not done.On 15-5-1990 verification was done.But it was stopped abruptly, and it was adjourned to 5-6-1990 for want of time.In the verification he stated that he made a complaint in borivli police station as per exh.D a zerox copy of which is produced. On 2-2-1991 I.E. After an year the Magistrate made an endorsement that verification statement was perused and directed the complainant to bring evidence.On 2-4-1991 the advocate for the complainant made an endorsement to the effect that the complaint does not press the offences under Section 386, 352, 419 I.P.C.But he pressed for process under Sections 451, 506 (1) read with 34 of I.P.C.On the same day the Magistrate ordered thus:- in view of the subsequent endorsement of the complainant, issue process under Sections 451, 506 (1) read with 34 of I.P.C.Against the accused.

[2] Shri tirodkar the learned counsel for the petitioner submits that a very strange procedure has been adopted by the Magistrate which is in violation of the provisions of Sections 200, 202, 203 and 204 of I.P.C.He submits that under these provisions a Magistrate is got only with three options.One is that when the Magistrate is satisfied with the allegation and materials and on examination of witness present on the date of filing of the complaint, he can issue process.Secondly, if he is not satisfied with the veracity of the complaint, he can dismiss the complaint, straightway.Thirdly, on the basis of the materials available before the Magistrate neither he dismiss or issue process, he can direct an enquiry under Section 156 of the cr.P.C.Or 202 of cr.P.C.

[3 AJccording to shri tirodkar, Magistrate however, cannot adopt the methods which he has adopted in this case.The Magistrate cannot collect the evidence by calling upon the parties when allegation contained in the complaint does not satisfy him, nor the complainant cannot bargain for that.The learned counsel submits that if the Magistrate is not satisfied with the offence which originally alleged in the complaint, the Magistrate can issue process at least, for some minor offence, if sufficient materials are there.I find considerable force in the contention of the learned counsel that a very strange procedure is seem to have been adopted by the Magistrate in this case.

[4] It has to be mentioned that about one year has taken by the Magistrate atleast to issue process in this case.A reading of Section 200 does not permit the Magistrate to wait for such a long time on a complaint filed by the complainant under Section 200 I.P.C.It should bear in mind that Section 200 cr.P.CIs an alternative protection for a citizen who suffers, against the reluctant attitude of the police either to entertain his complaint or a police officer May be baised against the accused.In that circumstances, a complaint filed under Section 200 should be Acted with a sense of urgency.Here, an year has been taken.The complaint was filed on 5-2-90 and verification has been taken for the reasons best known to

the Magistrate only on 6-3-1990 and the Actual verification process started on 5-6-1990 and again evidence was called for on 2-2-1991.Ultimately, the endorsement was made by the advocate on 2-4-1991 and the order was passed for issuing summons against the petitioner on 2-4-1991.The time spent by the Magistrate is not in the ordinary course of business of the Court.Such delay is not admissible in the light of the provisions of Sections 200, 202, 203, and 204 of cr.P.C.The Magistrate cannot split offences according to the wishes of the complainant as is done in this case.The procedure adopted by the Magistrate is clearly an instance of mis-carriage of justice.In view of this, I have to uphold the contention of the learned counsel for the petitioner.In the result the writ petition is allowed.Rule is made absolute in terms of prayer clause (b).No order as to costs.

prayer clause (b) :-

that the order of the issue of the process under Sections 451, 506 (1) read with Section 34 of the Indian penal code issued by the learned metropolitan Magistrate, 26th Court, borivli, Bombay in Court case no.58/s/1991 be quashed and set aside and the said complaint be quashed.Petition allowed.

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To perpetuate error is no virtue but to correct it is a compulsion of judicial conscience. ***2000 Cri. L.J.388(S.C.)***

The Judge must also bear in mind that he is not above criticism. Fair and reasonable criticism is necessary to improve the administration of justice. ***AIR 1955 Hyd. 264. AIR 1951 SC 10***

The word 'non-sense' and 'bloody fool' used by a judge against a litigant cannot be said to be attributable to him 'while' acting or purporting to act in discharge of his official duty- For his prosecution under section 504 of I.P.C. -sanction under section 197 of Cr. P. C. is not necessary. ***1993 Cri. L.J.499(DB)***

When a Magistrate acts illegally malafide and without jurisdiction in the matter of arrest he is not protected
AIR 1969 Pat 194

2) The conduct of the Chief Judicial Magistrate on the face of the record clearly appears to be good deal less happy and far from satisfaction – Which can not but earn from the court making him liable for appropriate action

1996 Cr.L.J.839

1) **I.P.C. 466** – A Judge fabricating any record in a pending case commits an offence under this section

ILR 1928 (52) Mad 347

2) **Personal Bias** :-

A judgment, which is the result of bias or want of impartiality, is a nullity and the trial **cormnon judice**

AIR 1945 PC 38

3) Court issuing summons to accused in a not baillable offence – when accused appears before the court and offers bail than court is bound to give bail to accused He can not send him to custody.

2008 (4) Crimes 327 (HC)

4) No complaint from that court is necessary where it is alleged that the sub ordinate Judge before whom a suit was proceeding has himself abetted an offence under section 193 – and has also committed offence under section 465 and 466

(AIR 1940 Lah 292)

5) A village munsif passing a decree contrary to law and without jurisdiction is guilty of maliciously pronouncing a decision and liable for punishment under section 219 of I.P.C.

AIR 1917 ALL 317

6) Unlawfully commitment to confinement with a view to put pressure on person confined to come to terms with a certain person in whom the accused is interested can be said to have been maliciously U/s. 220 of IPC

AIR 1956 Pepsu 30.

7) Where a village Court Judge charged with preparation of the register – Frames record which he knew to be incorrect He can be convicted us 218 of IPC

AIR 1956 Pepsu 30.

8) Trial prisoners produced in handcuffs before court- No immediate action taken by Magistrate for removal of their handcuffs and against escort party for bringing them in court or taking them away from the court in Handcuffs- It is a serious lapse on part of judicial officer in discharge of his duties – Keeping in view that he is a young Judicial Officer Supreme Court refrained from imposing punishment on him, however court recorded strong disapproval of his conduct and directed that a note of disapproval by court shall be kept in his personal file.

AIR 1996 SC 2299

9) Complaint in question was a product of fraud and a total a buse of process of court – It was filed to expose corrupt practices prevailing in subordinate courts – Serious doubt if procedure required under Cr. P.C. was followed by magistrate while taking cognizance – Complaint was liable to be quashed – Fraudulent act even in judicial proceedings could not be allowed to stand – All action taken in complaint including issuance of baillable warrants was declared void-ab-intio- (Para 9) This court in express News Papers Pvt Ltd. & ors – Vs – Union of India & ors [AIR 1986 SC 872] At para 118 has held thus.

"Fraud" on power voids the order if it is not exercised bonafide for end design. There is a distinction between exercise of power in good faith and misuse in bad faith. The former arises ***when on authority misuses its power in breach of law,*** by taking in to account bonafide, end with best intentions, some extraneous matters or by ignoring relevant matter that would render the impugned act or order ***ultra vires.*** It would be a case of fraud on powers.

The misuse in bad faith arises when the power is exercised for an improper motive, say, to satisfy a privateor personal grudge or for wreaking vengenence of a minister as in S. Pratap Singh – Vs – State

(AIR 1964 SC 733)

A power is exercised maliciously if its repository is motived by personal animosity towards those who are directly affected by its exercise Use of power for on alient purpose other than the one for which the power is conferred is malafide use of power. Same is the position when an order is made for a purpose other than that which finds place in the order. The ulterior or alien purpose clearly speaks of the misuse of the power…..

It was said Warangton C.J. in Short – Vs – Poole Corporation (1926) I Ch 66 that :

No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives would certainly be held to be inoperative.

In Lazarus Estates Ltd – Vs – Beasely (1956) 2 QB 702 at Pp 712-13 Lord Denning L.J. Said.

"No judgment of a court no order of Minister can be allowed to stand if it has been obtained by fraud, fraud unravels everything" (emphasis supplied)

See also in Lazarus case at p.722 per Lord Parker C.J.

"Fraud" Vitiates all transactions know to the law of however high a degree of solemnity.

(Para 10) Similar is the view taken by this court in the case of ***Ram Chandra Singh – Vs – Savitridevi and ors. (2003(8) SCC 319)*** Wherein this court speaking through one of us (Sinha J.)

"Fraud as is well known vitiates every solemn act fraud and Justice Newer dwell together. Fraud is a conduct either by letter or words which induces the other person or authority to take a define determinative stand as a response to the conduct of the former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud Indeed, imnocent representation may also give reason to claim relief against fraud A fraudulent misrepresentation is called deceit and in leading a man into damage by willfully or recklessly causing him to believe an act on falsehood.

It is a fraud in law if a party makes representation which he knows to be false and injury ensues therefore. Although the motive from which the representation proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of other in relation to a property would render the transaction void – ab – into Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.

2004 (3) crimes (SC) 33

10) Order of Magistrate showed that complaint disclosed no offence and inspite of this he ordered issue of process Magistrate had misused powers of court in issuing process – Order of magistrate qushed – Complaint dismissed and complainant saddled with casts of Rs.10,000/- payable to petitioner.

(para 7) What was expected of the learned magistrate was to find out that there any offence is made out in the complaint. The entire order of learned magistrate does not even remotely indicate how he came to the conclusion that offence is disclosed. He has observed that at this stage main allegation is that documents produced before the selection committee of the M.P.S.C. were false and matter was decided only after a trial, this reasoning of the learned magistrate in his order simply stated that it is a fit case for full fledged trial which reasoning is incomprehensible and it appears that for some reasons not on record the learned magistrate took cognizance of offence without having been himself satisfied that an offence was in fact committed.

the order of learned magistrate if read in its entirely clearly shows that the magistrate was aware that complaint discloses no offence and inspited of having become aware he issued the process for reason which can only be extraneous. (para 8)

The order not only suffers from non – application of mind but clearly show that it is passed for some extraneous considerations. As a senior additional chief metropolitan magistrate he is expected to know what is the effect of summoning a person as accused to criminal court – To cause harassment to the petitioner recourse taken to criminal court and the court lend necessary assistance to the complainant to abuse the process of law by passing a vague order consciously. It is not a case of some order passed hurriedly due to pressure of work the learned magistrate had passed an order running in seven pages which does not speak of a single sentence as to how and what offence is committed. I am convinced that the learned Magistrate also found that no offence is disclosed even thereafter going out of the way he wanted to help the complainant. The process of law was misused not only by the complainant but also by the learned magistrate. It is a clear case of misuse of Judicial power by the Court.

Vaidya – vs – state 2002 (2) Mh. L.J.830 (Bom)

11) A subordinate court or tribunal refusing to follow a High Court decision held amounts to deliberate and will full disregard of the High court order and is Contempt of Court. (Paras 11,13,15,16)

AIR 1972 SC 2466

12) Serious doubt if procedure required under Cr P.C. was followed by magistrate while taking cognizance – Fraudulent act even in judicial proceeding could not be allowed to stand – All actions taken in complaint including issuance of baillable warrant was liable to declared ***void ab initio***.

2004 (3) Crimes 33 SC

13) Contemnor not only violated Supreme Courts order but also Air Act – Sentence of one week simple imprisonment and Rs.1 Lac as cost of imposed on contemnor.

M.C. Mohta – Vs – Union of India 2003

14) Civil Judge Sessions Division acted in violation of Supreme Court order – Supreme court issued severe reprimand – copy of order forward to disciplinary authority for further action

AIR 2001 S.C.1975

15) Indeed there is no explanation as to why the learned Magistrate did not take appropriate steps to see the matter – His helpless ness or his indifference in this matter whichever be the position reflects a most unsatisfactory state of affairs – The Ld Magistrate seems to have clearly adopted an attitude of un-judicial indifference towards the judicial proceeding in his court.

The fact that the accused belongs to a respectable family and that there is no danger of his absconding were not considered by the learned sessions judge to be the only consideration for granting bail.

1967 CR.L.J. 1297

16) The High Court held that the learned magistrate who was functioning as S.D.J.M. has lost sight of statutory bar and has taken congnizence – I shocked my conscience that a Magistrate having been empowered to take cognizance of the offence is in dark about the statutory provisions. In my opinion the order of court and liable to be quashed.

2000 CR.L.J.4296

17) In the case in hand the magistrate has only acted against the warranting procedures establishing by law in one sided manner - The magistrate had acted in a biased manner absolutely bereft of any reason of legal consideration but only acting as an instrument of the first respondent for reason known to himself.

2004 Cri. L.J. 2818

18) **I.P.C.218** – The gist of the section is the stiffening of truth and the perversion of the course of justice in cases where an offence has been committed it is not necessary even to prove the intention to screen any particular person. It is

sufficient that he know it to be likely that justice will not be executed and that someone will escape from punishment.

A.I.R. 1921 BOM 115

19) Wrong interpretation of supreme courts order is contempt of court- The respondent took completely wrong view and adopted wholly incoorect interpretation.

Pramotee Telecom Vs. D.S. Mathur2008 ALL SCR 2320

20) Record showed that dispute is of civil nature – Judicial Magistrate did not ascribed any valid reason to proceed against the applicant – Impugned order is arbitrary and amounts to coularable exercise of the judicial power – Proceeding abuse of the process of court hence quashed.

2009 (1) MH L.J (Cri.) 439

21) **Magistrate seeming to be prejudiced against lawyer as well as complainant** and made adverse remarks against them – Held- a Judge is expected to maintain equanimity and not get swayed by the prejudices – Those remarks directed to be expunged – Magistrate directed to refrain from making such uncalled for and unwarranted remarks against any person and particularly without hearing him.

2007 ALL MR Cri. 3012 (Bom) Indar – Vs - state

22) Prosecution of Judicial Officer – I.P.C.219, 220 – for passing order said to be illegal – prior sanction U/s 197 of Cr. P.C. necessary.
[Pravin – Vs – J.D. Anandgaonkar Ex. J.M.F.C.]

2007 ALL MR (cri.) 3230

23) Where an A.D.J. dismissed an appeal by a readymade judgment without giving reasonable opportunity – Such judgment was held to be vitiated.

(Nirankarnath wahi – Vs – Fifth Addl District Judge, Muradabad)
AIR 1984 SC 1268

24) Court should act on legal evidence and not on surmises or outside information.

It should not allow its prejudices to interfere in its judgments and orders.

Sitaram – Vs –Yashwant 2003 (1) ALL MR 4

25) Judge whose judgment is overruled can not in the same or collateral proceedings rewrite overruled judgment – Overruling binds both the parties & judge

1998 AIR SCW 1908

26) Failure to hear material witness is denial of fair trial ***2008 ALL MR 1252***

27) Denial of hearing either, to accused or prosecution violates even minimum standards of due process of law

2008 ALL SCR 1252

28) Proceeding instated in court malafide by way of sharp practice and designed to abuse process of law – Exemplary cost of Rs.50,000/- imposed.

AIR 1996 SC 1733

29) Obiter dicta of Supreme Court – Binding on all Courts in India, in absence of a direct pronouncement on the subject by Supreme Court.

2009 ALL MR (Cri) 89

30) Decision of High Court – stay by Supreme Court – Even if a decision of the High Court is stayed by the Appex Court unless the decision of High Court is set aside by the Apex Court the Court subordinate to the High Court are bound by the same.

2009 ALL MR (Cri) 672

31) High Court decision – Binding on lower courts – Magistrate has no option but to follow judgment of Apex Court as explained by High Court.

2008 ALL MR 446

32) C.J.M. held to have committed contempt by releasing the accused on bail in a case with knowledge of successive rejection of bail application by the Sessions Judge, High Court and Supreme Court.

State – Vs – R.A. Khan 1993 Cri. L.J. 816

33) Bail can be granted when the Presiding Officer have completely forgotten their duties towards the poor accused who is in jail

Jai sing – Vs – State 1992 Cri. L.J. 2873

34) Defence based on facts which are not false – Then even if the defence raised is an abuse to the process of Court – No contempt

AIR 2003 SC 3039

35) Lawyer does not posses any immunity under Contempt of Court Act,
AIR 199 SC 1300

36) **I.P.C. 217, 218 :** For a conviction under this section it is not necessary to establish that an offence has actually committed – It could be sufficient if the circumstances are such that a reasonable interference can be drawn there from that the accused had a knowledge that he has likely by his act to save a person from legal punishment.
AIR 1932 cal 850

37) Where a public servant charged with the preparation of official record prepares a false report with dishonest intention of misleading his superior an offence is committed.
AIR 1975 SC 1925

38) Police Report is a no ground presuming guilt of accused he may be discharged after consideration of police report – It can not be said that the Court must automatically frame the charge merely because there is a police report.
AIR 1972 SC 545

39) Reckless allegation in affidavit filed in the High Court is a offence u.s. 199 of I.P.C.
AIR 1940 Pat 631

40) No discussion of prosecution evidence in judgment – Points for determination not followed by intelligent discussion of pros and cons of case – Evidence not judicially considered such a judgment cannot be called a judgment at all in the eye of the law and is certainly not in conformity with either the letter or spirit of s.367 of code.
(AIR 1963 Assm 151)

41) Advocate arguing his own case by wearing robes – Cannot do so by wearing robe and cannot act as advocate of his own – Plea that he as a party executed Vakalatnama to himself as advocate and so he can wear robes is beyond imagination.
2002 Cri.L.J.2859; 2011 ALL MR (Cri.)381 (Bom)

42) Documents were implanted in records of case pending before Court dishonestly. – The list of document does not find reference in roznama said list does not bear endorsement of judge having read and recorded or whatsoever – it is seen prima faced that without knowledge or connivance, participation and involvement of advocate such implant of papers in record of trial Court cannot

take place – Directed enquiry by District and Sessions Judge as to how without his endorsement papers entered file, also purpose and initiate action against person who may found responsible of tampering records of Court.

2005 (1) Bom C.R. Cri. 186 (N.B.)

43) A Court has inherent jurisdiction to recall and cancel its invalid order specially when such order is induced my misrepresentation by the party in whose favour it is made and the order is to the prejudice of the party against whom it is made and was made in his absence and without notice to him

AIR (30) 1943 Pat 127

44) **Judge –avoidance of duty-** entire conduct of case left in the hands of counsel for private party trial is irregular – Retrial ordered. Cr. P.C. 493, 270.

AIR 1959 AP 659

45) **Judge** – It would be unjust exercise of discretion to order for enquiry and report from another Police Officer belonging to the same police station in cases of complaints against Police Officer.

197 Cri.L.J. 702

46) There has been on avoidance of the function of judicial determination of the plea raised by the accused person for setting aside the cognizance order and for quashing the criminal proceedings merely on the ground that on the previous occasion the single judge had made on observation that cognizance should have been taken us 420 IPC ignoring the further direction given in the order – Matter remitted back to High Court for fresh consideration.

47) Cognizance upon complaint – by magistrate – Non examination of complainant an oath – Failure not mere irregularity but illegality – Whenever there is mandatory provision to follow particular procedure it is bounden duty of magistrate to follow – Violation is in complete disregard – whether Presumption under provisions of section 114 (c) of Evidence Act, that magistrate must have acted according to his duties could be raised – Held submission not helpful. It was improper and illegal on part of magistrate to issue **nay process. 1982 (1) Bom.C.R. 117**

48) Complaint of rate U/s. 376 of I.PC found to be false – Accused acquitted and complainant ordered to pay compensation of Rs.50,000/- to accused.

2007 ALL MR Cri. 2826

49) High Court upholding conviction without analyzing evidence and without referring various infirmities pointed out by accused – Held- absence of reasons has rendered High Court judgment not sustainable.

2009 ALL MR Cri. 1827 (SC)

Cr.P.C.479 :- disqualification to try case in which Judge or Magistrate is personally interested –

No judge or Magistrate shall except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

50) Magistrate can not take cognizance of his own complaint.

AIR 1952 Assam 68

51) The principal embodied in the section is that where a judge has an interest in a case pecuniary or such an interest as is likely to create a real bias in him he should not act in that case

19 Bom 608

52) If the Magistrate had any interest in the decision of the case he is disqualified from trying it however small that interest may be – One important subject at all events, it to clear away everything which might engender suspicion and distrust of the tribunal and to promote feelings of confidence in the administration of justice which is so essential to social order and security.

AIR 1919 All 345

53) Disqualification takes away jurisdiction – A magistrate who in consequence of a personal disqualification is forbidden by law to try a particular case though he may be authorized generally.

23 Cal 328

54) A magistrate not competent to try case, and if he tries the case the defect may not be cured U/s. 464.

AIR 1964 AP 226

55) Sarpanch who is complainant or interested in case, including himself in bench to try case proceedings of bench are illegal.

56) Where the officer who conducted the preliminary inquiry tried the accused as acting Session Judge. It was held that the trial was not a fair one and that the

sessions judge ought himself to have reported the case to the High Court in order that it might transfer it for trial to some other Court of session

9 CWN 228 (N)

57) The High Court has declined to hear the arguments of the appellant on the ground that they had alleged bias against the judges – Held that- it would not empower the Court to deny a right of hearing if the person alleging the said bias is otherwise entitled to in case where and allegation of bias against judges found to be not proved it is open to the Court to initiate such action as is permissible in law.

Electricity Regulatory Commission – Vs- CESC Ltd. 2002 (8) Sec 715 of pg. 763

58) ***"In Ashwini Kumar Ghose & Anr. -Vs – Arinda Bose & Anr. (AIR 1953 SC 75)"*** It was held that the Supreme Court is never over sensitive to public criticism; but when there is danger of grave mischief being done in the matter of administration of justice, the animadversion can not be ignored and viewed with placid equanimity–

The path of criticism is a public way : the wrong headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not action in malice or attempting to impair the administration of justice they are immune. Justice is not cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken comment of ordinary man.

- No criticism of judgment however vigorous can amount to Contempt of Court provided it is kept within the limits of reasonable courtesy and good faith. Fair and reasonable critism of judgment which is a public document or which is a public act of a judge concerned with administration of justice would not constitute contempt. Such a critism may fairly assert that the judgment is in correct or an error committed both with regard to law or established facts.

2005 (6) SCC 109 = AIR 2005 SC 2473

59) It is open to any one to express fair reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him.

AIR 1971 SC 221

60) A complaint of dishonesty of Judicial Officer to a Higher Officer keeping it confidential, does not amount to contempt.

1968 M.P.L.J.725

61) Disobeying Direction of Supreme Court will amount to contempt.
AIR 1997 Bom 260

62) Mistaken advice of counsel can be defence in civil contempt.
1977 Cr.L.J. 1809

63) Where a judge passes an order though all relevant records were sent to High Court, on a day when cause is not posted is contempt.

64) **I.P.C. 167** :- Official deliberately tampering with official record and issuing false copies whatever his motives deserve punishment not only for his own conduct but a deterrent to others.
AIR 1926 ALL 719

65) Disobedience of order by Presiding Officer of a subordinate Court will amount to contempt and High Court has power to punish such officer.
Gopala Reddy – Vs – Krishnauswamy 1969 MLJ Cri. 615

66) Court of Co-ordinate jurisdiction should have consistent opinion in respect of identical set of facts or on a question of law – Like questions should be decided a like-Hon,ble Supreme Court in Hari Singh's case laid down the ratio- if this rule is to followed then instead of achieving harmony in the judicial system it will lead to judicial anarchy.
2004 ALL MR Cri. 1802

67) Every Court which is subordinate to High Court in Maharashtra is bound by law laid down by Bombay Court. The subordinate Court must unquestioningly obey the law laid down by their High Court.
1990 Cri. L.J. 171

68) The judge must also bear in mind that he is not above criticism. Fair and reasonable criticism is necessary to improve the administration of justice.
AIR 1955 Hyd. 264, AIR 1951 SC 10

69) It is well settled that an order resulting from suppression of material facts and a false statement is a nullity in law. There is no need of any judicial precedent in support of the aforesaid preposition. This circumstance would alone be sufficient to cancel the order granted.
State – Vs- 1102 1996 Cri. L.J. 1102

70) Evidence to be approached with a sense of reality; with an awareness of life in its ordinary quality and not from unrealistic angle.

1992 Cri. L.J. 238 (Ker)

71) Trial Court not indicating what material are there to presume commission of offence charged – order framing charge quashed.

2004 Cri. L.J. 2513

72) Acceptance of defence set-up by accused at stage of enquiry is beyond purview of enquiry by Court.

2004 Cri L.J. 1913

73) If the Magistrate relies upon extraneous matters for discharging the accused or for framing the charge it vitiates the proceedings.

AIR 1962 Mys.167

74) It is duty of P.P. to conduct case fairly – He should therefore place the Court all evidence and should not withhold certain evidence.

AIR 1960 MP 102; 2007 ALL M R (Cri) 801

75) ***Administration of justice*** **– Fraud – Allegations of fraud played upon Court or of abuse of process of law, made and established from record –** Court would not sit on technicalities to deny relief to affected party - It will be bounden duty of Court to remedy the mischief, because no man can take advantage of his own wrong.

When allegation of fraud played upon the Court or of abuse of process of Court are made and if established from the record then the courts would not sit on technicalities to deny the relief to an affected party but, in that situation it will be the boundent duty of the Court to remedy the mischief. The cardinal principle recognized by Court of law and of equity is that – no man can take advantage of his own wrong (NUI LUS COMMODUM CAPER POTEST DEINJURIA SUA PROPRIAO) The Apex Court in the case of S.P. Changalvapa Naidu (dead) by his LRs. Vs. Jagannath (deed) by his LRs and ors. Reported in 1994 (1) SCC 1 has observed that the principle of finality of litigation Cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. In this case, the Court below has denied relief to the petitioner on the specious plea that he had not Locus-standi to maintain an application for setting aside the expert decree even through the same was the creation of a fraud played on the Court and of abuse of process of Court. In the above case the Apex Court has further observed that the courts of law are meant for imparting justice between the parties and that one who comes to the Court must come with clean hands. It is further observed that a person whose case is based on falsehood has no right to approach the Court and should be summarily thrown out at any stage of the litigation for a judgment or decree obtained by playing fraud on the Court is

a nullity and non –sst in the eyes of law and it be so treated by every Court whether superior or inferior.

The Apex Court has further observed that a fraud is an act of deliberated deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another loss. Further a litigant, who approaches the Court is bound to produce all the materials relevant to the litigation and if he withholds any in order to gain advantage of the other side then he would be guilty of playing fraud on the Court as well as on the opposite party similarly an abuse of process is improper use or perversion of process after it has been issued. The perversion of process is improper use of regularly issued process. In other words when the party employees the regularly issued process for some other purpose than for which it was intended by the law to effect is nothing but abuse of process. Once the courts are satisfied with this position them it will be the bounden duty of the court to expertise its inherent jurisdiction to remedy the mischief –if necessary by removing or the procedure and technical shackles EX DEBITO JUSTITIAE so as to do complete justice between the parties.

1994(1) SCC 1 followed (Para 5)

Rsmjisingh Bhuliaansingh Vs. Tarun K. Shah 2002(4) ALL MR. 198; 2002(6)Bom C.R.63

76) **Administration of Justice** – strength of judges full strength of judges is the prime need of the day unless sufficient number of judicial hands are provided arrears of case cannot be reduced; paucity of funds is no excuse.

Full strength of judges is the price need of the day time has come to innovate new method and tools so tackle the monster of arrears. At the same time judge population reaction is required to be increased. The state of Maharashtra is under constitutional mandate to discharge its obligation by providing funds man power and infrastructure the vacancies of Civil Judges Junior Division and Judicial Magistrates (First Class), Metropolitan Magistrate and Additional Chief Metropolitan Magistrate are required to be filed in within short time. The paucity of funds in no excuse. Where the law expects something to be done within prescribed time limit at least genuine efforts are required to be done to obey the mandate of law unless sufficient number of judicial hands are provided the arrear of cases can not be reduced (Para 27) ***Pritviraj Ambalal Patel Vs. State of Maharashtra 2003 ALL Mr. Cri. 1252 = 2003 Bom C.R. Cri. 1713 = 2003 (3) Mah. L.R. 317***

77) Advocates Act –Ss. 30,35 – Advocate appearing for a pimp or brothel keeper – Should not appear in the same case for the victims rescued from brothels (Para 37)

Prerna Vs. State Maharashtra 2002, ALL MR (Cri.) 2400

78) If the subordinate Courts, Tribunals and authorities within the territory of particular High Court refuse to carry out the directions given to them by the High

Court the result will be chaos in the administration of justice and the very democracy founded on rule of law crumbles.

1996 Cri L.J. 564

79) When attention of the High Court is drawn to a clear illegality the High Court can not reject the petition as time barred thereby perpetuating the illegality as miscarriage of Justice.

1981 Cr.L.J. 632 (S.C)

80) A judge must not side with either party nor should descend into the arena

AIR 1968 SC 178

81) A judge will put question to elicit truth. But he will not play the role of the public prosecutor or defence counsel. He will not be partisan nor will he frighten coerce confuse or intimidate witnesses – ***1988 1 Cr. LJ 609***

82) while the judge has unbridled power to put any question and / or to produce an document by a witness the same should not transgreass beyond the contours of the powers of the Court.

1997 SCC Cri. 851

83) A party cannot be compelled by the Court to examine a certain witness

AIR 165 SC 1008

84) Court cannot allow its view or observation to take the place of evidence.

AIR 1956 SC 415 = 1956 Cr LJ 805

85) A judge cannot exercise his personal knowledge –

AIR 1933 cal 36 ; AIR 1958 AP 595

86) Judge cannot ask the accused to wear a shoe and observe that it fitted the accused.

AIR 1956 SC 415

87) Judge are bound to call in aid their experience of life and test the evidence on the basis of probabilities. Evidence of only one party even when no evidence of rebuttal is led by the opposite party need not necessarily be accepted.

AIR 1969 SC 255;

88) ***In the case of Mohan Lal Vs. State of U.P. 1977 Acc 333,*** this Court observed that there are a series of decisions in which the same principles have been repeated again and again. It is distressing to note that the repeated pronouncement of this Court as also the perception made by the Supreme Court

have fallen on the deaf ears of our executive Magistrates who still threat the making of order under section 111. In modern time the judiciary, like any other state Organ, is under scrutiny of the public and rightly so, ***because in a democracy the people are the ultimate masters of the country and all state organs are meant to serve the people. The lack of vigil on the part of the lower provisional Court is regrettable.***

2009 Cri. L.J. 627

89) **Judicial Office** – Assumption of absolute integrity is the standard which Judges must observe – The norm of absolute integrity must continue to be the standard which every individual who is or has been a Judge must follow – when a retired Judge of the High Court is appointed as an administrator he she is appointed by virtue of the credentials of independence, impartiality and integrity which is associated with the office of a judge which was held at one time.

Lilavati Kirtilal Mehta –Vs- Chara K. Mehta. 2009(2) MH.L.J. 340

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Times of India – 17 April 2013 – Page 11

HC raps Magistrate for sending rape victim to jail

Woman To Get 1L From Judicial Officer's Salary

A Subramani TNN

Chennai: More than 12 years after a young woman, who accused a man of raping her, found herself in jail after a woman magistrate remanded her in judicial custody, the Madras HC has ordered a compensation of Rs 1 lakh, besides Rs 10,000 as cost, to the woman. It directed the state government to recover the sum from the salary of magistrate Gunavathi.

Justice Vinod K Sharma, who passed the order last week, also directed initiation of departmental proceedings against the magistrate, pointing out that instead of correcting her mistake of remanding the victim in judicial custody, the magistrate acted in the most irresponsible manner and also filed a false affidavit in the HC denying any such act.

The matter relates to a complaint lodged by a woman on October 16, 2000 alleging that one John Kennedy had a sexual relationship with her after promising to marry her. But after she became pregnant, he refused to do so, she said. Kennedy was arrested on charges of rape the same day and remanded in judicial custody. On October 17, 2000, the accused and the victim were taken for a medical examination. After the checkup, the woman was produced before

Gunavathi, who was the then a judicial magistrate at Dharmapuri. Quite mechanically, the magistrate remanded the woman also in judicial custody and she had to spend three days in a sub-jail before she was spotted by a legal aid volunteer. During her incarceration, she was allegedly ill-treated and not given medicines. Her counsel Sudha Ramalingam approached the court seeking Rs 5 lakh compensation.

Denying the allegations, the magistrate filed an affidavit saying the victim had mistaken her for someone else and that she never passed such an erroneous remand order. She even said the victim should be hauled up for criminal contempt of court for "scandalising or lowering the authority of the court."

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LAW OF PRECEDENTS

	Citation	Law Point	
	AIR 1990 SC 261	Judges are bound by precedents and procedure - They could use their discretion only when there is no declared principle to be found, no rule and no authority	
	AIR 1995 SC 1729, 2009 ALL MR (CRI) 89	Obiter dictum by Supreme Court - Is expected to be obeyed and followed.	
	AIR 2000 SC 1729	Rule of per incurium can be applied where a Court omits to consider a binding precedent of the same Court or the superior Court rendered on the same issue	
	(2011) 7 SCC 141	Longstanding precedent should not be disturbed — Consistency is necessary to maintain certainty in law	
	2011 (4) AIR Bom R 238	Judgement of another High court – Binding nature of – Observations of trial	

		Magistrate that the judgement of Kerala High Court is not binding on him – Further observing the legality and correctness of the judgement of another High Court is against the judicial discipline and propriety – Registrar General directed to take suitable action against concerned Judge.	
	2009 ALL MR (CRI) 672	Even if a decision of the High Court is stayed by the Apex Court, unless the decision of the High Court is set aside by the Apex Court, held, the Courts subordinate to the High Court are bound by the same.	
	2009-SCC(CRI)-2-72, 2009-SCC-3-258	it is not the proper way to dispose of the petition without giving proper reasons	
	2009 ALLL MR (CRI) 297 (SC)	It is not clear from order of trial Court as to which of the alternatives, i.e. the first category or the third category was being resorted to matter remitted to trial Court to be decided afresh expeditiously in the light of what has been stated in para 16 of Minu Kumari's Case.	
	(1995) 1 SCC 259	Supreme Court's order to High Court— Even if it is only in the form of a request instead of	

		explicit command or direction, it is a judicial order and is binding and enforceable throughout the territory of India— In case of flouting of the order by High Court, it is open to Supreme Court to initiate contempt proceedings against the erring Judges of High Court	
	1997-AIR(SC)-0-2477 , 1997-SCC-6-450	When a position in law iswell settled as a result of pronouncement of Supreme Court then it would be judicial impropriety for the sub ordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position	
	2010 (3) SCC (Cri) 165, LAWS(SC)-2010-5-86, AD(CR)-2010-3-353	Without good ground, High Court in breach of Supreme Court directions granting relief - held would amount to contempt of Supreme Court	
	1972-AIR(SC)-0-2466 , 1973-SCC-1-446	Refuse to follow High Court decision on count that petition is pending in Supreme Court is contempt of Court	
	2005-RAJLW-1-84 , 2004-CCC(SC)-4-295	Deliberate Attempt by bureaucracy to circumvent order of Supreme Court is contempt. Cost of Rs. 5,000/- imposed	
	2011 (4)	Binding precedent	

		AIR Bom R 219	cannot be ignored and brushed aside merely because another argument on same set of facts and situation possible.	
		1995 (6) SCC 614	The law is what the Competent Court say it is – The Court as a wing of state is by itself a source of law – The Court is not merely the interpreter of the law as existing but much beyond that.	
		AIR 1998 SC 1895	Precedent – The role of the Supreme Court has always been of law maker and it has travelled beyond merely dispute setting.	
		2009 ALL MR (CRI) 2165 (SC), 2009 ALL MR (CRI) 1351 (FB)	Precedent - Interpretation of stature – Penal statute requires strict construction.	
		2007 ALL MR (CRI) Journal 33 (Full Bench)	Art. 141 – While following judgment of higher court, Court has to examine as to whether issue involved in the case sought to be followed – Facts if found distinguishable can also tilt the position. As in that situation ratio of judgment may not be applicable.	
		AIR 2003 SC 2339	A little difference in fact may lead to a different	

			conclusion – A decision is an authority what it decides and not what can logically be deduced there from.	
		AIR 2003 SC 2661		One additional or different fact may make a world of difference between the conclusions in two cases. Disposal of cases blindly placing reliance upon a decision is not proper.
		2009 (1) B.Cr.C. 485		When there are conflicting views of the Supreme Court then High Court has to follow constitution Bench's judgment
		2004 ALL MR (CRI) 1802		Courts of Co-ordinate jurisdiction should have consistent opinion in respect of identical set of facts or on a question of law – Like questions should be decided a like – If this rule is not followed then instead of achieving judicial harmony it will lead to a judicial anarchy
		1990 Cri.L.J. 171		Courts in Maharashtra are bound to follow judgment of Bombay High Court. The subordinate Court must unquestioningly obey the law laid down by their High Court
		2008 ALL MR (CRI)		High Court & Supreme Court decision –

	446		Magistrate has no option but to follow judgement of Apex Court as explained by High Court.	
	AIR 2001 SC 1975		Civil Judge Session Division acted in violation of Supreme Court Order – Supreme Court issued severe reprimand – Copy of order forwarded to disciplinary authority for further action.	
	2004 (3) Crimes 33 (SC)		Fraudulent act even in judicial proceeding cannot be allowed to stand. No order of a Court can be allowed to stand if it is product of fraud.	
	AIR 1956 Pepsu 30		Where a village Court Judge charged with preparation of the register. Frames record which he knew to be incorrect he can be convicted u.s. 218 of I.P.C.	
	AIR 1917 ALL 317		A village Munsif passing a decree contrary to law and without jurisdiction is guilty of maliciously pronouncing a decision and liable for punishment u.s. 219 of I.P.C.	
	AIR 1921 BOM 115		I.P.C. 218 – The gist of the section is the stifling of truth and pervasion of the course of justice where an offence has	

		been committed. It is not necessary even to prove the intention to screen any particular person – It is sufficient that he know it to be likely that justice will not be executed and someone will escape from punishment.	
	2008 ALL SCR 2320 Promotee Telecom – Vs- D.S.Mathur	Wrong interpretation of Supreme Court's order is contempt of Court. The respondent took completely wrong view and adopted incorrect interpretation.	
	1996 Cri.L.J. 839	Conduct of C.J.M is far from satisfaction – He is liable for action	
	ILR 1928 (52) Mad 347	I.P.C. 466 – A Judge fabricating any record in a pending case commits an offence under this section.	
	AIR 1940 Lah 292	No complaint from that Court is necessary where it is alleged that the subordinate Judge before whom a suit was proceeding has himself abated an offence under section 193 and has also committed offence under section 465 and 466	
	1993 Cri.L.J. 499		
	2000 Cri.L.J. 388 (SC)	To perpetuate error is no virtue but to correct it is a compulsion of judicial conscience.	

	2007 ALL MR (CRI) 3012 Inder Singh –Vs- State		
	AIR 1984 SC 1268	Where A.D.J. dismissed an appeal by a readymade judgement without giving reasonable opportunity such judgement is vitiated.	
	AIR 1997 Mad 287	Later judgement of High Court contrary to earlier judgement of same High Court – Later judgement alone has to be upheld – The later adjudication should be taken as superseding the earlier. (para 16)	
	2008-LAWS(SC)-10-62 , 2008-KERLT-4-417 , 2008-SCC-16-1	Precedent – Discretion – Some guidelines will have to be evolved in this connection and the matter cannot be left at the sole unguided discretion of Judges, otherwise there may be conflicting decisions and judicial anarchy – A judicial discretion has to be exercised on some objective guiding principles and criteria, and not on the whims and fancies of individual Judges, Discretion after all cannot be the Chancellor's foot.	
	2006-	Case Law – Duty of the	

	ALLMR(CRI) -0-2269 , 2006-MhLJ-5-264	Judge – The Judge dismissed the complaint by a cryptic order without discussing case Laws – Held, The Judge should exhibit from the conduct and from their orders concern for the justice and not casualness The Courts are not expected to pass such Cryptic orders	
	2009 ALL SCR (O.C.C) 193, AIR 1986 SUPREME COURT 872	When malafides are pleaded & not denied Court is bound to accept the same.	
	AIR 1964 SUPREME COURT 72 (V 51 C 7)	Malafides pleaded against minister and no reply is filed by him but by Sub-ordinate – Malafides have been proved.	

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"RESTATEMENT OF VALUES OF JUDICIAL LIFE"

(JUDGES ETHICS CODE)

Chief Justices of all the High Courts have adopted a resolution that the judiciary will be bound by its own code of ethics to be known as the "restatement of values of judicial life" The 15 point Code stipulates that nay act of a judge of the Supreme Court or High court, whether in official or personal capacity, which erodes the judiciary's' credibility has to be avoided. The following are the main point of the code.

1. A Judges should not contest election to any office of a club, society or the association.

2. He should not hold such elective office except a society or association connected with the law.

3. Close association of a judge with individual members of the bar, particularly those who practice in the same court, must be eschewed.
4. A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-low any other close relative, if he or she is a member of the bar, to appear before him or even be associated in any manner with a case to be dealt by him.
5. A member of a judge's family, if he or she is a member of the bar, should not be permitted to use the residence in which the judge actually resides, as an office.
6. A judge should conduct himself with a degree of aloofness consistent with the dignity of his office.
7. A judge should not hear and decide a matter in which a member of his family, a close relative or a friend is concerned.
8. A Judge should not enter into public debate or express his express his view in public on political matter or on matters that are pending or are likely to arise for judicial determination.

9. A judge is expected to let his judgments speak for themselves. He will not give interviews to the media.

10. A judge will not accept gifts or hospitality except form his family, close relatives and friends.

11. A judge will not hear and decide a matter in which a company in which he holds shares is concerned, unless he has disclosed his interest and no objection to his hearing the matter is raised.

12. A Judge must not speculate in shares, stocks or the like.
13. A judge should not engage directly or indirectly in trade or business, either by himself o in association with any other business (publication of a legal treatise or nay activity in the nature of a hobby will not be construed as trade or business).
14. A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund.

15. Every judge must at all time be conscious that he is under public gaze and there should be no act or omission by him which is unbecoming of his office.

16. The Code of Ethics was released by Chief Justice A. S. Anand at the Chief Justice annual conference. It was also resolved that it would be mandatory for every judge to declare his assets, including those of his spouse and dependents.

HUMAN RIGHTS BEST PRACTICES FOR CRIMINAL COURTS & POLICE

(VOLUME -II)

HOW TO PROSECUTE JUDGES, POLICE AND GOVT. PLEADERS

WITH

HOW TO GET BAIL

(A COMPLETE GUIDE FOR GETTING BAIL)

(Revised 2nd Edition 2014)

By

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WITH THE BLESSINGS OF '**ALL MIGHTY ALLAH'**

ABOUT THE BOOK.

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2) **Swami Vivekananda**

3) **Rashtrapita Mahatma Gandhi**

4) **Bharatratna Dr. Babasaheb Ambedkar**

5) **Martin Luther King**

6) **Spiritual Guru Shri. Pyarebhai,Pusad**

7) **Parents Sau. Suman & Chandrabhushan Ojha**

8) **Master Navmesh, Kaushal, Raj, Ku. Kunjika & Ku. Manya**

AND - All Human Rights Activists and all those who directly and indirectly help us in publishing this book

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HIGH COURT OF BOMBAY

Hon'ble Judge(s) : BILAL NAZKI and F. M. REIS, JJ.

PRAVIN VIJAYKUMAR TAWARE ..Vs..SPECIAL EXECUTIVE MAGISTRATE

Jun 18,2009

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Cr. P.C. – Section 111, 117 – Magistrate has no power to arrest and detain a person – His power is to require to show cause and if necessary start enquiry – Powers are often misused by untrained Magistrates – Directions issued for safety of citizens – Sufficient time shall be given to arrange for surety – If any person is sent to Jail then the Executive Magistrate shall sent a copy of the order to the Principal DistrIct Judge, Who shall go through the order and if finds case of revision shall intervene SUO-MOTU u.s. 397 of Cr. P.C. – The copy of order must also be sent to superior officers also.

==========

JUDGEMENT

(1.) NUMBER of cases are coming before this Court complaining of an abuse of powers by the Executive Magistrate under Chapter VIII of the Criminal Procedure code. These cases come from the cities or bigger towns. This Court has not seen a case coming from a remote village. Obviously, the people living in such areas do not find it possible to reach the High Court. Therefore, this Court presumes that these powers may be abused with impunity as the persons suffering under these areas may not be able to reach the High Court. The power of the Executive Magistrate are exercised in the State of Andhra Pradesh by the Assistant Commissioner of Police In-Charge of the area. There is always a clash of interest between a Police Officer In-Charge of an area and the Magistrate exercising the magisterial power within the same area. We had earlier also expressed a desire that the Government should consider delegating these powers either to judicial Magistrates or at least to officials of the Revenue Department. The provisions of the criminal Procedure Code are being misused and abused sometimes purposely, but more often without note because of ignorance of law. We are taking this case as one of the sample cases for the purpose of demonstrating as to how the provisions of law are being abused.

(2.) SINCE the issues involved in both the above writ petitions are same, both the writ petitions are being decided by this common judgment. For the purpose of deciding the issue, the facts in Criminal Writ Petition No. 2682 of 2008 are taken note of.

(3.) THE petitioners received a notice 24th March, 2008. The petitioners submit that they are law abiding citizens and have never been involved in commission of any offence. According to them, two false complaints were registered against the petitioners. In Sessions case No. 58 of 1996, one of petitioner was acquitted and another was discharged. In another case being C. R. No. 8 of 2008 the petitioner No. 1 had been admitted to bail in anticipation of his arrest. The respondent issued a notice under Section 111 of the Criminal procedure Code on 24th March, 2008 and the proceedings were fixed for hearing 6th April, 2008. But the respondent passed orders on the same day i. e. 24th March, 2006 purportedly under Section 116 (3) of the Code of Criminal procedure without

giving any opportunity of being heard, directing the petitioners to execute an interim bond for good behaviour on conditions. The petitioners contend that it was not possible for the petitioners to arrange for surety and the surety which the respondents had sought and, therefore, the petitioner No. 1 was arrested and sent to jail on the same day. The petitioner No. 1 filed a revision in the Court of Sessions Judge. The learned Sessions Judge allowed the revision partly.

(4.) EARLIER also the proceedings were initiated against the petitioners which they had challenged by filing a Writ Petition and the writ petition was disposed of as a statement was made by the respondents that the Chapter proceedings against the petitioners were dropped. This order had been passed on 20th october, 2008.

(5.) BEFORE going to the counter affidavit, it will be necessary to have a look on the orders passed by the Executive Magistrate on 24th March, 2008. He passed an order under section 111 of the Criminal Procedure Code, referred to two cases and then said, "i have confirmed that there will not be any improvement in the behaviour of the respondents (petitioners herein) in future". Then says, "therefore, it is proper to proceed against you as per Section 110 (e) (g) of Criminal Procedure code, hence why not be taken one surety with solvency certificate of Rs. 1,00,000/- for 1 year for good behaviour from you and another chairman who is not involved in the dispute, as such two sureties from the area where the respondents are residing ? Its reasons be given orally or in writing. You have been given the date 6/4/2008 for the work". In fact this was not a show cause notice but was an order to furnish two sureties from the area where the petitioners were residing. It was also stated that one surety must be given by the Chairman. We do not know how can the respondents ask a surety of a particular person and if the particular person was not ready to give surety that would eventually mean that the man would have to go to Jail. This order was passed on 24th March, 2008, per se fixed on 6th April, 2008. But the petitioners were brought perhaps after arresting them before the Magistrate on the same day and on the same day he passed another order under Section 116 (3) of the Code of Criminal procedure in which he brazenly stated that for the interim period till the inquiry is completed the respondents (Petitioners in this writ petition)should give surety on following terms : (1) One surety with Solvency Certificate in the area where the respondents are residing. (2) One surety chairman who is not involved in the dispute in the area where the respondents are residing. Then on same day he puts a question as to whether the Petitioners wanted to say anything about interim bond. Records answer as "no" and then passed an order, which reads thus: "respondent:- Pravin Vijaykumar Taware, r/o. Sanghvi, Tal.-Baramati, Dist.-Pune, this respondent was produce before me as per section 110 (e) (g) of Cri. Pro. Code and the enquiry of the respondent is adjourned upto date 7/4/2008, which is necessary. Therefore, take the custody of the respondent and produce before me on the above day in the Court of Special Executive magistrate, Pune Rural Chavan Nagar, pune-8, on 7/4/2008 in the morning 11. 00 hours, as such informing you. Issued on 24/3/2008 with my signature and seal of the Court. The Respondent was arrested on 24/3/2008. "And sends the petitioner to jail.

(6.) AT no point of time the petitioners were given a chance to show cause against the furnishing of bond and at no point of time they were also given a chance to arrange for the bond and the conditions imposed were such that it was impossible to get a bond from the chairman with whom according to the petitioners, the petitioners had a dispute. This is absolutely in defensible. The scheme of chapter VIII of the Criminal Procedure Code is that when a Magistrate acting under Sections 107, 108, 109 or 110 of the Criminal

Procedure code deems it necessary to require any person to show cause under such sections, he shall make an order in writing. Therefore, when the magistrate takes action under Section 111 of the Criminal Procedure Code, he has no power to arrest and detain a person. His power is to require to show cause and if necessary start an inquiry. Inquiry has to be done in terms of section 116 of the Criminal Procedure Code and if at that stage the Magistrate is of the view that during the inquiry a person should be asked to give a bond and he refuses to give a bond then the person may be sent to custody till the inquiry is complete and final order can be passed under Section 17 of the Criminal Procedure code. Now this section also has proviso. One of the proviso is, "no person against whom proceedings are not being taken under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour". Then the second proviso is that, "the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111".

(7.) EVEN directing a person to give bond and on failure send him to jail cannot be done even at the interim stage unless some sort of inquiry is conducted with regard to truth of the information. This question came before the supreme Court as early as in the year 1991 in the case of Madhu Limaye Vs. Sub-Divisional magistrate, Monghyr and Ors. , reported in air 1971 SC 2486 : [2007 ALL SCR (O. C. C.)191], and the Constitutional Bench laid down the parameters of Section 117 of the Criminal procedure Code. Paragraph 43 of the judgment is reproduced here below :

"43. In our opinion, the words of the section are quite clear. As said by Straight, j. in Empress Vs. Babua, (1883)ILR 6 All 132, the order under S. 112 is on hearsay but the inquiry under S. 117 is to ascertain the truth of the necessary information. Sub-section (1) contemplates an immediate inquiry into the truth of the information. It is pending the completion of the inquiry that an interim bond can be asked for if immediate measures are necessary, and in default it is necessary to put the person in custody. Therefore, as the liberty of a person is involved, and that person is being proceeded against on information and suspicion, it is necessary to put a strict construction upon the powers of Magistrate. The facts must be of definite character. In nafar Chandra Pal Vs. Emperor, 28 Cal. WN 23 = (AIR 1924 Cal 114) there was only a petition and a report and these were not found sufficient material. In some of the cases before us no effort was made by the magistrate to inquire into the truth of the allegation. The Magistrate adjourned the case from day to day and yet asked for an interim bond. This makes the proceedings entirely one sided. It cannot be described as an inquiry within an inquiry as has been said in some cases. Some inquiry has to be made before the bond can be ordered. We, therefore, approve of those cases in which it has been laid down that some inquiry should be made before action is taken to ask for interim bond on placing the person in custody in default. In an old case reported in A. D. Dunne Vs. Hem Chunder, (1869)12 suth WR Cr 60 (FB), a Full Bench of the calcutta High Court went into the matter. The case arose before the present Code of criminal Procedure and, therefore, there was no provision for an interim bond but what sir Barns Peacock, C. J. said applies to the changed law also not only with regard to the ultimate order but also to the interim order for a bond. The section even as it is drafted today is hedged in with proper safeguards and it would be moving too far away from the guarantee of freedom, if the view were allowed to prevail that without any inquiry into the truth of the information sufficient to make out a prima facie case a person is to be put in jeopardy of detention. A definite finding is required that immediate steps are necessary. The order must be one which can be made into a final order unless something to the

contrary is established. Therefore, it is not open to a Magistrate to adjourn the case and in the interval to send a person to jail if he fails to furnish a bond. If this were the law a bond could always be insisted upon before even the inquiry began and that is neither the sense of the law nor the wording or arrangement of the sections already noticed. "

(8.) THEREFORE, at every stage the law has been violated. Surprisingly, the order challenged before the Sessions Judge was more or less upheld and the learned Sessions Judge noted that the impugned orders were not illegal or without jurisdiction. Only the condition of furnishing surety of the Chairman was set aside. The petitioners remained in illegal custody and we have no doubt about that. The petitioner seeks compensation of Rs. 10,000/- per day. He remained in custody for 4 days. Earlier also we have imposed costs. But in this case an additional affidavit was filed by the Executive magistrate tendering an apology to the Court. He sought condonation of the error committed by him and stated on affidavit that he had not exercised the power with any malice.

(9.) AFTER hearing the learned Public prosecutor and also the Executive Magistrate, who was also present in the Court, we give benefit of doubt to the Magistrate on the ground that perhaps these Magistrates are not aware of the law. They are not trained to act as magistrate. We understand they have not undergone any training before they were given the powers of a Magistrate. When a person is appointed or posted as an Assistant commissioner of Police, he is almost mechanically appointed as an Executive magistrate and is given authority to execute powers under Chapter VIII of the Criminal procedure Code. Since the Government is not interested in taking away these powers from the Police Officers and handover the powers to judiciary or to revenue officials, we are inclined to give the following directions:

(1) That the State Government shall immediately take steps to train its all executive Magistrates so that they understand as to how the provisions of chapter VIII of the Criminal Procedure code have to be applied.

(2) We understand that there is a police academy in the State. All the Executive magistrate should undergo a crash course. Preferably the Sessions Judges should be invited to teach these magistrate about the nuances of law, so that the powers are not abused or misused by the Executive Magistrate.

(3) Whenever, an order is passed by a magistrate at interim stage or at final stage requiring a person to give a bond, he shall be given sufficient time to furnish the bond and the surety.

(4) At the stage of inquiry, the Magistrate shall not ask for an interim bond pending inquiry unless the Magistrate has satisfied himself about the truth of the information sufficient to make out a case for seeking a bond.

(5) Whenever, an Executive Magistrate passes an order under sub-section (3)of Section 116 of Chapter VIII of the criminal Procedure Code directing a person to be sent to jail, a copy of the order shall be sent to the learned Principal sessions Judge immediately.

(6) On receiving copy of the order, the learned Principal Sessions Judge shall go through the order and if he finds a case of revision, he may intervene under section 397 of the Criminal Procedure code.

(7) A copy of the order directing a person to be sent to jail under Chapter VIII of the Criminal Procedure Code shall also be sent to the immediate superior of the magistrate in his Department.

(10.) WITH the above observations and the guidelines, both the writ petitions are disposed of.

(11.) COPY of this order shall be sent to all the Principal Sessions Judges in the State of maharashtra as also to the Principal Secretaries of the State, Law and Judiciary and Home Department. Ordered accordingly.

****

Cross Citation :1999 CRI. L. J. 2676

BOMBAY HIGH COURT

Hon'ble Judge(s) : D. G. DESHPANDE, J.

Shyam Dattatray Beturkar ..Vs.. Special Executive Magistrate, Kalyan and others, .

Crl. Writ Petn. No. 1044 of 1998, D/- 24 -3 -1999.

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(A) Criminal P.C. (2 of 1974), S.110, S.41, S.482 - Chapter proceedings - Quashing of - Petitioner arrested and chapter proceedings initiated against him on basis of pendency of criminal cases and statement of witnesses etc. - Said statement of witnesses recorded three months prior to arrest - No case of emergency - Arrest of petitioner and initiation of chapter proceedings against him - Is illegal. (Paras 29, 31, 32)

(B) Constitution of India, Art.21, Art.226 - DETENTION - Compensation - Illegal detention - Arrest of petitioner and chapter proceedings initiated against him found illegal - Further petitioner detained for non furnishing interim bond - Petitioner entitled to compensation for his arrest – Compensation of Rs. 4,000/- granted.

==========

Criminal P.C. (2 of 1974), S.41, S.110. (Paras 33, 34)

Judgement

ORDER :-

1. Heard Mr. Toraskar appearing for the petitioner Smt. Usha Kejariwal, the learned APP appearing for the State of Maharashtra as respondent No. 3. Mr. A. G. Nirmal, Sub-Inspector in his individual capacity as respondent No. 2 and the Special Executive Magistrate, Kalyan in his Official capacity as respondent No.1

2. This petition is filed by the petitioner for quashing chapter proceedings initiated against him by the respondents for his forthwith release and for claiming compensation of Rs. 25,000/- for his illegal detention and for other reliefs.

3. It was contended by the counsel for the petitioner that the petitioner is a resident of Kalyan that he is a law abiding and peace loving citizen, but Bazarpeth Police Station, Kalyan has been using provisions of Criminal Procedure Code to arrest and detain the petitioner as and when they like and they are doing this in contravention of the provisions of Criminal Procedure Code and the right of freedom guaranteed by the Constitution of India to the petitioner. Further according to him, the petitioner is so illegally arrested and detained at the instance of one Mhatre family whose family members have been convicted and sentenced to life imprisonment on the charge of murder of Ramesh Beturkar in 1982 and murder of Shakti Beturkar in 1992 in Kalyan. Both these victims of the murders were the family members of the petitioner, and the petitioner was the prosecution witness in the murder case of Shakti Beturkar. It is at the instance of Mhatre family that respondent Nos. 1 and 2 have been arresting the petitioner every now and then and detaining him without any rhyme and reasons subjecting him all sorts of mental agony and torture.

4. The petitioner has given number of instances of such illegal arrest in his petition. For example, on 24-2-1998 Bazarpeth Police Station arrested the petitioner under S. 151(3) of the Criminal Procedure Code and produced before the Judicial Magistrate for seeking 14 days custody. However, the Magistrate after finding that there were no reasons to arrest the petitioner under S. 151(3) of the Criminal Procedure Code immediately ordered his release on 24-2-1998 itself. Secondly, the petitioner was again arrested on 27-4-1998 at 23.05 hours under S. 151(3) of the Criminal Procedure Code and produced before the Judicial Magistrate, Kalyan on 28-4-1998 for seeking his detention for 7 days. But the Magistrate, Kalyan after finding that again there were no grounds for detention of the petitioner released him on 28-4-1998. The petitioner has also stated that in 1996 the chapter proceedings were initiated against him by respondent Nos. 1 and 2 under S. 110(e) and (g) of the Criminal Procedure Code and was called to execute an interim bond under S. 116 of the Criminal Procedure Code. The petitioner moved this Court by filing Criminal Writ Petition No. 941 of 1996 and Justice Ashok Agarwal and Justice R. M. Khandeparkar immediately ordered the release of the petitioner.

5. Lastly, the petitioner was arrested again on 15-7-1998 at 20-30 hours and chapter proceedings under S. 110 of the Criminal Procedure Code were initiated against him, he was called upon to furnish interim bond of his good behaviour for three years in the sum of Rs. 10,000/- with two sureties in the like amount and on his failure to do so, he was detained and he had to file the present petition, in which the learned APP had to concede that the petitioner was required to release forthwith and was so released by Justice Pandya on 10-8-1998. Therefore, according to the petitioner his detention in custody from 15-7-1998 to 10-8-1998 was illegal detention and for all these reasons he has filed this petition claiming the above reliefs.

6. It was also the contention of the petitioner that the Bazarpeth Police Station, Kalyan and respondent No. 1 are illegally invoking their powers and resorting initiation of the chapter proceedings without any basis whatever and harassing the petitioner and his detention for about 25 days from 15-7-1998 as stated above and harassment caused to him earlier by four illegal detention is mala fide, without legal basis for which he is entitled for the reliefs claimed including the relief of compensation of Rs. 25,000/-.

7. It was further contended by the advocate for the petitioner that even though the petitioner is facing some prosecution as per the details given by the petitioner in his petition and which are as under :-

1. I 73/91 Under Ss. 147, 148, 149, 302, 307, 120(b).
2. I 43/92 Under Ss. 324, 34.
3. I 0046/98 Under Ss. 324, 34.
4. N. C. 45/92 Under Ss. 504, 506
5. 189/93 Under Ss. 323, 504.
6. 13/92 Cr. P.C. 110(e)(g).
7. Local

Application 25/93. all these prosecutions were the prosecutions of 1991, 1992, 1993 and for good period of 5/6 years there were no prosecution against him up to 1998 when the case under S. 324 r/w S. 34 of the Indian Penal Code was registered against him vide Case No. 10046 of 1998. However, according to the petitioner pendency of all these cases cannot and does not give any right to the respondents to arrest him again and again under S. 151(3) of the Criminal Procedure Code and start chapter proceeding against him and all the orders of his forthwith release passed by the concerned judicial Magistrate of Kalyan at the relevant time and by this High Court have clearly show that his arrest and detention were illegal and was not called for and was without any legal and factual basis and therefore, it was contended by his advocate on the basis of certain authorities that this was a fit case to grant compensation to the petitioner for his illegal detention at least for the last illegal detention from 15-7-1998 to 10-8-1998.

8. The advocate for the petitioner further contended that so far as initiation of the proceedings under Ss. 151(3) and 110 of the Criminal Procedure Code from 15-7-1998 onwards is concerned, there was no compliance to any of the provisions of Chapter VIII of the Criminal Procedure Code that show cause notice was not served upon him, that no time was given to him for furnishing interim bond, that thumb impressions were taken forcibly by the police on certain papers, even though, he was in a position to write and put his signature in his own hand writing, that none of his family members were made aware of his arrest/detention, that there was no ground for his arrest and for initiation of chapter proceedings, and therefore, initiation of chapter proceedings against the petitioner and his arrest from 15-7-1998 onwards and his detention are illegal, mala fide and without justification, and he is entitled for the reliefs claimed and protection for any kind of further harassment or mental torture.

9. On the other hand it was contended by the learned A.P.P. that the petitioner was facing as many as seven prosecutions under different provisions of Indian Penal Code and considering those prosecutions and his activities as extortionist, his detention on all the earlier occasions under S. 151(3) of the Criminal Procedure Code and initiation of Chapter proceedings was fully justified. She also contended that when the chapter proceeding No. 13 of 1998 which is the subject matter for challenge in this petition were initiated and the petitioner was produced before the Special Executive Magistrate the respondent No. 1 on

17-7-1998, the mother of the petitioner and his other relative one Mr. Dinesh Patil were present before the Special Executive Magistrate and they were asked to make an arrangement of furnishing interim bond or sureties. But they did not avail of this opportunity and consequently, the petitioner was required to be detained from 17-7-1998 till he was released on 10-8-1998 by the order of this High Court. She, therefore, contended that the detention of the petitioner from 17-7-1998 to 10-8-1998 was on account of petitioner's failure to furnish bond, and therefore, it could not be said that the respondents acted mala fide or did not follow the provisions of law in that regard. She, therefore, opposed the petition vehemently and further contended that the statements of witnesses were recorded before initiating the present chapter proceeding No. 13 of 1998 and those statements reveal that not only the petitioner was facing earlier prosecutions but there were witnesses who had stated before the police that the petitioner was likely to commit the offences of extortion etc. as defined in S. 110(d) of the Criminal Procedure Code, and therefore, according to her, there were no mala fide on the part of the respondents in arresting and detaining the petitioner or initiating the chapter proceeding No. 13 of 1998. She also relied upon affidavit filed by respondent No. 1 on record page No. 29, affidavit of respondent No. 2 on record page 36 and affidavit of Joint Secretary to the Government of Maharashtra, Home Department, Mantralaya, Mumbai on record page 42 of the petition in compliance to the directions given by Justice Pandya on 25-8-1998. She further contended that since the petitioner has been released forthwith by this Court by order of Justice Pandya on 10-8-1998 nothing remains in this petition in that regard. So far as claim of compensation is concerned, she submitted that demand of compensation was itself illegal and unjust and not maintainable. She further contended that if compensation was awarded, same would result fear in mind of the police in discharging their official duties and this would ultimately result in affecting public peace and tranquillity etc.

10. I have given my anxious consideration to the submissions made by the advocate for the petitioner and learned APP for the State-respondents. It is true that the prayer of the petitioner for grant of compensation if allowed, would act as deterrent against police officials. But I am unable to agree with the submissions made by the learned APP that such a prayer should not be considered only on that count, because, in a society governed by the rules of law, the Constitution of India and the statutory provisions of Criminal Procedure Code, it is for the Court to see that all these provisions made for protecting liberty of the individual against arbitrary exercise of statutory powers are strictly complied with, and that whims and caprices and motives and prejudices of the police officers who are the guardians and protectors of law did not and do not mingle with the powers granted to them by the law.

11. It is true that the petitioner is facing prosecution in the following cases which are pending against him since 1991 :-

1. I 73/91 Under Sec. 147, 148, 149, 302, 307, 120(b).

2. I 43/92 Under Sec. 324, 34.

3. I 0046/98 Under Sec. 324, 34.

4. N. C. 45/92 Under Sec. 504, 506

5. 189/93 Under Sec. 323, 504.

6. 13/92 Cri. P.C. 110(e)(q).

7. Local

Application 25/93.

Out of these seven cases, there is one case of 1991, three cases of 1992, two cases of 1993 and one case of 1998. So far as seriousness of the cases is concerned, there is only one case of 1991 registered under Sections 302 and 307 of the Indian Penal Code. Other cases are registered under Sections 324 or 504 of the Indian Penal Code. Sr. No. 6 that is case No. 13 of 1992 and Sr. No. 7 that is the case No. 25 of 1993, are the chapter proceedings. As against this, the orders passed by the Judicial Magistrate in the applications for further remand regarding arrest of the petitioner under Section 151(3) of the Criminal Procedure Code and annexed with the petition at Exhibits A and B will show that the apprehension of the police and the reasons given by them regarding possibility of the petitioners committing cognizable offences in view of the forthcoming parliamentary election as is revealed in Exhibit A and in view of the Shiv Jayanti Utsav as is revealed in Exhibit 'B' did not find favour with the Magistrate and on both these instances the Magistrate ordered immediate and forthwith release of the petitioner and rejected the application of Bazarpeth Police Station for further detention of the petitioner.

12. Record page 19 of the petition shows that all the criminal cases pending against the petitioner as reproduced above were made the basis for at least of the petitioner on 24-2-1998 under Section 151(3) of the Criminal Procedure Code for seeking his further detention of 14 days. The order of the Division Bench comprising of Justice Agarwal and Justice Khandeparkar dated 10-9-1996 at Annexure 'C' of the petition shows that the Division Bench did not find any satisfactory reason to continue the detention of the petitioner and to the contrary, it was observed that the show cause notice of the chapter proceedings under Section 110 of the Criminal Procedure Code was served upon the petitioner on 13-8-1996 and on the same day he was taken in custody on the ground that he has failed to furnish security.

13. From all these facts, it will be, therefore, clear that it is the pendency of the aforesaid seven cases that has been repeatedly made basis for arrest of the petitioner under Section 151(3) of the Criminal Procedure Code and for initiating chapter proceedings against him. Two orders of the J.M.F.C. at Exhibits A and B and order of this Court of the Division Bench show that apart from the seven prosecutions stated above the Bazarpeth Police Station, Kalyan had nothing with them in all the three instances above to arrest the petitioner and seek his further detention and consequently, the Judicial Magistrate as per Exhibits A and B and Division Bench of this Court as per Exhibit C to the petition ordered release of the petitioner forthwith.

14. It is further clear from the record of the petition that when the present petition came before Justice Pandya on 10-8-1998, the learned APP did not and could not support the detention of the petitioner from 15-7-1998, and therefore, the learned APP had to concede that the petitioner was required to be released forthwith.

15. It will be therefore clear from the submissions made by the petitioner's advocate and from the record before this Court that respondent Nos. 2 and 3 have been arresting the petitioner under Section 151(3) of the Criminal Procedure Code and are initiating chapter proceedings against him only on the ground that he is facing seven prosecutions referred to and quoted to above, including his initiation of the present chapter proceeding No. 13 of 1998. It will also be clear from two orders of the J.M.F.C. Exhibits A and B of the petition that there was no immediate cause, information or material with the police before arrest of the petitioner on those two occasions and even for initiating of chapter proceedings in 1996 wherein Division Bench of this Court ordered immediate and forthwith release of the petitioner.

16. However, the question that is raised by the petitioner in this petition is that he is entitled for the compensation of Rs. 25,000/- for his illegal detention from 15-7-1998 to 10-8-1998 (as per the case of the petitioner), or from 16-7-1998 to 10-8-1998 (as per the case of the police) and second question is, whether the detention of the petitioner in chapter proceeding No. 13 of 1998 was illegal, without any basis and without complying requirements of the Criminal Procedure Code and without following the principle of natural justice viz. giving information of arrest of the petitioner to his relatives, giving opportunity to the petitioner and his relatives to furnish bond, and third question is, whether consequent upon the decision of the abovementioned two questions, whether the petitioner is entitled for the compensation in addition to the other reliefs claimed in the petition. Fourthly, whether the petitioner can get compensation on the basis of the Division Bench's judgment of this Court reported in 1999 All MR (Cri) 134 (Aurangabad Bench), Chandrabhan Rama Dhengle v. Indirabai Chandrabhan Dhengle, and on the basis of the judgment of the Supreme Court, reported in 1980 (Supp) SCC 649 : (1981 Cri L.J. 337), Gopalana-chari v. State of Kerala; judgment reported in (1993) 2 SCC 746 : (1993 Cri L.J. 2899), Nilabati Behera v. State of Orissa.

17. Since according to the counsel for the petitioner, the aforesaid judgments of this Court and Supreme Court have direct bearing to this case. It is necessary to consider the legal aspect of the case at the threshold. In the Division Bench's judgment of this Court (Aurangabad Bench) referred to above, the compensation of Rs. 50,000/- was granted to the petitioner Chandrabhan Dhengle by the Division Bench and respondent Nos. 2 to 5 viz. P.S.I. and S.E.M. etc. were ordered to pay the said amount and respondent No. 6, perhaps, State of Maharashtra was directed to hold departmental inquiry into the conduct exhibited by the respondents Nos. 2 to 5. The facts of that case were that Indirabai Dhengle, the wife of Chandrabhan Dhengle i.e. the petitioner, lodged a complaint against her husband for assault and beating. Since the offences were non-cognizable, no action was taken. However, the PSI initiated chapter proceedings against the petitioner/husband before S.E.M. for execution of bond with or without surety from him for keeping peace. In that background of the matter, it was held by the Division Bench that initiating chapter proceedings for keeping peace under Section 107 of the Criminal Procedure Code on the basis of the complaint lodged by the wife of the husband was completely illegal and unjustified and consequently, detention of the petitioner was illegal and he was entitled for compensation.

18. In Gopalanachari's case of the Supreme Court referred to above, the petitioner Gopalanachari, the man of 71 years of age, was in jail from 23-2-1980 and labelled as habitual criminal and was kept in custody under Section 110 of the Criminal Procedure Code, but on findings that his detention was completely illegal, Justice Krishna Iyer

ordered dropping of the proceedings against him with directions not to use Section 110 of the Criminal Procedure Code, torturesome fashion, against the week and poor merely because they belonging to the "have not" class and can be easily apprehended as "habitual" this or that or dangerous or desperate. Justice Krishna Iyer also drew attention of the State Government to the likely misuse of the preventive provisions and expect it to issue suitable instructions to the police minions so that the law will be legitimated by going into action where it must strike and by being kept sheathed where there is no need for indiscriminate display.

19. In Nilabati's case the Supreme Court has awarded compensation in proceedings for enforcement of fundamental rights in case where custodial death was proved and the Supreme Court has observed as under (at Pages 2908-2909 of Cri L.J.) :

"The Court is not helpless and the wide powers given to the Supreme Court by Article 52, which itself is a fundamental right, imposes a constitutional obligation on the Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to the Supreme Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the Court powerless and the constitutional guarantee a mirage, but may, in certain situations, be in an incentive to extinguish life, if for the extreme contravention the Court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restrain to avoid circumvention of private law remedies, where more appropriate."

20. All the three judgments referred to above by the counsel for the petitioner show that the Courts have been vigilant and/or required to be vigilant regarding fundamental rights of the citizens and if proper and justifiable case is made out by the petitioner, the Courts have ample powers and which were exercised to award compensation in case of misuse of statutory provisions by the machinery of the State in detaining the citizens illegally. The judgment of the Division Bench of this Court (from Aurangabad Bench) referred to above is a judgment on award of compensation in chapter proceedings for illegal detention, and therefore, in a sense the said judgment has direct bearing upon this case. However, it is necessary to find out whether detention of the petitioner in chapter proceeding No. 13 of 1998 either from 15-7-1998 to 10-8-1998 or 16-7-1998 to 10-8-1998 is a detention entitling the petitioner to claim compensation. Such a scrutiny is necessary because the compensation is claimed in respect of this detention, and therefore, even if, it is held by me that on all earlier occasions, the respondent could not succeed in seeking further detention of the petitioner and failed to get his further custody and the petitioner succeeded in getting the orders of release forthwith, this exercise is necessary because compensation is claimed only in respect of detention in chapter proceeding No. 13 of 1998.

21. In this regard it was submitted by the learned APP on the basis of record made available that Bazarpeth Police had in April 1998 sought permission of the Deputy Commissioner of Police, Kalyan to start chapter proceeding under Section 110 of the Criminal Procedure Code against the petitioner, that the permission was refused, and therefore, in June 1998 the Bazarpeth Police again sought similar permission and same was granted to them by the Deputy Commissioner of Police by their letter dated 13-6-1998. She, therefore, contended that it could not be said that the chapter proceedings No. 13 of 1998 were initiated against the petitioner without seeking permission from the seniors or without application of mind. She, further, contended that before obtaining this permission by letter dated 13-6-1998 the Bazarpeth Police had recorded statements of two persons viz. Madhukar Vishwanath Kadam and Subhash Barku Mali regarding extortionist activities of the petitioner and same was evident from the report submitted to the Special Executive Magistrate dated 17-7-1998 with reference to chapter proceeding No. 13 of 1998. She, therefore, contended that the petitioner was arrested on 16-7-1998 not only because of earlier pending 6/7 cases but because of the material collected by the Bazarpeth Police in the form of aforesaid two statements regarding activities of the petitioner requiring initiation of chapter proceedings under Section 110 of the Criminal Procedure Code.

22. She further contended that the allegations of the petitioner that none of his family were informed about his arrest and about necessity of the petitioner to furnish interim bond either by the Bazarpeth Police or S.E.M., were not only unsupported from the documents on record but to the contradictory to record, and therefore, these allegations were required to be turned down outright. In support she drew my attention to paragraph Nos. 5 and 11 of the petition and to Exhibit 'D' or the petition, the letter written by the petitioner's mother to the Assistant Commissioner of Police, Kalyan. She, therefore, contended that the said letter and the paragraph Nos. 5 and 11 of the petition falsified the contentions of the petitioner that no intimation of his arrest was given to his relatives or no intimation of requirements of furnishing interim bond was given to his relatives. On the basis of the same fact she further contended that the arrest of the petitioner on 16-7-1998 and his further detention was perfectly legal and if petitioner had furnished surety as ordered by respondent No. 1 immediately on 12-2-1998 or within reasonable time, he would not have been detained any more. Therefore, according to her, the Judicial Magistrate could not be blamed for his detention from 17-7-1998 onwards till petitioner released by this Court on 10-8-1998.

23. As against this it was contended by the petitioner's advocate that there was nothing with the respondents to show that any intimation of arrest of the petitioner was given to his relatives in writing on 15-7-1998 or 16-7-1998. He also contended that roznama of the chapter proceeding No. 13 of 1998 did not at all show that the mother of the petitioner or the so-called relative was present before the S.E.M. on 17-7-1998 and that they were intimated about the requirements of the petitioner to furnish interim bond of Rs. 10,000/- for six months with one respectable surety from the locality. He also contended that till 20-7-1998 neither the petitioner nor his relatives were knowing about the arrest and detention of the petitioner and when the petitioner's mother learned about this on 20-7-1998 and applied to the Assistant Commissioner of Police for necessary documents and particularly she was not given those particulars but was treated rudely and consequently no attempts could be made either by the petitioner or his relatives to furnish bond before the S.E.M., and seek release of the petitioners. It was further contended that the arrest of the petitioner on 15-7-1998 or 16-7-1998 and further detention under chapter

proceeding under Section 110 of the Criminal Procedure Code were totally illegal and there were no circumstances justifying his arrest and further detention and/or initiation of proceedings under Section 110 of the Criminal Procedure Code.

24. In view of these rival contentions, the facts are required to be scrutinized from the record of chapter proceeding No. 13 of 1998 which was made available by learned APP Smt. Kejariwal. The record which starts from Roznama from 17-7-1998 shows that the show cause notice under Section 111 of the Criminal Procedure Code was served upon the petitioner and he was asked to furnish surety. The petitioner denied the allegations made against him and at that time the petitioner was accompanied with his mother Shakuntala Beturkar and one relative Dinesh Patil. They were asked to make arrangement to furnish security or surety for Rs. 10,000/- and that they asked for some time. Further Roznama dated 24-7-1998, 31-7-1998, 3-8-1998, 10-8-1998 shows that the petitioner was produced some time but could not furnish interim bond and ultimately on 10-8-1998 he was released pursuant to the order of this Court.

25. Now so far as this Roznama is concerned, the contention of the learned APP Smt. Kejariwal that on 17-7-1998 the petitioner's mother Shakuntala Beturkar and one relative Dinesh Patil were present before the S.E.M. is not supported. Even though the Roznama makes a reference about their presence, I am not inclined to accept the Roznama in that regard because, if at all the petitioner's mother and relative were present and they were informed about the requirements of furnishing surety, their signatures in token of having received the said information should have been obtained on the Roznama or separate intimation should have been served upon them to show the compliance regarding giving of intimation and sufficient time and opportunity should have been given to the petitioner to furnish surety or to make arrangement in that regard. Ordinarily there is a presumption about the official acts and record, but in the instant case considering the previous instances, I am not inclined to draw such presumption in favour of the respondents.

26. It is further pertinent to note that the record and proceedings of the chapter proceeding case No. 13 of 1998 contain copy of show cause notice under Section 111 of the Criminal Procedure Code, order under Section 116(3) of the Criminal Procedure Code and statement of the petitioner recorded by S.E.M. under Section 112 of the Criminal Procedure Code. All these three important documents bear thumb impression of the petitioner. It is the case of the petitioner that his thumb impression was forcibly obtained in ordinary circumstances. I would not have accepted this contention without recording evidence or without requiring the matter to be proved by the petitioner. However, the counsel for the petitioner made categorical statement that the petitioner was capable of and was knowing reading, writing and put his signature and this fact of statement was not disputed by the respondent or their learned APP. Obtaining thumb impression from a man who is capable of putting his signature is a circumstance raising strong suspicion. These three documents referred to above bearing thumb impression, therefore, cannot support the case of the respondent that the relatives of the petitioner were made aware of regarding detention of the petitioner.

27. However the contention of the petitioner that none of his family members were made aware or informed about the arrest of the petitioner and he was being required to furnish ad interim bond, cannot be accepted for two reasons. Firstly in paragraph No. 5 of the petition it has been stated as :-

"The family members of the petitioner was only informed that the petitioner is being arrested under the chapter proceeding."

Secondly, in paragraph No. 11 of the petitioner it has been stated as :-

"The parents of the petitioner approached the office of the respondent No. 1 and respondent No. 2 twice with request to furnish the relevant papers viz. notice, order etc."

These two averments prima facie show that the family members or parents of the petitioner were made aware about the arrest of the petitioner and initiation of the chapter proceeding. Apart from this, the petitioner has filed the documents at Exhibit D to the petition dated 28-7-1998 and signed by the petitioner's mother which is an application or getting urgent copies of the chapter proceeding. In that application the petitioner's mother stated that the petitioner was arrested on 15-7-1990 at about 8.30 p.m. by Bazarpeth Police and she has further stated that she learnt that the chapter proceeding were started against her son by respondent No. 1 and that he has been sent to Kalyan Jail. These positive assertions in the aforesaid application coupled with the two statements made in the petition and reproduced above will show that the relatives of the petitioner were aware of and had learnt about initiation of the chapter proceeding against the petitioner, and they got this knowledge on 16-7-1998 or 17-7-1998. For these two reasons, therefore, the contention of the petitioner is required to be rejected.

28. The next question that arises is, whether the arrest of the petitioner on 15-7-1998 or 16-7-1998 by respondent No. 2 and his detention by respondent No. 1 on failure of the petitioner to furnish ad interim bond was justified? In this regard it was submitted by the learned A.P.P. that there was sufficient material before the respondent No. 2 in arresting the petitioner and initiating the chapter proceeding, and according to her, that material is in the form of statements of witnesses Madhukar Kadam and Subhash Mali. She also relied upon 6/7 criminal cases against the petitioner as the basis of this arrest.

29. I am not convinced by this submission made by the learned A.P.P. I have already held and observed that all the attempts of the respondent to arrest the petitioner and detaining him on the basis of pending cases became unsuccessful because of the intervention of the Courts viz. the Magistrate and the High Court as stated above. On all these previous occasions the police could not justify the arrest and the further detention of the petitioner as prayed by them and the petitioner was required to be released forthwith on all the previous occasions. Therefore, mere pendency of the criminal cases could not be legal and valid ground for arrest of the petitioner either on 15-7-1998 or 16-7-1998 for the purpose of initiating chapter proceeding No. 13 of 1998. So far as statements of Madhukar Kadam and Subhash Mali (which were relied upon by respondent No. 2 in the report submitted to respondent No. 1 on 17-7-1998 for initiating chapter proceeding No. 13 of 1998) are concerned, even these statements cannot justify the arrest of the petitioner on 16-7-1998 and his further detention on 17-7-1998 on account of petitioner's failure to furnish ad interim bond. The statements of Madhukar Kadam and Subhash Mali were recorded on 9-4-1998 i.e. about more than three months before the arrest of the petitioner. The delay of three months in the said two statements and arrest of the petitioner will clearly show that there was no case of extreme urgency or emergency when the petitioner was arrested on 16-7-1998 and chapter proceeding started against him on 17-7-1998. The petitioner was arrested on 16-7-1998 under Section 41(2) of the Criminal Procedure Code which provides that any officer in charge of a police station may, in like

manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in Section 109 or Section 110. Section 110 of the Criminal Procedure Code deals with the cases in which the security for good behaviour from habitual offenders can be taken. As per the report of respondent No. 2 to respondent No. 1 dated 17-7-1998 the chapter proceedings were initiated under Section 110(e) and (g) of the Criminal Procedure Code. Sub-section (e) of Section 110 is about the person who habitually commits, or attempts to commit, or abets the commission of, offences, involving a breach of the peace. Sub-section (g) of Section 110 is about the person who is so desperate and dangerous as to render his being at large without security hazardous to the community.

30. If the chapter proceedings against the petitioner are initiated for two reasons i.e. because the petitioner is falling in category of sub-section (e) or (g) of Section 110, then it is necessary for the respondent to prove prima facie that the petitioner was so desperate and dangerous as to render his being at large without security hazardous to the community or that he was habitually commits or attempts to commit or abets the commission of, offences involving a breach of the peace. Admittedly, the respondents are relying on only two statements of witnesses Madhukar Kadam and Subhash Mali but since these statements were recorded in April, 1998 they could not have been made basis for the arrest of the petitioner under Section 41(2) of the Criminal Procedure Code and initiation of the chapter proceedings under Section 110(e) and (g) in the month of July, 1998.

31. This is, therefore, the case where the petitioner was arrested on 16-7-1998 without there being any emergency or without there being any basis or information to the police that he is a desperate and dangerous character person creating problems for the security of the community or if he is not being arrested on that particular day or at particular time would have committed or attempted to commit or abetted the commission of offences involving breach of peace.

32. It is, therefore, clear that the arrest of the petitioner on 16-7-1998 under the aforesaid provisions was totally illegal and uncalled for and so also the initiation of proceedings under Section 110(e) and (g) of the Criminal Procedure Code.

33. Having come to the aforesaid finding the question is regarding grant of compensation claimed by the petitioner. If the arrest of the petitioner is found to be totally illegal and uncalled for, then respondents are liable to pay compensation to the petitioner. However, the compensation for the detention from 17-7-1998 to 10-8-1998 cannot be granted because the mother of the petitioner was knowing that the petitioner has been arrested and sent to Kalyan Jail on account of his failure to furnish ad interim bond. If the relatives of the petitioner were diligent, they could have got the petitioner released on furnishing ad interim bond or security immediately on 17-7-1998 or 18-7-1998. But no efforts in that regard were made by the petitioner or his relatives, and therefore, the respondents cannot be held responsible for the detention of the petitioner for all these period.

34. However, since the arrest of the petitioner on 16-7-1998 is found illegal, unwarranted and preceded by other 3 or 4 unjustified and unsuccessful arrest, he is entitled for the compensation of one day and compensation of Rs. 3000/- would be

sufficient in the circumstances of the case. Hence for all these reasons I pass the following order :-

ORDER

Petition is allowed.

Rule made absolute.

Chapter Proceedings against the petitioners are quashed.

Respondents to pay jointly and severally compensation of Rs. 3000/- to the petitioner for illegal detention and mental agony and Rs. 1000/- as the costs of the petition.

After this order was pronounced learned APP Smt. Usha Kejariwal prayed for stay of the operation of this order for a period of one month. Advocate for the petitioner has no serious objection. Hence this order is stayed for four weeks from today. Certified copy expedited.

Petition allowed.

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Cross Citation :2001-ALLMR(CRI)-0-2079 , 2001-MhL.J.-4-601,(2002) 104 BOMLR 34

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : J.N.PATEL,P.V.HARDAS,J

SURENDRA, RAMCHANDRA TAORI
Vs
STATE OF MAHARASHTRA THROUGH ITS SECRETARY DEPT OF HOME,MANTRALAYA

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(C) Cr. P.C. Section 106 to 110 – Mandatory procedure must be followed – Passing of final order without show cause notice is illegal proceeding quashed.

(D) Petitioner was tortured in police custody causing him serious injury – He was detained illegally without following the procedures provided under sections III and 116 – Compensation of Rs. 20,000 granted.

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JUDGMENT

J.N. Patel, J.

1. The petitioner who is a journalist and working as reporter of Daily Hindusthan published from Amravati, is a resident of Malkapur town in Buldhana District. The petitioner was required to invoke the extraordinary jurisdiction of this Court by filing the petition under Articles 226 and 227 of the Constitution of India as he came to be arrested and detained in custody under the impugned order passed by the respondent No. 2-Special Executive Magistrate and Police Inspector Local Crime Branch, Buldhana, District Buldhana on 23.10.1999 in a proceedings initiated under Chapter VIII of the Code of Criminal Procedure, 1973.

2. It is the case of the petitioner that, as a journalist, he exposed the police machinery of Malkapur Police Station on having taken up some matters criticising the mal practice and high handedness of the Police personnel. One of such matter was relating to sensational murder case in Malkapur town which occurred in the month of September 1999. It is the case of the petitioner that, annoyed by such publications, the respondent Nos. 3 to 6 started harassing the petitioner and also booked him in a false case. On 24.9.1999, the petitioner was threatened by respondent No. 4 Shri S.M. Jagdale, Police Sub-Inspector and therefore the petitioner approached City Police Station, Malkapur for lodging a complaint, but his complaint was not accepted and therefore he forwarded the complaint to the S.D.P.O. Malkapur and forwarded copies of the same to the authorities. The petitioner expressed that there was eminent danger to his life and personal liberty as he has been threatened by respondent No. 4. Instead of taking cognizance of the

complaint, the respondents Police Officials, out of vengeance, accosted the petitioner on 24.10.1999 at 10.30 p.m. when he was going to visit his relative, on his way. The respondent No. 6. Police Constable Baban Sangade, along with the Police Officers who are joined as respondent Nos. 3 to 5 mercilessly beaten the petitioner in Police Station, Rural, where respondent No. 6 Baban Sangade is attached and posted because of which the petitioner suffered injury to his right eye and other parts of the body. According to the petitioner, it is respondent No. 6 Baban Sangade who accosted the petitioner while he was going to visit his relative on his vehicle at Harikiran Society, Malkapur and brought the petitioner to Police Station, Rural Malkapur and informed respondent Nos. 3 to 5 on telephone and it is in the Police Station, Rural that all these persons mercilessly assaulted the petitioner. In support of his contention, the petitioner has placed on record photograph at Annexure 'O' and 'A-1'. It is the case of the petitioner that while assaulting the petitioner, he was threatened by respondent Nos. 3 to 6 that if he does not stop giving news against them, they will not leave him alive. Thereafter the petitioner was taken to City Police Station and there again respondent Nos. 3 to 6 along with the other staff on duty assaulted the petitioner and he was detained in lock up. Thereafter the petitioner was taken for medical check up to Medical Officer of Cottage Hospital, Malkapur who advised to take the petitioner to Buldhana for immediate medical treatment. But, instead of doing so the petitioner was brought back to police station and by threat and under duress, obtained in writing that the petitioner wants to take medical treatment in private hospital and the petitioner was released.

3. It is submitted by the petitioner that a false complaint came to be registered against the petitioner for having committed an offence under Section 353 of the Indian Penal Code and so on and that the petitioner was illegally detained on summoning him to the police station on the pretext of taking him to Buldhana Hospital for further medical treatment (Annexure 'D'). The petitioner came to be produced before the Special Executive Magistrate (Respondent No. 2) on 23.10.1999, who is a Police Inspector, by filing istegasha, showing his arrest on 23.10.1999 at 13.15 Hrs. under Section 41(2) of the Criminal Procedure Code vide istegasha No. 44/1999. On his production before the respondent No. 2 without even questioning the petitioner, the respondent No. 2 passed an order:

N.A. produced before me at 17.20 hrs. Brought by P.C. 1026 of Malkapur city. He has no complaint against Police. No surety. M.C.R. granted. 4.11.1999. Reqd. one year Rs. 10,000/- one solvency. One surety. Simple Cross. and was ordered to be sent to prison. On this, the petitioner informed the respondent No. 2 that he has been mercilessly beaten by the police and he is having various injuries and further requested to release him on personal bond and time to give the surety. But, neither his request was granted nor he was allowed to take legal aid, and, therefore, the respondent No. 2, without following the due process of law, straightway, passed the impugned order and sent the petitioner to M.C.R. fill 4.11.1999. It is contended on behalf of the petitioner that this was an illegal order because of which petitioner was in jail from 23.10.1999 to 30.10.1999 and it was only due to intervention of this Court that on 29.10.1999 an order was passed by this

Court to release the petitioner. But the petitioner was released on 30.10.1999 though the orders passed by this Court were communicated to the authorities by wireless and telephone.

4. It is the contention of the petitioner that the proceedings initiated by respondent No. 2 under Section 110 of the Criminal Procedure Code are totally unwarranted, and without following the procedure of law he came to be detained during the period 23.10.1999 to 30.10.1999 unlawfully and illegally and, therefore, the petitioner seeks action against respondent Nos. 2, 2-A, 3 to 6 in accordance with law. The petitioner also claims compensation for his custodial torture and illegal detention.

5. It is the case of the petitioner that the powers vested with the Police Officers to initiate proceedings under Chapter VIII of the Code of Criminal Procedure and the abuse of these powers by the police in connivance with their senior officers who have been appointed as Special Executive Magistrates is violative of petitioner's right enshrined in Articles 14 and 21 of the Constitution of India and, therefore, the petitioner seeks appropriate writ order or direction against the respondent-State to regulate arbitrary exercise of such powers which affects the liberty of person 'as in all such cases, without following the due process of law and the procedure provided under Chapter VIII, innocent persons are illegally detained in prison and, therefore, such powers of Executive Magistrate/Special Executive Magistrate vested in police officers should be directed to be withdrawn. The petitioner has also challenged the conferring of power of Executive Magistrate or Special Executive Magistrate in Police Officers below the rank of Commissioner of Police, as contemplated under Sub-section (5) of Section 20 of the Criminal Procedure Code. The petitioner has specifically sought a direction of withdrawal of powers conferred on respondent No. 2-A under Section 21 of the Criminal Procedure Code appointing him as Special Executive Magistrate for gross misuse of the powers by him and, therefore, declare the notification dated 10.2.1993 (Annexure F-1) which confers, power under Section 107 to 110 of the Criminal Procedure Code on the officers like respondent No. 2 (Police Officers), as bad in law and also a direction that the State shall not confer such powers on any other officer below the rank of Commissioner of Police. The petitioner has, in addition to his claim for compensation, also prayed for allowing the petition with costs.

6. In spite of service on all the respondents it is only respondent No. 2 who has chosen to file his submissions on affidavit. It is the case of respondent No. 2 that the petitioner, by taking advantage of his position as a journalist and reporter of one Daily Hindusthan at Malkapur, indulged in extortion of money from shopkeepers, businessmen and other Government Officers by publishing false and defamatory news items against them in newspapers and due to his nuisance value none of the affected persons dares to lodge any complaint against him. It is submitted that following cases are pending against the petitioner.

1. Crime No. 86/1997 under Section 406 of Indian Penal Code.

2. Crime No. 3020/98 under Sections 294, 540 and 506 of Indian Penal Code.

3. Crime No. 6049/1998 under Section 85(1) of Bombay Prohibition Act.

4. Crime No. 88/1998 under Sections 324, 504 and 337 of Indian Penal Code.

5. Crime No. 152/1998 under Sections 452 and 294 of Indian Penal Code.

6. Crime No. 149/1999 under Section 353 of Indian Penal Code read with Section 120 of Bombay Police Act.

7. N.C. No. 521/1998 under Section 504.

8. N.C. No. 28/1998 under Sections 323, 504 and 506 of Indian Penal Code.

It is further submitted that the enquiry before the S.D.P.O. Malkapur is pending for initiating externment proceedings against the petitioner as per Section 56 of the Bombay Police Act, 1951. Another allegation made against the petitioner is that he is in the habit of consuming liquor and committing breach of peace in the city by creating nuisance and therefore, in Ganpati festival, the petitioner was served with notice under Section 144 of the Criminal Procedure Code in September 1999 in order to maintain law and order and it is because of this notice that the petitioner was enraged and published a defamatory news item in Daily Hindustan dated 22.9.1999 against the Police of Police Station Malkapur City of which enquiry is pending.

7. According to respondent No. 2, on 21.10.1999 at 21 hours, the petitioner went to Police Station, Malkapur, Rural where Police Constable Baban Sangade was on duty. He enquired from him as to where is Gadari Saheb on which he was informed that he will come to know about it in the morning. At that time the petitioner was in drunken condition and his clothes were smeared with blood. Thereafter at 23.00 hrs. petitioner came to the Police Station. At that time, it was noticed that there was injury on his hand and blood was oozing out of it. At that time also the petitioner was in drunken condition. It is the case of respondent No. 2 that the petitioner told the Police Constable Baban Sangade that he is beaten by the people and therefore he should accompany him on which Police Constable Baban Sangade told the petitioner to report at Police Station, City. The petitioner again got enraged and started abusing Police Constable Baban Sangade in filthy language and further told him that "Police Wale Majle, Maza Hafta Kothe Ahe, Tumhi Paise Khata." On this Police Constable Baban Sangade requested him to go from there. So, petitioner picked up a stone and threw it on Police Constable Baban Sangade and assaulted him. Other police personnel present there separated the petitioner from Police Constable Baban Sangade. It is out of this incident that an offence under Section 353 of the Indian Penal Code read with Section 120 of Bombay Police Act came to be registered on 22.10.1999 at 01.00 hrs. against the petitioner at Police Station, Malkapur City as the incident occurred in Police Station, Malkapur, Rural which is within the jurisdiction of Police Station, Malkapur

City. In case of the complaint of the petitioner that he has been beaten by public, he was told that he should report the matter with that police station i.e. Police Station, Malkapur City. It is the contention of respondent No. 2 that after registering the said crime, the petitioner was arrested on 23.10.1999 and he was sent to Rural Hospital, Malkapur for medical examination. As per the Medical Officer at Rural Hospital, Malkapur, petitioner suffered minor injury and further he was referred to E.N.T. specialist at Buldhana for further treatment but the petitioner refused to go at Buldhana and informed in writing that he will get treated from private doctor. Thereafter, at about 12.30 hrs. he was released on bail.

8. The reason given for the arrest of the petitioner under Section 110 of the Criminal Procedure Code is that at the relevant time there were processions of immersion of Durga Idols and therefore the petitioner was arrested under Section 110 of the Criminal Procedure Code and was sent on 23.10.1999 at 17.20 hrs. to Special Executive Magistrate. Local Crime Branch and that it was necessary to take prohibitory action against the petitioner and therefore, under the istegasha No. 44/1999, under Section 110 of the Criminal Procedure Code, he was told to keep ready two sureties of Rs. 10,000/- each for his release. But, as the petitioner could not furnish sureties he was sent to magisterial custody till 1.11.1999. It is submitted that the petitioner was sent to magisterial custody as he could not produce the sureties and that the respondent No. 2 has not misused any powers or provision and the prohibitory action was taken against the petitioner as per law. It is also clarified that when he was produced before respondent No. 2, respondent No. 2 enquired with him as to whether there is any complaint against the police. But the petitioner informed that he has no complaint against the Police and it is only on 29.10.1999 when this Court passed an order, petitioner came to be immediately released on bail on 29.10.1999 and therefore there is no substance in the petition. The same deserves to be dismissed.

9. We have heard Mr. P.B. Patil, learned Counsel appearing for the petitioner and Mr. Bhushan Gavai, learned Government Pleader and Public Prosecutor along with Mr. K.S. Dhote, learned Additional Public Prosecutor for the respondents and have given anxious consideration to the facts and circumstances placed before us.

10. The facts relating to the arrest and detention of the petitioner by the impugned order passed in a proceeding initiated under Section 110 of the Criminal Procedure Code are not much disputed. It is also not disputed that the petitioner had suffered injuries as claimed by him. The only point of disagreement is who is responsible for these injuries suffered by the petitioner on 22.10.1999. It is the case of the petitioner that he was accosted by Police Constable Baban Sangade and taken to Police Station, Rural Malkapur where he called respondent Nos. 3 to 6 and they all assaulted him in the police station, which resulted in injury. On the other hand, it is the case of the respondent No. 2 that the petitioner had come to Police Station, Rural, Malkapur with a complaint that he has been assaulted by the members of the public and was in drunken condition. If these allegations and counter allegations are taken into consideration in the background that the petitioner

has lodged a complaint dated 24.9.1999, (Annexure A) to the S.D.P.O., Malkapur, followed by another complaint on 22.10.1999 which was sent through Post and Telegram Department, and a detailed complaint of the same was also lodged to the S.D.O. Malkapur before the petitioner came to be arrested by Police Station, Rural or City, Malkapur after he was summoned as per Annexure 'O'. We fail to understand as to why the Police did not take cognizance of the complaint made by the petitioner and there is no reply filed on affidavit before the Court by the State of Maharashtra to explain this. In the affidavit-in-reply filed by respondent No. 2, there is no whisper about this complaint lodged by the petitioner. Secondly, if the story given by respondent No. 2 in his affidavit-in-reply has to be accepted that the petitioner came to Police Station Rural, Malkapur in the night of 22.10.1999 with a complaint that he has been assaulted by members of the public, why the Police did not register such a complaint and sent the petitioner for medical examination. If the Police was satisfied that the petitioner had suffered serious injuries and was in drunken state, it was necessary on their part to get him medically examined for the injuries suffered by him and to ascertain the fact that he has consumed alcohol. None of the respondents have filed their affidavit-in-reply denying the allegations made by the petitioner. Therefore, this Court has no hesitation to arrive at a conclusion that the story given by the petitioner will have to be accepted that he was accosted by Police Constable Baban Sangade and brought to Police Station, Rural, Malkapur and given beating, causing serious injuries on his person. The respondents have not denied the injuries as reflected in the photograph annexed to the petition. On the other hand, it is their case that these injuries are caused because he is beaten by members of the public. In his affidavit-in-reply, the respondent No. 2 has, in terms accepted that the petitioner is a nuisance for the Society as he extorts money from businessmen, people in the locality as well as Government officers and therefore, the contention of the petitioner that as he was exposing the functioning of the Police i.e. mal practice and high handedness of the Police personnel. It was out of vengeance that the respondent Nos. 3 to 6 not only assaulted him in the Police Station while he was in their custody but also threatened him of dire consequences and the superior officers, in spite of repeated complaints by the petitioner, failed to take notice of it.

11. Now let us turn our attention to the proceedings initiated against the petitioner by the respondents under Chapter VIII of the Code of Criminal Procedure. The reason given in the affidavit-in-reply filed by respondent No. 2 for initiating such proceedings against the petitioner was that at the relevant time processions for immersion of Durga Idols was under process and therefore the petitioner was arrested under Section 110 of the Code of Criminal Procedure and was sent on 23.10.1999 at 17.20 hours, to Special Executive Magistrate Local Crime Branch and such action was necessary keeping in mind the processions of Durga Idols immersion and therefore the respondent No. 2, under istegasha No. 44/1999, under Section 110 of the Criminal Procedure Code as it was necessary to take prohibitory action against the petitioner told him to keep ready two sureties of Rs. 10,000/- each for his release. But as the petitioner could not furnish the sureties, he was sent to Magisterial custody on 1.11.1999 whereas the istegasha, on which the impugned order came to be passed do not mention anything about the prohibitory action taken by

the Police due to procession of immersion of Durga Idols. But there is a specific mention of the fact that considering the previous offences for which the petitioner is being prosecuted and that the petitioner lodges false complaint with senior officers against any person and publishes report in newspapers because of which nobody is prepared to make complaint against the petitioner in Police Station and because of this, common people are terrorised and there is a danger to their property and lives due to these activities of the petitioner and that there is all likelihood that he may commit offence of serious nature, and to prevent all this, it is necessary that he should be called upon to furnish substantial surety.

12. Chapter VIII of the Code of Criminal Procedure provides for various provisions under which security for keeping the peace and for good behaviour can be sought from any person. The provisions in this Chapter which empower the Court of Magistrates to obtain security from a person to prevent him from committing offence, in future, are of two kinds. (i) A security for keeping peace which is covered by the provisions under Sections 106 and 107 of the Criminal Procedure Code and (ii) A security for good behaviour which is covered by provisions under Sections 108 to 110. Sections 111 to 124 contains procedural provisions under which such proceedings are to be conducted. We are not concerned with provisions under Sections 106 and 107 of the Criminal Procedure Code. In case of security for good behaviour, it is Sections 108 to 110 which can be initiated. Sections 110, 111 and 116(3) of the Criminal Procedure Code relevant for the purpose, reads as under:

110. Security for good behaviour from habitual offenders.-When an Executive Magistrate receives information that there is within his local jurisdiction a person who

(a) is by habit a robber, house-breaker, thief or forger, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or

(d) habitually commits, or attempts to commit, or abets the commission of the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code (45 of 1860) or under Section 489A, Section 489B, Section 489C or Section 489D of that Code, or

(e) habitually commits, or attempts to commit or abets the Commission of offences, involving a breach of the peace or

(f) habitually commits, or attempts to commit or abets the commission of-

(i) any offence under one or more of the following Acts, namely

(a) the Drugs and Cosmetics Act, 1940 (23 of 1940);

(b) the Foreign Exchange Regulation Act, 1973 (46 of 1973);

(c) the Employee's Provident Funds (and Family Pension Fund) Act, 1952 (19 of 1952);

(d) the Prevention of Food Adulteration Act, 1954 (37 of 1954);

(e) the Essential Commodities Act, 1955 (10 of 1955);

(f) the Untouchability (Offenders) Act, 1955 (22 of 1955);

(g) the Customs Act, 1962 (52 of 1962); or

(ii) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or

(g) is so desperate and dangerous as to render his being at large without security hazardous to the community, such Magistrate may, in the mariner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years as the Magistrate thinks fit.

111. Order Co be made.-When a Magistrate acting under Section 107, Section 108, Section 109 or Section 110, deems it necessary to require any person to show cause under such section he shall make an order in writing, setting forth the substance of the information received the amount of the bond to be executed, the term for which it is to be in force and the number, character and class of sureties (if any) required.

116. Enquiry as to truth of information.-

(1)

(2)

(3) After the commencement and before the completion of the inquiry under Sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reason to be recorded in writing, direct the person in respect of whom the order under Section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may detain him in custody until such bond is executed or in default of execution until the inquiry is concluded:

Provided that-

(a) no person against whom proceedings are not being taken over under Section 108, Section 109, or Section 110 shall be directed to execute a bond for maintaining good behaviour.

(b) the conditions of such bond whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability shall not be more onerous than those specified in the order under Section 111.

Therefore, it is clear that proceedings under Section 110 are taken to prevent committing such acts by a person as mentioned therein. The object of this section is to bind down the person to good behaviour with an object to afford protection to the public against a repetition of crimes against their person or property and is not a punishment of the offender for his past offences, but for securing his good behaviour for the future. Since this section confers drastic powers to bind down persons suspected; but not proved to have committed any of the offences specified in various clauses, the powers should be used with extreme caution and judicial discretion and strictly according to the procedure laid down, so that it may not be used as an engine of oppressions, blackmail or private vengeance.

13. The first step in the proceedings is passing of a preliminary order under Section 111 of the Criminal Procedure Code which is a condition precedent for taking further steps in any proceedings under Sections 107 to 110 of the Code of Criminal Procedure. Such order, with its required contents, must be recorded and indicated even where the Police have brought before the Magistrate a person under arrest as a suspected offender. The first thing is that the Magistrate must do after receipt of the information, referred to in Section 110 is to apply his mind to such information, if he is satisfied that there is ground for proceeding under such Chapter to pass an order in writing under the present section and, therefore, it is mandatory on the part of the Magistrate for passing of a preliminary order stating the substance of the information etc. which will be served as a notice. It does not contemplate a notice different from such order. If the person charged is present in the Court, the order should be read over to him and that may amount to notice. If they are not present, a copy of summons must be enclosed with the summons or warrant as the case may be and therefore, it is quite clear that no final step in the proceedings can be made and therefore, without giving an opportunity to such person to show cause by reading over the order to him if he happens to be in the Court when order under Section 111 is made. It is only thereafter that the preliminary order under Sub-section (3) of Section 116 of the Code of Criminal Procedure can be passed and, therefore, one thing is clear that unless and until steps as contemplated under Section 111 of the Criminal Procedure Code are taken i.e. an order requiring a person to show cause under such section, which should be in writing setting forth the substance of the information received, the amount of the bond to be executed the term for which it is to be in force and the

number, character and class of sureties (if any) required no further steps can be taken, in the present case, plain reading of the impugned order which is reproduced below:

N.A. produced before me at 17.20 hrs. Brought by P.C. 1026 of Malkapur city. He has no complaint against Police. No surety M.C.R. granted.

4.11.1999.

Reqd. one year Rs. 10,000/-, One solvency, One surety, Simple Cross.

does demonstrate that the learned Executive Magistrate did not follow the procedure as contemplated under Section 111 of the Code of Criminal Procedure. Even the impugned order does not indicate under what clause of Section 110 of the Criminal Procedure Code he has to execute bond and furnish surety. The order also do not conform to the requirement of Section 116(3), which is indicative of the fact that the respondent No. 2A, in misuse of his powers conferred under Section 21 of the Criminal Procedure Code, remanded the petitioner to custody as the impugned order is passed without application of mind and by ignoring the due process of law, therefore, the detention of the petitioner can only be said to be illegal and in violation of Article 21 of the Constitution of India.

14. Our attention was drawn by the learned Counsel for the petitioner to the case of Chandrabhan Rama Dhengle v. Indirabai Chandrabhan Dhengle and Ors. , in which this Court held that the Magistrate was found to have exercised jurisdiction under Section 107 of the Criminal Procedure Code arbitrarily and in clear violation of Article 21 of the Constitution resulting in illegal detention of the petitioner in the said proceedings for a period of 63 days. The State was liable to pay compensation of Rs. 50,000/- to the petitioner for the said illegal confinement. Another case is of Vimladevi Tiwari v. State of Maharashtra and Ors. 1998 (3) Mh.L.J. 712 : 1998 Bom. C.R. (Cri.) 676 : 1999 (1) All M.R. 116, wherein also this Court held that the Court having failed to follow the procedure under Section 111 as well as 116 of the Criminal Procedure Code and causing detention of the son of the petitioner, can be only termed as wholly unauthorised and without jurisdiction. In the two cases cited before us, this High Court had an occasion to examine the manner in which the Special Executive Magistrate conferred with powers under Chapter VIII of the Code of Criminal Procedure had exercised them in an arbitrary manner and without following the due procedure, causing illegal detention, which was held to be wholly unauthorised and without jurisdiction.

15. In the given facts and circumstances of this case we are satisfied that the respondent No. 2, which office was held by respondent No. 2A overlooked the necessary and essential requirement of law, while passing the impugned order and arbitrarily ordered the magisterial custody remand of the petitioner without being vested with such powers at the instance of respondent Nos. 3 to 6 and the whole object of initiation of these proceedings which are challenged before this Court was to see that the petitioner is taught a lesson by torturing him in custody resulting in serious injuries and is also detained in

prison so that he should learn a lesson not to expose Police Officers of the region within whose jurisdiction he was residing.

16. In addition to seeking quashing of the proceedings, the petitioner has also claimed compensation on two counts, firstly for the injuries suffered by him while he was detained in Police custody and assaulted by respondent Nos. 3 to 6 to which there is no challenge by the respondent Nos. 3 to 6 and secondly for his wrongful detention in the prison under orders of respondent No. 2. The petitioner has also sought for directions against the State Government for withdrawing the powers vested in respondent No. 2 as Special Executive Magistrate and by ordering the respondent/State to refrain from vesting of such powers under Chapter VIII in Police Officers except in cases provided under Sub-section (5) of Section 20 of the Code of Criminal Procedure.

17. Mr. Patil the learned Counsel appearing for the petitioner after a well researched study made several submissions, highlighting the importance of independence of judiciary as an essential attribute of rule of law which is a basic feature of our Constitution in the background of frequent and deliberate misuse of powers vested under Chapter VIII in favour of Special Executive Magistrate, specially with reference to Police Officers in addition to various constitutional provisions. Mr. Patil has also drawn our attention to the various reports of Law Commission of India regarding reform of judicial administration and submitted that in fact this Court should issue appropriate writ, order or direction so as to declare Section 21 of the Code of Criminal Procedure as ultra vires as it vests unguarded discretion in the Stale to confer judicial powers on Police Officers which is misused with impunity with total arbitrariness as such misuse of powers has direct nexus with the liberty of the citizen and it is in derogation of the fundamental right guaranteed under Section 21 which shall provide that no person shall be deprived of his life or personal liberty except according to procedure established by law. Mr. Patil submitted that though the provisions under Chapter VIII, do provide for a procedure which can be called reasonable fair and just but it is prone to misuse by the Executive to subserve their cause and therefore, such appointment of Police Officers as Special Executive Magistrates deserves to be quashed and set aside.

18. Mr. Gavai, learned Government Pleader and Public Prosecutor submitted that when statute permits the State Government to appoint an Executive Magistrate to exercise powers vested in the provisions under Chapter VIII, it cannot be said to be arbitrary as the manner in which such powers are to be exercised is also regulated by the said provisions and, therefore, it will not be proper to quash and set aside or issue any writ, order or direction against the State from conferring powers of Special Executive Magistrates to Police Officers. It is submitted that the State, in its wisdom and considering the exigencies, has conferred powers of Special Executive Magistrate on Police Officers of the rank of Police Inspectors for conducting proceedings under Chapter VIII of the Code of Criminal Procedure and that in a given case, this Court can very well quash and set aside orders which are passed by such Executive Magistrates which are found to be illegal. Mr. Gavai has tried to canvass before us that the Court will have to consider the submissions made

by Mr. Patil by looking to the object which the Statute seeks to achieve and it should have a purposive approach for interpreting the provisions of Sections 20 and 21 of the Code of Criminal Procedure.

19. Our enquiry from the learned Public Prosecutor as to why the State Government thought it fit to confer power of Special Executive Magistrate by invoking Section 21 of the Criminal Procedure Code in an officer of the rank of Police Inspector when even in case of appointment of Executive Magistrates such powers are restricted by Sub-section (5) of Section 20 only to the officers of the rank of Commissioner of Police we were informed relying upon a communication by Fax from the State Government, that such powers were vested in Police Inspectors as the State was satisfied that they are experienced, Gazetted Officers of the Police Department and have reasonable knowledge of law. Well, we do not propose to go into all these niceties but we should record that vesting of powers of Special Executive Magistrate in Police Officers of whatever rank they may, has resulted in blatant misuse of such powers to the detriment of fundamental right of a citizen as enshrined in Article 21 of the Constitution of India. Very few cases reach the High Court relating to the proceedings before Special Executive Magistrate concerned with Chapter VIII of the Criminal Procedure Code. This Court has no hesitation to take a judicial notice of the fact that if there is a survey conducted in the jails in the State of Maharashtra of the under trial prisoners languishing in jail, most of them are those who are arrested in petty offences and surprisingly a reasonable number of such persons are those against whom proceedings under Chapter VIII have been initiated. At least we have not come across any case in which when such proceedings are challenged either by way of revision before the Sessions Court or by invoking the writ jurisdiction of this Court, a detention of a person against whom proceedings under Chapter VIII is pending, was found to be justifiable. Therefore, in our humble opinion, it is high time that the State, which is duty bound to protect the fundamental right of its citizen and particularly relating to their liberty, should resort to Section 478 of the Code of Criminal Procedure which vests in the State powers to order functions allocated to Executive Magistrates and such powers vested in favour of police officers as Special Executive Magistrate particularly in reference to Chapter VIII proceedings as they are commonly known and relate to Sections 108 to 110 as well as Sections 145 and 147 of the Criminal Procedure Code to be made over to Judicial Magistrate of the First Class or Metropolitan Magistrate, as the case may be.

20. We have already come to the conclusion that the petitioner was tortured in Police Custody which was illegal, causing him serious injuries and further came to be detained under the impugned order illegally and unauthorisedly, without following the procedure provided under Sections 111 and 116 of the Criminal Procedure Code. In Smt. Nilabatti Behera alias Lalita Behera v. State of Orissa and Ors. AIR 1993 SC 1960 : 1993 (2) SCC 746 : 1993 A.C.J. 787 : 1993 SCC (Cri.) 527, the Supreme Court held as under:

A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict

liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from and, in addition to the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available, in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.

The Supreme Court is not helpless and the wide powers given to it by Article 32 which itself is a fundamental right, imposes a constitutional obligation on it to forge new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to the Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the Court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the Court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence and recovery of damages, under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though the exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, were more appropriate and therefore, we direct the respondent/State to pay a sum of Rs. 15,000/- to the petitioner for custodial torture and illegal detention of the petitioner. The compensation to be paid to the petitioner within a period of four weeks from the date of passing of this Order. We also direct the respondent/State to pay Rs. 5,000/- as costs to the petitioner. We further direct the State to take suitable action against its guilty officers i.e. respondent Nos. 3 to 6 for custodial torture meted out to the petitioner. It will be open for the State to recover the amount of compensation directed to be paid to the petitioner from its officers who are found responsible in the cause. Rule made absolute in the aforesaid terms. Certified copy expedited.

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Cross Citation :2006 (2) B. Cr. C. 489, 2006 (5) Mh L.J. 243

BOMBAY HIGH COURT

Hon'ble Judge(s) : J. N. Patel, B Dharmadhikari, JJ

Rajesh S/O Suryabhan Nayak ..Vs..The State Of Maharashtra, Through Ministry Of Homes, Commissioner Of Police And Shri S.U. Nandanwar, Asst. Commissioner Of Police Kotwali Division (Special Executive Magistrate).. Decided on 7/6/2006

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(F) Cr. P.C. 1973, Sections 106 to 110 – Power to direct security for peace and good behavior – It is of nature being direct interference with liberty of individual – hence order must reflect application of judicial mind by magistrate – The order must be a reasoned and speaking order.
(G) Cr. P.C. 1973 , Section 116 (3) – Execution of bond – Amount of bond should not be excessive – The bond should be of such amount for which there is fair probability of being able to find security – The bond shall not be excessive.
(H) 'Cross – Surety' – The Magistrate have no right to aske for surety from caste, creed and religion.
(I) Cr. P.C. 1973, Section 106 to 116 – constitution of India, Article 22 (I) Enquiry in to chapter cases – Discouraging a person to engage lawyer of his own choice violates Article 22 (I) of constitution – It not only obstructs the course of justice but also pollutes the same and is contempt of court.
(J) Depriving and discouraging a person to engage lawyer – if special executive Magistrate and its staff finds inconvenience about peresence of lawyer with a person it means that they wants to extort money.

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JUDGMENT

1. These two writ petitions had been filed by the petitioners raising several key issues in reference to the practice and procedure followed by the Police Officers, who are vested with the powers of Executive Magistrate for conducting proceedings under Chapter VIII of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Code' for short).

2. In Criminal Writ Petition No. 428/2002 the petitioner is an Advocate, who was required to invoke the extraordinary jurisdiction of this Court, as one person by name Khobaib Raja engaged him to represent his case before the Special Executive Magistrate, Tahsil Division, city of Nagpur, in the proceedings initiated under Section 107 of the Code at the behest of Police Station Lakadganj, and has highlighted the various illegalities and irregularities being practiced in the court of Special Executive Magistrate, who also happens to be the Assistant Commissioner of Police of Kotwali Division, and has been joined in person as respondent No. 3. The main grievance of the petitioner is that in

addition to the procedure adopted by respondent No. 3 and the officials working under him, respondent No. 3's behaviour is unbecoming of holding the said post, as he misbehaved, insulted and humiliated the petitioner, who is an Advocate and was appearing for his client, by giving threat and used unparliamentary words, and that inspite of the petitioner having made complaints to the Superior Officers of respondent No. 3, no action in the matter was taken. It is further contended that the person, whom the petitioner was representing, was reprimanded for engaging the petitioner and was threatened with detention in jail by respondent No. 3 through his Clerk Shri Karade, in event of his failure to pay sum of Rs. 2000/-as bribe. Therefore, according to the petitioner, the respondent No. 3 has violated the majesty and dignity of the court of Special Executive Magistrate and solemn office of Executive Magistrate held by him and in connivance with his staff has been extorting money from persons against whom proceedings under Chapter VIII of the Code are initiated in his court under duress of detaining them in jail, if their demands are not fulfilled and by discouraging such persons to engage an Advocate of their own choice by insisting upon engaging Advocate who are patronised by his office and, therefore, such conduct of the respondent No. 3 and his staff is violative of Article 21 and 22 of the Constitution of India, as it deprives personal liberty of a citizen without following the procedure established by law, which should be reasonable, fair and just. Further, their conduct in denying a person to be defended by legal practitioner of his choice is violative of his rights under Article 21 and 22 of Constitution of India.

3. In so far as Criminal Writ Petition No. 293 of 2003 is concerned, it is filed by the petitioners contending that they were called upon to execute a bond of Rs. 25000/-in a proceedings initiated by Walgaon Police under Section 151 read with Section 107, 116(3) of the Code, by insisting upon executing the bond for the sum of Rs. 25000/-with one cross-surety in the like amount belonging to rival group, as interim order passed under Section 116(3) of the Code without following provisions of law and sent the petitioners in jail thereby curtailing their personal liberty contrary to the procedure established by law.

4. This court in both the matters has passed various interim orders including an enquiry into the allegations made by the petitioner Advocate Shri. R.S.Nayak in Criminal Writ Petition No. 428 of 2002 against respondent No. 3 and the staff working with him by senior Police Officer and also obtained record and proceedings of the cases in the two petitions. By its order dated 23/9/2003 in Criminal Writ Petition No. 498 of 2002 this Court thought it proper that both the petitions can be heard together and that is how we proposed to dispose of both these petitions by common judgment and order, as the nature of allegations made in the petitions and the illegalities and irregularities, which are alleged to have been adopted by the court of Executive Magistrate are of identical nature.

5. We have heard the learned Counsel for the petitioners and so also the learned Additional Public Prosecutor, representing the respondents in both the matters and with the able assistance of the learned Counsel for the parties, we have examined the record and proceedings in the two cases. What we find is that the allegations made in both the petitions - in so far as it relates to the procedure adopted by the Police Officers who are holding post of Executive Magistrate for conducting proceedings under Chapter VIII of the Code - that it is not properly followed resulting in violation of rights of the petitioners under Articles 21 and 22 of the Constitution of India and it deserves to be streamlined, and effective vigilance on the functioning of such courts of Executive Magistrate is need of the day so that such malpractices can be prevented and their working regulated and controlled by judicial supervision by the court of Sessions and so also administrative control by Senior

Police Officers, who have disciplinary control over the persons functioning in such courts including the Presiding Officers, who are of the rank of Inspector of Police and Assistant Commissioner of Police and are conferred with powers of Executive Magistrates, and conduct proceedings under Chapter VIII of the Code.

6. It is in this backdrop that we want to examine the allegations made in the two petitions against the conduct of the authorities and before we dwell on specific allegations made in these two petitions, we would like to reiterate the settled principles relating to initiation of proceedings under Chapter VIII, which provides for security for keeping the peace and for good behaviour. The provisions in this Chapter which empower courts and Magistrate to obtain security from a person to prevent him from committing offences in the future are of two kinds. Firstly, security for keeping the peace, which is contemplated under Sections 106 and 107 of the Code and secondly security for good behaviour, which is specified in Sections 108 to 110 of the Code. Rests of the chapter contains procedure and provisions which is set out in Sections 111 and 112 of the Code. We need not go into a detailed analysis of these provisions but we would like to highlight the practice and procedure which is to be adopted by person holding the post of Special Executive Magistrate or Executive Magistrate while conducting these proceedings.

7. Though the incidents of the various proceedings under this Chapter (Sections 106 to 110 of the Code) differ in material respects, there is one aspect, namely, that all these proceedings have for their object -the prevention, and not punishment of a crime. The other common aspect of all these proceedings is that they are not obligatory but confer the discretionary power on the specified court or magistrate to exercise such power in the specified circumstance being an interference with the liberty of the individual, such power must be exercised judicially, and strictly in accordance with the procedure laid down in the relevant sections. The Magistrate must first himself consider that immediate measures are necessary for the prevention of the breach of the peace or the disturbance of the public tranquility or then commission of any offence or for the public safety and then after recording his reasons in writing, direct the person concerned to execute a bond for keeping the peace, etc. until the conclusion of the enquiry. This postulates application of his judicial mind by the Magistrate, whose order is subject to judicial scrutiny by superior Courts of Revision and superintendence. He cannot completely mortgage his decision, or abdicate his power or surrender his own responsibility in favour of the police, though it would be well within his competence, in a given case to take into account the police report for what it is worth in forming his own conclusion on the material legally available to him. But this exercise must indisputably be seen to be done and the order of the Magistrate must clearly reflect the application of the Magistrate's own judicial mind to the facts and circumstances properly placed before him. However, summary the proceedings under Chapter VIII, Cr.P.C., may be considered, they are judicial proceedings and have to be conducted in accordance with the Code and the Magistrate holding these proceedings must see that the fundamental elements of the judicial process find expression in the machinery for administering justice. It is clear that an order under Sub-section (3) of Section 116 of the Code for furnishing of bond can be made only after the commencement of the enquiry and before its completion, provided the allegations forming the basis of the parent proceeding or the allegations leading to the necessity for furnishing of interim bonds are tested by inquiry and judicial mind is applied for ascertaining whether there is prima facie justifiable basis for such a direction. Sub-section (2) of Section 116 provides that the inquiry is to be as nearly as practicable in the manner prescribed for conducting trial and recording of evidence in summons cases. Chapter XX of the Code makes provision for trial

of summons cases. Until the allegations are supported by materials so as to satisfy the judicial mind that a direction for bond is called for, no order for furnishing of a bond can be given. Section 116 of the Code of 1973 corresponds to Section 117 of the Code of 1898, Sub-section (6) and (7) of the 1973 Code are new provision. Old Sub-section (3) commenced with .pending the completion of the enquiry.. The new Sub-section (3), however, starts with .after the commencement and before the completion of the enquiry.. This change has been made so as to put the matter beyond doubt that an interim bond can be called for only after commencement of the enquiry and before its completion. The amendment gives effect to the Supreme Court's decision in Madhu Limaye v. Sub-Divisional Magistrate, Momghyr (A.I.R.1971 S.C.2481)

8. The next important aspect, which has come to our knowledge by examining various record and proceedings from the file of the Executive Magistrate is the manner in which orders are passed under Section 111 and Section 116(3) of the Code. We are shocked and surprised to note that so far as the Execute Magistrate of Kotwali Division is concerned, the learned Special Executive Magistrate has got a printed form incorporating both the orders leaving certain margins so as to fill in the blanks/gaps which only go to indicate that the two orders are passed in a rigid manner without application of mind. We are afraid but have no hesitation to observe that this practice and procedure is probably followed by all the Executive Magistrates, who are Police Officers of the rank of the Assistant Commissioner of Police functioning in their respective Division throughout the city of Nagpur. The learned Additional Public Prosecutor on seeking instructions has made a statement that this practice would be discontinued forthwith. We may remind the Presiding Officers of the courts of Executive Magistrates that both the orders i.e. 1) Under Section 111 and other under Section 116(3) of the Code has to be passed by the learned Magistrate on due application of mind. In so far as order under Section 111 of the Code is concerned, it enjoins upon the Magistrate to make an order in writing, setting forth the substance of information received, the amount of the bond to be executed, term for which it is to be in force, and the number, character and class of sureties (if any required) and the Magistrate can only proceed to pass an order under Section 111 of the Code on the basis of substance of the information received by him, which has to be spelt out in the order, which requires that there must be information of a nature which convinces him that there is likelihood of a breach of peace. The person, who gave information might not be in a position to give details, but the source of information might be sufficient to convince the Magistrate that the breach of the peace was likely and if he was convinced, the law required him to take action. Needless to say, the substance of information must be setforth in the order which depends in each case upon the circumstances of the case. Without an order under Section 111 of the Code, the Magistrate has no competence to deal with such person. In so far the order which is required to be passed under Section 116(3) of the Code -The provisions of Section 116(3) clearly mention that the order of interim bond should be passed after recording reasons therefore. The Magistrate while acting under Sub-section (3) of Section 116, Cr. P.C., has to make careful consideration as regards to the separate case of emergency as contemplated under the said section and he must be satisfied that immediate steps are necessary. The fact that the police report indicated that the members of the opposite-party were likely to create breach of the peace is not sufficient to pass an order and it cannot be said that the Magistrate has given a careful consideration to the existence of a case of emergency when he merely relies on a police report without even calling the police officer to the witness box. An order made under Sub-section (3) is bad if it is not accompanied by reasons recorded in writing why the Magistrate wants to take the emergency measures..

9. The next important thing which is required to be kept in mind by the learned Magistrate is in relation to the amount of the bond. This should be fixed with due regard to the circumstances of the case, and must not be excessive. The Magistrate should consider the station in life of the person concerned, and should not go beyond a sum for which there is a fair probability of his being able to find security. Imprisonment is provided as a protection to society against the perpetration of crime by the individual, and not as a punishment for a crime committed, it is only reasonable and just that the individual should be afforded a fair chance at least of complying with the required condition of security.

10. While passing an order under Section 116(3) of the Code, the Magistrate is also expected to be conscious about the provisions relating to requirements of the bond. Since under new Section 116(3) of the Code a Magistrate cannot demand any surety bond, in a proceeding initiated under Section 107 of the Code the question of executing the bond or the liability of furnishing the surety will no longer arise under the said Section. The relevant provisions of Section 116 of the Code reads as under:

Section 116 : Inquiry as to truth of information. -

(1) When an order under Section 111 has been read or explained under Section 112 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under Section 113, the Magistrate shall proceed to inquiry into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons cases.

(3) After the commencement, and before the completion, of the inquiry under Sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under Section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded: Provided that -

(a) no person against whom proceedings are not being taken under Section 108, Section 109, or Section 110 shall be directed to execute a bond for maintaining good behaviour;

(b) the condition of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under Section 111. Sub Section (4) ...onwards not relevant for our purpose.

11. This, we are required to highlight as a fact that in a proceedings initiated under Section 107 of the Code, it is common practice on the part of the Executive Magistrate to insist for surety bond by passing interim order under Section 116(3) Cr.P.C. The court has taken judicial notice of this that inspite of a clear cut provisions in Clause (a) of the proviso

to Sub-section 3 of Section 116 of the Code of Criminal Procedure, in a proceeding initiated under Section 107 of the Code and the form No. 12 (Scheduled II) which is prescribed for executing bond under Section 107 of the Code, persons are detained in judicial custody for their failure to furnish interim surety in a proceedings initiated under Section 107 of Chapter VIII of the Code in exercise of jurisdiction not vested upon them in law. {See State of Maharashtra and Anr. v. Mangali Dewaiyya Pupalla, Mh.L.. 483, Mrs.Pramila Navin Shaha v. State of Maharashtra and Ors. 2005 All MR (Cri) 1233}. Having clarified the fact that in a proceedings initiated under Section 107 of the Code no surety/security or personal bond is required to be furnished under an interim order under Section 116(3) Cr.P.C., henceforth if it comes to the notice of this Court that a person against whom proceedings are initiated under Section 107 of the Code is detained in judicial custody for failure on his part to furnish interim surety/security Bond or personal Bond pursuant to an order passed under Section 116(3) of Cr.P.C. The State shall be liable to pay compensation to such person for violation of his fundamental right enshrined under Article 21 of the Constitution of India and the aggrieved person may also take recourse to other remedies available to him under the general law viz to prosecute the said magistrate for wrongful confinement and appropriate compensation for wrongful detention.

12. It will be fruitful to mention at this stage that there is a practice on the part of Executive Magistrate for insisting upon surety from caste, creed and religion other than that of the person against whom proceedings are initiated under the nomenclature .cross surety.. We may like to impress upon the Executive Magistrate, exercising powers under Chapter VIII of the Code, that such insistence of cross-surety irrespective of the nature of the case is unwarranted and most of the time it is insisted upon so as to deprive a person of his personal liberty so as to make it beyond his reach to fulfill such a condition. This is in addition to the practice of quoting excessive and prohibitive amount as sum of surety, though Clause (b) of proviso to Section 117 of the Code clearly provides that the amount of every bond shall be fixed with due regard in the circumstances of the case and shall not be excessive.

13. Concept of cross-surety has to be understood in the context of the peculiar facts and circumstances of the case, which is being dealt by the Executive Magistrate. One can understand that in a given case where proceedings are initiated against persons of the rival group to give security in keeping the peace of the opposite party. It has been so ordered in Criminal Writ Petition No. 293 of 2003 wherein the Executive Magistrate has specified that in order to keep peace and tranquility in village Kamunja, as there was probable and imminent danger of likelihood of breach of peace due to the rival claim and possession over the mosque Madarsa of Kamunja between two sect of Muslim namely 'Sunni' and 'Tablig', and hence such an order was required to be passed.

14. In reference to the grievance made by the Petitioner' Advocate Shri R.S.Nayak in Criminal Writ Petition No. 428 of 2002 an enquiry was conducted according to order passed by this Court by the Joint Commissioner of Police wherein the petitioner as well as his client was examined and the enquiry report dated 29/1/2003 came to be submitted to the court does prima facie makes out a case in favour of petitioner except for the issue of demand of bribe of Rs. 2000/-by the A.C.P. through his staff police constable Mr.Karade. Mr.B.T. Nighinglova, Joint Commissioner of Police, Nagpur in his report itself has mentioned that the concerned A.C.P. who was conferred with the powers of Executive Magistrate Kotwali Division has been transferred and so also his staff and all the ACPs in charge of the Division, who are conferred and vested with powers of Executive Magistrate

under the Commissionerate are instructed to strictly adhere to provisions of Chapter VIII of Code. The Respondent/State was kind enough to immediately respond to the interim orders passed by this Court from time to time and also filed affidavit of the then principal Secretary (Spl.), Government of Maharashtra, Home Department that they would streamline the procedure and exercise of powers by the Executive Magistrate and special Executive Magistrate under Chapter VIII of the code. But as suggested by this Court in the case of Surendra v. State of Maharashtra and Ors. 2001 (4) Mh.L.J.601, the Government is, however, of the opinion that considering the present scenario and the law and order situation it may not be feasible to revert back to the 1980's position and entrust this powers to judicial magistrate. The State has also, in the affidavit filed by the then Commissioner of Police Shri Jayant Umaranikar referred to the Circular dated 28th April, 2003 which provides for guidelines to the Executive Magistrate and Special Executive Magistrate while dealing with Chapter Case i.e. proceedings under Chapter VIII of the Code so as not to violate fundamental rights of citizens as enshrined under Article 21 of the Constitution of India. The same has been reiterated by the subsequent affidavit filed by the present Commissioner of Police. This court has been assured that in future the proceedings under Chapter VIII of the Code would be conducted in proper order. Respondent No. 2/The Commissioner of Police in his affidavit dated 22/3/2006 has also taken cognizance of the fact that the office of the Special Executive Magistrate and Executive Magistrate functioned till late hours in night and has noted that said officer would function in accordance with the guidelines issued by the Government of Maharashtra vide Circular dated 28/4/2003 and those instructions have been issued to all the ACPs vide Circular dated 20/3/2006 to conduct and hold their courts only during working hours and further to take prior permission from concerned Zonal Deputy Commissioner of Police, if there is any urgent case to be dealt with after working hours and in that case subsequently send the report to the Commissioner of Police stating the reason holding proceedings after office hours (the said circular is annexed as Annexure R-2). In view of the fact that the commitment made by the Commissioner of Police in his affidavit dated 22/3/2006 is on solemn affirmation, we accept it as an undertaking given to this Court and make it clear that in future if any violation of the undertaking takes place, this Court would take serious cognizance of such breach in addition to directing the State to initiate appropriate action against the persons found guilty of misuse of the powers vested in them under Chapter VIII of the Code.

15. We only propose to forewarn Police Offices vested with powers under Chapter VIII of the Code that they should also remember that the party against whom proceedings are initiated under Chapter VIII of the Code is entitled to forthwith receive copy of the order which may result in curtailing their liberty before they are remanded to judicial custody, either for their failure to execute necessary bond with or without sureties or at the conclusion of the proceedings, as it has come to our notice, on going through the present state of affairs in the office of Special Executive Magistrate Kotwali Division, that the staff functioning in the office of Special Executive Magistrate, Kotwali Division are careless in issuing certified copy of such orders which are amenable to revisional, appellate and writ jurisdiction of the courts and though such orders as a matter of practice are in printed forms depriving a person of certified copy of such orders, is nothing but an attempt on the part of the court of Special Executive Magistrate and its staff to deprive them of procedural justice.

16. By way of illustration, proceedings initiated by Shri Dhamke the present Special Executive Magistrate against one Pramod Dinakrrao Samarth vide Chapter Proceedings No.

64 of 2006 and interim order under Section 116(3) of the code was placed on record. It came to be passed in a proceedings initiated under Section 110 of the Code, which are all in printed form, clearly indicating that the orders under Section 111 of the Code as well as 116(3) of the Code have been passed by the Special Executive Magistrate without application of mind, as the proceedings initiated under Section 110 of the Code is not maintainable against said Pramod Dinkarrao Samarth for the simple reason that it does not confirm and meet the requirements of Section 110 of the Code. It is in this proceedings that an application for grant of certified copy was made by the counsel for the accused on 22/3/2006 and there is an endorsement from the office of Special Executive Magistrate, Kotwali Division, Nagpur that copies would be delivered within three days. Such practice deserves to be highly deprecated.

17. Assistant Commissioner of Police Shri Dhamke, who is the Special Executive Magistrate of Kotwali Division was personally present in the court and the learned Additional Public Prosecutor Smt.Neeta Jog on seeking instructions from him assured this Court that he will forthwith discontinue this practice of passing orders in printed form and further assured the court that certified copies of the order would be forthwith furnished to the person or his Advocate, who are appearing in his court and in future he will take all the necessary precautions to see that there is no violation of any right statutory or procedural of a citizen who is facing any proceedings in his court. We hope that such assurance given to the court would be followed in letter and spirit not only the by the Special Executive Magistrate of Kotwali Division but all divisions in the city of Nagpur so that miscarriage of justice is avoided and persons are not left at the mercy of the whims and caprice of the Police Officers, who are conducting chapter proceedings as Special Executive Magistrates.

18. In so far as grievance of Advocate Mr.Nayak is concerned, we have taken serious note of the same. We would like to bring it to the notice of the State the concept, object and scope of life and personal liberty as enshrined in Article 21 of the Constitution of India by quoting the observation of Shri K.Ramaswamy, J. in the case of Kartar Singh v. State of Punjab, . His Lordship while dealing with the constitutional validity of the draconian law i.e. Terrorist and Disruptive Activities (Prevention) Act, 1987 observed as under - .The right to life with human dignity of person is a fundamental right of every citizen for pursuit of happiness and excellence. Personal freedom is a basic condition for full development of human personality. Article 21 of the Constitution protects right to life which is the most precious right in a civilised society. The trinity i.e. liberty, equality and fraternity always blossoms and enlivens the flower of human dignity. One of the gifts of democracy to mankind is the right to personal liberty. Life and personal freedom are the prized jewels under Article 19 conjointly assured by Arts. 20(3), 21 and 22 of the Constitution and Article 19 ensures freedom of movement. Liberty aims at freedom not only from arbitrary restraint but also to secure such conditions which are essential for the full development of human personality. Liberty is the essential concomitant for other rights without which a man cannot be at his best. The essence of all civil liberties is to keep alive the freedom of the individual subject to the limitations of social control envisaged in diverse articles in the chapter of Fundamental Rights Part III in harmony with social good envisaged in the Directive Principles in Part IV of the Constitution. Freedom cannot last long unless it is coupled with order. Freedom can never exist without order. Freedom and order may coexist. It is essential that freedom should be exercised under authority and order should be enforced by authority which is vested solely in the executive. Fundamental rights are the means and the directive principles are essential ends in a welfare state. The evolution of the State from Police State to a Welfare State is the ultimate measure and accepted

standard of democratic society which is an avowed constitutional mandate. Though one of the main functions of the democratic Government is to safeguard liberty of the individual, unless its exercise is subject to social control, it becomes anti-social or undermines the security of the State. The Indian democracy wedded to rule of law aims not only to protect the fundamental rights of its citizens but also to establish an egalitarian social order. The individual has to grow within the social confines preventing his unsocial or unbridled growth which could be done by reconciling individual liberty with social control. Liberty must be controlled in the interest of the society but the social interest must never be overbearing to justify total deprivation of individual liberty. Liberty cannot stand alone but must be paired with a companion virtue; virtue and morality; liberty and law; liberty and justice; liberty and common good; liberty and responsibility which are concomitants for orderly progress and social stability. Man being a rationale individual has to live in harmony with equal rights of others and more differently for the attainment of antithetic desires. This intertwined network is difficult to delineate within defined spheres of conduct within which freedom of action may be confined. Therefore, liberty would not always be an absolute licence but must arm itself within the confines of law. In other words there can be no liberty without social restraint. Liberty, therefore, as a social conception is a right to be assured to all members of a society. Unless restraint is enforced on and accepted by all members of the society, the liberty of some must involve the oppression of others. If liberty be regarded a social order, the problem of establishing liberty must be a problem of organising restraint which society controls over the individual. Therefore, liberty of each citizen is borne of and must be subordinated to the liberty of the greatest number, in other words common happiness as an end of the society, lest lawlessness and anarchy will tamper social weal and harmony and powerful courses or forces would be at work to determine social welfare and order. Thus, the essence of civil liberty is to keep alive the freedom of the individual subject to the limitation of social control which could be adjusted according to the needs of the dynamic social evolution. The modern social evolution is the growing need to keep individual to be as free as possible, consistent with his correlative obligation to the society. According to Dr. Ambedkar in his closing speech in the Constituent Assembly, the principles of liberty, equality and fraternity are not to be treated as separate entities but in a trinity. They form the union or trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality. Equality cannot be divorced by liberty. Nor can equality and liberty be divorced from fraternity. Without equality, liberty would not produce supremacy of law. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality would not become a natural course of things. Courts, as sentinel on the qui vive, therefore must strike a balance between the changing needs o the society for peaceful transformation with orders and protection of the rights of the citizen. One of the functions of the State is to maintain peace and order in the society. As its part, State is not only the prosecutor of the offender but also the investigator of crime. To facilitate such investigation police has been given wide powers to arrest the suspect without warrant, interrogate him in custody search and seize incriminating material, to collect the evidence and to prosecute the offender. Deprivation of dignity of person, self-respect and inviolable right to life, would only be within the prescribed limits set down by laws; assiduously supervised by courts; and executive excesses strictly be limited. Excessive authority without liberty is intolerable. Equally excessive liberty without authority and without responsibility soon becomes intolerable. Lest the freedoms and fundamental rights become sacrificial objects at the altar of expediency. Unrestricted liberty makes life too easy for criminal and too difficult for law-abiding citizens. In a free society too many crooks blatantly break the law, blight young lives, traffic in drugs and freely indulge in smuggling

and claim fundamental rights to exploit weak links of law, indulge in violence and commercial camouflage. Our values are drastically eroded because many a man with no more moral backbone than a chocolate eclair claim the freedom and free action which results inevitably in increasing the members of violent criminals. In the midst of clash of interest, the individual interest would be subservient to social interest, yet so long as jubi jus, ibi remedium is available the procedure prescribed and the actions taken thereon by then law-enforcement authority must be the test of the constitutional mandates.

19. We hope this is sufficient to remind the State of the sacrosanct fundamental rights particularly under Article 21 of Constitution of India and that it will take all steps to protect it and would take all necessary preventive steps so that life and personal liberty of a citizen is not trampled by the Police Officers, who are vested with powers of Special Executive Magistrate/Executive Magistrate to conduct proceedings under Chapter VIII of the Code. Further, we may add the observations of Hidayatullah, J in respect of another right vested in a citizen under Article 22(1) of the Constitution of India by quoting His Lordship's observation in the case of State of M.P. v. Shobharam, wherein His Lordship has observed -

When our Constitution lays down in absolute terms a right to be defended by one's own counsel, it cannot be taken away by ordinary law and it is not sufficient to say that the accused who was so deprived of this right, did not stand in danger of losing his personal liberty. If he was exposed to penalty, he had a right to be defended by counsel. If this were not so then instead of providing for punishment of imprisonment, penal laws might provide for unlimited fines and it would be easy to leave the man free but a pauper. And to this end without a right to be defended by counsel. If this proposition were accepted as true we might be in the Middle Age. The Criminal Procedure Code allows the right to be defended by Counsel but that is not a guaranteed right. The framers of the constitution have well thought of this right and by including the prescription in the Constitution have put it beyond the power of any authority to alter it without the Constitution being altered. A law which provides differently must necessarily be obnoxious to the guarantee of the Constitution. There is nothing in the worth of the Constitution which permits any authority to alter this condition even on grounds of public interest as is the case with the guaranteed rights in Article 19. Not by a niggling argument be lessened the force of the declaration so explicit in its terms or whittle down its meaning by a specious attempt at supposed harmony between rights which are not interdependent. There are three rights and each stands by itself. The first is the right to be told the reason of the arrest as soon as an arrest is made, the second is the right to be produced before a Magistrate within twenty-four hours and the third is the right to be defended by a lawyer of one's choice. In addition there is the declaration that no person shall be deprived of his personal liberty except by procedure established by law. The declaration is general and insists on legality of the action. The rights given by Article 22(1) and

20 are absolute in themselves and do not depend on other laws. There is no force in the submission that if there is only a punishment of fine and there is no danger to personal liberty the protection of Article 22(1) is not available. Personal liberty is invaded by arrest and continues to be restrained during the period a person is on bail and it matters not whether there is or is not a possibility of imprisonment. A person arrested and put on his defence against a criminal charge, which may result in penalty, is entitled to the right to defend himself with the aid of counsel and any law that take away this right offends against the Constitution."

20. Advocate Mr.Nayak's grievance as highlighted in his petition is that his client was discouraged and deprived from engaging legal practitioner of his choice from appearing before the court of Special Executive Magistrate, Kotwali Division is a clear cut breach of Article 22(1) of the Constitution of India. The State and its functionaries should learn to respect an Advocate who represents his client to seek justice for him and to assist the Court in dispensing justice. If the courts of Special Executive Magistrate and its staff finds it inconvenient, if a person engages a legal practitioner of his choice, may be for various reasons and one of them which is spelt out in the petition i.e. to come in the way of the court and its staff extorting money from a person against whom proceedings are initiated, it not only obstructs the course of justice but also pollutes the same and is nothing short of contempt of court. In the enquiry conducted by Joint Commissioner of Police, as per report the Special Executive Magistrate and its staff stands exonerated of the allegations of extortion of money though the evidence given by Advocate Nayak and his client confirms to the allegations made in the petition that a sum of Rs. 2000/-were demanded from client of Advocate Nayak to settle the case rather than contest the proceedings initiated by him by engaging legal practitioner of his choice which was his legal right. The report cuts a very sorry figure in the manner in which proceedings are conducted in the court of Special Executive Magistrate. We are conscious of the fact that it is very difficult to prove these allegations but it is equally true that such allegations cannot be said to be unfounded.

21. Taking into consideration that the State and the Commissioner of Police has assured this Court that in future such occasion would not arise and they have taken necessary steps to prevent such practices, we find that almost all the prayers made by the petitioners are complied with and so far as claim of compensation made by the petitioner for the ill-treatment meted out to him by respondent No. 3 it can be left open and if the petitioner feels it proper, he may take appropriate steps, as observed by this Court in the case of Deelip Bhikaji v. State of Maharashtra and Ors. 2003(2) Mh.L.J.629.

22. In so far as the reliefs claimed in Criminal Writ Petition No. 293 of 2003 are concerned, the petitioners had already approached the court of Chief Judicial Magistrate, Amravati under Section 123(2) and (3) of Criminal Procedure Code which granted them relief of reducing the quantum of bond from Rs. 25000/-to Rs. 15000/-, probably by this time the proceedings must have come to an end and, therefore, the petition has become infructuous. Therefore, in our view no relief can be granted as sought for. These two petitions , therefore, stand disposed of. Rule is made absolute accordingly.

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Cross Citation : (1999) 101 BOM L R 566

BOMBAY HIGH COURT

Hon'ble Judge(s) : F Rebello, J

Shri Mohd. Sakir Itbari Ansari …Vs..Shri L.S. Danekar, Special Executive Magistrate
Decided on 30/11/1998

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Cr. P.C. – Section 107 – Condition imposed by Magistrate that the sureties must be from particular faith/community and well educated is arbitrary – Proceedings quashed

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JUDGMENT

1. Rule. - Respondent waives service. By consent Rule made returnable and heard forthwith.

2. The Petitioner in the present case has challenged a part of the show cause notice dated 10th October, 1998 wherein the Petitioner has been called upon to furnish two sureties of respectable people from the locality. The further condition imposed is that the sureties must be well educated citizens, one practicing the Hindu faith and the other Muslim. The third condition is that the sureties must be from the same locality and the fourth that they are well educated.

It is the contention of the Petitioner that the order of the Special Executive Magistrate imposing conditions calling on the Petitioner to furnish sureties of well educated persons, one practicing the Hindu faith and the other Muslim is not sustainable. Such an order it is pointed out would be contrary to and in violation of Articles 14 and 21 of the Constitution of India. Article 21 sets out that no person shall be deprived of his life or personal liberty except according to the procedure, established by law. It is therefore, contended that by imposing a condition as imposed by the learned Special Executive Magistrate the Petitioner's personal liberty is violated under Article 21 apart from action of the Magistrate being arbitrary in as much as it is volatile of Article 14 of the Constitution of India.

3. Learned Additional Public Prosecutor on behalf of the State points out that the area is a communally sensitive area and therefore the actions of the Magistrate are bona fide taking into consideration the situation in the locality. It is, therefore, contended that this cannot be said to be an arbitrary or capricious exercise of power. Such a condition it is contended will not be violative of Article 14 nor for that matter will offend Article 21 of the Constitution of India.

4. One of the conditions imposed by the impugned order requires the Petitioner herein to furnish sureties one each from a person practicing the Hindu and Muslim faith respectively. In other words, the sureties are identified based on their religion. The other condition is that the person must be respectable. The third condition is that the persons must be well educated and the fourth is that they should be from the same locality.

In so far as the condition that the sureties must be respectable people the condition perhaps cannot be faulted as the whole purpose is to maintain peace in the area. It is true that the perception as to who is respectable may change from person to person. Generally speaking a person from the locality, normally not involved in offences involving moral turpitude or for that matter other such offences which may attract provisions of the Indian Penal Code or any special legislation excluding acts where a person is charged for bona fide political activities or like manner. This requirement, therefore, by the Magistrate that the sureties must be respectable persons cannot be found fault with if this broader aspect of the expression is understood.

Similarly, will be the case of the requirement that sureties must be from the same locality. It is true that Krishna Iyer, J. in matters of bail application has held that it is not a requirement that sureties in so far as the bail is concerned, must be from the same locality. Many a time it may be impossible for a person arrested in a particular case if he does not have roots in that community or place to furnish surety from the said place. In the instant case, however, sureties have been called upon from the Petitioner for the purpose of securing peace in the area. In other words, the man is from the locality. It is under these circumstances that the condition of person being from the locality has to be understood. I, therefore, can find no exception in the said condition.

5. That leaves us with two other conditions imposed viz. that sureties must be persons belonging to particular religious faiths and well educated persons. It is the basic principle of our Constitution that there can be no discrimination. Classification is however possible provided it has reasonable nexus with the object to be achieved. In the instant case the object is to maintain peace in a communally sensitive area. Can communal peace be maintained only if sureties are people professing two different faiths. Can sureties be classified based on the religion they profess. The Constitution in respect of certain matters has recognized and granted special protection to religious and linguistic minorities pertaining to their religious beliefs and/or setting up and establishing educational institutions or in matters of their language. Apart from that is it possible to classify the citizens of this country based on their religious group to maintain peace and order. That would be against the very basic philosophy of our Constitution which recognize only citizens of India. Classification based on faith to promote the objective of achieving peace may be laudable but in the end self defeating. What happens say if in a communally tense area people professing one religion do not come forward as sureties for a person professing a faith different from them and unfortunately in the present scenario this cannot be ruled out. Does this mean that their freedom is dependent on the faith they profess. This will be totally repugnant to the secular character of our Constitution. Article 15 of the Constitution, sets out that the State shall not discriminate against any citizen on ground only on religion, caste, sex or place of birth or any of them. This is an indication that citizens cannot be discriminated based on their faith, though Article 15 is based on different precept.

6. The notice has been issued under Section 107. The conditions imposed by the notice must therefore satisfy the requirement of Article 14 i.e. that it is not arbitrary in other words should not be against our constitutional philosophy and such a condition should not be violative of a citizen's right to life and liberty granted by Article 21 of the Constitution. Liberty of an individual can only be restricted or affected by due process of law. In the instant case, the due process of law could be by issuance of notice under Section 107. However, the conditions in the notice must be non-arbitrary and non-discriminatory. A condition that sureties must be from two different religion denominations would clearly be arbitrary. This is nothing but a hangover of the colonial past. It is not in consonance with the Constitution which we gave to ourselves nor in consonance with the constitutional spirit as reflected in the preamble to the Constitution of India. The condition, therefore, is clearly arbitrary.

7. The other condition is that sureties must be well educated citizen. National statistics on education itself reveals as to what is the percentage of citizens of this country who are educated, and where not even 50% of our citizens have had access to primary education. What the Magistrate requires is a well educated citizen. What happens to the liberty of a citizen if only few available in the area for some personal reasons do not want to offer themselves as sureties. Must the life and liberty of citizens depend on the whims and fancies of well educated citizens. Even otherwise how is the object of maintaining peace, achieved by such a condition. Where in history or experience is there support for such a proposition that a citizen with a good education is necessarily a good citizen. What is well educated has also not been defined. Is it the requirement that the person must be a graduate, double graduate or holding a doctorate. Such a condition therefore is also clearly arbitrary.

8. In the light of that the following order:

(1) Condition that sureties must be from particular faith is arbitrary.

(2) Condition that the sureties must be well educated is also arbitrary.

(3) In the light of the above conditions in the show cause notice dated 10th October, 1998 are quashed and set aside…Rule made absolute in the aforesaid terms. In the circumstances of the case, there shall be no order as to costs.

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Cross Citation :2010-TLMHH-0-510 ,

HIGH COURT OF BOMBAY

(NAGPUR BENCH)

Hon'ble Judge(s) : S.A. BOBDE and A.B. CHAUDHARI,JJ

Shri. Deepak Shivaji Karande ….Vs…

1) Maharashtra State Human Rights Commission

2) Shri Nilesh C. Ojha, National President, Human Rights Security Council.

WRIT PETITION NO. 2697 OF 2010 **, June 16,2010**

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Protection of Human Rights Act, 1993 – Custodial Death – Illegal arrest – Section 151 of Cri. P.C. – The victim was asenior citizen of 78 years old – He was illegally detained by P.S.O. U.S. 151 of cri. P.C. under directions of S.P Wardha Smt. Ashwati Dorje – The Victim was not granted bail by the Tahsildar Deepak Karande – The victim died in jail – The son of victim filed petition before state Human Rights commission, Mumbai through Shri. Nilesh C. Ojha National President of Manav Adhikar Suraksha Parishad – Commission accepted the contention of the petitioner and directed Home secretary to take action against Smt. Ashwati Dorje, S.P. Wardha Shri. Deepak Karande, Tahsildar, Wardha and Shri V.D. Boite Jail Supreintendant, Wardha. The petitioner filed Writ petition challenging the legality of the order - It has been held by High court that the order is legal and does not require interference.

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JUDGEMENT

(1.) Heard learned counsel for the petitioner. The petitioner has challenged order of the Maharashtra State Human Rights Commission, Mumbai recommending that the disciplinary authority shall hold Departmental Enquiry into conduct of the petitioner and two others, in accordance with law, and complete the same as early as possible and preferably within three months. The learned counsel for the petitioner submitted that the order of the State Human Rights Commission is vitiated since admittedly, as recorded by the Commission itself, the petitioner was not heard. Learned counsel for the petitioner further submits that the Commission was bound to hear the petitioner before directing the initiation of enquiry since the proceedings before the Commission are judicial proceedings.

(2.) The Maharashtra State Human Rights Commission (hereinafter referred to as "the Commission") took cognizance of the complaint of one Nilesh Ojha, President of Mahav Adhikar Suraksha Parishad, Pusad, who complained about the custodial death of one Shankar Ghume, at Wardha District Prison while in illegal detention due to the negligence of three officers of the Police including the petitioner. It is not necessary to go into the details of the custodial death except to observe that the Commission found, after hearing the Collector, Superintendent of Police and Superintendent, District Prison, Wardha that many questions arise regarding action of the police and the Jail authority and that the

police should have exercised their discretion to release the deceased on bail, which was granted to him by the Court. The Commission has observed that it is reasonable to believe that the petitioner mechanically passed the order under Section 151 of the Code of Criminal Procedure and illegally refused the bail. However, without giving any finding whether the petitioner and other Police officers are indeed responsible for the custodial death, the Commission found it appropriate to direct that an enquiry should be held against them in connection with the custodial death in the light of its observations, particularly since the officers, including the petitioner, have not been heard.

(3.) Having heard the matter, there is no reason for us to hold that the order of the Commission directing the disciplinary authority to enquire into the conduct of the petitioner is vitiated only because the petitioner was not heard. Section 18 of the Protection of Human Rights Act, 1993, which is relevant, reads as follows.

"18. Steps during and after inquiry.- The Commission may take any of the following steps during or upon the completion of an inquiry held under this Act, namely:- (a) where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority - (i) to make payment of compensation or damages to the complainant or to the victim or the members of his family as the Commission may consider necessary; (ii) to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons; (iii) to take such further action as it may think fit; (b) approach the Supreme Court or the High Court concerned for such directions, orders or writs as the Court may deem necessary; (c) recommend to the concerned Government or authority at any stage of the inquiry for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary; (d) subject to the provisions of clause (e), provide a copy of the inquiry report to the petitioner or his representative; (e) the Commission shall send a copy of its inquiry report together with the recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission; (f) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission."

It is obvious from Sub-Section (ii) above that upon completion of the enquiry before the Commission, which in this case has undoubtedly been completed, the Commission has discretion to recommend the Government or the concerned authority for prosecution or such other action as the Commission may deem fit. The words "such other suitable action" in (a) (ii) above, would clearly cover the holding of Departmental Enquiry.

(4.) The order of the State Human Rights Commission does not hold the petitioner guilty of custodial death but merely directs an enquiry into the matter. In this view of the matter, we see no reason to interfere with the impugned order. The writ petition is, therefore, dismissed. No order as to costs.

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Cross Citation :2009-Mh L J(Cri)-3-47 , 2009-ALLMR(CRI)-0-2929

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : A. S. Oka, J.

DATTARAM KRISHNA PEDAMKAR ...Vs... STATE OF MAHARASHTRA

Apr 22,2009

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Cr. P.C. – Section 111, 110 (e) (g) – Direction to furnish interim bond without recording reasons in writing. The sub-section (3) of section 116 specifically requires that the Magistrate is required to record reasons in writing – The express statutory provisions are completely ignored by the Magistrate and the entire proceedings have been conducted contrary to the provision of the code – Such order is liable to be quashed.

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JUDGEMENT

(1.) RULE. Learned APP waives service for respondents. Taken up for hearing.

(2.) THE challenge in this petition under Article 227 of the Constitution of india and section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code") is to a show cause notice issued by the second respondent in purported exercise of power under section 111 of the said Code. By the said notice, the petitioner has been called upon to show cause as to why proceedings in accordance with section 110 (e), (g) of the said Code should not be initiated and the petitioner should not be directed to furnish bond in the sum of rs. 10,000/ -. By the said notice the petitioner was also called upon to show cause as to why interim bond should not be taken from him pending the proceedings.

(3.) THE submission of the learned counsel appearing for the petitioner was that an order under section 111 of the said Code has not been passed which is a condition precedent for initiating an action. Therefore, I had called upon the learned APP to produce the record of the chapter proceedings. Accordingly, the record has been produced. The record shows that a proposal for initiating the proceedings under Chapter-VIII of the said Code was submitted by the Senior inspector of Police of Worli Police Station, Mumbai. On the said proposal there is a short and cryptic order passed by the second respondent running into six lines. The order merely states that on perusal of the papers received from the senior Inspector of Police, he is satisfied that in future there is likely to a breach of peace on account of the activities of the petitioner and, therefore, it is necessary to take bond from the petitioner.

(4.) THE learned APP on instructions of the second respondent submitted that what has been issued to the petitioner is only a show cause notice and it is not a summons issued under section 113 of the said Code and, therefore, it was not necessary to pass an order under section 111 of the said Code.

(5.) WITH a view to appreciate the aforesaid submission of the learned APP, it will be necessary to refer to the relevant provisions of Chapter-VII of the said code. Section 110 empowers an Executive Magistrate to require a person against whom allegations mentioned in clauses (a) to (g) are attracted, to show cause as to why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding three years, as the Magistrate thinks fit. It must be stated here that the section specifically states that "such Magistrate may, in the manner hereinafter provided, require such person to show cause". Thus, the procedure to be followed is provided in subsequent sections. The procedure to be followed before requiring a person to show cause has been incorporated in section 111 onwards of the said Chapter VIII. Section 111 reads thus:-

"111. When a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required. "

Therefore, the condition precedent before an Executive Magistrate requires any person to show cause under section 110 is that he is required to make an order in writing setting forth the substance of the information received, the amount of bond to be executed and it's term. Therefore, on plain reading of sections 110 and 111 of the said Code, it is obvious that before an Executive Magistrate calls upon a person to show cause as to why he should not be ordered to execute a bond, as a condition precedent, the Magistrate is required to pass an order under section 111 of the said Code. Section 112 states that if the person in respect of whom such an order under section 111 is made is present, the Magistrate shall read over the said order to him and if he so desires the substance thereof shall be explained to him. If such person is not present, the Magistrate is required to issue a summons or a warrant as provided under section 113 of the said Code. If summons or warrant is issued, section 114 mandates that a copy of the order passed under section 111 shall be accompanied with the summons or warrant.

(6.) LA the present case, the proposal was submitted by the Senior Inspector of Police on 31st December, 2008 and a cryptic order on the said proposal has been passed on the same day. The proceedings were initiated on the same day i. e. on 31st December 2008. The Roznama of the proceedings shows that on that day the petitioner was not present before the learned Magistrate. Therefore, the learned Magistrate was under an obligation to issue a summons as required by section 113 enclosing therewith an order passed under section 111 of the said code. The order passed by the learned Magistrate below the proposal submitted by the Senior Inspector of Police does not set forth the substance of the information received. The said order which is a cryptic order running only in six lines by no stretch of imagination can be read as an order validly made under section 111 of the said Code. Thus, this is a case where an order purportedly passed under section 111 of the said Code is illegal and therefore, the very initiation of the proceedings is illegal. Moreover, a summons enclosing the said order was not issued to the petitioner.

(7.) THIS aspect that the initiation of the proceedings was itself illegal was noticed by this Court yesterday when the file of the proceedings was perused by this Court. This aspect was brought to the notice of the learned APP by this Court with a hope that the show cause notice will be withdrawn by the concerned officer. However, the show cause notice has not been withdrawn.

(8.) THE illegality committed by respondent No. 2 does not rest here. The roznama of the proceedings shows that the returnable date of the show cause notice was 5th January, 2009. The Roznama records that on that day an advocate filed Vakalatnama on behalf of the petitioner. The Roznama records that the show cause notice was read over to the petitioner. The Roznama further records that the petitioner was called upon to fill in a questionnaire. The Roznama further records that the petitioner was directed to furnish an interim bond. It is stated that at that stage the advocate for the petitioner pointed out to the learned Magistrate that such an order cannot be passed in view of the decisions of higher Courts. Therefore, time was granted to produce the decisions. Thereafter, the matter was adjourned from time to time as this petition was pending before this Court. Nevertheless, the Roznama dated 5th January, 2009 records a direction was issued by the Executive Magistrate to the petitioner to furnish an interim bond. Under sub-section (3) of section 116 of the Code, the Magistrate is empowered to direct a person to furnish an interim bond. However, sub-section (3) of section 116 provides that the said power of directing a person to furnish interim bond can be exercised if the learned Magistrate considers that immediate measures are necessary for prevention of breach of peace or disturbance of public tranquility or commission of any offence. Sub-section (3) of section 116 specifically requires that the learned Magistrate is required to record reasons in writing for directing a party to furnish an interim bond. A perusal of the Roznama shows that no reasons were assigned by the learned Magistrate and it is merely stated in the Roznama that the petitioner was called upon to furnish an interim bond.

(9.) THE perusal of the file shows that the express statutory provisions are completely ignored by the learned Magistrate and the entire proceedings have been conducted contrary to the provisions of the said Code. Therefore, the only option left for this Court is to quash and set aside the impugned notice and all further proceedings initiated on the basis of said show cause notice.

(10.) HENCE, I pass following order :-

(a) Rule is made absolute in terms of prayer clause (b); (b) All further proceedings on the basis of impugned notice are quashed and set aside. Order accordingly.

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Cross Citation :2006-MH L J (Cri)-1-655

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : R.M.S.Khandeparkar, P.V.Kakade, JJ

PRAMILA NAVIN SHAHA ..Vs..STATE OF MAHARASHTRA

Cri. W. P. 1709 of 2004 Of , Jan 19,2006

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Cr. P.C. – Section 107 – Interim bond – Held in proceedings u.s. 107 there can be no insistence to execute a interim bond – Order illegal – Liable to be quashed.

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JUDGEMENT

(1.) SINCE common questions of law and facts arise in both these petitions, they were heard together and are being disposed of by this common order.

(2.) HEARD. Rule. By consent, the rule is made returnable forthwith.

(3.) THE petitioners challenge the impugned order passed by the authorities below in the proceedings under section 111 of the Code of Criminal Procedure, 1973 for execution of the interim bonds and further for quashing of such bonds obtained upon passing of such orders. The reliance is placed in that regard in the decision of the learned Single Judge of this Court in The State of Maharashtra and anr. vs. Mangali Dewaivva Pupalla, reported in 1994 (1) Mh. L.J.. 483 = 1993 (1) Bom. C. R. 115 as also the decision of the Apex Court in the matter of madhu Limaye and anr. vs. Sub Divisional Magistrate. Monghvr and ors. , reported in 1971 Cri. L.J.. 1720.

(4.) IT is not in dispute that pursuant to the issuance of and service of the show cause notices dated 16th August, 2004 under section 107 of the Code of Criminal procedure, 1973, the respondents insisted for execution of the interim bonds and obtained the same on the very day i. e. on 16th August, 2004 itself allegedly for the purpose of maintaining peace in the locality under section 116 (3) of the Code of criminal Procedure, during the pendency of the proceedings.

(5.) THE provisions of law comprised under section 116 (3) of the Code of criminal Procedure clearly read thus :

"116 (3) After the commencement, and before the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary of the prevention ot a breach of the peace or disturbance of the public tranquility or the commission of any offence of for the public safety, may, for reasons to be record in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded : provided that (a) no person against whom proceedings are not being taken under section 108, section 109 or section 110 shall be directed to execute a bond for maintaining good behaviour; (b) the condition of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111.

(6.) APPARENTLY, the proviso (a) to Sub-section (3) of section 116 of the Code of Criminal Procedure clearly provides that the interim bond cannot be insisted upon in the proceedings other than those under sections 108, 109 and 110. Admittedly, in the matter in hand, the proceedings were initiated consequent to the allegations against the petitioners of likelihood of breach of peace and the act on the part of the petitioners. Obviously, therefore, those proceedings are in terms of section 107 of the Code of Criminal Procedure. Being so, considering the provisions of law comprised under the proviso (a) to sub-section (3) of section 116 of the Code of Criminal Procedure, the respondents could not have insisted for execution of the interim bonds by the petitioners in the proceedings initiated against them. On that count itself, the orders directing the petitioners to execute interim bonds and further the interim bonds obtained consequently from the petitioners are liable to be quashed.

(7.) THE learned Single Judge of this Court while dealing with the similar issue had held that "the correct interpretation of Clause (a) of the proviso to subsection (3) of section 116 of the Code is that the power of the Magistrate to direct a person to execute a Bond for keeping the peace or maintaining of good behaviour until the conclusion of the inquiry is restricted only to cases arising under sections 108, 109 or 110 of the Code. " We are in respectful agreement with the said ruling of the learned Single Judge in the matter of Mangali Dewaivva pupalla's case (supra). Being so, the impugned orders directing the petitioners to execute interim bonds are liable to be set aside and the interim bonds obtained from the petitioners are liable to be quashed.

(8.) AS regards the grievance of the petitioners for quashing and setting aside the impugned notices under section 107 of the Code of Criminal Procedure, the learned Advocate for the petitioners fairly submitted that if the petitioners are given sufficient time to file necessary reply to the said notices, the petitioners would file the same before the authorities below, while reserving the petitioners' right to approach this Court in case any final order to be passed happens to be contrary to the interest of the petitioners.

(9.) IN the result, therefore, the petitions succeed. The impugned orders dated 16th August, 2004 directing the petitioners to execute interim bonds and further the interim bonds obtained from the petitioners are hereby quashed and set aside. The petitioners to file reply to the said impugned notices dated 16th August, 2004 within a period of two weeks from today to the concerned authorities and the concerned authorities, after hearing the petitioners, to pass an appropriate order in accordance with the provisions of law. The rule is made absolute accordingly with no order as to costs. It is made clear that this Court has not expressed any opinion on the merits of the case. Petition allowed.

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Cross Citation :2000 Cr. L.J. 1888,

HIGH COURT OF ORISSA

Hon'ble Judge(s) : P.K.MISRA

Abdul Naim ...Vs..State of Orissa

Cri. Misc. 3951 Of 1998, Jul 05,1999

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Cr. P.c. S. 110 – Police has no power to arrest a persion against whom proceeding u.s. 110 is initiated – The Magistrate if thinks proper can issue a production warrant – Similarly the action of the Magistrate in calling upon the peititioner to execute a bond even though the enquiry had not commenced is without jurisdiction.

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(1.) This is an application under Section 482, Code of Criminal Procedure, 1973 (hereinafter referred to as the "Cr. P.C.") to release the delinquent who is being proceeded against in a proceeding under Section 110, Cr. P.C., now pending in the Court of the Executive Magistrate, Cuttack, in Criminal Misc. Case No. 709/98.

(2.) In the present order I shall only deal with the action of the police and the magistrate in arresting the petitioner and keeping him under detention until such petitioner was released on bail under orders of this Court.

(3.) It appears that the proceeding under Section 110, Cr. P.C. was initiated on the basis of Non-F.I.R. No. 76/98 submitted by the Officer-in-Charge of Cantonment Police Station. It appears that the petitioner was arrested by the I.I.C., Cantonment P.S. and produced along with the Non-F.I.R. No. 76/98 on 17-8-1998 before the Executive Magistrate, Cuttack, who passed the following order :-

"17-8-98. Delinquent Sk. Janu alias Abdul Naim, S/O Abdul Alim of Pension Lane, P.S. Cantonment, Dist-Cuttack produced from Police custody being arrested by I.I.C. Cantonment P.S. Non-F.I.R. No. 76/98 u/S. 110, Cr. P.C. He complains no ill-treatment by the Police. The substance of the P.R. are read over and explained to the delinquent and he is called upon to show cause why he should not execute a bond of Rs. 15,000/- with two local satisfactory sureties for the like amount to be of good behaviour for a period of six months. But the allegation is derived,. Delinquent neither prays to release him good behaviour no interim bond. Hence he is remanded to jail custody till 1-9-98. Later - Advocate J. Pal and others appear for the delinquent. Put up on date fixed."

(4.) The question arises whether the police had the power to arrest the petitioner while initiating the proceeding under Section 110, Cr.P.C. and further as to whether the Executive Magistrate had the power to detain the petitioner in jail custody. For the aforesaid purpose, it is necessary to notice the relevant provisions of the Cr.P.C.

(5.) Chapter-VIII of the Code of Criminal Procedure contains several provisions relating to security for keeping the peace and for good behaviour. Section 106 relates to security for keeping the peace on conviction. Section 107 relates to security for keeping the peace in other cases, namely, where the Magistrate receives information that any person is likely to commit breach of the peace, or disturb the public tranquillity, or do any wrongful act which may occasion a breach of the peace and disturb the public tranquillity. Section 108 relates to security for good behaviour from persons disseminating seditious matters and

Section 109 relates to security for good behaviour from suspected persons. Admittedly, Sections 106 to 109 are not applicable. As a matter of fact, the police and the Magistrate have purported to proceed under Section 110. As per the provision of Section 110, Cr. P.C., if the Executive magistrate receives information that there is a person within his jurisdiction who comes within the purview of the various clauses, namely clauses (a) to (g) indicated in Section 110, "the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit". In other words, before taking any action under Section 110, the Magistrate is required to issue notice to the delinquent to show cause. Section 111 which is applicable to provisions under Sections 107, 108, 109 and 110, Cr. P.C. lays down that the Magistrate acting under any of the above sections, shall make an order in writing setting-forth the information received, the amount of the bond to be executed, the term for which it is to be in force and the number, character and class of sureties, if any, required. Section 112 lays down the procedure in respect of the person present in Court and Section 113 provides that summons of warrant may be issued to the person not present in Court. If a person is not present in Court, the Magistrate is to issue summons requiring him to appear and if such person is already in custody, the Magistrate is required to issue a production warrant directing the officer to bring the delinquent to the Court. The Proviso to Section 113 indicates that whenever the Magistrate has reason to fear the commission of a breach of the peace and it appears to the Magistrate that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue warrant for arrest of the delinquent.

(6.) In the present case, admittedly no such warrant had been issued by the Magistrate and the police had on its own arrested the petitioner and produced the petitioner along with the report on the basis of which the proceeding was initiated. While issuing summons or warrant under Section 113, the order made under Section 111 has to be sent. Section 115 contemplates that the Magistrate has the power to dispense with the personal attendance of a person called upon to show cause. Section 116 contemplates an enquiry as to the truth of the information and sub-section (3) of Section 116 contemplates that after commencement and before the completion of the enquiry under sub-section (1), the Magistrate may for reasons to be recorded in writing, direct for execution of the bond which is otherwise commonly termed as "interim bond".

(7.) In the above background of the provisions, it is apparent that the action of the police in arresting the petitioner was wholly unjustified and without jurisdiction. Similarly, the action of the Magistrate in calling upon the petitioner to execute a bond even though the enquiry had not commenced and keeping the petitioner in custody for non-execution of the bond was also equally without jurisdiction. The learned counsel appearing for the State has not been able to justify the arrest of the petitioner and the subsequent action of the Magistrate. It is apparent that the Magistrate has proceeded to take stringent action against the petitioner even without bothering to examine the limits of his jurisdiction under Chapter-VIII.For the aforesaid reasons, the direction of the Magistrate remanding the petitioner to jail custody is found to be illegal and without jurisdiction. However, since in the meantime, the petitioner has been asked to show cause, it is directed that the proceeding, if not already completed, should be completed within a reasonable period. Since the arrest of the petitioner was without jurisdiction, the bail furnished by the petitioner stands discharged. It is, however, made clear that if the proceeding is still

continuing, the petitioner should attend the same on each date unless otherwise directed by the Magistrate.

(8.) Subject to the aforesaid observations and directions, the Criminal Misc. Case is disposed of. Order accordingly.

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Cross Citation :2006-MH L J(Cri)-1-265 , 2006-Cri.L.J.-0-1135

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : ABHAY S.OKA, J

Vasantkumar Jivrambhai Majithia ...Vs..State of Maharashtra

Criminal Writ Petition 1690 of 2005 Of , Oct 27,2005

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A) Cr.P.C. – Section 111, 116 – For the purpose of this section the allegation against a person being so dangerous and habitual offender must be supported by evidence of general repute.

B) Cr.P.C. – Section 251 – It mandates that particulars of offence must be put to accused and he will be asked whether he plead guilty or not – The P.I. acting as Executive Magistrate without following the procedure straightway asked the petitioner to execute a bond which is in printed cyclostyled form – The procedure is unjust, unfair and contarary to law – Roznama of case proves malafideds of P.I. – Proceeding is liable to be quashed – copy of order forwarded to Home Secretary.

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JUDGEMENT

(1.) RULE. The learned A. P. P. waives service for the Respondent No. 1. Service on Respondent No. 2 is dispensed with. Taken up for hearing forthwith. I have heard the learned Counsel for the Petitioner and the learned Associate Advocate General for the state.

(2.) THE challenge in this petition under article 227 of the Constitution of India read with section 482 of the Code of Criminal procedure, 1973 (hereinafter referred to as "the said Code") is to the show cause notice dated 26th April, 2005 issued by the Special Executive magistrate, Mulund Division, Mulund, under section 111 of the said Code.

(3.) THE learned Counsel for the petitioner submitted that the notice under section 111 of the said Code is contrary to law. He pointed out that the notice recites that there was a dispute between the Petitioner and the witness No. 1 over the business of cable network business. It is alleged that the petitioner hurled abuses at the witness No. 1 and therefore, a N. C. complaint has been registered against the Petitioner for commission of offence under sections 323 and 504 of the indian Penal Code. It is alleged that on 26th april, 2005 at about 9. 45 a. m. the Petitioner threatened the witness No. 1 and warned him to withdraw the N. C. complaint by warning him that in Mumbai number of accidents take place. By the said show-cause notice, the petitioner was called upon to show-cause as to why he should not be directed to furnish a bond for good behaviour for one year with one surety in the sum of Rs. 5,000/- of a respectable person. The Petitioner was called upon to remain present on 10th May, 2005 in the office of the Special Executive Magistrate. It is alleged that on 10th May, 2005, when the petitioner met Assistant Police Inspector Shri. Rapade, who asked the Petitioner whether he was willing to settle the dispute by paying cash or whether he was willing to provide a cable line connection. It is alleged that it is the said shri. Rapade who served show cause notice on the Petitioner. On 10th May, 2005, the petitioner narrated all this to the Assistant commissioner of Police, under whose signature the notice was issued. Thereafter API Shri. Rapade and a Constable Shri. Sapkal started demanding money for themselves. On the next date fixed i. e. on 14th June, 2005, the Petitioner attended the office of the Special Executive magistrate along with his Advocate. His advocate submitted an application on that day with a prayer to furnish copies of the complaint lodged with the Police Station to enable the petitioner to submit a reply. An adjournment was sought for a period of one month. The allegation in the petition is that the Application made by the Advocate was not accepted and the Petitioner was forced to execute a bond.

(4.) WHEN this petition came up before this Court on the earlier date, the learned A. P. P. produced a copy of the order dated 14th June, 2005 passed by the Special Executive magistrate under section 107 of the said Code directing the Petitioner to furnish a bond in the sum of Rs. 5,000/ -. Therefore, the Petitioner was permitted to amend the said petition for challenging the said order. Accordingly amendment was carried out for incorporating the challenge to the said order.

(5.) ON 6th September, 2005, this court passed the following order:

"1. My attention has been invited by the learned A. P. P. to circular dated 3rd september, 2005 issued by the Home ministry. A copy of the circular is taken on record. The learned Counsel for the petitioner has placed on record a copy of the decision of the Division Bench of this Court reported in 2001 ALL MR (Cri.) page 2079 (Surendra s/o. Ramchandra Taori Vs. State of maharashtra and ors.). In paragraph 19 thereof, this Court observed that vesting of powers of Special Executive magistrates in Police Officers of whatever rank has resulted in blatant misuse of the said powers to the detriment of the Fundamental Rights of the citizens as enshrined in the Article 21 of the Constitution of India. 2. The Division Bench has recommended that the State should take recourse to the Section 478 of the Code of Criminal procedure, 1973 by vesting the powers of Special Executive Magistrate in the judicial Magistrate First Class or the metropolitan Magistrate. 3. The learned A. P. P. seeks time to take instructions as regards the aforesaid aspect. Stand over for two weeks for further orders. " On the last date the learned Associate Advocate general produced copies of the Circulars dated 3rd September, 2005 and 28th April, 2003. The learned Associate Advocate General also produced a copy of the affidavit filed on behalf of

the State Government in Criminal Writ petition No. 173 of 2002 filed in the Nagpur bench of this Court as well as the order passed by the Bench at Nagpur in the said case.

(6.) THE learned Counsel for the petitioner submitted that the Special Executive magistrate did not follow the procedure prescribed by the said Code and on 14th June, 2005 without giving any opportunity of being heard to the Petitioner forced the Petitioner to execute a bond. He submitted that the State government has refused to abide by the directions given by this Court in the said decision reported in 2001 ALL MR (Cri.) page 2079 (Surendra s/o. Ramchandra Taori Vs. State of Maharashtra and ors.). He submitted that the Division Bench of this Court recommended that the State Government should consider of exercising powers under section 478 of the said Code by vesting the powers of the Executive Magistrates in the judicial Magistrate First Class or the metropolitan Magistrate. He pointed out the roznama of the proceedings and stated that the case has been conducted in a high handed manner contrary to the procedure prescribed by the said Code. He pointed out that the order dated 14th June, 2005 is a cyclostyled order and it shows non application of mind inasmuch as the said order records that the Petitioner accepted the allegations made against him and tendered apology. He pointed out that the petitioner never accepted the allegations and never tendered apology.

(7.) THE learned Associate Advocate general has fairly argued the matter and has assisted this Court. He has placed reliance on the Circulars dated 28th April, 2003 and 3rd september, 2005 issued by the Home Ministry for the guidance of the Special Executive, magistrates. He pointed out that the Circular dated 3rd September, 2005 has been issued after the procedural lapses on the part of the special Executive Magistrate in this case were brought to the notice of the State Government. He submitted that for the reasons which are recorded in the affidavit filed in Writ Petition no. 173 of 2002, the State Government has expressed inability to accept the recommendations made by the Division Bench of this Court in the Surendra's case (supra). He submitted that the State Government has made in-depth consideration of the recommendation of this Court.

(8.) I have considered the submissions. With a view to decide the controversy involved in this petition, it will be necessary to refer to the provisions of section 107 which reads thus:

"107. Security for keeping the peace in other cases.- (1) When an Executive magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility and is of opinion that there is sufficient ground for proceeding, he may in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit. (2) Proceeding under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act as aforesaid beyond such jurisdiction. "

Sections 111 to 116 are also relevant for the purpose of this petition, which read as under:

"111. Order to be made.- When a magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any)required. "

"112. Procedure in respect of person present in Court.- If the person in respect of whom such order is made is present in court, it shall be read over to him, if he so desires, the substance thereof shall be explained to him. "

"113. Summons or warrant in case of person not so present.- If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is to bring him before the Court; provided that whenever it appears to such magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest. "

"114. Copy of order to accompany summons or warrant.- Every summons or warrant issued under section 113 shall be accompanied by a copy of the order made under section 111, and such copy shall be delivered by the officer servingor executing such summons or warrant to the person served with, or arrested under, the same.

"115. Power to dispense with personal attendance.- The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace or for good behaviour and may permit him to appear by a pleader. "

"116. Inquiry as to truth of information.- (1) When an order under section 111 has been read or explained under section 112 to a person in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary. "

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons-cases.

(3) After the commencement, and before the completion, of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reason to be recorded in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded: provided that - (a) no person against whom proceedings are not being taken over under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good

behaviour. (b) the condition of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111.

(4) For the purposes of this section the fact that a person is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be provided by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt within the same or separate inquiries as the Magistrate shall think just.

(6) The inquiry under this section shall be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry of the said period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs: provided that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.

(7) Where any direction is made under subsection (6) permitting the continuance of proceedings, the Sessions Judge may, on an application made to him by the aggrieved party, vacate such direction if he is satisfied that it was not based on any special reason or was perverse. "

(9.) THE power under section 107 can be exercised when the Special Executive magistrate receives an information that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasions a breach of peace or disturb the public tranquility. The said section further provides that if the executive Magistrate is of the opinion that there is sufficient ground for proceeding, he may in the manner provided in the Code require such person to show cause why he should not be ordered to execute a bond (with or without sureties) for keeping peace for such period, not exceeding one year, as the Magistrate deems fit. Section 111 of the said Code mandates that when a Magistrate acting under section 107 deems it necessary to require any person to show cause, he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force. Section 113 provides that if such person to whom notice is intended to be issued is not present in Court, the Magistrate shall issue a summons requiring him to appear. In exceptional circumstances, the said section gives powers to the learned Magistrate to issue warrant of arrest. Section 114 mandates that every summons issued under section 113 shall be accompanied by a copy of the order made under section 111 and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with or arrested under the same. Section 116 lays down the procedure for holding the inquiry. Under section 116, the Executive Magistrate is under an obligation to make enquiry into the truth of the information upon which action has been taken and for that purpose he has to take such further evidence as may be necessary. Sub-section (2) of section 116 mandates that such an enquiry shall be made as nearly as may be practicable in the manner prescribed for conducting the trial and recording evidence in summons cases. Sub-section (3) provides that if the Magistrate considers that immediate measures are necessary for the prevention

of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety, he may after commencement but before completion of the enquiry, for reasons to be recorded in writing direct the person in respect of whom the order section 111 has been made to execute a bond with or without surety for keeping peace or maintaining good behaviour until conclusion of the inquiry and may detain him in custody until such bond is executed or in default of execution, until the inquiry is concluded.

(10.) IN the present case a perusal of the case file which was produced before this court shows that a copy of the order passed under section 111 was not forwarded with the summons issued to the Petitioner under section 113 of the said Code. In fact the Roznama of the proceedings does not record that a separate order as contemplated by section 111 is passed setting forth the substance of the information received. The roznama of the proceedings records that on 10th May, 2005, the Petitioner remained present and he submitted a reply to the show-cause notice. Roznama dated 18th may, 2005 records that witness No. 1 was present and he was heard. On that day the petitioner sought time. The next date was fixed as 26th May, 2005 on which adjournment was granted to the Petitioner. On the next day, the hearing could not take place as the concerned officer was not available. Roznama dated 7th june, 2005 records that after commencement of the proceedings, there are complaints filed against each other by the Petitioner and the witness No. 1. The case was adjourned to 14th june, 2005. Roznama dared 14th June, 2005 records what transpired on that day. The english translation thereof is as under: "opponent present for hearing. Witness No. 1. present for hearing. Enquiry was made with the opponent herein whether he was prepared to execute a bond, the opponent made a request to accept personal bond. Therefore, the request of the opponent was accepted. The contents of the show-cause notice were read over and explained to the opponent. A personal bond for maintaining peace and keeping good behaviour in the sum of Rs. 5,000/- for a period of one year was obtained in writing from the Opponent and the matter was disposed of. " the order passed on 14th June, 2005 appears to be in a printed or cyclostyled form. The printed portion of the order records that the petitioner accepted the allegations made against him and has prayed for acceptance of apology. The printed portion of the order further records that on the basis of the evidence produced by the Senior Inspector of Police, Mulund Police station, the Special Executive Magistrate has come to the conclusion that the Petitioner was having criminal tendancies and from the petitioner there was a likelihood of breach of peace and tranquility in the area and therefore, the order was passed directing him to furnish bond. In the printed format of order, only the name of the Petitioner, his address and the bond amount has been filled in by hand. It is pertinent to note that the Roznama dared 14th June, 2005 does not record that the Petitioner accepted the correctness of the allegations made against him and tendered apology. What is recorded in the roznama is that the Special Executive magistrate asked the Petitioner whether he was willing to furnish a bond and the Petitioner requested that he may be allowed to furnish a personal bond. There is no reference to any separate order passed by the Executive magistrate on 14th June, 2005. There is no reference in the Roznama to evidence produced by the Senior Inspector of Police. After perusing the file, I found that no such evidence by the Senior Inspector of Police is on record. Thus the order dated 14th June, 2005 shows a complete non-application of mind. Though there is nothing on record to show that the petitioner accepted the allegations made against him and tendered an apology, the order records the acceptance of allegations by the Petitioner and apology.

(11.) GOING by the Roznama of the proceedings, it appears that a reply was filed by the Petitioner on the earlier date. The provisions of section 116 of the said Code mandate that as far as possible, the procedure for summons case shall be adopted in conducting the inquiry. Section 251 of the said code which deals with the procedure of summons case provides that the particulars of the offence alleged against the Accused shall be stated to him and shall be asked whether he pleads guilty or has any defence to make. Section 252 further provides that if the accused pleads guilty, the Magistrate is required to record his plea. The Roznama records that the Special Executive Magistrate asked the petitioner whether he was willing to furnish bond. The Petitioner had filed a reply contesting the show-cause notice and therefore, there was no occasion for the learned Magistrate to ask the question which is recorded in the Roznama. When the Petitioner had filed a reply to the show-cause notice, it is very difficult to accept that the Petitioner made a prayer for seeking permission to give personal bond. It is pertinent to note that the Roznama does not record that the Petitioner pleaded guilty or that he tendered apology. As stated earlier, it is impossible to accept that the Petitioner voluntarily offered to give personal bond. As the Petitioner did not accept the allegations made against him in the show-cause notice and even assuming that interim order as contemplated by sub-section (3) of section 116 of the said Code was required to be passed, the learned Magistrate was bound to record reasons in writing. In the present case, the order dated 14th June, 2005 is the final order which proceeds on an erroneous assumption that the Petitioner accepted the correctness of the allegations made against him and tendered apology. The order is erroneous for the reason that it relies upon the non-existing evidence allegedly produced by the Senior inspector of Police. There is complete non-application of mind on the part of the officer concerned. It is obvious that the procedure which is followed by him is unjust, unfair and contrary to law.

(12.) IT will be necessary to refer to the decision of the learned Single Judge of this court reported in 1993 Mh. L. J. page 1409 (Smt. Christalin Costa and others Vs. State of Goa and others). In paragraph 7 this Court observed thus:

"7 In my view all these submissions of shri. Nadkarni seems to be sound and deserve acceptance. As far as the last grievance is concerned a bare perusal of section 107 of Criminal Procedure Code read with section 111 shows that such proceedings are to be instituted only in respect of information received by the magistrate if he is satisfied that there is any danger or likelihood of somebody committing breach of the peace and disturbing public tranquility. Obviously when there are quarrels between two private individuals it appears that this situation is not contemplated by these legal provisions. Quarrels between individuals are not normally creating any problem of public order and at the most it may lead to a problem of law and order to be dealt with by the appropriate penal law. Proceedings under section 107 are always dealing with preventive measures to be taken by the magistrate in order to pre-empt any possibility of breach of peace and disturbance of public tranquility. In the case of Jayant D. Shah and 4 others Vs. State of maharashtra, 1986 (1) Crimes 305, this court has held that the provisions of sections 107 to 110 cannot be used or exercised for satisfying private vendetta of a querulous person and the exercise of powers by the Magistrate under the aforesaid sections on the basis of incidents involving trivial quarrels without application of mind would amount to gross abuse of the process of law. "

(Emphasis supplied). In paragraph 8 the learned Single Judge after considering the provisions of section 107 and 111 of the Code proceeded to hold thus:

"8. . . . . The harmonious construction of these two provisions clearly suggests that no order requiring any person against whom proceedings under section 107 of Criminal procedure Code have been instituted can be passed by the Magistrate to execute a bond for maintaining peace unless a notice is issued to him to show cause as to why he should not be ordered to execute such a bond and this notice is to be given to him only after an order in writing is made by the Magistrate setting forth the substance of the information and among others details of the bond to be executed by the said person. It follows therefore that the magistrate is expected to apply his mind on the material placed before him by the police along with his report and on giving an opportunity to the opposite party to have a say on the question of executing a bond issue appropriate orders in this respect. The execution of the bond appears therefore to be an independent facet of the inquiry which the Magistrate is entitled to hold on the basis of the report forwarded to him by the police. Such inquiry as to the truth of the information forwarded to him in the report by the police is contemplated in section 116 of Criminal Procedure Code. It is true that its sub-section (3) provides that the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety, may direct the person against whom proceedings have been instituted under section 107 and an order under section 111 has been made to execute a bond. But this power of the Magistrate can be exercised by him only after the commencement and before the completion of the inquiry. "

(Emphasis supplied).

(13.) IN the present case the show-cause notice issued under section 111 and the order dated 14th June, 2005 are required to be quashed and set aside only on the ground that there is no separate order passed by the learned magistrate as contemplated by section 111 of the said Code. Passing of such an order is a condition precedent for initiating proceedings. Apart from this ground, there is a complete non-application of mind and the procedure followed by the learned Executive Magistrate is contrary to law. At this stage it will be necessary to refer to the circular dated 28th april, 2003 issued by the Home Ministry. Certain guide-lines have been issued by the home Ministry to the Special Executive magistrates. In Circular dated 3rd September, 2005, the State Government has directed that the cyclostyled orders under section 107 should not be issued and the order should not be passed without recording reasons as the orders are quashed generally on these grounds.

(14.) RELIANCE is placed by the learned counsel for the Petitioner on the recommendation of this Court made in the case of Surendra Taori (supra). In paragraph 19 of the said Judgment, the Division Bench of this Court observed thus:

"19. . . . . Therefore, in our humble opinion, it is high time that the State, which is duty bound to protect the fundamental right of its citizen and particularly relating to their liberty, should resort to section 478 of the Code of Criminal Procedure which vests in the State powers to order functions allocated to Executive Magistrates and such powers vested in favour of police officers as Special Executive Magistrate particularly in reference to Chapter VIII proceedings as they are commonly known and relate to sections 108 to 110 as well as sections 145 and 147 of the Criminal Procedure Code to be made over to Judicial Magistrate of the first Class or Metropolitan Magistrate, as the case may be. "

My attention has been invited to the reply filed by the State in Criminal Writ Petition No. 173 of 2002 before the Nagpur Bench of this Court. In the said reply reasons have been given by the State for not accepting the recommendations of the Division Bench. In the said affidavit, it is stated thus:

"7. I respectfully say and submit that the government has given anxious consideration to the observations made by this Hon'ble Court. Considering the present scenario and the law and order situation, the State Government is of the opinion that it may not be advisable to revert back to pre-1980 position and entrust this power to the Judicial Magistrates or Metropolitan magistrates as observed by this Hon'ble court. In my respectful submission, therefore, it is not necessary to withdraw the functions allotted to the Executive magistrates relating to scrutiny for keeping peace and for good behaviour provided under Chapter VIII and maintenance of public order and tranquility provided under chapter X of the Code of Criminal procedure. "

In my view no grievance can be made by the petitioner as regards failure of the State to accept the recommendation of this Court.

(15.) HENCE the petition succeeds. The state Government is expected to issue necessary direction to ensure that the provisions of the said Code are scrupulously followed and complied with by the Special Executive magistrates. Hence the following order is passed:

i) The impugned order dated 14th June, 2005 is quashed and set aside and the proceedings initiated on the basis of the impugned show cause notice are quashed,

ii) The Principal Secretary to the Home department, State of Maharashtra, is directed to circulate a copy of this judgment to all the Special Executive magistrates to ensure that the proceedings under Chapter VIII of the code are conducted strictly in accordance with law.

iii) The parties to act on an authenticated copy of this order. Petition allowed.

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Cross Citation :2008-JIC-2-418 , 2008-ADJ-4-529

HIGH COURT OF ALLAHABAD

Hon'ble Judge(s) : R. K. RASTOGI, J.

Har Charan ...Vs.. State of U.P

Cri.M.Appln. 3646 of 2008 Of , Mar 05,2008

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A) Cr. P.C. – Section 110 – Notice – Printed Cycostyled Proforma used by Magistrate – Shows non-application of judicial mind and is abuse of process of court – The proceeding based on such vague notice is quashed.

B) The notice issued by Magistrate is based on report of station officer – Nothing material to show how applicant was so dangerous and despirate – Notice is vague – Entire proceeding vitiated .

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JUDGEMENT

(1.) THIS is an application under section 482, Cr. P. C. for quashing the order dated 24-10-2007 and the notice dated 18-12-2007 issued against the applicant in Case No. 01 of 2008 -State v. Har Charan under Section 110 (g), Cr. P. C. , police Station Barsana, district Mathura, pending in the Court of Sub divisional Magistrate, Chhata, District Mathura.

(2.) HEARD the learned counsel for the applicant, as well as learned A. G. A. for the state at the stage of hearing on admission of this application. Since the point involved in the matter is legal one I am deciding it at this stage on merits with the consent of the parties without calling for any counter affidavit or rejoinder affidavit. Since these proceedings have been drawn on the report of the S. O. of P. S. Barsana, District Mathura against the applicant and since Smt. Babita opposite party No, 2 is not a party in the above case, no notice is being issued to her,

(3.) THE facts relevant for disposal of this application are that on 18-12-2007, Smt. Ritu Sharma, Sub Divisional Magistrate, chhata, Distrclt Mathura issued a notice under Section 111, Cr. P. C. for drawing proceedings against the applicant under Section 110 (g), cr. P. C. It is a notice issued on a cyclostyled proforma and in its para 1, the contents of Section 110 (g), Cr. P. C. have been reproduced. There is reference of the report of S. O. of P. S. Barsana dated 24-10-2007 against applicant Har Charan at its top, and then it has been stated in this cyclostyled notice that Har Charan is criminal and he is involved in antisocial activities and on account of his fear and terror nobody was ready to adduce evidence against him. He can do any untoward incident which may result into breach of peace. So a notice was given to him to appear before the Court on 28-1 -2008 and show cause as to why he should not be required to execute a personal bond of Rs. 1,00,000/- with two surety bonds of the like amount for maintaining peace for three years. The grounds on the basis of which the above conclusion was drawn that he was so desperate and dangerous as to render his being at large without security is hazardous to the

community have not been mentioned in this notice and there is only a reference of the report of the S. O. , P. S. , Barsana, dated 24-10-2007 in support of the above allegation.

(4.) A copy of the above report dated 24-10-2007 has been filed as annexure 6 to the application and there is again a repetition of the requirements of Section 110 (g), Cr. P. C. and at its bottom in the column of criminal history of the applicant, there is reference of Case Crime No. 264 of 2007 under Sections 323, 504, 506, 324, 452, i. P. C. P. S. Barsana against the applicant.

(5.) LEARNED counsel for the applicant has submitted that in the aforesaid case crime 264 of 2007, originally N. C. R. No. 54 of 2007 was registered on the report of Smt. Babita against Vijay Singh, Gopi Chandra, smt. Leela and Smt, Somwati under Sections 323, 504 and 506, I. P. C. in respect of the incident which had allegedly taken place on 29-6-2007 at 3. 30 p. m. This N. C. R. was registered against the above-named accused of that case on 29-6-2007 at 6,30 p. m. Learned counsel for the applicant pointed out that the name of present applicant Har Charan does not find place in this N, C R, as an accused, and the allegation in the above F. I. R, is that Smt, Babita had gone to these accused persons to acquire about her husband, and then all these above named four accused persons had beaten her by kicks, fists, lathi, Danda, and had abused her.

(6.) IT further appears that after the lapse of four days, Smt. Babita moved another application before the S. O. , Barsana on 3-7-2007 in which she stated that on 29-6-2007 an incident of Maar Peet had taken place with her but in that incident Vijai Singh, gopi Chandra, Smt. Leela and Smt. Somwati (named in the above F. I. R.) had not participated, and she had lodged this wrong report against them on account of being perplexed. She stated that actually Har Charan, mahesh, Veer Pal and Prem Pal had committed maar Peet with her after entering her house, and then on the basis of this application n. C. R. No. 54 of 2007 was converted into Case Crime No. 264 of 2007 adding offences under Sections 324 and 452, I. P. C. against the above-named newly added accused persons.

(7.) LEARNED Counsel for the applicant submitted that thus a perusal of the record of the case upon which the S. O. , Barsana has placed reliance for taking action against the applicant under Section 110 (g), Cr. P. C. goes to show that the applicant was not named in the original F. I. R. dated 29-6-2007 which was lodged soon after the incident, and the subsequent addition of the name of the applicant Har charan and three others as participants in place of those named in the original N. C. R. after the lapse of four days goes to show that the entire case against Har charan is false, and so the proceedings should be quashed.

(8.) THE learned A. G. A. submitted in his reply that only a show cause notice was issued to the applicant and he had the efficacious remedy to challenge the proceedings by filing reply to the notice, and the present application under Section 482, Cr. P. C. is not maintainable. In reply, the learned counsel for the applicant submitted that in this case, the record shows that the learned magistrate has simply signed a cyclostyled notice without application of mind because if she had gone through the record of Case crime No. 264 of 2007 referred in the report of the S. O. , P. S. Barsana, she would have come to know that the applicant was not named as an accused person in the N. C. R. and his name was added as an accused after expiry of four days from the incident, and that, besides implication of the applicant as accused in that case at such a later stage, no material was referred to in that report to show that the applicant was terrorist and dangerous person

and that his being at large without security was hazardous to the community. He has further pointed out that on this report of the S. O. the rubber stamp "awalokit notice under S. 111, cr. P. C. ke antargat jari hai", was affixed and the learned S. D. M. without application of mind has simply initiated it at the relevant place of the rubber stamp. It was further pointed out that the notice under section 111 Cr. P. C. is also a cyclostyled notice and Har Charan's particulars only have been mentioned in it with a reference of the report of the S. O. Barsana dated 24-10-2007 without mentioning the facts as to how the applicant was desperate and dangerous to the community. He submitted when an order is passed and a notice is issued without application of mind, as has been done in the present case, the same can be challenged under Section 482, Cr. P. C. as issuance of such an order and notice amounts to abuse of the process of the Court.

(9.) I agree with the above contention of the learned counsel for the applicant because there is nothing in the report of the s. O. , P. S. Barsana, District Mathura dated 24-10-2007 to show as to how the applicant was so desparate and dangerous as to render his being at large without security hazardous to the community. The notice issued on the basis of such a vague report and the proceedings drawn on the basis of such a vague notice amount to abuse of the process of the Court and so they can be challenged by filing an application under Section 482, Cr. P. C.

(10.) THE application under Section 482, cr. P. C. therefore deserves to be allowed and the order of learned Magistrate for issuance of notice to the applicant passed on the above report dated 24-10-2007 and the notice dated 18-12-2007 issued in pursuance thereof deserve to be set aside. The state shall however be at liberty to draw afresh proceedings against the applicant under Section 110 (g), Cr. P. C. in accordance with law giving particulars of all that material in the notice in case there is sufficient material before it for drawing proceedings against the applicant.

(11.) HENCE the application under Section 482, Cr. P. C. is allowed and the order passed by the learned Magistrate on the report dated 24-10-2007 of the S. O. , P. S. Barsana, district Mathura and the notice dated 18-12-2007 issued by the S. D. M. Chhata, District mathura are set aside and the proceedings drawn against the applicant on the basis of the above order and notice are hereby quashed. The State is however at liberty to draw a fresh proceedings against the applicant in accordance with the provisions of law as discussed above. Application allowed.

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Cross Citation :2009-Chand Cri C-1-153 , 2008-Cr. L.J.-2333

HIGH COURT OF DELHI

Hon'ble Judge(s) : JUSTICE SHIV NARAYAN DHINGRA, J.

Keshav Kumar ....V/s..... Sadhu Rai

W.P(Crl.) 2448 of 2006 Of , Feb 25,2008

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Cr. P.C. – Section 107, 151 – Dispute between two parties – Complaint disclosed no Cognizable offence – Police Officer to help the criminals detained the petitioner U.S. 151 of Cr. P.C. – Held, proceeding against petitioner is illegal and unlawful – Proceeding quashed – Petitioner gratned with a token compensation of Rs. 50,000/- for illegally detaining him – Commissioner directed to initiate proceeding against erring police personels.

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JUDGEMENT

(1.) THIS Writ Petition under Article 226 and Articles 14,21 and 22 of the Constitution of India read with Section 482 Cr. P. C. For appropriate directions of enquiry into the acts of the police officials in illegally detaining the Petitioner and sending him to Tihar Jail invoking Section 107/151 cr. P. C. on a false complaint of one Ashok Kumar Munna (Respondent No. 5), a Bad character of the area and for quashing the proceedings.

(2.) PETITIONER has stated that he was a businessman and living at flat No. C-48, Karampura, Moti Nagar, New Delhi at first floor. Respondent No. 5, Ashok Kumar Munna was a known Bad Character of the area of Police Station moti Nagar. He contested the elections for the area Councilor and MLA. He was agent of local leaders and local police in illegal recovery of money from the traders and innocent people. He flourished under the patronage of local leaders and police and also was indulging in grabbing and encroaching public land. He alleged that Respondent No. 5 made unauthorized encroachment covering open public place towards rear portion of the flat and raised a construction upto the second floor, in this process, he closed the window/ventilation of Petitioner's only toilet-cum-bathroom. Against this illegal action, Petitioner had made complaints to MCD and also filed a Civil Suit No. 471/04 seeking demolition of the unauthorized construction and his right to ventilation. The Civil Suit was still pending. He submitted that on 16th July, 2006 at the instance of respondent No. 5 he was taken to Police Station and put behind bars. He was threatened by Respondent No. 2, Sub-Inspector Sudesh Ranga that unless he withdraws his complaints against Ashok Kumar Munna and expresses sorry to him and also withdraws his Court case, he would not be let off and would be harassed like that. On 16th July, 2006 he was not allowed to go home and kept illegally in Police Station. On 17th July, 2006, when respectable persons of the area went to the Police Station to give surety for the Petitioner, they were threatened by SI Sudesh Ranga and Ashok Kumar Munna, who told that he would ensure that the Petitioner was not bailed out for a week. Petitioner was produced before ACP (SEM) and was sent to Tihar Jail on 17th July, 2006. The acp did not listen to the requests and pleas of the Petitioner or his Advocate or other persons of the locality, who had come to stand surety to him. His surety was not accepted and he was sent to Judicial Custody. He was released from the Tihar Jail in the evening of 18th July, 2006. It is stated that later on Petitioner obtained certified copies of the Kalandra proceedings against him, he found that proceedings under Section 107/151 Cr. P. C were

initiated against him at the instance of Ashok Kumar Munna, who had been threatening him earlier and the Petitioner had made complaints against him to police several times.

(3.) ACCORDING to the Status Report filed by the police, the stand of the police is that on 16th July, 2006, a complaint was lodged at the Police station by Ashok Kumar Munna. On receiving this complaint, Sudesh Ranga, SI (Respondent No. 2) went to the house of Petitioner and on seeing police, petitioner started abusing Respondent No. 5 and stated in the fit of rage that he would not get the toilet repaired and started shouting. As there was every apprehension of commission of some cognizable offence, Petitioner was arrested u/s 107/151 Cr. P. C. It would be worthwhile to reproduce the complaint of Ashok kumar Munna (Respondent No. 5) on the basis of which proceedings were initiated against the Petitioner. The complaint is without date. There is no stamp of receipt of it at Police Station. The complaint is addressed to SHO PS. Moti nagar and reads as under: it is prayed that I, Ashok Kumar Munna S/o Late Shri Har Sahai, I am resident of c-43 Karam Pura. My neighbour is Keshav Kumar S/o Shri Narayan Singh from whose toilet water always seeps into our house. Due to this, the entire wall has become damp and we get foul smell into our entire room. I had tried to make him understand about this problem but no solution has been found. Today when I again wanted to talk to him over this topic, he refused to talk and told that he would not get this repaired whatever I may do. He quarreled with me and did 'maarpeet', therefore I have come to Police Station for registration of report. Appropriate proceedings be initiated against him.

(4.) A perusal of above complaint would show that the complaint disclosed no cognizable offence, no medical of Ashok Kumar Munna was got done by police. A civil case was already going on between the parties. As per petitioner, Ashok Kumar Munna himself had made unauthorized construction abutting toilet of the house of the Petitioner thus closing all ventilation of the toilet. A civil case in respect of removal of this unauthorized construction was also going on. It is very surprising that on the basis of this complaint which does not disclose any cognizable offence and only disclosed a civil dispute, police officials went to the house of Petitioner, arrested him and thereafter registered proceedings under Section 107/151 Cr. P. C. alleging petitioner's shouting and collection of people there. Sections 107, 108 and 109 are to maintain public tranquility and to prevent a wrongful act that may occasion a breach of peace or disturb public tranquility. The Section cannot be invoked when there is a civil dispute between the two neighbours in respect of unauthorized construction. Police cannot act as an agent of those, who do unauthorized construction and cannot be an accomplice of those, who try to swallow their neighbours' rights. The proceedings initiated against the petitioner at the instance of Ashok Kumar Munna only re-confirm the league between the criminals and the police and also shows how the life and liberty of innocent persons is at stake at the hands of such police officials. It is apparent that Petitioner was taken into custody by police on 16th July, 2006 itself without any rhyme and reason. The undated complaint was obtained later on to justify the action and high handedness. He was produced before ACP (SEM)on next day, who sent him to Tihar Jail without application of mind and without seeing if there was a case worth proceeding under Section 107 or 151 Cr. P. C. ACP while acting under Section 107/151 Crp. C. acts as a Special Executive magistrate and performs quasi-judicial functions. He is supposed to apply his mind which GOD has given to him and not to act blindly on the report of his subordinates and juniors. No reason has been given in the Status Report as to why the sureties produced by the Petitioner on 17. 7. 2006 were not taken on record and accepted on the same day and why he was sent to Tihar Jail.

(5.) IT is apparent that the proceedings against the Petitioner were unlawful and illegal. The Petitioner was detained by police illegally from 16th july 2006 to 18th July, 2006 when he was released after his surety bond was accepted by the ACP on 18th July, 2006. The petition of the Petitioner is allowed. The proceedings under Section 107/151 Cr. P. C. are quashed. Respondent no. 1 is directed to pay a token compensation of Rs. 50,000/- to the Petitioner for illegally detaining him in custody for two days. The Commissioner of Police is also directed to initiate departmental proceedings against the erring police officials being Respondents No. 2 to 4, who acted in gross contravention of law and who were in league with the area criminals. The Petitioner would be at liberty to claim appropriate compensation under law.

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Cross Citation :2009-Chand Cri.C.-1-149 , 2008-AD(Cr)-3-165

HIGH COURT OF DELHI

Hon'ble Judge(s) : JUSTICE SHIV NARAYAN DHINGRA, J.

Purshottam Ramnani ..Vs.. Government of NCT of Delhi

W.P.(Crl.) 1392 of 2007 Of , Feb 28,2008

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Cr. P.C. – Section 151 – Illegal proceeding and wrongful confinement – A token compensation of Rs. 50,000 granted to petitioner.

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JUDGEMENT

(1.) THIS Writ Petition under Article 226/227 of the Constitution of india read with Section 482 Cr. P. C. has been filed by the Petitioner with following prayers:

(a) issue an appropriate writ, order or direction to the respondents no. 2 and 3 not to Pobstruct/restrain the petitioner from visiting flat no. 53, Swastik kunj, Plot No. 29, Sector-13, Rohini, Delhi;

(b) issue appropriate writ, order or direction to the respondents no. 2 and 3 to register the complaint dated 7. 9. 2007 of the petitioner addressed to dcp (North West);

(c) issue appropriate writ, order or direction by quashing the proceedings under Sections 107/151 of the Code of Criminal Procedure initiated against the petitioner at the instance of respondents no. 4 and 5;

(d) issue appropriate writ, order or direction against respondents 1 to 3 to award damages to the petitioner for having been illegally sent to jail at the instance of respondents no. 4 and 5;

(e) Award costs in favour of the petitioner and against the respondents; and

(f) Pass such other and further order (s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(2.) THE Petitioner has contended that he knew one Mr. Raj Kumar bansal and his wife Urvashi Bansal (Respondent No. 4). Mr. Raj Kumar Bansal requested him for financial help and the Petitioner extended all financial help to him from time to time. Mr. Raj Kumar Bansal used to repay the loan to the petitioner. Mr. Raj Kumar Bansal and Urvashi Bansal had no child and they adopted a baby girl Neelambri Bansal. They invested money to purchase three flats numbers 1, 53 and 198 in Swastik Kunj, Sector-13, Rohini, Delhi between 10. 3. 1995 to 29. 12. 1995. The Petitioner had started the business of construction and developing of buildings by that time and he renovated and decorated Flat No. 1, Swastik Kunj at the request of Mr. Raj Kumar Bansal. Quarrels started between Mr. Raj Kumar Bansal and his wife Urvashi Bansal. The petitioner in order to help them, renovated the second flat no. 198, Swastik kunj so as to rent it out and have some running income. The flat was let out to one Shri Ramesh Kumar at the monthly rent of Rs. 7,000/- per month.

(3.) IN March 2000, due to the strained relations, Urvashi Bansal was turned out by her husband Mr. Raj Kumar Bansal from flat no. 1, Swastik Kunj and she started living with her mother. After being turned out she approached the petitioner and requested for financial assistance. Petitioner claims that he advanced a loan of Rs. 5 lac to her for renovation of 3rd flat i. e. flat no. 53, swastik Kunj. She spent about Rs. 2. 5 lac on the renovation of that flat and started living there. Thereafter, she started seeking financial help from the petitioner from time to time. Petitioner used to treat her as his sister. He advanced a fresh loan of Rs. 10 lac to her and assisted her in the legal battle against her husband and also assisted her in continuation of studies of her adopted daughter. Since she could not repay the loan availed from the petitioner, she executed a Power of Attorney in Petitioner's favour in respect of flats no. 1 and 198, Swastik Kunj, Sector-13, Rohini and confirmed that so long as the loan taken by her was not returned, the Petitioner could retain the power of Attorney of the two flats. She handed over the vacant physical possession of flat no. 198, Swastik Kunj to the Petitioner. She then asked the petitioner to shift to flat no. 53, Swastik Kunj and both started living in same flat. The Petitioner claims that he disposed of his father's flat no. B-144, karam Pura, Delhi and started living with Respondent No. 4 at 53, Swastik Kunj since May, 2003. He also advanced another loan of Rs. 8 lac to her and in lieu of that Respondent No. 4 handed over all the original documents pertaining to flat no. 53, Swastik Kunj to him and also executed an undertaking in his favour affirming that she will repay the loan amount along with interest within a span of five years and in case she failed to repay the amount, the Petitioner would become the owner of the said flat. Petitioner further claims that in October, 2005 he again advanced another loan of Rs. 10 lac to her. In lieu of the said loan she gave him two post dated cheques of Rs. 5 lac each. These two cheques later got dis-honoured on presentation. On 24. 11. 2006, Mr. Raj Kumar Bansal, husband of Urvashi Bansal died and on this she and her daughter shifted to flat no. 1, Swastik Kunj, where Mr. Raj Kumar

Bansal used to live, and started living there. Petitioner continued living at flat no. 53 exclusively.

(4.) ON 25. 8. 2007, Petitioner found a change in the attitude of urvashi Bansal/respondent No. 4. Respondent No. 4 along with her sister Upma bhagoria (Respondent No. 5) visited flat no. 198, Swastik Kunj and broke open the locks of the said flat. On this, Petitioner made a call at 100 and brought all these facts to the notice of the police. A PCR Van visited the flat and took the Petitioner, Respondent No. 4 and her sister to the Police Station. At Police station, Petitioner was made to sit outside and a complaint was got registered by Respondent No. 4 in connivance with police officials against the Petitioner. He alleged that the police officials were in collusion and connivance with respondent No. 4 and registered a false case against the Petitioner instead of registering a complaint of the Petitioner regarding breaking open of lock. Petitioner was falsely implicated in proceedings under Section 107/151 Cr. P. C. and was taken into custody. Respondent No. 4, with the help and connivance of police took forcible possession of flat no. 198, Swastik Kunj, Rohini. Petitioner furnished surety bond before Special Executive Magistrate on 29. 8. 2007 and was released from the jail on 30. 8. 2007. After his release from jail, when he reached his flat no. 53, Swastik Kunj, where he was living for past 8 years, he noticed that outer lock of the door had been broken and respondent No. 4 had removed all belongings of the Petitioner. Petitioner approached the concerned Police Station and brought these facts to the notice of the SHO. Instead of registering his complaint, police officials threatened him that in case he visited the flat again another proceedings under Section 107/151 cr. P. C. shall be initiated against him. Petitioner made complaint to the higher police officials but in vain. On 22. 9. 2007, Respondent No. 4 called upon the petitioner to return all original documents of the flats and threatened that in case those are not returned, she would get the Petitioner eliminated. Petitioner stated that he was forced to live in a 'dharamshala' as he was not in a position to live in flat no. 53 and also had no other house. The Petitioner then sent a complaint to the Chief Justice of Delhi High Court with copy to the commissioner of Police. He has challenged the action of the police on various grounds.

(5.) A perusal of proceedings under Section 107/151 Cr. P. C. would show that on receipt of DD No. 10a ASI Sultan Singh went to the spot where he found Petitioner in drunken condition and abusing Urvashi Bansal and the labourers, who were working in the flat no. 198, Swastik Kunj. He was ready to beat the labourers and said that this was his house. Respondent No. 4 made a complaint to him that after her husband death, Petitioner pretended to be her brother. They had also lived together even during the lifetime of her husband in flat no. 53, Swastik Kunj, but separately. After death of her husband petitioner wanted to capture her flats. She had three flats, which were her property. She went to the flat for some labour work and the Petitioner obstructed and was ready to beat the labours. ASI Sultan Singh in his report observed that there was a quarrel for possession of property and some crime might take place. However, proceedings under Section 107/151 Cr. P. C. were initiated against the Petitioner and he was taken in custody.

(6.) SECTION 145 Cr. P. C. is a specific provision to be invoked if a dispute is in respect of immovable property and it reads as under:

145. Procedure where dispute concerning land or water is likely to cause breach of peace " (1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon

other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section, the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in the manner provided by the Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits or the claims of any of the parties, to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any as he thinks necessary, and, if possible, decide whether and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute: provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1).

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1)shall be final.

(6) (a) If the Magistrate decides that one of the parties was, or should under the proviso to sub-section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbances of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub-section shall be served and published in the manner laid down in sub-section (3).

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons, claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceeding under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107.

(7.) FROM the report of Sultan Singh, ASI it is clear that the dispute between Petitioner and Respondent No. 4 was in respect of possession of the property. Petitioner was claiming to be in possession of flat no. 198, swastik Kunj on the basis of Power of Attorney and an agreement, while respondent No. 4 was claiming it to be in her possession. Even if the property belonged to Respondent No. 4, she had admitted that Petitioner had lived in flat no. 53, Swastik Kunj with her even when her husband was alive. It is also evident that original documents and agreement was in custody of Petitioner. Respondent No. 4 was not living at flat no. 198, Swastik Kunj but had gone there with so called labours and the Petitioner found that his lock had been broken. It is also undisputed from the documents placed on record that it was petitioner, who gave a call at '100' to police and made a complaint about breaking open the lock by Respondent No. 4. Thus, clearly the proceedings should have been initiated against Petitioner and Respondents under Section 145 cr. P. C. Though police has power to initiate proceedings under Section 107 cr. P. C. as well, but one is bound to consider if on being threatened of forcible dispossession, a person calls police, does he commit breach of peace. If informing authorities is breach of peace, then better people settle their dispute without seeking police help. Moreover, it was Respondent No. 4, who had gone to the flat and broken the lock. She was not booked under Section 107/151 cr. P. C. and only Petitioner was booked under Section 107/151 Cr. P. C. It is evident that the Petitioner was wrongly arrested and booked under Section 107/151 Cr. P. C. and was wrongly sent to jail. The detention of the Petitioner was illegal. In view of specific provisions of Section 145 Cr. P. C. , the police should have initiated proceedings against both under Section 145 Cr. P. C. and if required under Section 107 Cr. P. C. The attitude of police only fortifies the claim of the Petitioner that the police was in league with Respondent No. 4 and was helping Respondent No. 4 to recover possession from the Petitioner, forcibly.

(8.) THE Petition of the Petitioner is allowed and the proceedings under Section 107/151 Cr. P. C. against him are quashed. The Commissioner of police/respondent No. 2 is directed to initiate proceedings against the erring police officials, who deliberately invoked Section 107/151 Cr. P. C. in an illegal manner in a property dispute where Section 145 Cr. P. C. was to be invoked and wrongly confined Petitioner first in the Police Station and then in the jail. Since, Petitioner was wrongly sent to jail under Section 107/151 Cr. P. C. , I consider that Petitioner is entitled to damages. The Petitioner may claim damages by filing a suit for tortuous liability against the police, however, a token damage of Rs. 50,000/- is awarded to the Petitioner for wrongful confinement of the Petitioner under Section 107/151 Cr. P. C.

(9.) AS far as other reliefs sought by the Petitioner are concerned, the Petitioner is at liberty to take appropriate legal action before the appropriate Court for recovery of possession of the properties, if he has any kind of right and title over the properties. In Writ Petition, the Court cannot entertain the matter with disputed facts. With these directions, the Writ petition stands disposed of.

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-:CHAPTER = 5:-

PROSECUTION AGAINST POLICE

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HOW TO PROSECUTE POLICE OFFICER MISUSING HIS POWER

****

ILLEGAL ARREST, MENTAL & PHYSICAL TORTURE, CUSTODIAL TORTURE

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Cross Citation :1998 CRI. L. J. 2908 , AIR 1998 SC 2023, 1998 AIR SCW 1877

SUPREME COURT OF INDIA

Hon'ble Judge(s) : M. K. MUKHERJEE AND G. B. PATTANAIK, JJ.
Mohd. Zahid ….Vs…. Govt. of NCT of Delhi
Criminal Appeal No. 892 of 1997, D/- 8 -5 -1998.

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Cri. P.C. Sec. 340 – False entries in case diary by the Police Officer – Police Officials interpolated the entries in the case diary to create false story to falsely implicate the accused – Accused detained for possessing illegal arms – Evidence of official making arrest not supported by independent witnesses – Time of arrest interpolated – Order of conviction liable to be set aside – Show cause notice issued to Police Officer for Prosecution under section 193, 195, 211 of I.P.C. – Commissioner of police directed to keep the Daily Diary Book in sealed cover until further orders.

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Penal Code (45 of 1860), S.193, S.195, S.211. (Para 11)
Vijay K. Jain, Advocate, for Appellant; V. C. Mahajan, Sr. Advocate (Rajiv Sharma), Advocate, for Mrs. Anil Katiyar, Advocate with him, for Respondent.
* From Judgment and Order of Designated Court - II, Delhi in S.C. No. 272 of 1995, D/- 19-7-1997 and 22-7-1997.

Judgement

M. K. MUKHERJEE, J. :- This appeal under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ('TADA' for short) is directed against the judgment and order dated July 22, 1997 of the Designated Court II, Delhi convicting the appellant for an offence under Section 5 of TADA and sentencing him to suffer rigorous imprisonment for 5 years and to pay a fine of Rs. 1,000/-, and in default of payment of fine to undergo rigorous imprisonment for 2 months more.

2. According to the prosecution case, in the afternoon of March 8, 1990, Sub-Inspector Gopi Chand (P.W. 6) of I.S.B.T. (Inter State Bus Terminus) police post along with Assistant Sub-Inspector Chander Bhan (P.W. 5) and other police personnel was on patrolling duty at the inner gate of I.S.B.T. When they were checking the luggage of passengers they saw the appellant alighting from a bus with a rexin bag. Seeing them he tried to move away briskly . P.W. 6 apprehended him on suspicion and found, on search of his bag, 3 country-made pistols and 12 cartridges. He seized those articles under a memo and put them in separate sealed packets. Along with those articles he forwarded a report to the Kashmere Gate Police Station for registration of a case against the appellant and took up investigation. The seized articles were thereafter sent for examination by the Central Forensic Science Laboratory, which reported that the pistols were in working order and the cartridges were alive. On receipt of that report P.W. 6 filed charge-sheet against the appellant with the requisite sanction of the Deputy Commissioner of Police, North District, New Delhi under Section 39 of the Arms Act, 1959.

3. The appellant pleaded not guilty to the charges levelled against him; and his specific defence was that in the evening of March 6, 1990 when he got down at I.S.B.T. from the bus he boarded at Meerut the police apprehended him, and after detaining him for three days in the police post foisted a false case against him. He asserted that no country-made fire-arms nor cartridges were recovered from him.

4. In support of its case the prosecution examined 7 witnesses of whom P.Ws. 5 and 6 were the witnesses to the recovery and seizure of the fire-arms and ammunitions. The appellant, however, did not examine any witness in his defence but produced before the Court certified copy of a telegram sent by his father to the higher authorities on March 8, 1990, wherein he complained that his son Zahid (the appellant) was arrested by the Police Post, I.S.B.T. on March 6, 1990 and an application that he (the father) moved before a Metropolitan Magistrate, New Delhi on the same day making identical complaint.

5. The Designated Court held that the evidence of P.Ws. 5 and 6 was reliable and could be made the basis for conviction, notwithstanding the fact that no independent witness was examined to corroborate their evidence as the explanation offered by P.Ws. 5 and 6 that none of the members of the public present at the bus terminus agreed to join the search was reasonable. In disbelieving the case made out by the appellant the Designated Court observed that if really he was arrested by the police on March 6, 1990 it was expected of the father of the appellant to send the telegram on that date itself and not on March 8, 1990 at 5.00 P.M. as the telegram indicates. According to the Designated Court, since the appellant was apprehended by the police at 5.30 P.M. on March 8, 1990 it was very likely that the said telegram was sent by his father immediately after his apprehension, to make out a defence.

6. Though, apparently, there is no reason as to why P.Ws. 5 and 6 would implicate the appellant falsely, a closer look into the materials brought on record clearly indicates that it is the defence version which is true and not that of the prosecution, as given out by the above two witnesses. From the application that Kadir Ahmad, father of the appellant, filed before the Metropolitan Magistrate, IV Court, Delhi on March 8, 1990 we find that his allegation therein was that his son was arrested by some officers of I.S.B.T. police post of Kashmere Gate Police Station, Delhi on March 6, 1990 at or about 7.00 P.M. and since then he was in their custody. His further allegation was that even though his son was arrested on that day he was not produced in any Court till then, i.e. March 8, 1990. Accordingly, he prayed that his son be immediately released from custody or in the alternative be produced in Court. On that application the Magistrate passed an order directing the Station House Officer to report by the following day, i.e. March 9, 1990. It further appears that on that very day, (March 8, 1990), the Station House Officer of Kashmere Gate Police Station passed on the said direction of the Magistrate to the Head Constable of I.S.B.T. police post. Though the appellant did not examine his father or any other witness to prove at which hour of the day the above application was filed and moved, it can be safely presumed that it was filed and order of the Magistrate obtained thereon, during Court hours, which ended at 5.00 P.M. Since, according to the prosecution, the appellant was arrested at 5.30 P.M. the above circumstances undoubtedly makes the defence version probable.

7. To confirm whether we would be justified in basing our conclusion on the above circumstance, we called for the Daily Diary Book of the police post containing entry No. 33 dated March 8, 1990, a copy of which (Ext. PW4/A) was exhibited by Head Constable Premvir Singh (P.W. 4) to prove that the patrolling party left the police post at 5.00 P.M. On a careful look of the original entry we, however, find that the time at which the party left, stands interpolated; and even by naked eyes it can be seen that the time of departure of the party which was earlier shown as 6 P.M., was changed to 5 P.M. We further find

that to keep the sequence of entries in order, similar interpolations had been made in the earlier two entries: while entry No. 31 which was initially shown to have been made at 5.30 P.M. was subsequently changed to 4.52 P.M. and entry No. 32 earlier made at 5.35 P.M. was changed to 4.55 P.M. P.W. 4, who exhibited a plain copy of D.D. No. 33, testified that he could not produce the original as the same had been destroyed. It is now manifest that the above statement was falsely made by P.W. 4, lest the production of the original diary entry exposed the concerned police officers about the interpolation made. The reasons for the interpolation is not far to seek. If P.Ws. 5 and 6 had left the police post at 6.00 P.M. (as originally shown in the Daily Diary Book entry No. 33) they could not have apprehended the appellant at 5.30 P.M. as testified by them nor could they have prepared the seizure list at the same time (as shown).

8. From the materials on record we have, therefore, no hesitation in concluding that it was only on receipt of the order of the Magistrate as communicated through the Station House Officer of Kashmere Gate Police Station that P.Ws. 5 and 6 along with other police personnel felt it absolutely necessary to justify the detention of the appellant and with that ulterior object cooked up the story of his apprehension at 5.30 P.M. on March 8, 1990 with unauthorised fire arms and ammunitions. Unfortunately, these aspects of the matter were completely overlooked by the Designated Court while accepting the case of the prosecution in preference to that of the defence.

9. We, therefore, allow this appeal and set aside the conviction and sentence of the appellant and acquit him. The appellant who is in jail, be released forthwith.

10. Since the appellant has been made a victim of prolonged illegal incarceration due to machination of P.Ws. 5 and 6 and other police personnel of I.S.B.T. police post we direct the Delhi Government to pay him a sum of Rs. 50,000/- as compensation. The payment should be made within two months from the date of receipt of the order. The State Government will, however, be at liberty to recover the said amount from the erring police officers.

11. From the materials on record, discussed above, we are also of the opinion that it is expedient in the interest of justice that an enquiry should be made in accordance with sub-section (1) of Section 340, Cr.P.C. into commission of offences under Sections 193, 195 and 211, I.P.C. by Sub-Inspector Gopi Chand (P.W. 6), and under Sections 193 and 195, I.P.C. by Assistant Sub-Inspector Chander Bhan (P.W. 5) and Head Constable Premvir Singh (P.W. 4). We, therefore, in exercise of the powers conferred by sub-section (2) of Section 340, Cr.P.C., call upon the above three persons to show cause, on or before July 17, 1998, why a complaint should not be made against them for the aforesaid offences. Let a copy of the judgment along with this order be served upon them through the Commissioner of Police, Delhi. Registry is directed to keep the Daily Diary Book in a sealed cover until further orders of this Court.

Appeal allowed.

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IN THE HIGH COURT OF JUDICATURE OF BOMBAY

Hon'ble Judge(s) : B.R. GAVAI, J

Rajkumar Pandurang Narute & ors. ….Vs … The State of Maharashtra
Criminal Application No. 488 of 2011
Decided on : 07/07 / 2011

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Police Atrocities – Police falsely implicated a Journalist who published certain articles against some police officer working in the Traffic Department of the Police at Solapur – Police cooked up a false story of offering of bribe by the applicant and offence u.s. 12, 7 of the prevention of corruption Act was registered against him – Noticing from the nature of allegations the police custody of the accused was not at all necessary – The case was not handed over to Anti-Corruption bureu – It is a glaring example wherein police machinery has attempted to take vengeance against the petitioner – The commissioner of Police shown undue interest in the matter and has acted in contravention of practice of transferring the investigation to Anti Corruption Bureu – Held – Show cause notice issued to Shri. Himmatrao Deshbhratar, Commissioner of Police, Solapur as to why action should not be taken against him for acting contrary to the law and causing undue hardship to a citizen thereby depriving him of his personal liberty as guaranteed under Article 21 of the constitution of India – Notice also issued to Shri. Shirish S. Tandalekar A.C.P. and Shri. Vikas R. Ramugade P.I. who sought police custody of the petitioner as to why action should not also be taken against them for abuse of the powers vested in them.

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1. The patent case is a glaring example wherein the police machinery has attempted to take vengeance against the petitioner merely because the petitioner who happens to be a journalist has published certain articles against some police officers working in the Traffic Department of the Police at Solapur.

2. Noticing that from the nature of allegations the police custody of the accused was not at all necessary, the Court had directed the Inspector who is the first informant as also the Investigating Officer who sought police custody of the accused to remain present in this Court today. Accordingly, Shri Shirish Tandalekar, the Assistant Commissioner of Police (Traffic), Solapur and Shri Vikas R. Ramugade, the Senior Inspector of Police attached to Vijapur Naka Police Station are personally present in the Court.

3. In the affidavit filed by Shri Shirish S. Tandalekar, it is stated that on the basis of the complaint lodged by the complainant Vikas Ramugade for the offence punishable under Sections 353 read with Section 34 of IPC and under Section 12, 7 of the Prevention of Corruption Act, 1988 was registered at Vijapur Naka Police Station. It is stated that bribe amount was immediately recovered in presence of two panchas.

4. In paragraph 9 certain allegations have been made that the applicant was acting at the behest of Rakesh Tolle, the Editor of Daily Surajya who was interested in grabbing the plot.

5. Prima-facie, I am unable to understand as to how the present applicant can be booked for the offence punishable under Prevention of Corruption Act. Recourse to Section 12 atleast prima-facie would not be available inasmuch as the same pertains to abatement and unless there was a main accused who could be charged under Section 7 of the Prevention of Corruption Act, the present applicant could not have been proceeded by aid of Section 12 of the said Act.

6. Be that as it may, insofar as Prevention of corruption matters are concerned, there is a separate bureau under the Director General of Police, Anti Corruption. The entire matters in the State pertaining to prevention of Corruption are being investigated by the various officers working in the said bureau. It is not in dispute that insofar as Solapur is concerned, there is anti corruption bureau which is manned under the leadership of Dy. Superintendent of Police, Anti Corruption Bureau. In normal circumstances after registering a crime under the Prevention of Corruption Act, the investigation ought to have been handed over by the concerned police officers to the Anti Corruption Bureau.

7. Since in the present case after the complaint was registered at Vijapur Naka police station, the investigation was transferred to Shirish S. Tandalekar who is Assistant Commissioner of Police attached to Traffic Branch, a specific query was made to Shri Tandalekar as to how he came in the picture. He makes a statement in the Court that he was directed by the Commissioner of Police to investigate in the matter.

8. It, therefore, appears that Commissioner of Police has also shown undue interest in the matter and has acted in contravention of practice of transferring the investigation to the Anti Corruption Bureau.

9. Issue notice to Shri Himmatrao Deshbhratar presently working as Commissioner of Police, Solapur as to why an action should not be taken against him for acting contrary to the law and causing undue hardship to *a* citizen thereby depriving him of his personal liberty as guaranteed under Article 21 of the Constitution of India. The notice be made returnable on 19th July, 2011. The learned APP to communicate the order to the concerned police officer.

10. Notice is also issued to Shri Shirish S. Tandalekar, Asst. Commissioner of Police and Shir Vikas R. Ramugade as to why an action should not also be taken against them for abuse of the powers vested in them. The said officers who are personally present in the Court accept the notice. The notice to them is also made returnable on 19th July, 2011.

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Cross Citation :1999 CRI. L. J. 1915

MADRAS HIGH COURT

Hon'ble Judge(s) : N. K. JAIN AND M. KARPAGAVINAYAGAM, JJ.

Krishnamma ….Vs … Government of Tamil Nadu"
H.C.P. No. 768 of 1998, D/- 20 -11 -1998.

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Unfair Investigation – Abuse of Power by Police – False implication of accused in a serious charge of murder – Police arresting the petitioner in a charge of murder and extorting false voluntary statement by torture - The victim is found alive -Held - State is liable to pay compensation even no bias has been pleaded by the petitioner – Rs. 50,000 to each is awarded as compensation- state is free to take action against police officers responsible for such highly illegal acts, so that police personal will discharge duty/obligation in right direction and without involving innocent persons in grave crimes, as in this case, and will transperacy and accountability so that the confidence of the public be reposed on police.

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Cases Referred : Chronological Paras
1998 SCC (Cri) 847 6
1997 Cri LJ 743 : AIR 1997 SC 610 : 1997 AIR SCW 233 4, 5, 11
(1996) 1 Mad LW (Cri) 110 : 1996 Mad LJ (Cri) 221 4, 5
1996 SCC (Cri) 858 : 1996 (2) Cur CC 439 (SC) 4, 5
1994 SCC (Cri) 577 : 1994 Supp (1) SCC 274 6
1994 Cri LJ 3139 : 1994 SCC (Cri) 899 6
1993 Cri LJ 2899 : 1993 SCC (Cri) 527 : AIR 1993 SC 1960 : 1993 AIR SCW 2366 4, 5
T. K. Sampath, for Petitioner; S. Anbalagan, Addl. Public Prosecutor, for Respondents.

Judgement

N. K. JAIN, J. :- The petitioner, mother of two detenus herein, has filed this petition alleging that her sons viz. Raja Reddy and Narayanan alias Narayana Reddy have been detained in Sub Jail, Tiruvellore illegally and prays to produce them before this Court and set them at liberty.

2. It is alleged that the petitioner's son Raja Reddy got married one Malliswari alias Sujata, who left the house on 12-4-1998 on her own, and subsequently, a complaint was lodged with Edurukuppam Police Station, Chittoor District, Andhra Pradesh state, in Cr. No. 33 of 1998 for an offence under Section 498-A, I.P.C. and 'women missing'. It is alleged that on 29-4-1998, the Village Administrative Officer of Tiruttani taluk approached the Sub Inspector of Police, Pallipet Police Station and informed about the finding of the half burnt body of a woman in the forest area and the Sub Inspector of Police, after verification registered a case in Cr. No. 216 of 1998 under Section 302, I.P.C. and informed the same to the second respondent herein. It is further stated that the said Malliswari was seen alive on 26-5-1998 at Tirupati and she had been handed over to the Karvet Nagar Police Station and in her statement under Section 164, Cr. P.C. she had stated that the detenus were in

no way responsible for her leaving the matrimonial home. A news item was published in English daily on 1-6-1998 and the petitioner sent telegrams to the Chief Justice of India, New Delhi and to the Chief Justice, High Court, Madras on 5-6-1998, regarding the illegal detention of the detenus and about the fact of the victim girl seem alive. Still the petitioner's sons are in illegal detention. In this H.C.P. the petitioner prays to produce the detenus before this Court and to set them at liberty and also claims compensation.

3. A detailed counter-affidavit has been filed. It is stated in the counter-affidavit that on the information of the Village Administrative Officer, a case was registered and investigation took place. It has been stated that Raja Reddy, one of the detenus herein, gave a voluntary statement and a knife, a gunny bag and a motor cycle were seized, that on the basis of the voluntary statement of Raja Reddy, his brother Narayanan alias Narayana Reddy was interrogated and both the detenus were arrested on 24-5-1998 and produced before Judicial Magistrate No. 1, Tiruttani for remand, and they were remanded till 15-6-1998. It has been further stated that Sengaya Reddy, the father of Malliswari, has further stated that the girl should have been murdered by her husband, Raja Reddy and his family members. Malliswari and Raja Reddy were seen together at 8.00 p.m. on Sunday on 16-5-1998. Other witnesses also reiterated the same statement. It is further stated in the counter-affidavit that on 9-6-1998, when it came to the notice that the said Malliswari is not dead, but alive, she was enquired. It is also stated that Malliswari had stated that unable to bear the ill-treatment and the harassment at the hands of the detenus, she left the matrimonial home. On 10-6-1998, a report had been filed before the Judicial Magistrate No. I, Tiruttani requesting to drop the proceedings and accordingly actions were dropped against the detenus and bail was granted to the detenus in Crl. O.P. No. 8447 of 1998 on 11-6-1998.

4. Learned counsel for the petitioner submitted that on the basis of the voluntary statements given by the detenus, they have been falsely implicated in the commission of the offence of murder and they have been in illegal custody for about 45 days and as such, they are entitled to get compensation. Learned counsel relies on the decisions in Nilabati Behera v. State of Orissa, 1993 SCC (Cri) 527 : (1993 Cri LJ 2899), Punjab and Haryana High Court Bar Association v. State of Punjab, 1996 SCC (Cri) 858; D. K. Basu v. State of West Bengal, AIR 1997 SC 610 : (1997 Cri LJ 743) and in Chandra, B. v. State (1996) 1 LW (Cri) 110 in support of his contention.

5. Nilabati Behera v. State of Orissa (1993 SCC (Cri) 527 : (1993 Cri LJ 2899) is a case relating to a custodial death. In that case, the deceased was taken into police custody, and on the next day the dead body of the deceased with a handcuff and multiple injuries was found by some railway men lying on the railway track. The explanation of the State was that the deceased managed to escape from police custody by chewing off the rope with which he has tied, and that the dead body of the deceased was found on the railway track with multiple injuries which indicated that he was run over by a passing train. The Apex Court did not accept the explanation of the State and held that the Court can direct the State to pay compensation to the victim or his heir by way of 'monetary amends' and redressal. It has also held that the State has strict duty to ensure that a citizen in custody of police or prison is not deprived of his right under Article 21, except in accordance with law. In Punjab and Haryana High Court Bar Association v. State of Punjab, 1996 SCC (Cri) 858 in a case of abduction and alleged murder of an advocate his wife and minor child, the Apex Court considered various decisions and Art. 9(5) of the International Covenant on Civil and Political Rights, 1966 that 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation' and awarded compensation. In Chandra v. State (1996) 1 LW (Cri) 110 on an earlier occasion, in H.C.P. this Court directed that the detenus would have to seek their remedy in a proper

Court of law. It was agitated before Supreme Court. The Supreme Court sent back the matter holding 'that if it is found that the said Balaraman had been illegally detained during this period as claimed by the appellant, the High Court may give appropriate relief in the said proceedings'. Then this Court found that the detenu was in illegal detention and awarded compensation. In D. K. Basu v. State of West Bengal, AIR 1997 SC 610 : (1997 Cri LJ 743) in a case of torture and cruel inhuman or degrading treatment, Their Lordships issued the requirement to be followed in cases of arrest or detention till legal provisions are made in that behalf as preventive measures. Their Lordships observed that any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Art. 21 of the Constitution whether it occurs during investigation, interrogation or otherwise. Their Lordships further observed that "it is now a well accepted proposition in most of the jurisdiction, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts'. On the basis of these decisions, the learned counsel for the petitioner prayed for the award of compensation.

6. Learned Additional Public Prosecutor has not disputed the principle laid down in the above cases, but submitted that the above mentioned cases will not be helpful and useful to decide the controversy of compensation in the instant case, as those cases arose on account of custodial death, abduction and murder, torture, cruel, inhuman or degrading treatment etc. whereas in this case, on a reasonable suspicion existed and on the basis of the evidence of the witnesses and also on the identification made by the father of Malliswari and villagers only, the detenus were arrested. Learned Additional Public Prosecutor further submitted that the investigating Officer had acted in good faith only. He relied on the decisions in Kartar Singh v. State of Punjab, 1994 SCC (Cri) 899 : (1994 Cri LJ 3139) while considering the vires of 3 Acts, and upholding the said Acts, it has been held that the classifications have rational nexus with the object sought to be achieved by the TADA Act and Special Court Act and consequently there is no violation of Art. 14 and that where two procedures exist for two classes of persons both must satisfy the test of Arts. 14 and 21 of the Constitution. It is also observed that if one process is harsh, oppressive, unconscientious, unfair, unjust and unreasonable the same would be unconstitutional". In Kabir Chawla v. State of U. P., 1994 SCC (Cri) 577 the detention order was passed on 9-2-1993 under the National Security Act and the order of detention was not confirmed by order dated 18-2-1993. But, inspite of the said order of the State Government, the petitioner was not released immediately and was kept in illegal detention till 22-2-1993. The Apex Court, without expressing any opinion on the merits of the claim left the petitioner to take recourse to the appropriate remedy available to him in law for redress of this grievance. In State of Tamil Nadu v. R. Arasu, 1998 SCC (Cri.) 847, in a preventive detention case, compensation was awarded on coming to the conclusion that "the sponsoring authority was responsible in not furnishing all the relevant materials before the detaining authority but furnished incorrect (if not false) information to the detaining authority on the basis of which the order of detention had been passed. The Apex Court agreed with that contention. Learned Additional Public Prosecutor, in support of the cases mentioned above, prays for the dismissal of this petition.

7. We have given our careful consideration to the arguments advanced by the learned counsel for the petitioner and the learned Additional Public Prosecutor. We have perused the materials on record. We have gone through the case laws cited by the learned Counsel appearing on either side.

8. So far as the legal position is concerned, there is no doubt that this Court has got power to grant compensation on the public law, in addition to private law. In an

appropriate case, compensation can be awarded by this Court. But, each case depends upon the facts of its own.

9. So far as the power of the investigating officer is concerned, investigating officer is duty bound to investigate and to find out the real culprit and on the basis of the evidence so collected and on reasonable suspicion existed he can arrest a person. This is also not in dispute. In the backdrop of these, it is to be seen whether investigation has been conducted in a fair and bona fide manner. According to learned Additional Public Prosecutor, the accused/detenus have been arrested as there was information that Malliswari was missing, that a partly burnt body of a woman found in the forest area, was identified by the father of the said Malliswari and villagers and the bangles and cloth seized from the body of that partly burnt woman was identified as that of Malliswari, by seeing the photograph of that partly burnt woman. There is also evidence that the said Malliswari was last seen with her husband Raja Reddy. To this extent, the arrest of Raja Reddy, on a reasonable suspicion, at the most, can be considered to be a bona fide one. But as per the counter-affidavit of the second respondent, Raja Reddy gave a voluntary statement to the effect that he, with the help of his brother Narayana Reddy, murdered his wife, by stabbing her with a knife, buried in a pit in Kandavanapalli village and later exhumed the body and put it in a gunny bag and carried it to Kanavaymedu village and set fire, and on that basis, the said knife, a gunny bag and motor cycle said to have been used for the commission of that offence, were seized. It is also seen in the counter affidavit, that Narayana Reddy, in his statement has stated that Raja Reddy and he murdered Malliswari. It is settled that confession is an admission of a guilt as the person making said against him. No doubt, the voluntary statement given before Police is not admissible in law, and the admissibility and the relevancy of the material so seized, will ultimately be decided by the Court. The question as to whether the investigation conducted is proper and bona fide, has to be tested on the facts, the victim girl who has been alleged to have been murdered was really found alive later. As culled out, these accused have been arrested for the offence of committing a murder, as stated above, alleging that the body of a partly burnt woman was seen in the forest area and it was identified, on seeing photograph, by Sengaya Naidu and others, as that of Malliswari. But, one thing is clear. Arrest of the detenus, on the basis of the investigation conducted in this case is not fair. The Police have not investigated as to who was the partly burnt woman found in the forest area of the second respondent and so also the real culprit in that case. Had the said Malliswari not been arrived at a later point of time, the position of the accused would have been different. In any case, the real culprit who was responsible for the partly burnt woman, had gone scot free. As investigation played its part, in the absence of Malliswari's presence, prima facie it would proceed to prove the charge framed against the accused. Since Malliswari, who was alleged to have been murdered, was seen alive, it is clear that the so called voluntary statement to the extent stated above, are not recorded with free will and atmosphere. Such type of interrogation in the facts of the case excites suspicion on its voluntariness. It clearly reveals that the voluntary statement from Raja Reddy, and also from Narayana Reddy, was extorted by resorting torture and threat. Even though the detenus have never raised objections regarding the non-compliance of the provisions while arresting the detenus and also not said at any point of time that the girl was alive, it will not help the case of the prosecution in connecting the accused to the crime, on the basis of voluntary statement, more particularly when Malliswari was alive. The act of connecting Narayana Reddy to the crime, on the basis of voluntary statement obtained from Raja Reddy, is not convincing and the possibility to hold that the brother of Raja Reddy has also been falsely implicated in the crime is not ruled out. It is also seen that the investigation was not supervised properly.

10. No doubt, the paper news, by itself, is not admissible, but the fact remains that the victim Malliswari was ultimately found alive. A cursory perusal of the news report and the copies of the telegrams would reveal that the petitioner, a hapless woman, had gone pillar to the post and knocked the doors of the temple of justice with tears and helplessness. Even though as per paper news, everything came to light much earlier, the detenus were granted bail only on 11-6-1998. So we have no hesitation to hold that because of the inaction of the police, such miserable thing had happened. On considering the overall facts and the legal position, we are fully convinced that this is a fit case where personal liberty of two persons, has been deprived of by the carelessness, inaction and unfair investigation of the police, which cannot be said to be bona fide even no bias has been pleaded. In the facts and circumstances of the instant case and even in the absence of any specific allegation of mala fide, the petitioner cannot be deprived of from getting compensation. The decisions cited by the learned Additional Public Prosecutor are not helpful to the facts of the present case. Therefore, the detenus are entitled to get monetary compensation, to compensate their redress.

11. As stated earlier, the State is liable to pay compensation to the detenus, who are the sons of the petitioner herein, in view of the above discussion and the decision of Basu's case (1997 Cri LJ 743) (cited supra). We are of the view that ends of justice would be met if we grant compensation to each of the detenus, a sum of Rs. 50,000/- (Rupees Fifty thousand only) each. The State is free to take action against the Officers/Officials concerned, so that Police personnel will discharge duty/obligation in right direction and without involving innocent persons in grave crimes, as in this case, and will bring transparency and accountability so that the confidence of the public be reposed on police.

12. A copy of this order be sent to Chief Secretary, Government of Tamil Nadu, Madras and Director General of Police, Madras for necessary action.

13. The H.C.P. is ordered accordingly. The detenus are directed to be set at free. The bail bonds executed by the detenus shall stand discharged. The payment of compensation to be made to the detenus directly, within two month from the date of receipt of a copy of this order. Order accordingly.

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Cross Citation :1991 CRI. L. J. 1963

MADRAS HIGH COURT

Hon'ble Judge(s) : ARUNACHALAM, J
S. D. Ashok Kumar .....Vs...The State
Crl. M.P. Nos.8989, 8990 and 15798 of 1989, D/- 19 -12 -1989.

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Cri. P.C. Sec. 482 – Quashing of F.I.R. and investigation – F.I.R. is registered by the Police to harass the accused who is persuing the case against Dy. S.P. – Offence u/s 420 of I.P.C. registered – Held, When the Police machinery is used for ulterior purposes then such F.I.R. and investigation has to be quashed even if the F.I.R. disclose a cognizable offence – The subsequent investigation had negativated it – The very manner in which an unusually quick and spontaneous investigation had commenced portrays the abuse of police power – The Power to quash had to be necessarily exercised for the investigation locking in bonafides – The liberty of an individual so sacred and sacrosanct has be protected zealously by the Court as observed by Hon'ble Supreme Court in AIR 1982 SC 949 – The F.I.R. and all proceedings quashed.

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Cases Referred: Chronological Paras
1989 Cri LJ 1752 (Pat) 34
1989 Cri LJ 2301 : 1989 SCC (Cri.) 713 : AIR 1989 SC 2222 16
1988 Cri LJ 1175 22
1988 Cri LJ 853 : AIR 1988 SC 709 26
AIR 1982 PunjHar 372 : ILR (1982) 2 P and H 339 (FB) 24,34
1982 Cri LJ 819 : AIR 1982 SC 949 25,34,35
1977 Cri LJ 1125 : AIR 1977 SC 1489 23,24
1975 Cri LJ 325 : AIR 1975 SC 495 21
1970 Cri LJ 764 : AIR 1970 SC 786 : 1970 All LJ1348 20
1966 Cri LJ 677 : AIR 1966 Mysore 152 23
1960 Cri LJ 1239 : AIR 1960 SC 866 16
1956 All LJ 700 33
1946 Cri LJ 413 : AIR 1945 PC 18 17,18
1939 Cri LJ 261 : AIR 1938 Mad 129 18

Mr.K. A. Panchapakesan, for M/s. S. Sadasharan and S. Nagarajan, for Petitioner; Mr. R. Shanmughasundaram, Addl. P.P. on behalf of State.

Judgement

ORDER:- Crl. M. P. No. 8989 of 1989 is a petition u/S. 482, Cr. P.c., filed by the accused in Crime No. 284 of 1989, on the file of the Sub-Inspector of Police, Madurantakam, within the jurisdiction of the Judicial Magistrate, Madurantakam. The petitioner seeks to invoke the inherent powers of this court, to call for the records in Crime No. 284 of 1989 on the

file of the respondent-Police Station and quash the first information report and further proceedings in pursuance of the said first information report, as an abuse of process of court.

2. Crl. M.P. No. 8990 ofl989is a petition for stay filed by the accused, pending disposal of Crl. M.P. No. 8989 of l989.

3. Bhaskaran, .J. admitted Crl. M. P. No.8989 of I 989 on 8-8-1 989 and on the same day directed interim stay of further proceedings in Crime No. 284 of l989on the file of the respondent, for two weeks. The stay ordered was continued for three more weeks on 22-8-1989and thereafter it does not appear, that the stay has been extended.

4. Crl. M.P. No. 15798of1989 has been filed by the State represented by the learned Public Prosecutor u/S. 482, Cr. P.C. to vacate the order of stay made in Crl. M.P. No.8989 of 1989 and permit further investigation in Crime NO. 284 of 1989.

5. To arrive at a decision in all these petitions, it may be necessary to deal with certain salient facts. The accused, Ashok Kumar, is a resident of Madurantakam and appears to be a dealer in precious stones. The first informant V. Venkatachalam is a resident of Dharmapuri situated approximately 200 miles away from Madurantakam. It is not disputed that the accused Ashok Kumar and the first informant, Venkatachalam, had business transactions for some length of time. The first information report will also disclose that there had been money dealings as well between the first informant and the accused.

6. The first information report addressed to the Deputy Inspector General of Police, Chengai Anna District, Teynampet, Madras, appears to have been forwarded to the Madurantakam Police Station on 3-7-1989. On the same date the Sub-Inspector of Police, Madurantakam (Law and Order) had obtained an opinion from the Assistant Public Prosecutor II in charge of Madurantakam, that an offence punishable u/S.420, I.P.C. was disclosed, on the averments found in the first information. On 4-7-1989 the complaint of Venkatachalam, the first informant, was registered at I p.m., as Crime No.284 of 1989 and investigation taken up.

7. The date and time of occurrence have been stated to be approximately 3 years prior to 4-7-1989, the date of registration of the crime. The first information report reads as follows in first person:

"I am dealing in precious stones which are used in jewellery. by buying and selling them at different places. In the course of such trade, I had business contacts with Madurantakam Ashok Kumar (accused) and in pursuance thereof, we had money transactions. In the course of such trade relationship, Ashok Kumar told me three years ago, that he would take my Fiat Car M.E.D. 5814, a 1979 Model vehicle, for Rs. 53,000/- and that he himself would discharge Rs. 22,000/- due on a hire purchase for the car, entered into at Bangalore, and for the balance sale consideration, he would give me precious stones. Ashok Kumar stated so before two witnesses, who are respectively T. N. Arjuna Pillai, resident of 39,1. O.M. Street, Saidapet, Vellore and Kandaswamy, Karukuppettai Village, Kancheepuram, Ashok Kumar told before them that he would take the car. He took the car three years ago in 1986 from Dharmapuri to Madurantakam. Meanwhile, Ashok Kumar, alleging that in the business dealing between me and him, I had cheated to the tune of Rs. 10,000, given a false complaint with the influence of his elder brother Ukkam Chand, the ax-Chairman of the Madras Water and Sewerage Board and the case arising out of the said complaint is pending trial at Madurantakam. Now Ashok Kumar is using my Fiat Car M. E. D.5814 with a fake registration certificate book. The original R.C. Book has been deposited by me with the Financier Sohan Finance, 170, VIth Cross, Santhi Nagar, Bangalore, Telephones Nos. 70825 and 28751. I did not take any action against Ashok Kumar till now, since his elder brother had influence in the earlier Government. Hoping that 1 will get

justice now, I am preferring this complaint. I request that my Fiat Car M.E.D. 5814 may be seized from Ashok Kumar and restored to my possession."

8. It is on this first information report, that very prompt investigation was initiated on 4-7-1989 and the accused was arrested on 5-7-1989 at 8-20 p.m. and produced before the Chief Judicial Magistrate, Chengalpattu and remanded to Judicial custody. The house of the petitioner in Crl. M.P. No. 8989 of 1989 was searched on 8-7-1989; but nothing incriminating was seized. However, the respondent noticed a light green Fiat Car bearing registration No. M. S. W.8458 in the garage of the petitioner's house, bearing chassis No. P.N. 41471, Engine head No. 1362 GI 1172 and Engine NTo.15549. The two back wheels of the Fiat Car were not to be seen. This car was not seized by the respondent; but the particulars from the R.C. Book were noted.

9. On 12-7- 1989 the court of Session, Chengalpattu directed the enlargement of the petitioner on bail on certain conditions, which were relaxed by this court on 17-7-1989.

10. Mr. K.A. Panchapakesan, learned counsel appearing for the petitioner, while referring to the averments in the first information report, relating to the prosecution launched against the first informant by the petitioner, brought to my notice that the said complaint was registered on 2-9-1985 and Venkatachalam was arrested and released soon thereafter and the case is now pending trial, before the Judicial Magistrate, Madurantakam. The cheating referred to in that complaint was on 15-8-1985. After meticulously taking me through the contents of the impugned first information report, he contended that it does not disclose any cognizable offence, which alone would, in law, permit the police to proceed with the investigation of the case. If no cognizable offence is disclosed, it is his submission, that the police would not have any authority to take up investigation and on that sole ground the impugned first information report will have to be quashed. He further contended that the contents of the first information report, disclose that the car was taken three years ago in or about 1986 from Dharmapuri and, therefore, the Madurantakam Police will have no jurisdiction to investigate, on the impugned first information report, u/S. 156, Cr. P.C. which empowers any officer in charge of the police station to investigate any cognizable case, without the order of the Magistrate having jurisdiction over the local area within the limits of such station. It is, therefore, his argument that the investigation by Madurantakam Police is without jurisdiction. The complaint, if it discloses a cognizable offence, must have been forwarded by Madurantakam Police to the concerned jurisdiction Police Station, for investigation and report. He also contended that the petitioner, Ashok Kumar, had filed a private complaint against the District Superintendent of Police, Chengalpattu, which has been taken on file as C.C. No. 75 of 1989 by the Chief Judicial Magistrate, Chengalpattu, and was posted for enquiry on 6-7-1989. To prevent his appearance before the Chief Judicial Magistrate, in the guise of an investigation on a three year belated complaint, which did not disclose any offence, with a view to harass the petitioner, these proceedings have been initiated which, on the face of it, portray an abuse of process of court. In passing, he would submit that the complaint of the petitioner against Venkatachalam preferred on 2-9- 1985 and referred to in the impugned FIR would show that even from 1-9-1984, the relationship between the petitioner and Venkatachalam had not been smooth, and that on an earlier complaint lodged in or about February, 1985 by the petitioner against Venkatachalam, the latter promised to pay the money he owed to the petitioner, in the precious stones trade, after adjustment of the monies seized from him by the police? on such complaint. Therefore, according to the counsel the alleged car transaction is a myth.

11. Per contra, Thiru, R. Shanmughasundaram, the learned Additional Public Prosecutor vehemently contended, that the investigation could not be proceeded with in view of the stay granted by this Court. The investigation done so far revealed vital clues to

attract the offence u/S. 420, IPC. The investigation is at a standstill now and if investigation was not to be permitted, it would lead to accumulation of cases without proper disposal. According to him, it is not the stage when this Court could stifle the investigation, when, according to him, the averments in the complaint prima facie disclose an offence u/S.420, IPC. He would further contend that at the time of search of the residence of the petitioner, a Fiat Car bearing registration No. M.S.W. 8458 was found in the Car shed. The entry in the R. C. Book relating. to that car indicated that one Ganesan was the owner of the Car. The registration certificate showed that it belonged to a goods vehicle and not to a Fiat Car. Therefore, there was reasonable suspicion that the Fiat Car seen in the Car shed of the petitioner may be connected with the Fiat Car M.E.D. 5814, which is the subject matter of the crime. He would also contend that quashing of a first information report will be an extraordinary remedy and the petitioner, if aggrieved, could always invoke the inherent powers of this court after filing of the final report. He would also urge that the aspect of mala fides should not be gone into at this stage. The prosecution has not denied the pendency of a case against Venkatachalam and the Deputy Superintendent of Police, Chengalpattu, initiated at the instance of the accused, Ashok Kumar.

12. In view of nature of contentions urged by either counsel, I directed the production of the investigation record, to find out the material collected during investigation, till it was stayed by this court, on 8-8-1989. Though after the middle of September, there has been no stay of investigation, investigation had not been carried out and the prosecution had come out with a petition to vacate the stay. This petition to vacate the stay was filed early in Nov.1989 and ultimately the main petition itself is being disposed of now.

13. Normally, at this stage, where a complaint has been made and investigation has just been initiated, it may not be expedient to go into the question of mala fides, put forth by the learned counsel for the petitioner. However, certain basic facts, as they appear in the records, will have to be stated. The effect of those materials without adding or subtracting or appreciating the truth or otherwise of such material, if it is possible to conclude that further continuation of investigation will be an abuse of process of law, such investigation could be quashed and there is no dearth of authority for such a proposition.

14. The first information report dated 13-6-1989, stated to have been sent by post from Dharmapuri to the Deputy Inspector General of Police, Chengai, Anna District, appears to bear an initial of the D.S.P., D.I.G., on the very same date. This has been forwarded on 28-6-1989 to the Deputy Superintendent of Police, Chengalpattu, who, in turn, had directed investigation and report by the Inspector of Police "H". On 4-7-1989 the Inspector of Police "H" had directed the S.I. H- I Crime to investigate and report. It is only thereafter the FIR was registered as a crime. In between, on 3-7-1989 the opinion of the Assistant Public Prosecutor had been obtained by the Sub Inspector of Police, (Law and Order). The record produced shows that on 8-7-1989, while the Sub-Inspector of Police. had searched the house of the petitioner, he had noted down the details of the Fiat Car bearing registration No. M.S.W. 8458 found in the garage of the petitioner-The contents of the R.C. Book relating to M.S.W. 8458 form part of the case diary. The record clearly indicates that M.S.W. 8458, which was originally a goods vehicle, was later altered into a motor car. Initially it was a closed van manufactured in 1961 run on diesel and it was later converted on 3-10-1986 into a motor car with a Fiat body with the necessary permission and such permission which had been sanctioned forms part of the entries, in the registration certificate. The vehicle, which was originally in the name of one Ganesan, has been transferred to the name of the petitioner on 26-3-1986. It is also seen from the case diary that after the registration of the complaint at I p.m. on 4-7-1989, the Sub-Inspector of Police went over to the residence of the petitioner and peeped into the car shed, which

was locked, and found that there was a Fiat car inside, though clearly the details of the car were not visible. Therefore, he deemed it necessary to enquire the first informant. He proceeded to Dharmapuri and examined Venkatachalam and recorded his statement on 4-7- 1989. On the same day he went over to Vellore and examined witness Arjuna Pillai and later examined witness Kandaswamy at Conjeevaram. He halted at Conjeevaram on the night of 4th and on the morning of 5th reached Madurantakam and examined witnesses Shanmugham, Thamin, Ansari and Kumar. It was only late that evening at 6 p.m., the accused was arrested. Dharmapuri is approximately at a distance of over 200 miles, from Madras and Vellore is about 90 miles away from Madras. Conjeevaram is at a distance of 45 miles from Madras, while Madurantakam is exactly 50 miles from Madras. After the registration of the complaint at 1 p.m. at Madurantakam on 4-7-1989, it prima facie appears impossible to go over to Dharmapuri, examine the complainant, reach Vellore on the same night for Examination of witnesses and still find it possible to reach Conjeevaram the very night itself for examination of a witness at Conjeevaram, before returning to Madurantakam on the next morning. This appears to be stranger than fiction. It may be, that at this stage the Court cannot appreciate the scope and nature of investigation carried out by the agency entrusted with such task, but when an impracticable factor stares at the face, the Court cannot hide its head, as an ostrich and prefer to be in oblivion to basic circumstances. It is further seen from the material collected during investigation, that even in April, 1985, Venkatachalam and others had moved this court and obtained anticipatory bail on an alleged complaint by Ashok Kumar, the accused in this crime. This fact is clear from the petition filed by Venkatachalam and others u/S. 482, Cr. P.C., in Crl. M.P. No. 2974 of 1985 and the order of Singaravelu, J., directing the release of Venkatachalam and others on bail, in the event of arrest, on 24-4-1985, made in the said petition. It is also noticed from the records produced by the respondent that on the reverse of the sheet, where the statement of Kumar u/S.161, Cr. P.C. has been recorded in carbon on 5-7-1989, (there are two carbon copies of the statement of the witness apart from the original written in ink), an endorsement had been made (on the second carbon copy) as follows :

"Charge sheet stage. Draft Charge to be prepared. Since High Court stayed I. case.....suitable order awaiting."

This endorsement also shows that the investigation is almost over and only the draft charge sheet had to be prepared, before forwarding a final report to court.

15. Since I found that details, as recorded in the R.C. Book of the car M.S.W.8458, had been noted by the respondent, I called for the production of the registration certificate of the car M.S.W. 8458, by the petitioner through his counsel, and the same was produced in court. The learned Additional Public Prosecutor was permitted to peruse the registration certificate. I have also carefully gone into the contents of the registration certificate, which are as follows:-

"The registration certificate shows that the original owner of M.S.W. 8458, a goods vehicle was R. C. Ganesan of Madras. It was initially a closed standard ten van manufactured in 1961. The registration certificate was issued on 9-3-1962 Subsequently it was transferred with effect from 10-7-1969 to Major S.A. Hakim, Madras, and later with effect from 30-10-1972 in the name of W.S. Riaz Ahamed, Madras-21. With effect from 25-11-1985 the transferee was S.A. Ahmed of Madras. The petitioner became the owner of this vehicle from 26-3-1986. With effect from 19-5-1987 alterations were made in the vehicle by which the goods vehicle was changed into a motor car and the fuel fused was changed to petrol from diesel. There was a change in the engine number, but the chassis number remained the same. There was a slight difference in the unladen weight, after alteration."

16. The power to quash a criminal proceedings, where the first information report ex facie makes out no offence, has been considered by the Supreme Court in a series of

cases starting from Kapur's case AIR 1960 SC 866: 1960 Cri LJ 1239. The latest decision of the Supreme Court is reported in 1989 SCC (Crl.) 713: 1989 Cri LJ 2301 decided by a Bench of three judges in State of U.P. v. R. K. Srivastava. The Supreme Court has observed that it was now a well settled principle of law, that if the allegations made in the FIR taken at their face value and accepted in their entirety do not constitute an offence, the criminal proceedings -instituted on the basis of such FIR should be quashed. In R.P. Kapur v. State of Punjab AIR 1960 SC 866: 1960 Cri LJ 1239 the Supreme Court held that the inherent jurisdiction of the High Court can be exercised to quash proceeding, in a proper case, either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code and the High Court would be reluctant to interfere with such proceedings at an interlocutory stage. It was not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. Some of the categories of cases where inherent jurisdiction to quash proceedings can and should he exercised are (at page 1242 of 1960 Cri LJ):

(1) Where the allegations in the first information report or the complaint even if they are taken at their face value and accepted in their entirety, did not constitute the offence alleged, in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not;

(2) Where the allegations made against the accused persons do constitute an offence alleged, but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. A clear distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence, which on its appreciation, may or may not support the accusation in question will have to be borne in mind; and

(3) Where there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged.

17. It is now fairly settled, that the broad proposition, that the Court can in no case interfere with the investigation of the case, does not appear to be justified. At the same time it admits of no doubt as observed in Nazir Ahmed's case AIR 1945 PC 18: 1946 Cri LJ 413 that the power of investigation so far as it vests exclusively in the police or investigating agency is not to be interfered with, by the Courts and the investigating agency should be left to carry on investigation without any interference. This only postulates, that so long as the investigation is in accordance with law, it cannot be interfered with. That does not mean that immunity is given to investigation, which is not in consonance with the relevant provisions of law, governing the particular ease. In a nutshell, there cannot be a blanket bar against the quashing of a proceeding at the investigative stage. If the High Court is convinced that the first information report does not disclose a cognizable silence and that the continuation of an investigation, based on no foundation, would amount to an abuse of power of police, necessitating interference to secure the ends of justice the inherent power will have to be exercised. This statutory power u/S. 482, Cr. P.C. has to be exercised sparingly with circumspection, in the rarest of rare cases, to do real and substantive justice for the administration of which alone it exists or to prevent the abuse of the process of the court.

18. Even in Emperor v. Nazir Ahmad AIR 1945 PC 18: 1946 Cri LJ 413, it was observed as follows:-

"No doubt if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation and for this

reason Newsam J., may well have decided rightly in M.M.S.T. Chidambaram v. Shanmugam Pillai, AIR 1938 Mad 129 : 1939 Cri LJ 261. But that is not this case."
The observation of Newsam, J., can also be usefully extracted, though it related to a private complaint.
Since prevention is always better than cure, the obligation to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable, yet do not amount to crimes, is one that must never be shirked".
19. Before going into the arena of the law laid down by the Supreme Court and other High Courts on the pre-requisites, for quashing a first information report, a scan of S.154, Cr. P.C. indicates that on every information, relating to the commission of a cognizable offence, the power of the police to investigate sets in. In a non-cognizable case a police officer is barred from investigating without an order from the Magistrate. S. 156, Cr. P.C. furnishes the power to the Police Officer to investigate a cognizable case, without an order of the Magistrate, but it is confined to the local area within the limits of such station and within the jurisdiction of the Magistrate of the local area. S. 157, Cr. P.C. makes it abundantly clear that if, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered to investigate u/S. 156, Cr. P.C. he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers, to proceed, to the spot, to investigate the facts and circumstances of the case…….Therefore, the statutory sanction, which can form the foundation for a lawful investigation by the Police will be a reasonable suspicion of the commission of a cognizable offence. If the information that the police officer does not disclose any cognizable offence, the statutory mandate to commence investigation would be absence and lacking. Even if the first information report, which cannot be treated as an encyclopaedia, contains only certain facts, which could genuinely lead to a reasonable belief that a cognizable offence had been committed, the High Court must be slow in exercising its inherent powers to quash the first information report and stifle the investigation. In other words, even if the first information report does not come within the ambit straightway of a cognizable offence, if the material collected subsequently disclose, the commission of a cognizable offence, the police cannot be halted in their tracks. If the first information report does not disclose a cognizable offence, the Court shall exercise its jurisdiction, once it is satisfied that even when challenged the investigating agency, on the basis of all the material collected, was unable to show any reasonable suspicion of the commission of a cognizable offence, and a patent harassment of the accused was obvious, amounting to clear abuse of power by the police. The salutary inherent power will then have to be necessarily exercised, as otherwise the contemplation to secure the ends of justice in S.482, Cr. P.C. would become a dead letter.
20. In S. N. Sharma v. Bipen Kumar Tiwari, AIR 1970 SC 786: 1970 Cri LJ 764, the Supreme Court observed (at page 767; 1970 Cri LJ):
"It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed in appropriate cases, an aggrieved person can always seek a remedy by invoking the power of the High Court under Art.226 of the Constitution of India under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a Writ of Mandamus restraining the police officer from misusing his legal powers."
21. The availability of power exercisable u/ S.482, Cr. P.C. in appropriate cases equally, as it could be done by the High Court acting under Art. 226 of the Constitution of India has been confirmed by the Supreme Court in AIR 1975 SC 495: 1975 Cri LJ 325

(Delhi Development Authority v. Smt. Lila D. Bhagat). In that case the Supreme Court laid down the law by stating that in an appropriate case it may be, rather, is, permissible to protect a person from illegal and vexatious prosecution by grant of an appropriate writ or, in exercise of the inherent or revisional powers of the High Court. It is, therefore, certain that there is express authority that a proceeding initiated under the provisions of the Criminal Procedure Code, can be quashed by the High Court either under the extraordinary powers under Art.226 of the Constitution of India or under the inherent powers u/S.482, Cr. P.C. or under the revisional power u/S. 397, Cr. P.C.

22. As observed by the Orissa High Court in Suresh Chandra Swain v. State of Orissa, (1988 Cri. LJ 1175) there can be no logic to say that powers which are exercisable in respect of proceedings, cannot be applied in respect of investigations, particularly when S. 482, Cr. P.C. itself does not clamp any limitations therein as suggested, though however, it may be true that u/S.397 obviously an investigation cannot probably be quashed since that section empowers the High Court or the Sessions Judge, as the case may be, to call for and examine the records of any proceeding before any inferior criminal court only.

23. In Sejappan Madi Mallapon v. State of Mysore, AIR 1966 Mysore 152: 1966 Cri LJ 677 a Division Bench of the Mysore High Court, while considering the amplitude of the power of the High Court u/S.561(A), Cr.P.C. (corresponding to S.482, Cr. P.C.) held that the section was wide enough to enable it, in a proper case to stop the investigation which should never have commenced or to make which there was no power under the Criminal Procedure Code. It would, however be neither necessary nor possible to make an exhaustive examination of all those cases in which, the High Court could under the Section, exercise its inherent power with respect to an investigation commenced by the police. That power is always exercisable, where there is a misuse of power by the police, or there is the commencement of an investigation without the requisite authority and the High Court considered it necessary to exercise its inherent power, to secure the ends of justice. If, as noticed by the Supreme Court in S. N. Sharma's case an aggrieved person has a remedy by invoking Art. 226 of the Constitution, equally the enunciation of law by the Supreme Court in the State of Karnataka v. L. Muniswami, (AIR 1977 SC 1489: 1977 Cri LJ 1125), with regard to the power u/S.482, Cr. P.C. extracted hereunder cannot be overlooked (at page 1128; 1977 Cri LJ) :-

" In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted degenerate into a weapon of harassment or prosecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material in which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx

And again,

..... Considerations justifying the exercise of inherent powers for securing the ends of justice naturally vary from case to case and a jurisdiction as wholesome as the one conferred by S.482 ought not to be encashed within the strait-jacket of a rigid formula."

24. A Full Bench of the Punjab and Haryana High Court in Vinod Kumar v. State of Punjab (AIR 1982 P and H 372), after extensively quoting the case law, held that, however, there was no reason why the identical relief which could be accorded to an aggrieved person under Art. 226 of the Constitution cannot be so accorded in the exercise of its inherent powers u/S.482, Cr. P.C., especially when the language of this provision was of a wider amplitude and has been authoritatively so held by the Supreme Court in the State of Karnataka v. L. Munuswamy, AIR 1977 SC 1489: 1977 Cri LJ 1125.

25. In the case of State of West Bengal v. Swapan Kumar Guha, AIR 1982 SC 949: 1982 Cri LJ 819, after referring to the earlier pronouncements, Chandrachud, C.J. observed as follows (at page 828; 1982 Cri LJ):

"The condition precedent to the commencement of investigation u/S.157 of the Code, is that the FIR must disclose, prima facie, that a cognizable offence has been committed. It is wrong to suppose that the police have an unfettered discretion to commence investigation u/S.157 of the Code. Their right of inquiry is conditional by the existence of reason to suspect the commission of cognizable offence and they cannot, reasonably, have reason so to suspect unless the FIR, prima facie, discloses the commission of such offence. If that condition is satisfied, the investigation must go on and the rule in Khwaja Nazir Ahmed will apply. The Court has then no power to stop the investigation, for to do so would be to trench upon the lawful power of the police to investigate into cognizable offences. On the other hand, if the FIR does not disclose the commission of a cognizable offences would be justified in quashing the investigation on the basis of the information as laid or received."

In the same case Amarendra Nath Sen, J. had the following observations to make:-

"In my opinion, the legal position is well settled. The legal position appears to be that if an offence is disclosed, the Court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed; if, however, the materials do not disclose an offence, no investigation should normally be permitted. The observations of the Judicial Committee and the observations of this court in the various decisions which I have earlier quoted, make this position abundantly clear. The propositions enunciated by the Judicial Committee and this Court in the various decisions which I have earlier noted are based on sound principles of justice. Once an offence is disclosed an investigation into the offence must necessarily follow in the interests of justice. If, however, no offence is disclosed, an investigation cannot be permitted, as any investigation, in the absence of any offence being disclosed, will result in unnecessary harassment to a party, whose liberty and property may be put to jeopardy for nothing. The liberty and property of any individual are sacred and sacrosanct and the Court zealously guards them and protects them."

26. In the same case the view of the Supreme Court was, that the disclosure of an offence or otherwise in the first information report, would depend on the facts and circumstances of each particular case. In the course of such consideration the Court has mainly to take into consideration the complaint or the FIR and may in appropriate cases take into consideration the relevant facts and circumstances of the case. On a consideration of all the relevant materials, the court has to come to the conclusion whether the offence is disclosed or not. If, on a consideration of the relevant material, the Court is satisfied that no offence in disclosed, it will be the duty of the Court to interfere with any investigation and to stop the same, to prevent any kind of uncalled for and unnecessary harassment to an individual. This power under S. 482, Cr. P.C. cannot be exercised in a

routine case, where information of an offence or offences had been lodged and the investigation had commenced, search and seizure followed and the suspects arrested. However, in exceptional cases where non-interference would result to miscarriage of justice. the Court and the judicial process, should interfere at the stage of investigation. It will be very relevant at this stage to quote the observations of the Supreme Court in Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre, AIR 1988 SC 709 : 1988 Cri L J 853 (at page 855; 1988 Cri LJ) :

"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purposes and where in the opinion of the Court chances of penultimate conviction are bleak, and therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while talking into consideration the Special facts of a case also quash the proceeding even though it may be at a preliminary stage."

27. The authoritative enunciation of law having been narrated, let us now turn to the facts of the case at hand. The contents of the first information report extracted earlier in the order, show that the first informant and the accused (Petitioner) had business dealings in finance and precious stones and in the course of such business, about 3 years prior to 13-6-1989, the petitioner offered to take the Fiat Car MED 5814, belonging to the first informant, for a value of Rs. 53,000/- and towards the sale consideration, he agreed to discharge the hire purchase then in favour of a Financier at Bangalore and for the remaining, offered precious stones in the trade of which, both of them had incessant contacts in the past. The complaint does not speak about any deception practiced by the petitioner. Nothing is stated about the fraudulent or dishonest inducement practiced, to deliver any property or about the intentional inducement to do or omit to do anything which the first informant otherwise would not have done. I am unable to find the averments in the first information report, disclosing an offence u/S.420, IPC for which offence the Crime has been registered. Further on the face of the complaint, it is clear that the car was taken away by the petitioner, from the first informant, at Dharmapuri and driven to Madurantakam. Prima facie, this averment would indicate, that the commission of the offence, if any, at all was at Dharmapuri and not within the local jurisdiction of the Madurantakam police. However, if the allegations in the FIR are taken at their face value, it only discloses a transaction in the course of trade dealings, between both the parties which may, if true, give rise to a civil liability and cannot be christened as a Crime.

28. At a late stage the learned Additional Public Prosecutor contended that the statements recorded u/S. 161, Cr. P.C. will show that the initial talk was at Madurantakam between the first informant and the petitioner, and the car had been taken away on 10-4-1985 and not in 1986 as alleged in the complaint. This argument was countered, by contending that in fact the car had been taken away by the petitioner on 10-4-1985, the inaction of the first informant after 24-4-1985, when he was directed to be enlarged on bail, in the event of arrest was inexplicable. The complaint would then be belated by 4 years and 2 months.

29. The very pattern, in which the complaint received by post, had been taken emergent notice, of leading to an alleged impossible visit to Dharmapuri, Vellore and Conjeevaram on the same night and the subsequent arrest of the petitioner, a day prior to the hearing of his private complaint against the Deputy Superintendent of Police-in-charge of the District, within whose jurisdiction Madurantakam Police Station is situated,

indisputably indicates that on a complaint, which does not disclose any cognizable offence, action had been taken, with an oblique motive. The manner in which similar complaints regarding cognizable offences of this nature are dealt with by the police, cannot escape judicial notice, and on facts if everything prior to the arrest of the petitioner had been so stage managed, the process of justice cannot but raise its eyebrows. That is not all. There cannot be even a reasonable suspicion of the commission of a cognizable offence, because the first information report itself discloses, that at the instance of the petitioner, the first informant was prosecuted and the proceedings were pending in Court.

30. The one other averment in the complaint that the petitioner was using the Fiat Car MED 5814 belonging to the first informant, with a fake R.C. book did entail anxious consideration, about the possibility of not halting investigation at this stage. I specifically questioned the learned Additional Public Prosecutor on this aspect and attempted to find out if the R.C. book concerning the other Fiat Car MSW 8458 had any bearing on this averment. After being instructed by the investigating officer, the learned Additional Public Prosecutor submitted that MSW 8458 was a goods vehicle and not a car and that is what had been alleged in the affidavit filed by the Sub Inspector of Police to vacate the order of stay of investigation made by this Court at the time of the admission of this petition, it will be very dangerous to arrive at a decision on the basis of the affidavit of the petitioner or the counter affidavit of the investigating officer, to consider about the scope of the exercise of the inherent power. Since I had noticed in the investigation record, entries regarding MSW 8458, which showed that the vehicle, which was a van originally, had teen converted into a car. I directed the learned counsel for the petitioner to produce the registration certificate of MSW 8458. A perusal of the contents of the registration certificate shows that the petitioner is the owner of this car with effect from 26-3-1986. The registration certificate also shows that alterations had been made to this van even in 1987 and all that form part of the entries in the said book. It is not as though the investigating officer was not aware of these details, for I find an entry in the record produced about the conversion of this goods vehicle into a car. Thus the two cars have no connecting link.

31. One other aspect, which the learned Additional Public Prosecutor submitted on the basis of the affidavit of the investigating officer is that the Financier did not produce the Registration Certificate of the Car MED 5814, in spite of several notices and even when the investigating Officer met the Financier in person on several occasions with a request to produce the R.C. Book. The notice to the Financier had been given on 31-7-1989, 9 days prior to the order of stay made by this Court and it passes one's comprehension, if the investigating agency was so helpless. in not being able to seize the registration book from the Financier if, in fact, there was any seriousness about this matter, after the arrest of the petitioner. There is not even an averment in the FIR that the Financier at Bangalore had complained of non-payment of hire charges, or was insisting the first informant to pay the dues. In the event of non-payment of hire charges, it will be rather add, that the Financier did not take efforts to seize the car., which was within his power under the hire purchase agreement. All these factors are stated, for if we look at from any angle, there cannot be any reasonable suspicion, in the mind of the police officer, about the commission of a cognizable offences. The case records produced show that the investigation was almost complete and a draft charge sheet was to be prepared and meanwhile, the High Court had stayed the proceedings. If that be so, it is very clear that there is no material whatsoever even to base a foundation, that the Car MED 5814 was being used by the petitioner with a fake R.C. book. The investigating officer, who must have noticed from the records produced the order of bail obtained by the first informant from this court, on a complaint made by the petitioner even in April. 1985, should have at least then indicated that there

was no reason whatsoever to continue the investigation further, but an unfortunate stand has been taken, that vital clues were revealed in the investigation done so far, which is not at all reflected in the material produced before court.

32. The learned Additional Public Prosecutor submitted that the jurisdiction of the police officer to investigate could not be gone into at this stage, since the statement recorded u/S. 161, Cr. P.C. at Dharmapuri, from the first informant, disclosed that the initial talk by the petitioner, of taking the first informant's car, took place at Madurantakam, though the car was taken from the first informant's possession at Dharmapuri.

33. The Allahabad High Court in Bholanath v. State (1956 All LJ 700) held that u/S. 156, Cr. P.C. a police officer in charge of a police station can investigate only those cases which relate to the local area. Under this section the police officer is not empowered to investigate cases which do not relate to his circle. The detailed facts, as stated earlier, would inevitably show that there was an anxiety on the part of the Madurantakam police to clutch at jurisdiction, which they did not possess.

34. The observation of the Supreme Court in the State of West Bengal v. Swapan Kumar Guha, AIR 1982 SC 949: 1982 Cri LJ 819 certainly permits this Court in appropriate cases to take into consideration the relevant facts and circumstances, after mainly taking into consideration the complaint or the FIR. The Patna High Court in Subhash Agarwal v. State of Bihar (1989 Cri LJ 1752) has observed that the materials subsequently collected in the course of investigation, could also be taken note of, apart from the contents of the FIR to arrive at a conclusion whether the continuation of the investigation would amount to an abuse of power by the police, necessitating interference to secure the ends of justice. The Full Bench of Punjab and Haryana High Court in Vinod Kumar v. State (AIR 1982 P. and H. 372) took the view that the requisite pre-conditions for the exercise of the power would stand satisfied under the following circumstances without being exhaustive those were briefly summaried as under (at page 382 P. and H.; AIR 1982:-

(i) when the first information report, even if accepted as true, discloses no reasonable suspicion of the commission of a cognizable offence:

(ii) when the materials subsequently collected in the course of an investigation further disclose no such cognizable offence at all;

(iii) When the continuation of such investigation would amount to an abuse of power by the police thus necessitating interference in the ends of justice; and

(iv) that even if the first information report or its subsequent investigation purports to raise a suspicion of a cognizable offence, the High Court can still quash if it is convinced that the power of investigation has been exercised mala fide."

35. On a careful, deep and anxious consideration, after excluding the factual details, which cannot be gone into at this stage, the inescapable conclusions are:-

(a) The first information report does not disclose a cognizable offence;

(b) Even the material collected during investigation, which from the endorsement made, indicate that the investigation has reached the stage of drafting the charge sheet, does not disclose a reasonable suspicion of the commission of a cognizable offence.

(c) The very manner in which an unusually quick and spontaneous investigation had been commenced in the background of several infirmities pointed out, without any possible or attempted explanation, portrays abuse of police power; and

(iv) That even if the first information report purported to raise a suspicion of the commission of a cognizable offence of the user of a fake registration book, the subsequent investigation has negatived it and the power to quash has to be necessarily exercised, for the investigation commenced and pursued lacks bona fides.

This is one of those rarest of rare cases, where the liberty of an individual, so sacred and sacrosant has to be protected zealously by the court as observed by Amarendra Nath Sen, J., in the State of West Bengal v. Swapan Kumar Guha, AIR 1982 SC 949: 1982 Cri LJ 819.

36. In view of the discussion above, I am constrained to quash all the proceedings taken in pursuance of the first information report registered in Crime No. 284 of 1989, since there is no legal sanction either to initiate investigation or to further continue it. Crl. M. P. No. 8989/89 is allowed. No order is necessary in Crl. M.P. Nos.8990 and 15798 of 1989 in view of the orders passed in Crl. M.P. No. 8989 of 1989.

Order accordingly**.**

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Eq Citation :2011 (1) SCC (Cri) 336, 2010-TLPRE-0-595

IN THE SUPREME COURT OF INDIA

CORAM : P, SATHASIVAM, Dr. B.S. CHAUHAN, J.

BabubhaI

Vs.

State of Gujarat

CRIMINAL APPEAL NO. 1599 of 2010 Of Aug 26,2010

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A) Cr. P.C. – S. 482 – Tainted investigation – Quashing of investigation which is tainted and baised, suffers from irregualtities and conducted in malafide exercise of power by police causing serios prejudice and harassment to any party then such investigation is vitiated and any other order passed by investigating agency on basis of such vititated investigation is laible to be quashed – charge sheet is quashed.

B) Article 20, 21 of the constitution – Fair investigation – Investigation must be fiar, transparent and judicious – Police cannot be permitted to harass any party on basis of tainted investigation – Such tainted investigation has to be quashed- fresh investigation may be ordered from other investigation agencies.

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JUDGEMENT

(1.) Leave granted.

(2.) These appeals and other connected appeals have been preferred against the judgment and order dated 22.12.2009 of the High Court of Gujarat at Ahmedabad, passed in Special Criminal Application Nos. 1675/2008, 1679/2008 with Crl. Misc. Application Nos. 8249/2009, 8361/2009, 8363/2009 and 7687/2009.

(3.) Facts and circumstances giving rise to the present cases are that on 7.7.2008, some altercation took place between members of the Bharwad and the Koli Patel communities over the plying of rickshaws in the area surrounding Dhedhal village of Distt. Ahmedabad, Gujarat. The Bharwad community had been preventing the Koli Patels from running their rickshaws in the said area. On the next day, i.e. on 8.7.2008, case No. C.R.No.I- 154/2008, was registered at 17:30 hours in the Bavla Police Station under Sections 147, 148, 149, 302, 307, 332, 333, 436 and 427 of the Indian Penal Code, 1860 (hereinafter called as "IPC") read with Section 135 of the Bombay Police Act, 1951 (for short "BP Act") and Sections 3, 7 of Prevention of Damages of Public Property Act, 1984 (for short "1984 Act") for an incident which occurred at Village Dhedhal, wherein Mr. M.N. Pandya, Sub-Inspector of Police, Bavla Police Station has stated that while he was patrolling in Bavla Town, he received a message from H.C. Kanaiyalal, Police Station Officer, at 10.00 a.m. that some altercation/incident had taken place between the two communities at Dhedhal Cross Roads. On receiving the said information, he along with other police personnel, rushed to the place of incident, however, by that time the crowd had already dispersed. Thereafter, he received information that a clash was going on between the said two communities in Dhedhal village. Immediately, he contacted the Control Room, as well as the Deputy Superintendent of Police of Dholka, for further police support and rushed to the spot where he found about 2000-3000 persons from both the communities, all with sticks, dhariyas, swords etc., attacking each other. The police resorted to teargas shells as well as to lathi charges to disperse the crowd. Several rounds of firing were resorted to in order to disperse the mob. In the incident, more than 20 persons were injured and three houses of members of the Bharwad community were set on fire. One person, namely Ajitbhai Prahladbhai, also died. Several police personnel were also injured. No person was named in the said FIR.

(4.) Another FIR, being Case No. C.R.No. I-155 of 2008, was registered at Bavla Police Station on the same date i.e. 8.7.2008 at 22:35 hrs by Babubhai Popatbhai Koli Patel (appellant in SLP (Crl.) No.2077/2010 and respondent in SLP (Crl.) Nos. 3235-3240/2010) (hereinafter called as complainant), resident of village Vasna, Taluka Bavla, wherein he alleged that an incident took place on the same day at 9:15 hours near Dhedhal village in which he named 18 persons as accused. As per this FIR, an incident occurred on 7.7.2008 in the evening at about 6.30 p.m. His cousin Jayantibhai Gordhanbhai told him that when Budhabhai of their village and two rickshaw-walas were taking passengers at Dhedhal Chokdi, the Bharwads of Dhedhal village who were also plying rickshaws, chhakdas etc. told the Koli Patels not to take passengers from there and they took away the keys of the jeep, beat up the Koli Patel boys, abused and threatened them and told them not to bring jeeps and rickshaws to Dhedhal Chokdi. Babubhai Popatbhai Koli Patel, complainant reached Dhedhal Chokdi and met Budhabhai LaL.J.ibhai Koli Patel of his village and his brother Jayantibhai LaL.J.ibhai and enquired about the incident. They complained about browbeating and threatening by the Bharwads as the Bharwads wanted that no one else

should bring jeeps and chhakdas to Dhedhal Chokdi. The informant/complainant stated that Kantibhai Ratanbhai Bharwad and other persons standing nearby told them to stop and threats were made by the Bharwads. On the date of the incident, when the informant was coming towards Dhedhal village from Vasna, his cousin Vadibhai Pakhabhai's tractor and one chhakda rickshaw were passing through the road. When they reached near Dhedhal village pond, the rickshaw and tractor were halted, his car was also stopped and he got down from the car and saw that 10 to 12 persons belonging to the Bharwad community were assaulting his cousin Vadibhai Pakhabhai and Amubhai Pakhabhai with sticks. They were also assaulting the chhakda rickshaw-walas. He saw Ganesh Jaksi of the Bharwad community of Dhedhal village having tamancha-like weapon in his hand and instigating the other persons to indulge in violence. He also saw Sanjay Chela Bharwad, Dhiru Matam Bharwad, Sura Raiji Bharwad of Dhedhal intercepting people going on the road and Karshan Chako Bharwad, Moman Natha Bharwad, Kalu Sedhu Bharwad, Kalu Hari Bharwad, Chinu Bhikhu Bharwad assaulting Vadibhai Pakhabhai and Amubhai as well as the chhakda rickshaw-wala saying that the road was not for them and thus, they should not pass through it. The complainant and Manubhai went to rescue Vadibhai. At that time, Jayantibhai LaL.J.ibhai Patel of their village and Matambhai Vadibhai Patel came on a motor cycle. They were also stopped and all the persons jumped on them and started assaulting and abusing them. He saw that Surabhai Raijibhai Bharwad had inflicted stick blows on Manubhai due to which he was injured and became unconscious. When the mob beat up Manubhai, at that time, other Bharwads from Dhedhal village had also arrived.

(5.) The Bharwads started beating passersby on vehicles, who had worn clothes like Koli Patels and causing injuries to them. The Bharwads made calls on mobile phones to call other Bharwads. The Bharwads assaulted and killed Manubhai Koli Patel and Ajitbhai Prahladbhai Koli Patel by assaulting them with deadly weapons like revolver, dhariyas and sticks and also caused serious injuries to Babubhai Popatbhai Koli Patel, informant/complainant on his head and hand. They also caused minor and major injuries to other persons.

(6.) On 9.7.2008, the inquest panchnama was carried out and three dead bodies were sent for post mortem. The report of the autopsy revealed a large number of injuries inflicted on the deceased persons. Statements of injured witnesses, who were admitted in Long Life Hospital, namely Dashratbhai Popatbhai Patel (PW.26), Hemubhai Babubhai Patel (PW.12), Jayantibhai LaL.J.ibhai (PW.14), Vadibhai Pakhabhai (PW.27) were recorded on 10.07.2008. Statements of injured witness Matambhai Vadibhai (PW.18) were recorded on 10.7.2008 and 21.7.2008.

(7.) The accused in both the cases filed Special Criminal Application No. 1675/2008 praying for investigation of CR No.I-154/2008 registered with Bavla Police Station by an independent agency like the CBI, Special Criminal Application No. 1679/2008 for quashing of C.R. No.I-154/2008 and C.R. No.I-155/2008 registered with Bavla Police Station. Three applications being Criminal Misc. Application Nos. 8249/2009, 8361/2009 and 8363/2009 to quash and set aside the proceedings undertaken by Sessions Court during the pendency of the applications filed earlier were made. Twenty two persons were arrested. On completion of investigation, the charge sheet was filed on 10.10.2008 against 12 accused persons and the case was committed to Sessions Court.

(8.) By judgment and final order dated 22.12.2009, the High Court quashed the FIR registered as CR No.I-155/2008 and clubbed the investigation of the FIR along with the

investigation of the other FIR bearing CR No.I-154/2008 to the extent it was feasible. The court transferred the investigation to the State CID Crime Branch and directed the new Investigating Officer to investigate the Bavla Police Station C.R.No.I-154/2008 as it stood earlier prior to the deletion of Section 302 IPC with a further clarification that quashing of the FIR registered by Bavla Police Station i.e. C.R.No.I-155 of 2008 could not mean that accused in respect of the said FIR has been discharged of the offences as they would face the charges in C.R. No.I-154/2008 and the accused who stood arrested in connection with C.R.No.I-155 of 2008 would stand arrested in connection with case C.R. No.I-154/2008. Hence, these appeals.

(9.) Shri R.K. Abichandani, learned senior counsel appearing for the appellant/complainant in C.R. No.I-155/2008, and Shri Tushar Mehta, learned Additional Advocate General have submitted that the High Court quashed the FIR without appreciating that there are no common factors in both the FIRs so as to indicate that both FIRs had arisen out of the same transaction. Thus, the FIRs could not be clubbed; the incident recorded in CR No. I-155/08 occurred prior in point of time and facts recorded in both the FIRs make it evident that there had been two separate incidents at two different places and for distinct offences. In CR No. I-155/08, three persons belonging to Koli Patel community had died and 26 persons of the same community were injured at the hands of Bharwads, whereas no person from the Bharwad community suffered any injury. Both the FIRs had been lodged specifying that the FIR in CR No.I-155/08 has been in respect of the incident occurred at 9.15 am while the incident involved in CR No. I-154/08 has been in respect of incident occurred at 9.30 am. The incident first in time took place at Dhedhal Chokdi (Cross Roads) while the other incident occurred in village Dhedhal near the pond. The Court further erred in granting the relief to persons/applicants before it who had been absconding according to the Investigating Agency. Thus, their applications could not have been entertained. The appeals deserve to be allowed and the judgment and order of the High Court is liable to be set aside.

(10.) On the contrary, Shri U.U. Lalit, Shri C.A. Sundaram, Shri Rajeev Dhavan, and Shri P.S. Narsimha, learned senior counsel appearing for the respondents-accused in C.R. No.I-155/2008, have opposed the appeals contending that the High Court reached the correct conclusion that both the crimes were two parts of the same transaction. They occurred at the same place and the version given by Babubhai Popatbhai Koli Patel in C.R. No.I-155/2008 cannot be considered a counter version giving rise to a cross case. Thus, no interference with the impugned judgment and order of the High Court is required.

(11.) We have considered the rival submissions made by learned counsel for the parties and perused the record. Two FIRs.

(12.) In Ram Lal Narang Vs. Om Prakash Narang and Anr. AIR 1979 SC 1791, this Court considered a case wherein two FIRs had been lodged. The first one formed part of a subsequent larger conspiracy which came to the light on receipt of fresh information. Some of the conspirators were common in both the FIRs and the object of conspiracy in both the cases was not the same. This Court while considering the question as to whether investigation and further proceedings on the basis of both the FIRs was permissible held that no straitjacket formula can be laid down in this regard. The only test whether two FIRs can be permitted to exist was whether the two conspiracies were identical or not. After considering the facts of the said case, the Court came to the conclusion that both conspiracies were not identical. Therefore, lodging of two FIRs was held to be permissible.

(13.) In T.T. Antony Vs. State of Kerala and Ors. (2001) 6 SCC 181, this Court dealt with a case wherein in respect of the same cognizable offence and same occurrence two FIRs had been lodged and the Court held that there can be no second FIR and no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences. The investigating agency has to proceed only on the information about commission of a cognizable offence which is first entered in the Police Station diary by the Officer In-charge under Section 158 of the Code of Criminal Procedure, 1973 (hereinafter called the Cr.P.C.) and all other subsequent information would be covered by Section 162 Cr.P.C. for the reason that it is the duty of the Investigating Officer not merely to investigate the cognizable offence report in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and the Investigating Officer has to file one or more reports under Section 173 Cr.P.C. Even after submission of the report under Section 173(2) Cr.P.C., if the Investigating Officer comes across any further information pertaining to the same incident, he can make further investigation, but it is desirable that he must take the leave of the court and forward the further evidence, if any, with further report or reports under Section 173(8) Cr.P.C. In case the officer receives more than one piece of information in respect of the same incident involving one or more than one cognizable offences such information cannot properly be treated as an FIR as it would, in effect, be a second FIR and the same is not in conformity with the scheme of the Cr.P.C. The Court further observed as under:

"A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate..... However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution."

(Emphasis added).

(14.) In Upkar Singh Vs. Ved Prakash and Ors. (2004) 13 SCC 292, this Court considered the judgment in T.T. Antony (supra) and explained that the judgment in the said case does not exclude the registration of a complaint in the nature of counter claim from the purview of the court. What had been laid down by this Court in the aforesaid case is that any further complaint by the same complainant against the same accused, subsequent to the registration of a case, is prohibited under the Cr.P.C. because an investigation in this regard would have already started and further the complaint against the same accused will amount to an improvement on the facts mentioned in the original

complaint, hence, will be prohibited under section 162 Cr.P.C. However, this rule will not apply to a counter claim by the accused in the first complaint or on his behalf alleging a different version of the said incident. Thus, in case, there are rival versions in respect of the same episode, the Investigating Agency would take the same on two different FIRs and investigation can be carried under both of them by the same investigating agency and thus, filing an FIR pertaining to a counter claim in respect of the same incident having a different version of events, is permissible.

(15.) In Rameshchandra Nandlal Parikh Vs. State of Gujarat and Anr. (2006) 1 SCC 732, this Court reconsidered the earlier judgment including T.T. Antony (supra) and held that in case the FIRs are not in respect of the same cognizable offence or the same occurrence giving rise to one or more cognizable offences nor are they alleged to have been committed in the course of the same transaction or the same occurrence as the one alleged in the First FIR, there is no prohibition in accepting the second FIR.

(16.) In Nirmal Singh Kahlon Vs. State of Punjab and Ors. (2009) 1 SCC 441, this Court considered a case where an FIR had already been lodged on 14.6.2002 in respect of the offences committed by individuals. Subsequently, the matter was handed over to the Central Bureau of Investigation (CBI), which during investigation collected huge amount of material and also recorded statements of large number of persons and the CBI came to the conclusion that a scam was involved in the selection process of Panchayat Secretaries. The second FIR was lodged by the CBI. This Court after appreciating the evidence, came to the conclusion that matter investigated by the CBI dealt with a larger conspiracy. Therefore, this investigation has been on a much wider canvass and held that second FIR was permissible and required to be investigated. The Court held as under:

"The second FIR, in our opinion, would be maintainable not only because there were different versions but when new discovery is made on factual foundations. Discoveries may be made by the police authorities at a subsequent stage. Discovery about a larger conspiracy can also surface in another proceeding, as for example, in a case of this nature. If the police authorities did not make a fair investigation and left out conspiracy aspect of the matter from the purview of its investigation, in our opinion, as and when the same surfaced, it was open to the State and/or the High Court to direct investigation in respect of an offence which is distinct and separate from the one for which the FIR had already been lodged."

(Emphasis added).

(17.) Thus, in view of the above, the law on the subject emerges to the effect that an FIR under Section 154 Cr.P.C. is a very important document. It is the first information of a cognizable offence recorded by the Officer In-Charge of the Police Station. It sets the machinery of criminal law in motion and marks the commencement of the investigation which ends with the formation of an opinion under Section 169 or 170 Cr.P.C., as the case may be, and forwarding of a police report under Section 173 Cr.P.C. Thus, it is quite possible that more than one piece of information be given to the Police Officer In- charge of the Police Station in respect of the same incident involving one or more than one cognizable offences. In such a case, he need not enter each piece of information in the Diary. All other information given orally or in writing after the commencement of the investigation into the facts mentioned in the First Information Report will be statements falling under Section 162 Cr.P.C. In such a case the court has to examine the facts and

circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is affirmative, the second FIR is liable to be quashed. However, in case, the contrary is proved, where the version in the second FIR is different and they are in respect of the two different incidents/crimes, the second FIR is permissible. In case in respect of the same incident the accused in the first FIR comes forward with a different version or counter claim, investigation on both the FIRs has to be conducted.

(18.) The instant case is required to be examined in the light of the aforesaid settled legal propositions. If the two FIRs are read together, it becomes clear that the incident started in the morning as per both the FIRs. C.R. No.I-154/2008, lodged by Mr. M.N. Pandya, Sub Inspector of Police stated that he reached the place of occurrence after receiving the information from the police station and found that mob had already dispersed. The case of the prosecution is that when the police reached the place of occurrence of the first incident, the mob had already dispersed, could not be correct for the reason that some of the witnesses have stated that the clash was going on when the police arrived and police resorted to force to disperse the mob. In fact, it was the police who summoned the ambulances which took the injured persons to hospitals. In the first incident as per the said FIR the place of occurrence had been village Dhedhal near the pond. In the pond, the damaged tractor, motor cycle and chhakda were found. Mr. M.N. Pandya called the extra police force and went inside the village. He found 2000-4000 persons and witnessed a free fight between them. The Koli Patels had surrounded some of the houses of the Bharwads. Some persons had been locked inside their houses and they had also put their houses at fire. The superior officers also came there. Police has used force to disperse the mob in the said incident and there were heavy casualties and there was loss of lives also. If we examine minutely the FIR in C.R. No.I-155/2008, the incident also occurred near the pond in the village Dhedhal. The damaged tractor, motor cycle and chhakda were there in the pond. One person Ajitbhai Prahladbhai was killed in the incident. Babubhai Popatbhai Koli Patel also got injured. While comparing both the FIRs there is no doubt that both the incidents had occurred at the same place in close proximity of time, therefore, they are two parts of the same transaction. More so, the death of Ajitbhai Prahladbhai has been mentioned in both the FIRs. From the report for deletion of Section 302 IPC, it is apparent that it is not the case of the Investigating Officer that the death of Ajitbhai Prahladbhai had not occurred during the course of the incident in connection with which C.R. No.I-154 of 2008 came to be registered.

(19.) It is also evident that houses of the Bharwads were inside the village in contiguous areas and the offence had spread over the entire area as is evident from the panchnama of the scene of offence drawn in C.R. No.I-155 of 2008 as well as from the contents of the said FIR. Same situation regarding the place of occurrence appears from the panchnama of the scene of incident in C.R. No. I-154/2008. Panchnama of the scene of incident of C.R. No.I-154/2008 includes the scene of occurrence of C.R. No.I-155/2008 which makes it clear that both the FIRs pertain to the two crimes committed in the same transaction. The scene of offence panchnamas establish clearly that the incidents in both the cases could not be distinct and independent of each other. In fact, it is nobody's case that incident relating to CR No.I-155/08 occurred at Dhedhal Chokdi (Cross-Roads).

(20.) In view of the above, we are of the considered opinion that the High Court reached the correct conclusion and second FIR C.R. I-155/2008 was liable to be quashed. Tainted Investigation

(21.) In some of the applications before the High Court, allegations of bias malafide against the investigating agency had been made submitting that investigation had not been fair and impartial and therefore, it stood vitiated because of material irregularities and therefore, investigation be handed over to some independent agency like CBI. The Court examined the grievance of those applicants and recorded the following findings:- (i) In spite of the fact that serious allegations had been made as regards the manner in which investigation had been made in the affidavit in reply, such allegations had not been denied; (ii) The investigation has been one-sided. Statements of witnesses belonging to only one community had been recorded, and the members of the other community had been totally excluded from recording their statements, indicating bias in favour of one community and against the other; (iii) In CR No.I-154/2008 several Koli Patels had been arraigned as accused, many of them are not named by any witness in their statements annexed with the charge-sheet. Thus, it was not clear as to how the said persons have been implicated in the offences in question. Such accused would certainly go scot-free, which clearly indicates the nature of investigation which has been carried out in respect of one of the FIRs; (iv) Not a single witness named in the charge sheet belongs to the Bharwad community and despite the fact that statements of witnesses reveal that persons belonging to both the communities have sustained injures, in the charge sheet, as well as the statements placed on record by the prosecution, not a single person belonging to the Bharwad community is shown to have sustained injuries; (v) Though the witnesses refer to names of the Bharwads whose houses were set on fire after shutting them in, none of the persons belonging to the Bharwad community are cited as witnesses nor are their statements recorded. This is the nature of the investigation carried out in respect of C.R.No. I-154 of 2008; (vi) When in respect of the second FIR pertaining to the alleged first incident, the informant was in a position to name all the accused belonging to the Bharwad community along with their father's name and surname, it is surprising that in the investigation carried out by the Investigating Officer no statement of any person belonging to the Bharwad community naming any person belonging to the Koli Patel community as having taken part in the incident has been recorded; (vii) The offence has been bifurcated into two parts and one serious in nature and the other a much diluted one. Even in the diluted offence, some persons belonging to one community have been named as accused though no material has been collected to connect most of them with the offence in question. There is nothing to indicate as to how the said names came to be revealed. All the accused belonging to the same community, i.e., Koli Patels have been shown to be absconding accused in the charge-sheet filed against some of the accused belonging to the Bharwad community despite the fact that they are shown as witnesses in another FIR and their statements had been recorded by the Investigating Officer; (viii) Accused of one case have been shown by the prosecution in the charge sheet as absconding accused but they had been attending court proceedings in the company of the Investigating Officer in another case; (ix) There is over-action in relation to one FIR and complete inaction in so far as the another FIR is concerned. The resultant effect of the poor investigation carried out in connection with one FIR would be that all the accused of the said FIR would be acquitted and only the accused of another FIR which belongs to one community would have to face the prosecution; (x) In such a fact-situation, persons who would otherwise be co-accused, would be witness against them in the case arising out of the another FIR which would cause immense prejudice to them; (xi) Deletion of offence

under section 302 IPC from the FIR CR No.I-154/2008 was totally unwarranted; and (xii) Charge-sheet against same set of 12 persons had been filed in relation to both the FIRs. However, there was no evidence against the said persons in connection with some of the offences and the prosecution was ready and preparing to get them discharged under section 169 Cr.P.C. On appreciation/consideration of the material available on record, the High Court recorded the aforesaid findings of fact and came to the following conclusion:

"The manner in which the investigation has been carried out as well as the manner in which these cases have been conducted before this Court, clearly indicate that the investigation is not fair and impartial and as such the investigating agency cannot be permitted to continue."

Thus, it is evident from the above that not only investigation in respect of both the FIRs had not been fair and has caused serious prejudice to one party but even before the High Court conduct of the party and investigating agency has not been fair.

(22.) None of the learned counsel appearing for the parties has raised any doubt about the correctness of those findings, rather all of them have fairly conceded that investigation was not conducted properly.

(23.) The High Court, in view of the fact that there has not been a fair investigation, transferred the case to State CBCID, however, it issued the following directions:

"The investigation in respect of the first information report registered vide Bavla Police Station I-C.R. No.154 of 2008 is transferred to the State CID Crime Branch. Both the Investigating Officers of the aforesaid FIRs shall hand over the investigation papers to the new investigating agency. The Investigating Officer who is entrusted with the investigation shall carry out further investigation in Bavla Police Station I-C.R. No.154 of 2008 as it stood earlier prior to the report for deletion of section 302 IPC. It is clarified that quashing of the first information report registered vide Bavla Police Station I-C.R. No.155 of 2008 does not mean that the accused in respect of the said FIR shall stand discharged of the offences. They shall now face the said charges in the first information report registered vide Bavla Police Station I-C.R. No.154 of 2008. The accused who are arrested in connection with Bavla Police Station I-C.R. No.155 of 2008 shall stand arrested in connection with Bavla Police Station I-C.R. No.154 of 2008."

(24.) We fail to understand that if the High Court has quashed the FIR in C.R.No. I-155/2008, how the charge sheet, which was filed after investigation of allegations made therein, could survive and be directed to be read in another case and other consequential orders be also read in another case. Further in case the High Court came to the conclusion that investigation was totally biased, unfair and tainted, the investigation had to be held to have stood vitiated and as a consequence thereof charge sheets filed in both the cases could have become inconsequential.

(25.) The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the Investigating Officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The Investigating Officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must

dispel any suspicion as to its genuineness. The Investigating Officer "is not to bolster up a prosecution case with such evidence as may enable the court to record conviction but to bring out the real unvarnished truth". (Vide R.P. Kapur Vs. State of Punjab AIR 1960 SC 866; Jamuna Chaudhary and Ors. Vs. State of Bihar AIR 1974 SC 1822; and Mahmood Vs. State of U.P. AIR 1976 SC 69).

(26.) In State of Bihar Vs. P.P. Sharma AIR 1991 SC 1260, this Court has held as under:

"Investigation is a delicate painstaking and dextrous process. Ethical conduct is absolutely essential for investigative professionalism. ....Therefore, before countenancing such allegations of mala fides or bias it is salutary and an onerous duty and responsibility of the court, not only to insist upon making specific and definite allegations of personal animosity against the Investigating Officer at the start of the investigation but also must insist to establish and prove them from the facts and circumstances to the satisfaction of the court. ....Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power....The word 'personal liberty' (under Article 21 of the Constitution) is of the widest amplitude covering variety of rights which goes to constitute personal liberty of a citizen. Its deprivation shall be only as per procedure prescribed in the Code and the Evidence Act conformable to the mandate of the Supreme Law, the Constitution. The investigator must be alive to the mandate of Article 21 and is not empowered to trample upon the personal liberty arbitrarily..... An Investigating Officer who is not sensitive to the constitutional mandates may be prone to trample upon the personal liberty of a person when he is actuated by mala fides."

(27.) In Navinchandra N. Majithia Vs. State of Meghalaya and Ors. AIR 2000 SC 3275, this Court considered a large number of its earlier judgments to the effect that investigating agencies are guardians of the liberty of innocent citizens. Therefore, a heavy responsibility devolves on them of seeing that innocent persons are not charged on an irresponsible and false implication. There cannot be any kind of interference or influence on the investigating agency and no one should be put through the harassment of a criminal trial unless there are good and substantial reasons for holding it. Cr.P.C. does not recognize private investigating agency, though there is no bar for any person to hire a private agency and get the matter investigated at his own risk and cost. But such an investigation cannot be treated as investigation made under law, nor can the evidence collected in such private investigation be presented by Public Prosecutor in any criminal trial. Therefore, the court emphasised on independence of the investigating agency and deprecated any kind of interference observing as under:

"The above discussion was made for emphasising the need for official investigation to be totally extricated from any extraneous influence..... All complaints shall be investigated with equal alacrity and with equal fairness irrespective of the financial capacity of the person lodging the complaint. ....A vitiated investigation is the precursor for miscarriage of criminal justice."

(Emphasis added)

(28.) In Nirmal Singh Kahlon (supra), this Court held that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused under Article 21 of the Constitution of India.

(29.) In Manu Sharma Vs. State (NCT of Delhi) (2010) 6 SCC 1, one of us (Hon'ble P. Sathasivam, J.) has elaborately dealt with the requirement of fair investigation observing as under:-

"..... The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.... It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law dehors his position and influence in the society.... The Court is not to accept the report which is contra legem (sic) to conduct judicious and fair investigation.... The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expansive power of the police to make investigation.....".

(30.) This Court in K. Chandrasekhar Vs. State of Kerala and Ors. (1998) 5 SCC 223; Ramachandran Vs. R. Udhayakumar and Ors. (2008) 5 SCC 413; and Nirmal Singh Kahlon (supra); Mithabhai Pashabhai Patel and Ors. Vs. State of Gujarat (2009) 6 SCC 332; and Kishan Lal Vs. Dharmendra Bafna (2009) 7 SCC 685 has emphasised that where the court comes to the conclusion that there was a serious irregularity in the investigation that had taken place, the court may direct a further investigation under Section 173(8) Cr.P.C., even transferring the investigation to an independent agency, rather than directing a re-investigation. "Direction of a re-investigation, however, being forbidden in law, no superior court would ordinarily issue such a direction."

(31.) Unless an extra ordinary case of gross abuse of power is made out by those in charge of the investigation, the court should be quite loathe to interfere with the investigation, a field of activity reserved for the police and the executive. Thus, in case of a mala fide exercise of power by a police officer the court may interfere. (vide: S.N. Sharma Vs. Bipen Kumar Tiwari and Ors. AIR 1970 SC 786).

(32.) In Kashmeri Devi Vs. Delhi Administration and Anr. AIR 1988 SC 1323, this Court held that where the investigation has not been conducted in a proper and objective manner it may be necessary for the court to order for fresh investigation with the help of an independent agency for the ends of justice so that real truth may be revealed. In the said case, this court transferred the investigation to the CBI, after coming to the conclusion that investigation conducted earlier was not fair.

(33.) The above referred to judgments of this Court make it clear that scheme of investigation, particularly, Section 173(8) Cr.P.C. provides for further investigation and not of re- investigation. Therefore, if the Court, comes to the conclusion that the investigation has been done in a manner with an object of helping a party, the court may direct for

further investigation and ordinarily not for re-investigation. The expression ordinarily means normally and it is used where there can be an exception. It means in the large majority of cases but not invariably. "Ordinarily" excludes "extra-ordinary" or "special circumstances". (vide: Kailash Chandra Vs. Union of India AIR 1961 SC 1346; Eicher Tractors Ltd., Haryana Vs. Commissioner of Customs, Bombay AIR 2001 SC 196; and State of A.P. Vs. Sarma Rao and Ors. AIR 2007 SC 137). Thus, it is evident that in exceptional circumstances, the court in order to prevent the miscarriage of criminal justice, if considers necessary, it may direct for investigation de novo wherein the case presents exceptional circumstances.

(34.) In the instant case, admittedly, the High Court has given detailed reasons for coming to the conclusion that the investigation has been totally one-sided, biased and mala fide. One party has been favoured by the investigating agency. The natural corollary to this finding is that the other party has been harassed in an unwarranted manner. Thus, the cause of the other party has been prejudiced. The charge sheets filed by the investigating agency in both the cases are against the same set of accused. A charge sheet is the outcome of an investigation. If the investigation has not been conducted fairly, we are of the view that such vitiated investigation cannot give rise to a valid charge sheet. Such investigation would ultimately prove to be precursor of miscarriage of criminal justice. In such a case the court would simply try to decipher the truth only on the basis of guess or conjunctures as the whole truth would not come before it. It will be difficult for the court to determine how the incident took place wherein three persons died and so many persons including the complainant and accused got injured. Not only the fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. Investigating agency cannot be permitted to conduct an investigation in tainted and biased manner. Where non- interference of the court would ultimately result in failure of justice, the court must interfere. In such a situation, it may be in the interest of justice that independent agency chosen by the High Court makes a fresh investigation. Thus, the order of the High Court requires modification to the extent that the charge sheets in both the cases and any order consequent thereto stand quashed. In case, any of the accused could not get bail because of the pendency of these appeals before this Court, it shall be open to him to apply for bail or any other relief before the appropriate forum. In case, such an application is filed, we request the appropriate court to decide the same expeditiously and in accordance with law. It is further clarified that those persons who were arrested in connection with CR No. I-155/08 would not stand arrested in connection with CR No. I-154/08. However, if during the fresh investigation, any incriminating material against any person is discovered, the Investigating Authority may proceed in accordance with law. It shall be open to the accused to approach the appropriate forum for any interim relief as per law.

(35.) In view of the above, the appeals are disposed of with the modification of the order of the High Court to the extent explained hereinabove.

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[Note :- The same principle is reiterated by Hon'ble Supreme Court in the case of 2007 ALL MR (Cri) 555 (SC) where, it has been held that,

'Fair investigation is expected from the prosecution – It is to be carried out not only from the stand of the prosecution but also the defence because onus of proof may shift to the accused at a later stage.]

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Cross Citation :1990 CRI. L. J. 2257

MADHYA PRADESH HIGH COURT

Hon'ble Judge(s) : GULAB C. GUPTA, J.

"Jugal Kishore v. State of M.P."

Misc. Cr. Case No. 432 of 1989, D/- 2 -11 -1989

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A] One sided Investigation – Police is bound to investigate the plea of accused also – A dishonest, unfair or one sided investigation violate the constitutional guarantee and justify interference by Court of Law – Such proceeding has be quashed

B] To put an accused person to long lasting trial on an incomplete and one sided investigation and promise to consider full facts only when they are brought before the court at defence stage amounts to ignoring default of the I.O. and clothe him with the authority to harass accused. It may even amount to judicial sanction of substitution of rule of law by the Police Raj, and subversion of our constitutional ideals. These consequences deserve notice of the Session Judge while interpreting his own authority and jurisdiction in the matter.

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Case Referred : Chronological Paras

Judgement

ORDER :- The applicants accused persons by this application u/s. 482, Cr. P.C. seek quashing of proceedings in Criminal Case No. 1119/88, pending before Shri R.K. Pandey, Judicial Magistrate, Class I, Sagar alleging that they are frivolous and vexatious and amount to abuse of the process of the said Court.

2. Facts appearing in case diary show that the applicants are alleged to have committed house trespass into the house bearing No. 258/3, Gujarati Bazar, Sagas and

have thus committed the offence punishable u/s. 448/34, I.P.C. It also appears that one Rajendra Kumar Dubey claiming to be the owner of the said house, lodged a report at the City Kotwali, Sagar on the basis of which the F.I.R. was recorded. Statement of applicant Jugal Kishor was also recorded by the Investigating Officer during the course of investigation. The applicant Jugal Kishor told the Investigating Officer that he was tenant of the house in question since last about 48 years and was at the present paying rent of Rs. 12 per month to the Income-tax Department. He also stated that the house had been attached by the Income-tax Department in 1984 where he was directed to pay the rent to the said Department. He also stated that he was paying rent of the house to the Income-tax Department since then. The Investigating Officer did not follow the clue and did not verify the correctness of the said information from the Income-tax Department. The Investigating Officer; relying on the statement of witnesses of the complainant, filed the challan before the Judicial Magistrate who took cognizance of the same and issued process to the applicants. The applicants requested the learned Magistrate to discharge them as they could not, even prima facie, be treated to be trespassers. They filed documents showing attachment of the house by Income-tax Department and receipts of rent paid by them. The learned Magistrate was of the view that the defence of the applicants could not be consider at this stage. The matter was thereafter taken to the Court of 3rd Additional Sessions Judge, Sagar by filing a revision. According to the learned Judge, allegations against the applicants were supported by the F.I.R. and hence proceedings could not be quashed. That is how the matter is before this Court in this application u/s.482, Cr. P.C. invoking its extraordinary jurisdiction to prevent abuse of the process of the Court of Judicial Magistrate.

3. Perusal of the case diary leads this Court to hold that investigation of the case by the Investigating Officer was neither fair nor honest. Indeed it was one sided. It is, in the opinion of this Court, possible to hold that the Investigating Officer was influenced by the complainant and has therefore failed to carry out his legal duties and obligations. Section 136, Cr. P.C. confers authority on the Officer-in-charge of a Police Station to investigate a cognizable case either himself of by a subordinate Officer. Section 157, Cr. P.C. requires him to first consider whether there are sufficient grounds to undertake such investigation. Sections 160 and 161, Cr. P.C. give the Investigating Officer the authority to require attendance of witnesses and record their statement. Sections 169 and 170, Cr. P.C. establish that the Investigating Officer is required to evaluate evidence to ascertain whether it was sufficient or deficient. It is, therefore, plain that investigation of allegations made against a person is a serious and solemn exercise undertaken by the Police Officer as on the result of this investigation hanges the fate of 'personal liberty' of the person which is constitutionally guaranteed. A dishonest, unfair or one-sided investigation would therefore, violate the constitutional guarantee and justify interference by a court of law. Now, if the Investigating Officer was honest and impartial, he would have carried on the investigation with the Income-tax Department to ascertain whether the applicant Jugal Kishor was depositing rent as asserted by him and whether the house was under attachment. It requires no discussion to hold that if assertions of applicant Jugal Kishore were true, there would be no case, even prima facie of house trespass the applicants. No tenant can be prosecuted for the offence of house trespass on the allegation of entering into the tenanted premises. There is no explanation why the truth of the defence of applicant Jugal Kishor was not verified. In the absence of any explanation, there are sufficient reasons to doubt the honesty and bona fides of the Investigating Officer. Such officers and such one-sided investigations, in the opinion of this Court, not only miscarriage of justice but also hearing the police and their department into disrepute.

4. The learned Additional Sessions Judge seems to be of the opinion that F.I.R., by itself, is sufficient to frame charge against the applicants and put them on trial. He also feels that the defence of the applicants cannot be considered at this stage. While his view about defence may be sustainable, it is difficult to agree with his view that F.I.R., by itself, is sufficient to frame charge and put the applicants on trial. This report cannot be used as substantive or primary evidence of the truth of its contents and is, therefore, never treated as a substitute for evidence given on oath. It is also well settled that where there is no other evidence of facts mentioned in the F.I.R., the accused person cannot be convicted (see Nankhu Singh v. State of Bihar, AIR 1973 SC 491 : (1972 Cri LJ 1204), Damodar prasad v. State of Maharashtra, AIR 1972 SC 622 : (1972 Cri LJ 451); A. Nagesia v. State of Bihar, AIR 1966 SC 119 : (1966 Cri LJ 100); State of Bombay v. Rusy Mistry, AIR 1960 SC 391 : (1960 Cri LJ 532); Mardansingh v. State of M.P., AIR 1963 Madh Pra 97 : (1963 (1) Cri LJ 272) and Umrao Singh v. State of M.P., AIR 1961 Madh Pra 45 : (1961 (1) Cri LJ 270). Then Ss.190 and 2044, Cr. P.C. which authorise the Magistrate to take cognizance of the offence and issue process, require consideration of facts constituting the alleged offence. The use of the words 'may take cognizance' in S.190 gives judicial discretion to the Magistrate in the matter. It is not always necessary for him to take cognizance and in the exercise of this power, he can even direct fresh investigations before deciding whether the facts placed before him disclose any cognizable offence. (A.C. Agrawal v. Kali Prasad, AIR 1968 SC 1 : (1968 Cri LJ 82) and State of Assam v. Abdul Noor, AIR 1970 SC 1365 : (1970 Cri LJ 1264). similarly S.204, Cr. P.C. requires the Magistrate to discover 'sufficient grounds' for proceeding further and for this purpose, be guided by his opinion. It is, therefore, obvious that though the results of investigation are of considerable importance, the Magistrate is not bound to accept the report in all cases and start proceeding against the accused person. There would be no justification, in the considered opinion of this Court, to exercise these powers in cases where there is only the FIR but no other evidence to prove facts stated therein. If the grievance of the applicants had been considered by the learned Additional Sessions Judge in this legal perspective, he may not have found any difficulty in exercising his revisional powers in their favour. Since unfair and one-sided investigation is likely to result in false and vexatious trial, the order of the Magistrate taking cognizance of the same and issuing process to the applicants could have been quashed. Revisional powers have always been exercised to prevent abuse of the process of the Court and avoid mis-carriage of justice. The learned Additional Judge does not seem to be informed of these duties and obligations under law and seems to have adopted a short cut to dismiss the applicant's prayer. This Court expected the senior judicial officers like the Additional Sessions Judge to be little more serious in the discharge of this duties and little more committed to the cause of justice.

5. To put an accused person to a long lasting trial on an incomplete and one-sided investigation and promise to consider full facts only when they are brought before the Court at the defence stage amounts to ignoring default of the investigating Officer and clothe him with the authority to harass such a person. It may even amount to judicial sanction of substitution of 'rule of law' by the police Raj and subversion of our constitutional ideals. These consequences deserved notice of the learned Additional Sessions Judge while interpreting his own authority and jurisdiction in the matter. Even if he had applied the widely used 'Golden rule of Statutory Interpretation.', he would have avoided these consequences which have the effect of defeating the object and purpose of S.397, Cr. P.C. That this rule is applied even to statutes dealing with Criminal matters should be clear from the Supreme Court decisions in State of U.P. v. C. Tobit, AIR 1958 SC 414 at p. 416 : (1958 Cri LJ 809 at p. 811) and Santa Singh v. State of Punjab, AIR 1976 SC 2386 : (1976 Cri LJ 1875).

6. Whatever might be the constraints of the learned Additional Sessions Judge, this Court does not suffer from any such constraint, Section 482, Cr. P.C., which is in fact invoked by the applicants, casts an obligation on this Court and otherwise secure the ends of justice. Starting proceedings which are wanting in bona fides and are frivolous, vexatious or oppressive is, without doubt, abuse of the process of the court of the Judicial Magistrate. Simply because the Investigating Officer does not conduct full, fair and independent investigation, the applicants cannot be required to go through the formality of trial and get acquitted by putting the entire material on record by way of defence. Similarly the ends of justice require that this Court consider for itself, whether there is a prima facie case against the applicants to justify their trial. Contents of the documents filed before the revisional court prima facie show that the applicant Judgal Kishor was the tenant of the disputed premises and was paying rent to the Income-tax Department iii obedience of the order issued in that behalf. There is nothing on record to explain these circumstances. These circumstances sufficiently indicate that there is bound to be denial of justice to the applicant, if they are required to undergo the full trial and these circumstances are considered only by way of defence. This Court is, therefore, under a legal obligation to use these extraordinary powers, quash proceeding before the trial Magistrate and save the applicants from the harassment inherent in the trial, which apparently is frivolous and vexatious.

7. As a result of discussion aforesaid this application succeeds and is allowed. Proceeding in Criminal Case No. 1119/86 pending before Shri R.K. Pandey, Judicial Magistrate, Class I, Sagar are hereby quashed and applicants discharged. ..**Petition allowed.**

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2007 ALL MR (CRI.) 648, LAWS(BOM)-2007-1-17

HIGH COURT OF BOMBAY

Coram :- D.G.Deshpande , S.R.Sathe JJ.

Decided on January 11, 2007
CRIMINAL APPEAL 817 of 1989

Suwarna, Deendayal Soni Appellant
VERSUS
State of Maharashtra Respondents

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Criminal P.C.(1973), S.24-Duty of Prosecution – It is not the job of prosecution to try only for the convition of accused, but it is their duty to place all the facts on record- The proceedings before trial Court show that the prosecution has been not fair at all to the accused-prosecution and it has to be stated that the trial was not at all fair. Both the prosecution and trial court are to be blamed for this lapse-FOR all these reasons, this appeal is required to be allowed and the accused is entitled to be acquitted.

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Advocates :- C.G.Gavnekar , F.R.Shaikh

JUDGEMENT

1. HEARD Mr. Gavnekar, learned advocate appearing for the appellant/accused and dr. Shaikh, learned APP appearing for the respondent/state.
2. ACCUSED is a lady, convicted under section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life by the 3rd Addl. Sessions Judge, Nasik. By this appeal, she has challenged her conviction.
The case, in brief, of the prosecution is that, this accused was the friend of deceased sunita. Deceased Sunita was staying in their rented tenement situated in Awasti Chawl on Jail road of Nashik Road. Sunita was living with her husband Shantaram Labhade. On 27. 1. 1989, this accused, being a friend of deceased Sunita, went to her house. She stayed with them, had supper with them and stayed in their house in that night. It is alleged by the prosecution that during night all three of them slept on one bed.
It is the case of the prosecution that during night time Sunita woke up and noticed that this accused and her husband were having physical intimacy. Sunita objected and told her husband that he should not have any such relations with the accused and, therefore, her husband got enraged and poured kerosene on the person of sunita while this accused caught Sunita with her both hands. Husband Shantaram brought burning chimany near and the clothes of Sunita caught fired. In the process, husband Shantaram and sunita got burnt. Then shouts for help were there. The owner of chawl Mewaram Awasti rushed. The door was broke open by another tenant by name shirsath. Husband Shantaram told that he would himself go to the police station and, accordingly he left the house. Then

Mewaram went to the police station and lodged report at about 3. 30 a. m. on 28. 1. 1989 as per narration made to him by Sunita, which was reduced into writing as station diary entry No. 6. Sunita was taken to civil hospital by the police where her dying declaration was recorded by the Special Judicial magistrate Mr. Bawiskar. Statement of Shantaram was also recorded by the SEM and, after Sunita was succumbed to the injuries, offence of murder was registered.

3. IN the mean time, both Sunita and her husband Shantaram died in the hospital and, therefore, charge sheet was filed only against this accused.

During trial, the defence of accused was of total denial. According to her, she has been falsely implicated by Sunita. The trial Court, however, believed the dying declaration of Sunita and disbelieved the dying declaration given by her husband Shantaram and convicted the accused, as stated above. Hence this appeal.

4. LEARNED advocate Mr. Gavnekar, appearing for the accused, vehemently urged that firstly even if the prosecution story is accepted as it is, there is no evidence on record at all to show that this accused was having any kind of intimacy or illicit relations with deceased Shantaram, nor there was any evidence to show that this accused used to go to deceased Sunita and stay at her house along with her husband Shantaram. Mr. Gavnekar also contended that in the absence of any such evidence, it was most difficult to believe that there could be any kind of physical intimacy between the accused and Shantaram giving cause for Sunita to get enraged. He, therefore, contended that the accused, being a friend and having no kind of sexual relationship with shantaram, had no reason, whatsoever, to take this kind of revenge by burning Sunita alive. He also contended that if the prosecution itself had tendered on record two dying declarations, one given by Sunita and other given by her husband shantaram, then there was no reason to disbelieve the dying declaration of Shantaram.

Further, according to Mr. Gavnekar, the story given by deceased Sunita in her dying declaration that accused caught her and Shantaram poured kerosene on her person and both of them set her on fire by a chimani, is totally false. Because if husband Shantaram wanted to kill his wife Sunita in this manner, he would have, at least, taken care to see that he does not receive any injury. In any case, the injuries to shantaram would not have been to such an extent resulting in his immediate death in the hospital.

On the other hand, the learned APP tried to contend that there was no reason to disbelieve the dying declaration of Sunita. He, therefore, urged that there was no merit in this appeal.

5. WE find it difficult to digest the case of prosecution. Admittedly, there is absolutely nothing on record to show or suggest, even remote, that this accused had any illicit relation with Shantaram, nor there is any evidence to show that prior to the incident she repeatedly frequented the house of deceased sunita or, that Shantaram or accused were having intimacy or close relationship.

6. EVEN from the statement of Sunita (Exhibit 20) i. e. the dying declaration, this accused went to her house on that day being a friend of Sunita at 5. 00 p. m. They had food together. They slept together on cot. In such a situation, even if Sunita noticed that accused and Shantaram were having physical intimacy, the accused would not have gone to the extent of burning her friend Sunita in spur of moment, because the accused is not habitual criminal at all.

The proceedings before trial Court show that the prosecution has been not fair at all to the accused. It is not the job of prosecution to try only for the accused conviction, but it is their duty to place all the facts on record. However, the dying declaration of Shantaram even though it was recorded by the SEM was not brought on record and proved. Similarly the post mortem report of Shantaram was also not placed on record and proved. These

two documents are in the miscellaneous File containing original police papers. The dying declaration of Shantaram shows that according to Shantaram on that night he was living with his wife and a lady guest i. e. the accused has come at 11. 00 in the night. Shantaram, his wife and the guest were sleeping on one cot. At about 12 in the midnight, his wife Sunita raised suspicion upon him and her friend. Therefore, there was quarrel and his wife poured kerosene upon herself and also upon shantaram and set her fire and then he also caught fired. This was an important piece of evidence collected during investigation and it was necessary for the prosecution as well as the court to get it on record and proved. Similarly the post mortem report of Shantaram shows that shantaram had received 66% of burns.

Not producing and proving these two documents creates strong suspicion about prosecution and it has to be stated that the trial was not at all fair. Both the prosecution and trial court are to be blamed for this lapse.

7. FOR all these reasons, this appeal is required to be allowed and the accused is entitled to be acquitted. We, therefore, pass the following order :-:order: the appeal is allowed. Conviction of the accused under Section 302 r/w 34 of IPC is set aside. She is acquitted. Accused is on bail. Her bail bond shall stand cancelled.

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2007(1) B.Cr.C.143= LAWS(BOM)-2006-12-114

HIGH COURT OF BOMBAY

Coram :- B.R.Gavai J.

Decided on December 12, 2006
Criminal Application 2859 of 2006

Angadh Rohidas Kadam . VERSUS . Madhukar Shankarrao Bhosale

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A. Constitution of India, Article 21—Fair Trial—Prosecution withholding statements of witness who do not support prosecution case- Held, prosecution cannot convert itself in to persecution- withholding statements of witness who do not support prosecution case would amount to jeopardize concept of fair trial- the investigating agency and the prosecution both represent the State. Every action of the State is legally required "to be fair, just and reasonable".

In case, the investigating agency and the prosecution withhold any evidence in favour of the accused from the accused, they are not being fair, just and reasonable with the accused. Therefore, their action would be in violation of Article 14 of the constitution of India. Article 21 of the Constitution of India also requires that the procedure established by law should be fair and reasonable. A procedure which permits the withholding of evidence which is in favour of the accused from the court and from the accused, cannot be termed as "fair and reasonable"- Furthermore, in every judicial proceeding the parties are expected to come with clean hands. By withholding the evidence without any legal justification, the prosecution would be hiding vital facts from the Court. It would, thus, come to the Court with unclean hands. The prosecution is expected to reveal the whole truth and nothing but the truth to the Court. Neither the investigating agency, nor the prosecution can be permitted to keep the Court in the dark. After all, half-baked truths are unpalatable to the judicial taste. " in am in

full agreement with the views expressed by the learned Judge of this Court in case of Ramesh wamanrao Babhulkar (supra), and the learned Single Judge of Rajasthan High Court, in case of Dhananjay Kumar Singh (supra). It is well settled principle of law, that the prosecution cannot convert itself into persecution. The fundamental right guarantied under Article 21 of the constitution of India would recognize the right of an accused for fair trial. If the prosecution is permitted to withhold statements, only on the ground that they do not support the prosecution case, then the very concept of fair trial would be jeopardized.

B. Interpretation of statutes—Cardinal Principle of Single Section of statute cannot be read in isolation but various section are to be constructed harmoniously

C. Criminal Procedure Code,1973 Section 233(3) r.w.Ss.161,173(5)(b) and 207(iii)-Entering upon defence –Issuance of Process for compelling attendance of witness or production of document or thing-Right of accused - - Prosecution could not withheld statements only on ground that they would have strengthened defence –Request of defence for issuance of process for production of statements of witness recorded during investigation, but not filed along with chargesheet, granted.

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Final Verdict :- Criminal Application allowed

Advocates :- E.P.Sawant , Joydeep Chatterji , S.D.Kaldate

JUDGEMENT

1. RULE. Rule made returnable forthwith. Heard by consent.

2. BY way of present application, the applicant challenges the order passed by the learned Ad hoc additional Sessions Judge, Gangakhed, dated 4th September 2006, below Exhibit 51 in Sessions Trial No. 6/2006, thereby rejecting the application of the applicants / accused for direction to the prosecution to produce statements of Dadarao Marotrao Kadam, Bapurao Dnyandeo kadam, Kusumbai Bapurao Kadam and Dadarao Limbaji Kadam, recorded under Section 161 of the Criminal Procedure, 1973.

The factual background, in short, giving rise to the present petition is as under :-The applicants are facing trial in Sessions trial No. 6/2006 before the Ad hoc Additional Sessions judge, Gangakhed, for the offence punishable under sections 498-A, 304-B read with Section 34 of the Indian penal Code, arising out of Crime No. 66/2005 registered at

Police Station, Palam (Taluka Palam, District Parbhani). During the course of trial, the prosecution examined Police Inspector, Mukund Kewle, who is the investigating Officer, as prosecution witness no. 6. In his cross examination, he has deposed thus :

"i recorded statements of dattarao Kadam, Bapurao Kadam, kusum Kadam and Dadarao Limbaji kadam. On going through record, i say that their statements were not filed in court along with charge sheet. It is true to say that statements of these persons were not filed in court along with charge sheet because they did not support prosecutions case. "

After the evidence of PW 6 was recorded, the Counsel for the applicants filed an application below Exhibit 41 seeking a direction to the Investigating Officer to produce statements of the aforesaid four persons which were recorded under Section 161 of the Code of Criminal procedure, 1973. The same came to be rejected on the same day. In the meanwhile, the defence had applied for issuing process to the aforesaid four persons in order to examine them as defence witnesses. This application has been granted and they have been summoned to appear as witnesses. The counsel for the applicants thereafter filed an application below Exhibit 51 purportedly under Section 233 (3) of the Code of Criminal Procedure, to direct Palam police Station to produce the statements recorded in crime No. 66/2005 under Section 161 Cr. P. C. of the aforesaid four persons. The same came to be rejected. Hence, this application under Section 482 of the Code of criminal Procedure, 1973.

Mr. Chatterjee, learned Counsel appearing on behalf of the applicants, submitted that the learned trial court has not taken into consideration the import of Section 233 (3) of Cr. P. C. He submits that perusal of section 233 (3) would reveal that it is mandatory for a magistrate to issue process for production of the documents. He submits that the refusal can be only on three grounds i. e. if the application is made for the purpose of vexation or delay or for defeating the ends of justice. He further submits that such a ground has to be recorded by him in writing. He further submits that the judgment of this Court in case of Ashok Ananda Hange Vs. State Maharashtra of Maharashtra, reported in 760 2001 (3) Mh. L. J. 760, is on interpretation of provisions of Section 173 of cr. P. C. and not on the provisions of Section 233 of cr. P. C. and, therefore, reliance placed by the learned trial court was not well placed. He further submitted that in view of the law laid down by the learned Single judge of this Court in case of Ramesh Wamanrao Babhulkar vs. Maharashtra State of Maharashtra, reported in 1995 (2) Mh. L. J. 724 724, the accused is entitled to have copies of all statements of witnesses recorded by prosecution under section 161 of the Code even if a particular statement is not being relied upon by the prosecution. He has further relied upon judgment of Rajasthan High Court in case of dhananjay Rajasthan Kumar Singh Vs. State of Rajasthan, reported in 3873 2006 CRI. L. J. 3873, wherein a similar view has been taken.

3. MR. S. D. Kaldate, learned Counsel appearing on behalf of respondent no. 1 submits that the accused is entitled to only copies of such of the witnesses who are examined by the prosecution.

From the record, it can be seen that though the Investigating Officer has in clear terms admitted that the statements of those four persons have been recorded, they were not filed in the court along with the charge sheet because they did not support the prosecution case. The learned trial court has rejected the application on the sole ground that since the

statements are not filed along with the charge sheet, it was not necessary to supply copies of the same to the accused.

4. THEREFORE, the question that arises for consideration is as to whether the accused is entitled to the copies of the statements of persons recorded under section 161 of Cr. P. C. , even if they do not form part of the charge sheet and that such witnesses are not examined by the prosecution. The another question that will also be required to be considered is regarding the scope of section 233 of Cr. P. C. For appreciating the rival contentions, it would be necessary to refer to certain provisions of the Code of Criminal Procedure, 1973.

Section 161 of Cr. P. C. reads as under :

" (1) Any police officer making an investigation under this chapter, or any police officer not below such rank as the State government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case. (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. "

Section 162 of Cr. P. C. reads as under :

" (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced in writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made : provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act. Explanation : An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. "

Sub-Section 5 of Section 173 of Cr. P. C. reads as under :

"report of police officer on completion of investigation. (5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the magistrate along with the report- (a) all documents or relevant extracts thereof on which the

prosecution proposes to rely other than those already sent to the Magistrate during investigation; (b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses. "

Section 207 of Cr. P. C. reads as under : supply to the accused of copy of police report and other documents.

"in any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following :- (i) the police report; (ii) the first information report recorded under section 154; (iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173; (iv) the confessions and statements, if any, recorded under section 164; (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173; provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused; provided further that if the magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court. "

Section 233 of Cr. P. C. reads as under :

" (1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof. (2) If the accused puts in any written statement, the Judge shall file it with the record. (3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. "

It could thus be seen that under Section 161 of Cr. P. C. , a police officer making an investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case. It can be seen that such person is bound to answer all queries relating to such case put to him by the Investigating Officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. The Police Officer is authorized to reduce into writing any statement made to him in the course of an examination under the said Section; and if he does so, he shall make a separate and true record of the statement of each of such persons whose statement he records.

Section 162 of Cr. P. C. requires that no statement made by any person to a police officer, if reduced to writing, be signed by the person making the statement. Sub-Section 1 of Section 162 prohibits the use of such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, except permitted by the proviso. The proviso to the said Section permits the accused to

use any part of his statement if duly proved, to contradict the prosecution witness of whose statement is recorded, in the manner provided under Section 145 of the Indian Evidence Act. Section 173 (5) requires that when report after completion of investigation is sent to the Magistrate, all documents or relevant extracts thereof on which the prosecution proposes to rely, and the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses, are to be forwarded along with the report. Section 207 of Cr. P. C. mandates furnishing of the accused free of costs copies of certain documents along with the statements recorded under Sub-Section 3 of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under Sub-Section 6 of Section 173. Sub-Section 6 of Section 173 provides that if the police officer is of opinion that any part of any such statement is not relevant to the subject matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused. The police officer is also required to state his reasons for making such request. Section 233 of Cr. P. C. enables an accused after he enters his defence, to apply to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross examination, or the production of any document or other thing. It further provides that if such an application is made, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. It further provides that such grounds shall be recorded by him in writing.

5. IT can be seen from the aforesaid provisions that a valuable right is available to an accused under section 162 of Cr. P. C. , to confront a prosecution witness with any part of his statement which is duly proved to contradict such a witness in the manner provided under section 145 of the Indian Evidence Act, 1872. It can further be seen that as per provisions of Section 173 (5) (b) and Section 207 (iii) of Cr. P. C. , a police officer is bound to forward to the Magistrate, along with his report, the statement of all the persons whom the prosecution proposes to examine as its witnesses, and that the Magistrate is duty bound to furnish to the accused, free of costs copies of statements recorded under Sub-Section 3 of Section 161 of all persons whom the prosecution proposes to examine as its witnesses. However, a part therefrom could be excluded for which a request for such exclusion is made by the Investigating officer under Sub-Section 6 of Section 173 and granted by the learned Magistrate.

6. THE learned Single Judge of this Court in case of Ramesh Wamanrao Babhulkar Vs. State of maharashtra (supra), has held thus :

"it thus appears to be an established position that the accused is entitled to have the copies of all the statements of witnesses for prosecution recorded under section 161, criminal Procedure Code, even if that particular statement is not being relied upon by the prosecution, it being unfavourable to the prosecution. "

The learned Single Judge of Rajasthan High court, in case of Dhananjay Kumar Singhs case (supra), dealing with similar situation, has observed thus :

"28 28. Despite the legal provisions, despite the case law, there is still a school of thought which postulates that the police and the prosecution can withhold information both from the accused and the Court. According to this thinking, in case the prosecution does not wish to rely on the statements of certain witness, or on some piece of evidence, then it is not bound to disclose the same, even if the evidence is in the favour of the accused. Such an interpretation would be both against the Principles of natural Justice and against the concept of fair play. Undoubtedly, principles of Natural Justice are an integral part of a fair trial. Article 21 of the Constitution of india and the Universal Declaration, mentioned above, both guarantee a fair trial to the accused. Even if the code does not contain any provision for providing "all" the evidence collected by the investigating agency, such a provision has to be read into the Code. For, principle of Natural justice - audi alteram partem - would have to be read into the Code. It is tried to state that opportunity of hearing means effective and substantial hearing. Truncated evidence, half hidden evidence given to the accused or placed before the court, do not amount to effective hearing. Thus, under the principle of audi alteram partem the accused would have the right to access the evidence which is in his favour, but which the prosecution is unwilling to produce in the Court and whose disclosure does not harm the public interest. In case the relevant evidence in favour of the accused is not supplied, we would be creating "kangaroo Courts" and weaving an illusion of justice. Such Courts and such illusions are an anathema to the judicial sense of fair play. "

29. Moreover, the investigating agency and the prosecution both represent the State. Every action of the State is legally required "to be fair, just and reasonable". In case, the investigating agency and the prosecution withhold any evidence in favour of the accused from the accused, they are not being fair, just and reasonable with the accused. Therefore, their action would be in violation of Article 14 of the constitution of India. Article 21 of the Constitution of India also requires that the procedure established by law should be fair and reasonable. A procedure which permits the withholding of evidence which is in favour of the accused from the court and from the accused, cannot be termed as "fair and reasonable". Thus, such a procedure would be in violation of Article 21 of the constitution of India. Therefore, section 172 (3) would have to be interpreted in such a way as to make it commensurative with the constitutional spirit.

30. Furthermore, in every judicial proceeding the parties are expected to come with clean hands. By withholding the evidence without any legal justification, the prosecution would be hiding vital facts from the Court. It would, thus, come to the Court with unclean hands. The prosecution is expected to reveal the whole truth and nothing but the truth to the Court. Neither the investigating agency, nor the prosecution can be permitted to keep the Court in the dark. After all, half-baked truths are unpalatable to the judicial taste. " in am in full agreement with the views expressed by the learned Judge of this Court in case of Ramesh wamanrao Babhulkar (supra), and the learned Single Judge of Rajasthan High Court, in case of Dhananjay Kumar Singh (supra). It is well settled principle of law, that the prosecution cannot convert itself into persecution. The fundamental right guarantied under Article 21 of the constitution of India would recognize the right of an accused for fair trial. If the prosecution is permitted to withhold statements, only on the ground that they do not support the prosecution case, then the very concept of fair trial would be

jeopardized. I am unable to persuade myself to agree with the view taken by the learned Single Judge of this Court in case of Ashok ananda Hange (supra). The learned Judge has not taken into consideration the effect of Sections 207 and 233 of cr. P. C. It is a cardinal principle of interpretation, that a single Section of a statute cannot be read in isolation but various Sections are to be construed harmoniously. Secondly, the learned Judge in this case does not notice the earlier view taken by this Court in case of Ramesh Wamanrao Babhulkar (supra). In that view of the matter, I find that the accused was entitled to statement of the witnesses, as prayed for.

There is another angle from which the present matter needs to be looked into. Section 173 (5) (b), so also, Section 207 (iii) of Cr. P. C. refer to the statements of persons to whom the prosecution proposes to examine as its witnesses. From the record, it can be seen that the aforesaid four persons were listed as prosecution witnesses initially. It is thus clear that the prosecution has initially proposed to examine them. However, the said statements were not filed in the Court along with the charge sheet only because they did not support the prosecution case. I am of the view that from the plain reading of Section 173 (5) (b) and Section 207 (iii) of Cr. P. C. , it is the duty of the Investigating Officer to forward copies of statement of all such persons to whom the prosecution proposes to examine. In the present case, the names of the aforesaid persons were mentioned in the list of witnesses. As I have already discussed herein above, the said statements could not be withheld only on the ground that they would have strengthened the defence of the accused persons. The prosecution is not supposed to be interested in ensuring conviction of the accused in any circumstance. What is expected, is to assist the court in unearthing the truth.

Then the question comes as to what is the scope of Section 233 of Cr. P. C. A bare perusal of sub-Section 3 of Section 233 would reveal that when accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. It can thus be clearly seen that when an accused exercises his right under Sub-Section 3 of Section 233 for compelling the attendance of any witness or production of any document, the learned Magistrate can refuse the said request only on three grounds : (i) vexation, (ii) delay, and (iii)defeating the ends of justice. Moreover, the Magistrate is required to record his reasons for refusing the request. A bare perusal of the said Section would reveal that except those three grounds, the request cannot be turned down on any other ground.

7. A perusal of the impugned order would reveal that the learned Magistrate has not referred to any of the three grounds as contemplated under Section 233 of cr. P. C. , while refusing request of the applicants. The request is rejected only on the statement made on behalf of the prosecution, that their names are not mentioned in the charge sheet. In that view of the matter, I find that the impugned order is unsustainable in law, on this ground also.

In the result, the Criminal Application is allowed and the rule is made absolute in terms of prayer clause b" "b".

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Cross Citation :2003-AIR(SC)-0-657 , 2003-SCC-1-644

SUPREME COURT OF INDIA

Hon'ble Judge(s) : Y. K. SABHARWAL AND K. G. BALAKRISHNAN, JJ.

Bijay Kumar Mahanty ….V/s …. Jachi Ram Chandra Sahoo
Criminal Appeal 441 of 1993 Dec. 13, 2002

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Contempt of lawful order by Police – Officer – The police officer arrested the accuse even if he was granted bail by the Court – The Police officer was found to be guilty of contempt of Court – He was sentenced to imprisonment of 7 days – While confirming the sentences Hon'ble Supreme Court observed that,

(1) Police Officers are supposed to be the members of a disciplined force. It is of utmost importance to curb any tendency in them to flout orders of the court. It is more so when flouting of order results in deprivation of personal liberty of an individual. If protectors of law, to take revenge, defy court orders they will have to be sternly dealt with and appropriate punishment inflicted also with a view to send a message across the board that such an act cannot be countenanced.

(2) The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. If the orders of the court are disobeyed with impunity by those who owe an obligation to the society to preserve the rule of law, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute.

(3) Lastly, it was contended that instead of imprisonment, fine be imposed on the appellant. In a matter of this nature, where a police officer, disregarding the bail order, arrests a person because case against him is of alleged assault on one of police official, we do not think that mere sentence of the fine would meet the ends of justice. No interference is called for in the judgment and order in the High Court. The appeal is accordingly dismissed.

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Y.K.SABHARWAL

(1) Police Officers are supposed to be the members of a disciplined force. It is of utmost importance to curb any tendency in them to flout orders of the court. It is more so

when flouting of order results in deprivation of personal liberty of an individual. If protectors of law, to take revenge, defy court orders they will have to be sternly dealt with and appropriate punishment inflicted also with a view to send a message across the board that such an act cannot be countenanced.

(2) The appellant is a police officer. At the relevant time, i.e., on 13th November, 1990, he was the officer-in-charge of the police station in question. A police officer of that police station had reported that the respondent had assaulted him on 30th September, 1990 which was the immersion day of Goddess Durga while he was on duty and the respondent had been asked by him to give side to other image (Medha) to pass. A case was registered against the respondent.

(3) Now, the admitted facts. In connection with the aforesaid case, the respondent was arrested by the appellant on 13th November, 1990 from his residence at 7.30 a.m. He was kept in police custody and was produced before the magistrate on 14th November. The respondent in respect of this very case had been granted bail by the sessions judge on 6th November, 1990. The respondent had obtained certified copy of the order of bail on 7th November. The respondent was produced before the magistrate on 14th November when his advocate produced a certified copy of the order of the sessions judge and, thus, he was released by the magistrate.

(4) The only controversy is whether the respondent had produced, before the appellant, the certified copy of the order of bail at the time of his arrest. According to the respondent it was produced. In the proceedings of contempt that was initiated by the High Court, on receipt of reference from the sessions judge, Cuttack, appellant denied that the copy of the bail order was produced before him. The High Court, on appreciation of evidence, held that copy of the bail order was produced before the appellant who arrested the respondent despite it. The appellant was held guilty of contempt and was sentenced for civil imprisonment for a period of seven days. Under these circumstances, this appeal has been filed under section 19 of the Contempt of Courts Act, 1971 (for short, the 'Act').

(5) It is of paramount public interest that the people, after obtaining an order of the court, should not feel helpless or without any remedy when such order is flouted.

(6) In Advocate General, Bihar v. M. P. Khair Industries, this Court said that"... it may be necessary to punish as a contempt a course of conduct, which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice. The public have an interest, an abiding and a real interest and vital stake in the effective and orderly administration of justice, because unless justice is so administered, there is the peril of all rights and liberties perishing. The court has the duty of protecting the interest of the public in the due administration of justice and so it is contempt of court not in order to protect the dignity of the court against 'Contempt of Court1 may seem to suggest, but to protect and to vindicate the right of the public that the administration of justice shall not be prevented, prejudiced, obstructed or interfered with."

(7) The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. If the orders of the court are disobeyed with impunity by those who owe an obligation to the society to preserve the rule of law, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute.

(8) The case against the appellant was held proved by the High Court on appreciation of evidence, perusal of the original record of the case flies including the certified copy of the bail order that had been obtained and its condition.

(9) Mr. Mehta, learned counsel for the appellant, submits that the finding of guilt was returned against the appellant by the High Court without production of any independent evidence. The finding, it is contended is based on probabilities when the requirement of

law is that the charge of contempt shall be proved beyond any reasonable doubt. It was also contended that the appellant, while forwarding the respondent to the magistrate, had mentioned at the end in his own hand that the respondent told him about the bail order having been passed by the learned sessions Judge which shows his bona fides. The further contention is that belief of the appellant that the respondent had been granted bail was of no consequence since it was his duty to arrest the respondent in connection with the case registered against him and he could not release the respondent merely acting on his belief. Further, it was submitted that the respondent did not produce the bail order before the SDO and SDPO who had come to the police station on tension being created after the arrest of the respondent.

(10) We have no difficulty in accepting the contention that the case against the appellant is required to be proved beyond reasonable doubt. The contempt proceedings under the Act are quasi criminal. The standard of proof required is that of criminal proceedings. Therefore, the charge has to be established beyond reasonable doubt (see Mirtyunjoy Das and Anr. v. Sayed Hasibur Rahaman and Ors.).

(11) We are, however, unable to accept the contention of the learned counsel that the charge against the appellant has not been proved beyond reasonable doubt. The respondent was arrested at 7.30 a.m. from his residence. The only other person available at that time when the certified copy of the bail order was shown to the appellant was the mother of the respondent who was examined as a witness. The appellant crushed the order. Different persons have the tendency to use different language -while narrating the same incident. It is of no consequence that the respondent at one stage stated that the bail order when produced was 'torn', at another stage stated that it was 'bundled' and with reference to that order, his mother used the word 'rubbed'. The said order, as already noticed, was examined by the High Court before arriving at the finding that it bears marks of violence. The appellant admitted that as per his belief the respondent had been granted bail. If that was so, appellant would have given an opportunity to the respondent to produce that order instead of arresting him despite that belief. The appellant wanted to arrest the respondent any way. The case related to an alleged assault on a police officer of a police station of which the appellant was in- charge. No fault can be found with the finding of the High Court that the act was a result of revenge which prompted the appellant to act against his belief that the respondent had been granted bail and act against such a belief. There was tension as a result of the arrest of the respondent because he was arrested despite bail order. There was nothing to show that the respondent was produced before the SDO and SDPO when they visited the police station. It is nobody's case that those officers met the respondent. The High Court has rightly held the appellant guilty of contempt of court.

(12) Learned counsel for the appellant contends that apology that has now been tendered by the appellant may be accepted. The incident relates to the year 1990. The respondent was deprived of his personal liberty despite grant of bail by the sessions judge. The appellant has tendered the apology only now after lapse of nearly 12 years. The appeal was admitted in the year in 1993. The case has been on board for quite some time. The apology has been tendered only on 30th November, 2002. The apology has to be sincere and not merely to escape the punishment. In our view, it is not a fit case where the apology tendered at this belated stage ought to be accepted.

(13) Lastly, it was contended that instead of imprisonment, fine be imposed on the appellant. In a matter of this nature, where a police officer, disregarding the bail order, arrests a person because case against him is of alleged assault on one of police official, we do not think that mere sentence of the fine would meet the ends of justice. No

interference is called for in the judgment and order in the High Court. The appeal is accordingly dismissed.

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Cross Citation :1993 CRI. L. J. 3311

ORISSA HIGH COURT

Hon'ble Judge(s) : B. L. HANSARIA, C. J. AND S. K. MOHANTY, JJ.

State Of Orissa …Vs... Bijaya Mohanty,

Original Cril. Misc. Case No. 124 of 1992, D/- 7 -4 -1993.

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Contempt of Courts Act (70 of 1971), S.12(3) - CONTEMPT OF COURT - BAIL - POLICE ATROCITIES -Deterrent punishment - Police officials arresting person in violation of order of anticipatory bail passed by Court - Art. 21 of Constitution violated - Sentence of fine would not meet ends of justice, especially when condemner was police official - Civil imprisonment for seven days awarded – Police officer are protector of Law – If they violates the law they should be punished severely.

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Mr. S. K. Das, Govt. Advocate, for Petitioner; Mr. G. Rath and Mr. B. R. Sarangi, for Respondent; Mr. D. Panda and Mr. S. C. Mohapatra, for Intervenor.

JUDGEMENT : HANSARIA, C. J. :- The opposite party, a police officer, has faced this contempt proceeding. At the relevant time, he was the Officer-in-charge of Pattamundai Police Station. The proceeding has been initiated on a reference from the Sessions, Judge, Cuttack. The allegation is that the opposite party arrested one Jadu alias Ramachandra Sahoo, who has intervened in this case and would be described hereinafter as 'the intervenor', in C.R. Case No. 855 of 1990 on 13-11-1990, despite a certified copy of the order dated 6-11-1990 of the Sessions Judge, Cuttack, releasing the intervenor in the said case on bail having been produced before the former, which was not honoured. The defence of the contemner-opposite party is that the copy of the order in question had not been produced, and it is only in the police station, where the intervenor had been taken afterwards, that mention was made by him about his having been released on bail. He was thereafter forwarded to the court of the S.D.J.M. Kendrapara and was produced on 14-11-1990 before the said court, when his advocate had produced for the first time a certified copy of the order of the Sessions Judge, when he was released on bail by the S.D.J.M.

2. The only point for decision, therefore, is whether from the materials on record it can be held that the certified copy of the order of release passed by the learned Sessions Judge had been produced before the opposite party when he arrested the intervenor (Jadu) on 13-11-1990.

3. Shri Rath appearing for the opposite party submits that three circumstances would belie the allegation. These are : (i) a look at the certified copy of the order, which is

in the file of I.C.C. Case No. 301 of 1990 instituted by the intervenor himself against the opposite party on the allegation of wrongful confinement etc., would show that this order does not bear any mark of tearing, which would belie the case of the intervenor that when the certified copy of the order was shown to the opposite party, it was torn by him; (ii) the S. D.O. and the S.D.P.O., who had come to Pattamundai police station on a tense situation having been created after the intervenor had been kept confined in the police station, were not reported by him that the opposite party had arrested him despite a certified copy of the bail order having been shown to him; and (iii) the order of the S.D.J.M., Kendrapara passed on 14-11-1990 itself would show that when the intervener was produced before him, the certified copy of the order of bail was produced by his advocate, before which nothing had been stated by him even about his release on bail by the Sessions Judge.

4. In so far as the first circumstance is concerned, Shri Rath brings to our notice the statement made by the intervenor in Miscellaneous Case No. 1017 of 1990 of the court of the Sessions Judge, Cuttack (which is the case which terminated in the present reference), a Photostat copy of which is on record, that after the certified copy of the order had been shown to the opposite party, he used unparliamentarily words against the court and "tore the order the threw it at a distance". In cross-examination, however, the statement was that the opposite party had 'bundled' the bail order the threw it to a distance. Reference to other evidence on record, namely, the evidence of the mother of the intervenor who was examined in the aforesaid case as witness No. 3 (the intervenor having been examined as witness No. 1), shows that according to her, the opposite party "snatched the bail order, rubbed it and threw it away".

5. The aforesaid shows that though the intervener in his examination-in-chief stated about the tearing of the bail order, if the entire evidence is taken in its totality, the same would show that the allegation cannot really be taken to be 'tearing' of the certified copy of the order but of showing violence to it - which was described by the intervenor in his examination-in-chief as 'tearing', in his cross-examination as 'bundling', and by his mother as 'rubbing'. Too such emphasis on the word 'tearing' alone would not, therefore, be justified. We have to see the substratum of the case and should not confine our attention to a particular word used once. To satisfy ourselves whether violence was used, we have perused and certified copy of the order, which is on the record of the aforesaid case, which does bear marks of violence. The certified copy further shows that application for the same was made on 7-11-1990 and it was granted also on the same day. The first circumstance relied on by Shri Rath does not, therefore, belie the allegation.

6. Shri Panda appearing for the intervenor urges in this context that the certified copy having been obtained on 7-11-1990, there could not have been any earthly reason not to show it to the opposite party who had come to arrest the intervenor. The submission is undoubtedly weighty and merits acceptance. At this stage, it may be stated that the release order by the Sessions Judge was on a petition under Section 439, Cr. P.C. and perusal of the connected records - the same being Criminal Miscellaneous Case No. 892 of 1990 - shows that the intervenor had surrendered before the court of Sessions Judge on 5-11-1990. Earlier to that, the Intervenor had approached the Sessions Judge on 16-10-1990 under Section 438, Cr. P.C. praying for anticipatory bail. In that case, the A.P.P. was asked to produce the case diary, but ultimately that petition was not pressed and was rejected on 5-11-1990, and on the same day an application under Section 439, Cr. P.C. was filed, which came to be allowed on 6-11-1990 after remanding the accused Jadu to custody on 5-11-1990. We have mentioned about this aspect of the case, because

Shri Rath at one stage had submitted, albeit faintly, as to the legality of the order of the Sessions Judge releasing the intervenor on bail by his order dated 6-11-1990. On being asked as to whether it would be open to the opposite party to question the legality of the order in this proceeding and not to obey the same for that reason, Shri Rath, however, fairly submitted that this stand could not have been taken by the opposite party and that he has really not taken that stand in this case.

7. As to the second circumstance, there is nothing on record before us to show as to whether the intervenor had made any grievance or not to the S.D.O. and the S.D.P.O., who had admittedly come to Pattamundai police station where the intervenor had been kept confined on 13-11-1990 after his arrest. For the present case, we need not go into the background as to why the S.D.O. and the S.D.P.O. had to come to that police station and whether the same was due to the effort on the part of the associates of the intervenor to take him away forcibly from the police station, which led to a tense situation, or whether it was because of the public resentment in having taken the intervener to the police station from his residence handcuffed and naked, as is submitted by Shri Panda - the first version having been given by Shri Rath. It is, however, undisputed that these two officers did come to the police station. But, as already stated, what transpired between them is not known. What, however, appears from the forwarding report of the opposite party is that in that report, the whole of which is typewritten, there is an addition by hand at page 3 reading : "He (accd.) says that he is released on bail but he could not produce the order of the court". This shows that something must have transpired which led the opposite party to insert this in the forwarding report.

8. Shri Panda refers in this connection to the evidence of the opposite party given in Criminal Miscellaneous Case No. 1017 of 1990 wherein it is stated in his examination-in-chief that though initially the intervener had not disclosed about his bail, but as he did it afterwards, he mentioned this fact in his own handwriting in the forwarding report. The learned counsel draws our pointed attention to the statement made in cross-examination by the opposite party that he had "believed the version of the petitioner while forwarding him to the court that he was granted bail by the Court of Sessions". The learned counsel states that nothing further is left to show that despite the opposite party having believed that the petitioner was released on bail, which belief must have been based, according to the learned counsel, because of the production of the certified copy of the order of bail, the intervener was arrested and, as such, the opposite party wilfully violated the Sessions Judge's order.

9. Shri Rath, however, first submits in this connection that the aforesaid statement of the opposite party would show that he had perhaps believed the aforesaid version of the intervener or that he might have believed the same. The effort of the learned counsel is to water down the weight of the statement and to protect the opposite party from the consequence of the categorical admission made by him. We would not read the aforesaid statement as "might have believed" or "perhaps believed". It is just 'believed'. There is no ambiguity in the statement; it is quite clear. It is also not an off the cuff statement made by the opposite party - it was made in a court of law in case which had been instituted against him for initiating contempt proceeding relating to the matter at hand. Then, the opposite party is not a rustic illiterate villager not knowing the import of the admission made by him in cross-examination. He is a responsible police officer. For these reasons, the importance and significance of the aforesaid statement cannot be allowed to be diluted.

10. Shri Rath then submits that the opposite party might have believed about the release of the intervener on bail because of the fact that at one stage a petition for anticipatory bail had been filed by the intervener in connection with which the case diary had been called for from the police station, which might have led the opposite party to believe that the intervener might have been released on bail. We do not propose to examine this contention, because whatever might have been the source of information to the opposite party about the release of the intervener on bail, once he took the source to be authentic and believed the factual aspect, it is not necessary to find out as to what was the source and whether the same was authentic or not. It is for this reason that we do not propose to address ourselves on the question as to whether, if the information had been given by the intervener himself, the source could be called authentic, which, according to Shri Rath, could not be so taken. Of course, the learned counsel fairly agrees that if this information would have been derived by the opposite party from an authentic source, then he was bound to act in accordance with it, even if no certified copy of the order would have been produced before him. The learned counsel has agreed to this aspect of the matter, because the same is founded on four decisions of the apex Court, namely, B. K. Kar v. Chief Justice of Orissa, AIR 1961 SC 1367 : (1961 (2) Cri L.J. 438); Hoshiar Singh v. Gurbachan Singh, AIR 1962 SC 1089 : (1962 (2) Cri L.J. 236); Burnna Prasad v. State of U.P., AIR 1968 SC 1348 : (1968 Cri L.J. 1514); and Aligarh Municipal Board v. Ekka Tonga Mazdoor Union, AIR 1970 SC 1767 : 1970 Cri L.J. 1520.

11. We may say a few words here as to why, according to us, despite the opposite party believing that the intervener had been granted bail, he arrested the latter and what prompted him to do so in violation of the order. If a person believes a certain thing to be true, he would normally like to act in conformity with and not against the fact which is believed to be true; and if he does so, there must be strong reason for the same. It is not a case, in our view, where madness led the opposite party to act as he had done, and if it was madness, there was method in it, which Hamlet found. The reason for acting against the fact believed to be true by the opposite party is not difficult to find. The reason was that the intervener was an accused in a case which related to assault on police officer of Pattamundai police station of which the opposite party was the Officer-in-charge and about which alleged action of the intervener the opposite party himself had been reported, as would appear from what is being stated later. So, we are inclined to think that it was the felt necessity of revenge which prompted the opposite party to act against his belief. Be that as it may, the second circumstance mentioned by Shri Rath has no cutting edge.

12. This leaves for consideration the third circumstance mentioned by Shri Rath. That relates to the order passed by the S.D.J.M., Kendrapara before whom the intervener had been produced on 14-11-1990, a copy of which is Annexure 5. That order can be divided into two parts. The first part is about production of the intervenor, non-moving of bail and ordering for remand till 24-11-1990. The second part deals with filing of power by an advocate named Shri Benudhar Rout along with a petition and a certified copy, inter alia, of the concerned order. Shri Rath submits that this shows and shows clearly, that the certified copy of the order was really in possession, and it is because of this that in when the advocate appeared, he filed the copy of the order, which, not being with the intervener earlier could not be filed by him.

13. As to the aforesaid circumstance, the submission of Shri Panda is that the intervener having been taken into custody and the certified copy of the order having been thrown away by the opposite party while arresting the intervener, it was apparently not in his

possession when he was produced before the S.D.J.M.; but that certified copy was picked up by somebody and was handed over to the advocate who produced it before the S.D.J.M. Shri Panda also submits that the normal practice in courts like that of S.D.J.M. is that the formal part of the order is written by the Bench Clerk sometimes, and in the second half the court takes up the matter and passes the final order. On Shri Panda making a submission that a perusal of the order as passed by the S.D.J.M. would bear his submission, the records were called for and we have perused the same. It does show that a part of that (a copy of which is Annexure 5 of aforesaid Misc. Case No. 1017/90) had been written by somebody else than the S.D.J.M., he should be the Bench Clerk. That was so from its beginning till "Custody till 24-11-1990" (from page 1 of the aforesaid annexure to the first part of fourth line of page 2. Of course, some alterations were made later in this part perhaps by the S.D.J.M.). The remaining part and the one in which mention has been made about filing of a power by advocate Shri Rout is in the hand of the Presiding Officer. So, from what has been stated in the order of 14-11-1990, it cannot be said that the certified copy of the order of release was really in possession of the advocate and was not with the petitioner at all at any time prior to the same having been produced by the advocate before the S.D.J.M. on 14-11-1990.

14. To satisfy our mind fully as to whether it could at all be that the order was with advocate Shri Rout, we called for other records, namely, Criminal Miscellaneous Case No. 892 of 1990 of the Sessions Judge, Cuttuck, in which the order of bail had been passed, as also Criminal Miscellaneous Case No. 836 of 1990, which dealt with the prayer of the intervener under Section 438, Cr. P.C. These records show that Shri Rout was nowhere in the picture when these orders were passed; not even when the C.J.M. had accepted the bail bonds etc., records relating to which are also available in G. R. Case No. 855 of 1990, which forms part of record of S.T. Case No. 141/30 of 1989, which is the number of the court of the Sessions Judge, to whom of the intervener was committed to stand trial for the offence in question, which gave rise to G.R. Case No. 855 of 1990. All these show that Shri Rout came into picture, so far as the present case in concerned, only when the intervener was produced before the S.D.J.M. on 14-11-1990.

15. Because of what had been stated above, we would hold that the circumstances sought to be relied on by Shri Rath cannot assist the opposite party.

16. We have another observation to make before we conclude on the question of guilt. The same is that the case in which the intervener was arrested was one in which the informant was none else than a police officer of Pattamundai police station itself and the allegation was that on 30-9-1990, which was the immersion day of Goddess Dugra, he was on duty and the intervener was asked to give side to other 'Medha' (i.e. image) when the latter is said to have accosted the former and throttleld him, but somehow the police officer escaped. This was reported to the Officer-in-charge of the police station, the opposite party himself, and a case was registered. This shows that the police officers of Pattamundai police station (including the opposite party) might have adopted a revengeful attitude against the intervener and despite his having been released on bail by the Sessions Judge, they thought it fit to arrest him and teach him a lesson.

17. In view of all the above, we are satisfied that the intervener had been arrested by the opposite party despite the former having produced the order of bail passed by a competent court. We, therefore, find the opposite party guilty of contempt.

18. This takes us to the question of sentence. Section 12(3) of the Contempt of Courts Act, 1971 may indicate that it is sentence of fine which should normally be awarded when a person is found guilty of civil contempt, as has the opposite party been, but if a special case is made out to show that sentence of fine would not meet the ends of justice and sentence of imprisonment is necessary, the Court should direct detention in civil confinement.

19. Let it be seen what nature of sentence is merited in the case at hand. This is not the first occasion when a person has been found guilty of civil contempt by this Court and punished for the same. Indeed, such cases have been many. This Court had occasion to express its mind recently in a number of cases as to what harm commission of civil contempt causes to the entire system of administration of justice and as to why a strict view on sentence is called for to root out this evil, about which it has been stated that of late it has become alien to cancerous growth calling for recourse to strong measures to see that justice becomes available to all, who would not get it if lawful orders of competent courts are violated, which would result in people with muscle power and money power alone being able to settle score on streets.

20. Of course, sentence has to be awarded keeping in view the facts and circumstances of each case and there can be no precedence in such a matter. A sentence has to be tailor-made; it cannot be ready-made. Let us see what where the broad facts of the present case. Let us also see who is the offender. It is both the offence and the offender which is required to be borne in mind while deciding appropriate sentence apart from keeping in view the impact the sentence awarded is likely to have on the society. Further, awarding of sentence is guided by four stars - they represent retribution, prevention, deterrence and reformation. All of them are required to be considered in their proper perspective to decide the quantum of sentence.

21. Let us first see what constituted civil contempt in the present case. The same is arrest of a person in defiance of Court's order. The act, therefore, violated even the fundamental right enshrined in Art. 21 of the Constitution. The liberty of the intervener had been taken away without authority of law; indeed, in gross violation of law. May be that the intervener is involved in many cases and may be he is an undesirable person, as mentioned by Shri Rath obliquely. This presentation of the intervener is disputed by Shri Panda, according to whom, the intervener is a respectable person as he is a Sarpanch of Pattamundai Gram Panchayat and an ex-Councillor of Pattamundai N.A.C., as stated in the petition filed before the Sessions Judge which gave rise to Miscellaneous Case No. 1017 of 1990. Be that as it may, the offence alleged against the intervener in G.R. Case No. 855 of 1990, in which he was arrested, was one which does not speak about his depravity - the alleged assault etc. had taken place when a procession for immersion of Goddess Dugra was being taken and police officer had asked to give side to another procession. There is no baseness here, no moral turpitude is involved. Then, the intervener is undoubtedly a citizen of India and this Court has to see that liberty of an Indian, even of bad character, is taken away only in accordance with the procedure established by law. If a person protected by Art. 21 is allowed to be arrested despite an order prohibiting it, a serious view has to be taken to preserve and protect rule of law.

22. Let us now see who is the offender. He is none else than a police officer, who is to maintain rule of law. He is a limb of the law enforcing agency and cannot become part and parcel of law violating agency. Further, he is no ordinary police officer. At the relevant time

he was the Officer-in-charge of a police station to whom people look forward to protect themselves from the violaters of law. An Officer-in-charge of a police station is clothed with so vast powers by the Code of Criminal Procedure that an offence committed by such a person has to be viewed seriously. The higher the power, the greater the responsibility of the holder of power.

23. As to retribution, it can be said that the same has no relevance when a Court decides to punish a contemner. The grossest form of retribution is "eye for eye, tooth for tooth". It is not with a view to retribute at all that Courts spring into action to punish a contemner, there is perhaps some misconception in this regard. Retribution has no place in a case where a Court decides to punish a contemner. It is not to preserve the dignity of the Court that it punishes or wants to punish a contemner; it is really to preserve the rule of law and the faith of the people in the system of administration of justice that Courts come forward to discharge this unpleasant duty.

24. Prevention, of course, has its place in the sentencing ethos even while sentencing a contemner because repetition of the offence of contempt is something which a Court would like to take care of, and adequate care at that because this cannot be allowed to become part of habit, as it does not augur well in a polity governed by rule of law.

25. Deterrence is definitely a factor to be borne in mind. The violator of Court's order has to be punished in such a way that others would think twice, indeed, think many times, before they take to their head to violate Court's order, which, as stated in by this Court in a number of cases, has very wide ramifications.

26. Reformation not relevant in the present case. The trait of character, which can be said to lie at the root of the offence at hand is not such which by a reformative touch can really bring about a change in the character of the offender, as it was the desire to take revenge which was responsible for the offence. The desire for revenge has been at the root of many evils; many wars have been fought for this from time immemorial. A person who would like to take revenge would go almost mad and would take resource to all actions - legal or illegal, moral or immoral, right or wrong, good or bad, - just to feed fat his grudge. Such is the intensity of a feeling of revenge in a human mind that reformation has perhaps a very little role to take care of this type of mental set up.

27. Bearing in mind all the aforesaid aspects of the matter concerning sentence and the need to preserve rule of law and the further stark fact that the contemner is none else than the one who owes as obligation to the society to preserve rule of law, we are of the opinion that a sentence of fine would not meet the ends of justice and the present has to be a case where sentence of civil imprisonment has to be awarded. But then, this sentence need not be for long duration. We are of the view civil imprisonment for a period of seven days would be the proper, reasonable and adequate sentence to be awarded in the present case, and we so award.

28. The proceeding is closed by finding the opposite party guilty of civil contempt and by sentencing him for the same to civil imprisonment for seven days.

29. K. MOHANTY, J. :- I agree. **Order accordingly.**

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Cross Citation : 2010 CRI. L. J. 60

ORISSA HIGH COURT

Hon'ble Judge(s) : B. P. RAY, J
Rabindranath Satpathy …Vs… Hina Sethy.
Cri. M.C. No. 470 of 2004, D/- 17 -8 -2009.*

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Cri. P.C. Sec. 197 – Abuse of Power by police – Sanction for prosecution – Complainant went to lodge F.I.R. at Police Station – Officer in charge of Police station did not register F.I.R. but tore it and abused complainant – Held – Refusal to receive complaint and toering it can not be considered as official duty – Rather it is a serious lapse on his part – The police officer by refusing to record the information has not only omitted or neglected to perform his official duty but also thereby facilitated an offender to escape from the criminal liability – Such police officer cannot be protected – They has to face the prosecution – No sanction is required for prosecution of such Police Officers.

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S.K. Padhi, Sr. Counsel and Associates, for Petitioner; D.P. Dhal, for Respondent.

Judgement:- Petitioner assails the order dated 19-1-2004 passed in I. C. C. No. 28/2002 wherein the learned S. D. J. M., Chhatrapur has taken cognizance of the offences under Sections 218/294, I. P. C. and under Ss. 3(1), (ix), (x), (xv), 3(2), (vi), (vii) and 4 of the S. C. and S. T. (P. A.) Act, 1989 and issued process against the petitioner.

2. It is alleged that on 11-10-2002 while the complainant-opposite party was engaged in grazing his cattle, he was abused and assaulted by some of his villagers. Petitioner was the Officer-in-charge of Hinjili Police Station at the relevant time. In order to lodge complaint, the complainant went to Hinjili P. S. and met the petitioner. The petitioner, however, did not entertain the complaint, on the contrary, complainant (opp. party) was arrested and forwarded to the Court and on the basis of which, G. R. Case No. 376/2002 was initiated. After release, the complainant-opp. party filed a complaint case against the petitioner and four others and the learned Magistrate after conducting enquiry under S. 202, Cr. P. C. took cognizance of the offences as aforesaid. The petitioner challenges the said order on the ground that he being a public servant cannot be prosecuted without a valid sanction.

3. Admittedly, the petitioner was the Officer-in-Charge, Hinjili P. S. and as such, he was a public servant at the relevant time. Petitioner is entitled to the protection under S. 197, Cr. P. C. provided, it is found that he was engaged in the performance of his official duties and the act or omission alleged against him has any reasonable nexus with discharge of his duty. It is well settled in law that in order to extend the protection given to the public servant under S. 197, Cr. P. C., it is to be seen as to whether the alleged act committed by the public servant is reasonably connected with the discharge of his official duty. At the same time, if the public servant is under any legal obligation to do certain act and he omitted or neglected to do the same, he cannot claim the privilege. In this regard the Apex Court has clarified the position that Section 197, Cr. P. C. needs to be construed strictly while determining its applicability to any act or omission in the course of service. (See (2004) 8 SCC 40 : (2004 Cri LJ 2011) State of Orissa v. Ganesh Chandra Jew).

4. Applying the above principle enunciated by the Apex Court, the allegations levelled against the petitioner need to be scrutinized to determine as to whether the petitioner is entitled to legal protection to save himself from the culpability of the offences for which the cognizance has been taken.

5. The case of the complainant-opposite party is that on 11-10-2002 while he was engaged in grazing his cattle, accused persons came there, abused him in filthy languages, assaulted and threatened him as to why he has lodged complaint against them. He shouted for help. Villagers came there and rescued him. The complainant went to the Hinjili Police Station along with the other witnesses to lodge F. I. R. against the culprits/wrong doers. It is alleged that the petitioner did not entertain the FIR, rather abusing the complainant, he torn the same.

6. There is no semblance of doubt that the accusation of the complainant that he was abused and assaulted by the accused Nos. 1 to 4 in the complaint petition constitutes cognizable offences. When a person is assaulted and consequently received injuries and goes to the police station to lodge FIR, it is the bounden duty and statutory obligation on the part of the police authority to accept the same and investigate into the matter. The Officer-in-Charge of the Police Station cannot refuse to accept the complaint, if it discloses cognizable offence. The allegation disclosed in the complaint petition regarding the assault and injuries received thereby was required to be investigated. Refusal to receive the FIR and to tear it in front of the complainant can in no stretch of imagination be considered as official duty; rather it was a serious lapse on his part. No Police Officer can refuse to receive any complaint. This has been deprecated by the Apex Court in the cases of Prakash Singh Badal and another v. State of Punjab and others, (2007) 1 SCC 1 : (AIR 2007 SC 1274) and Lallan Chaudhury and others v. State of Bihar and another, (2006) 12 SCC 229 : (AIR 2006 SC 3376). Heavy duty has been cast on the police authority to record information which reveals cognizable offence. Omission or neglect to discharge the said duty would jeopardize the administration and in dispensation of justice. In the State, where rule of law prevails, a public servant, in charge of law and order, cannot refuse or neglect to discharge his statutory duty and at the same time to refuse under the law is to shield himself from the legal consequence. The accused by refusing to record the information has not only omitted or neglected to perform his official duty, but also thereby facilitated an offender to escape from the criminal liability. In such circumstances, the benefit of statutory provision under S. 197, Cr. P. C. cannot be pressed into service.

7. In the facts and circumstances of the case, I am not inclined to interfere with the proceedings and the order passed against the petitioner in I. C. C. No. 28 of 2002 by the learned S. D. J. M., Chhatrapur.

Accordingly, the CRLMC is dismissed.**Application dismissed.**

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Cross Citation :2008-MhLJ(Cri)-3-182 , 2008-BCR(Cri)-2-273

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : Khandeparkar R.M.S. and Sayed A.A., JJ.

Salma Babu Shaikh ….. Vs ….. State of Maharashtra

Criminal writ petition 400 of 2007 of Mar. 03, 2008.

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[A] Article 226 of constitution of India - Prosecution of erring Police Officer for their criminal negligence – Petitioners daughter died due to harassment by accused – The Police officer's conduct was to shield the real culprits and allowing him to got scot free – Appropriate action is required to be taken against erring police officers and personnel – Including disciplinary action and criminal proceedings – They would also liable to pay costs of Rs. 10,000/- to the petitioner.

[B] Direction to register FIR against police by High Court - Prosecution of Police under Sec. 201 of I.P.C., Sec 145 (2) (c) (d) of Bombay Police Act etc. – Held , Mere availability of alternate remedy is not an absolute bar for exercise of writ jurisdiction to direct initiation of criminal proceedings against erring police officers.

[c] Reply Affidevit by senior police officer to save subordinates - The reply affidavit filed by the police officer is a classic example of how all these three police officers are in connivance with each other in attempt to justify their deliberate inaction – The members of the public who approach the police authorities with the hope and expectation that the wrongdoers should be punished, would lose trust in the police department, if such erring police officers are not punished – Govt. directed to take action – Failure to do so by the Govt. , the petitioner is at liberty to approach the court afresh.

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(1.) RULE. BY consent, rule is made returnable forthwith. The learned Advocates for the respondents waive service.

(2.) THE petitioner in this petition has approached this Court with the grievance about inaction on the part of the respondents/police authorities in conducting necessary investigation and not taking appropriate action against the offender/s responsible for the death of her daughter and hence, for necessary directions and relief in the matter.

(3.) THE petitioner is the resident of sandesh Nagar, Shanti Wadi, Bail Bazar, kurla (West), Mumbai for about last 25 years along with her family which comprised of her two daughters and husband. One of the daughters is stated to have expired on 17-1-2006 in

suspicious circumstances. The deceased girl was named Yasmin and was studying in 10th standard and was punctual in attending the school.

(4.) IT is the case of the petitioner that one boy by name Deepak used to encourage and incite the deceased Yasmin to meet one Umesh Yallapa Arote under one pretext or another as allegedly the said Umesh had one sided love affair with the said daughter of the petitioner. Said Umesh used to visit the neighbours of the petitioner and used to approach the daughter of the petitioner yasmin through one of the neighbouring girl named Sunita Naresh Poojari. It is her further case that being unsuccessful in wooing the daughter of the petitioner, said Umesh used to give threats to the deceased daughter of the petitioner and had even warned her that in case she failed to marry him, he would not spare her and the person to whom she would marry. Consequently, yasmin was always under tension and stress on account of the said threat by umesh. Of late he had also started demanding money from the deceased girl and she was forced to part with her gold chain of 15 grams to him. It is her further case that on 16-1-2006 at about 2:00 a. m. , during early hours of the said day while the girl was studying at her residence , Umesh came to the site and started pulling her outside the house. However, he did not succeed in his evil design as he was obstructed from doing so by the petitioner and he was handed over to the neighbours' custody while she went to report the matter to the Alapure beat Chowky No. 5 of the Kurla Police Station and informed the matter to the police authorities about the harassment caused by Umesh to her daughter. However, the police refused to record the complaint and directed her to go to the Bail Bazar Chowky. Even when she went to the Bail Bazar chowky, the police refused to register the complaint and directed her to go back to alapure Beat Chowky. The petitioner thereupon went to the main Kurla Police Station and could succeed in lodging N. C. complaint beingn. C. No. 132/2006, dated 16-1-2006. Meanwhile, Umesh managed to run away and the police expressed inability and helplessness to apprehend him.

(5.) ON 17-1-2006 one person by name ganesh Galshetwar approached the deceased girl with a mobile phone belonging to Umesh and informed the deceased girl to speak to Umesh with the help of the said mobile phone as Umesh wanted to speak to her. The deceased girl thereupon had conversation with Umesh with the help of the said phone, as was asked to do by ganesh and immediately thereafter, being scared and frightened, ran inside the house and poured kerosene on her body and set herself ablaze. Though the petitioner thereafter approached the police authorities, the latter refused to record the complaint. Ultimately, the petitioner succeeded in submitting a written complaint on 2-6-2006 to the commissioner of Police, Additional Commissioner of Police, deputy Commissioner of police, Assistant Commissioner of Police and the respondent No. 6 herein bringing to their notice all the necessary facts in the matter and requesting them to take necessary action. However, since the respondents have not conducted necessary investigation and have not taken appropriate steps to apprehend and prosecute the culprit in the matter, the petitioner has approached this Court.

(6.) AT this stage it is to be noted that the petition was initially filed against the State of Maharashtra, the Commissioner of Police, additional Commissioner of Police, deputy Commissioner of Police, Assistant commissioner of Police, Senior Inspector of police of the Kurla Police Station and Police sub-Inspector attached to the Kurla Police station and the said Umesh. When the matter came up for hearing for admission on 13-6-2007, after hearing the learned advocate for the petitioner and the learned additional Public Prosecutor for the Respondent Nos. 1 to 7, this Court (Coram: Smt. Ranjana P. Desai and D. B. Bhosale, jj.) observed that according to the petitioner the police had failed to investigate the case properly and have purposely shielded the accused Umesh and registered a case of accidental death. On perusal of the records, it was observed that the

statement of Kausar bano, which was recorded by the police, prima facie indicates that Umesh had subjected the deceased to emotional blackmail and it was, therefore, necessary for the investigating agency to conduct the investigation in proper perspective. It was also observed that the dying declarations prima facie did not satisfactorily disclose to be genuine and therefore the Deputy Commissioner of Police, zone-V, Mumbai was required to look into the matter himself again. Accordingly, direction was issued to the deputy Commissioner of Police to conduct fresh inquiry, if necessary, and to submit report. The report came to be submitted on 18-7-2007. However, in the course of the hearing, it was revealed that the inquiry was not conducted by the Deputy Commissioner of Police but by the Assistant Commissioner of Police which was contrary to the order dated 13-6-2007 and therefore when the matter came up for hearing on 5-9-2007, the learned A. P. P. , on taking instructions, stated that the report submitted earlier could be allowed to be withdrawn in order to enable to conduct proper inquiry by the deputy Commissioner of Police. Accordingly, time was granted and the report dated 6-10-2007 in respect of the inquiry conducted by the Deputy Commissioner of Police was submitted to this Court on 10-10-2007. When the matter came up for hearing on 5-12-2007, on perusal of the report it was found that the same disclosed a clear finding by the Deputy Commissioner of Police that the Senior Inspector of Police Shri dilip Shivram Yadav, who was the concerned officer in-charge of the investigation at the relevant time, did not give proper guidance in the course of the investigation to his subordinates nor he perused the papers of the investigation and did not pay any attention to the doubts expressed by the petitioner and the petitioner's family about the involvement of the respondent No. 8 in the death of Yasmin and in a negligent manner concluded that the death was accidental and got the summary report approved. It was also seen that the Deputy commissioner of Police had conclusively observed in the report in relation to ADR no. 12/2006 that the entire investigation was in a negligent manner. Considering the same, it was inquired with the learned A. P. P. as to why the appropriate disciplinary action has not been taken against the concerned officers? it was also brought to the notice by the Advocate for the petitioner that the records revealed the acts on the part of four Police Officers, namely, Shri Murad abdul Mulani, PSI, Shri Vishwanath Tanaji tambe, PSI, Shri Dilip Shivram Yadav, PI and Shri Uttam Chopane, Asst. Commissioner of Police, amounting to offences in the nature of issuing and signing false reports, giving false information to screen the offender and helping the offender to cause to disappear material evidence of the offence, which would warrant prosecution under sections 197, 201 and 203 of the indian Penal Code r/w the other provisions thereof as well as under section 145 (2) (c)and (d) of the Bombay Police Act, 1951 against the said officers and mere disciplinary proceedings would not be sufficient to meet the ends of justice. Though the contention was sought to be disputed on behalf of the respondents, on perusal of the records and after perusing the decisions of the Apex Court in the matter (Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of sales Tax, Indore and ors.), reported in 1979 DGLS (soft) 449 : 1980 (1)S. C. C. 71 : A. I. R. 1980 S. C. 346, (Commissioner of Sales Tax, M. P. , Indore Vs. M/s. Bombay General Stores. Shahdol), reported in A. I. R. 1969 M. P. 213 and (P. K. Varghese and Sons Vs. Sates Tax Officer, Special Circle, emaculam), reported in A. I. R. 1965 Ker. 212 and on going through the entire record, it was observed that the records disclose that the concerned Police Officers were entrusted with the duty to investigate into the matter which related to the death of a young girl in suspicious circumstances and inspite of suspicion about the involvement of a particular person being clearly pointed out to the concerned Police Officers, it was totally ignored and there was no satisfactory explanation placed on record in that regard, even though an affidavit was filed by one of the concerned Senior Police Officers. The records apparently also disclose that the police

had merely proceeded on the basis of the alleged dying declarations of Yasmin and in that regard under the order dated 13-6-2007 it was already observed by this Court that the alleged dying declarations do not appear to be genuine. In fact, it was also observed that there was no reason for inaction on the part of the Police Officers to investigate into the matter about the doubt which was expressed by the petitioner and her family members, nor there was any explanation forthcoming in that regard and in that view of the matter, the said four police Officers were permitted to be joined as the respondents and the notices were issued to the said respondents pursuant to which PI Dilip Shivram Yadav, the respondent no. 9, PSIs Vishwanath Tanaji Tambe, the respondent No. 10 and Murad Abdul mulani, the respondent No. 11 have filed their affidavits in reply.

(7.) IT is the case of the respondents that on 17-1-2006, in the afternoon hours, the station House Officer on duty i. e. , the respondent No. 11, received an information from the Lokmanya Tilak Hospital, Sion, mumbai that a girl by name Yasmin Babu shaikh, aged about 18 years, had been admitted in the hospital with severe burn injuries and he accordingly made the necessary entries in the station diary and rushed to the hospital. The concerned officer then recorded the dying declaration of the said yasmin Babu Shaikh after verifying from the Medical officer that the patient was in a condition to give statement and the mother of the deceased, namely, the petitioner was present at the time of recording of the statement. In her statement, the deceased had stated that she had appeared for her unit test examination on 16-1-2006 and as she had found it difficult, she was under mental pressure from 16-1-2006. On 17-1-2006, at about 1:00 p. m. , she was required to attend further unit test examination; however, because tension mounted due to the studies, she poured kerosene from the stove and set herself ablaze and that she had no complaint against anyone regarding the said incident. It is their further case that the said dying declaration was recorded at about 3:30 p. m. while the patient was in a condition to give her statement. It is their further case that yet another statement of the deceased was recorded by Smt. Ruksana begum Nazir Hussain Sayyed, a respectable person from the locality in question and answer form on 17-1-2006 itself wherein the incident narrated by the deceased was similar to the one recorded by the said Police Officer. Further statements came to be recorded of the petitioner and her husband on 17-1-2006 wherein they had expressed their doubt about the involvement of Umesh in the death of Yasmin on account of his one-sided love affair. It has been further stated that Yasmin expired on the 17th itself at about 10:00 p. m. , having suffered 97% burn injuries and consequently adr No. 12/2006 came to be registered by the Kurla Police Station. During the investigation, statements of various witnesses were recorded including one of the neighbours of the deceased by name Smt. Pramila Ramchandra Mishra, which was recorded on 28-1-2006, who had stated in her statement that at about 5:00 p. m. on 17-1-2006 when she had visited the house of Yasmin, her father was inspecting the school bag of Yasmin and he found some loose papers in the note book and one of the papers had some note written in Hindi and as the father of Yasmin was unable to read and write, he had requested the Smt. Mishra to read the same for him. Smt. Mishra had found the said note to contain a letter which read as under:

"uma I love you, I am going to burn myself. Nobody is responsible for the same. Nobody should trouble Uma. I will not leave anybody if somebody troubles him. Uma I miss you. "

It has been stated that it is further case of the respondent that the father of the victim girl has not produced the said note till this date to the police authorities. It is further case of the respondent that though the petitioner and his family members had expressed doubt about the involvement of the said Umesh, there was no other evidence against him to implicate him in the offence under section 306 of the Indian penal Code and the dying declaration of the deceased did not implicate or held him responsible and in the

circumstances, the report under section 174 of the Criminal procedure Code was submitted to the Assistant commissioner of Police and the Special executive Magistrate, Kurla Division, which was accepted by order dated 11-12-2006. The affidavit in reply on behalf of the respondent also disclose that there was a non-cognizable complaint registered against umesh on 16-1-2006 at about 9:30 p. m. for the incident of giving abuses and threat by him to the petitioner. It is further stated that the duty officer thereafter had sent the beat Marshal No. 5 for search of the said umesh for giving him warning, however, he could not be located at his residence on the said day. According to the respondent, yasmin committed suicide for the reasons disclosed by her in her dying declarations and, therefore, there is no substance in the case put forth by the petitioner. That is the case pleaded in the affidavit filed by Shri dilip Yadav, the Inspector of Police (Investigation) on 11-6-2007.

(8.) SUBSEQUENT to hearing of the matter on 5-9-2007, an affidavit came to be filed by the respondent No. 6 Shri Vilas Pawar, senior Inspector of Police in relation to the inquiry initiated by the Department against pi Dilip Yadav and PSIs Vishwanath Tambe and Murad Mulani informing that the deputy Commissioner of Police had recorded the finding that the said officers were negligent in the performance of their duty and show cause notice was issued to them in which punishment of stoppage of increment for a period of one year was proposed. However, subsequent to the hearing before this Court the authorities withdrew the show cause notice dated 10-9-2007 by order dated 29-10-2007 and on 31-10-2007 the Joint Commissioner of Police (Law and Order) issued orders for holding departmental inquiries against the said officers and on 7-11-2007 charges were framed and the deputy Commissioner of Police, Zone-VII, mumbai was appointed as the inquiry Officer and the inquiry would be completed expeditiously. The said affidavit was filed on 23-7-2007.

(9.) CONSEQUENT to issuance of the notices, as already stated above, the officers sought to be impleaded on account of allegations against them, they have filed their affidavits. Shri Dilip Yadav, pi in his affidavit dated 18-1-2008 has stated that the endorsement signed by him on the report for obtaining the summary dated 31-10-2006 to the extent that the statement of the father and mother of the deceased Salma not having expressed suspicion against anybody or complained against anybody was incorrect. During the period there were about 62 ADRs forwarded by the concerned investigating Officers to him for obtaining summary in the month of October, 2006 and in the usual course, the notings in the summary reports were made by the ADR clerk and signed by him as he was generally aware about the progress in those cases and it was his mistake that he did not read the notings carefully. He has further stated in the affidavit that he had never personally investigated the said case and the investigation was being conducted under the supervision of the Senior Inspector of police and further that after the transfer of psi Mulani, he had merely passed an order transferring the investigation to PSI Tambe and the latter had never forwarded any report to him till the report of the summary dated 31-10-2006. He has further stated that the observation of the Deputy commissioner of Police regarding failure on his part to give proper guidance to the Investigation officer was unwarranted as in the case in hand the investigation was being carried out under the guidance of the Senior Inspector of Police. He has also stated that failure to pay necessary attention to the incorrect notings made by the ADR Clerk was not deliberate nor mala fide. Considering the departmental action already initiated against him, it is his case that he has been already sufficiently punished for his negligence and therefore his explanation in the matter should be accepted.

(10.) PSI Vishwanath Tanaji Tambe, the respondent No. 10, in his affidavit dated 21-1-2008 has stated that when PSI Mulani had approached the victim in the hospital, no family

member and no person had expressed any complaint or doubt in relation to the incident in any manner whatsoever or howsoever and PSI Mulani had taken abundant precaution to summon Smt. Ruksana Begum, who was a member of the police Janata Samiti and to request her to record the dying declaration in question and answer form. He has further stated that on 17-1-2006 PSI Mulani had conducted the probe, inspected the house premises and conducted inquest panchnama on 18-1-2006 and had also recorded the statement of the petitioner. He has also stated in his affidavit that the petitioner had made passing reference about the love affair of her daughter with one Umesh Yellapa Arote and that it could be one of the reasons for the incident. The affidavit further disclose that on 18-1-2006 the father of the victim girl while taking charge of the body of the girl had expressed doubt about the involvement of Umesh Arote in the matter and had said that the act committed by his daughter could be on account of frustration caused by one sided love of the said Umesh Arote and had requested that action be taken against him. However, there was no proof advanced by him to substantiate the said statement. He has further stated that in the course of the investigation one thing clearly surfaced that the victim girl committed suicide on account of less marks obtained and the said fact was corroborated by her statement, the statement of her father and the mother before PSI Mulani and Smt. Ruksana. He has also stated that in the initial stage i. e. on 17-1-2006 there was no whisper about Umesh Arote and even later there was no proof advanced to link up the said Umesh or to show any direct nexus between the cause of death and the said umesh Arote. A categorical statement in this regard by the respondent in para 11 of the affidavit reads thus:

"11. I say that in the course of the events that have occurred one thing surfaces clearly is that the victim girl caused to commit suicide on account of less marks obtained, this fact was corroborated by her statement, the statement of her father and mother made before PSI MULANI and Smt Ruksana. In the initial stage i. e. 17-1-06, there was no whisper about Umesh Arote. Further even later there was no proof advanced to link up the said Umesh Arote or show any direct nexus between the cause of death and the said Umesh Arote. I respectfully submit that the statements recorded at the initial stages are vital documents which speak for itself about the state of affairs existing then. "

He has also stated in the affidavit that since the time the parents of the girl expressed their doubt about Umesh Arote, PSI mulani took steps to find out his whereabouts. However, he was not traced and accordingly diary entry was made. It was revealed that the said Umesh Arote had left the house since 17-1-2006 and could not be traced despite all efforts in that regard. He has further confirmed that the postmortem report disclosed the cause of death to be due to burns. However, he has hastened to say in the affidavit that

"further it is pertinent to note at this juncture that the said victim girl had not caused to raise any complaint against the said Umesh arote whilst she was alive and on her proper senses in the statements given. Thus save an except a vague doubt expressed, there was no iota against the said Umesh Arote who was not traced despite all diligent efforts then. Therefore, the case was sent for classification as an accidental death case. "

(11.) IN the further affidavit dated 4-2-2008 filed by PSI Vishwanath Tambe, the respondent no. 10, he has stated that prior to handing over of the ADR No. 12/2006, the investigation was conducted and carried out under the supervision of the Senior Police Inspector who is the officer in-charge of Police Station and further that subsequent to the death of Yasmin, statements of several people were recorded by the respective officers and thereafter the said ADR was handed over to him. He has further stated that he had directed his subordinates to search one Umesh but the same proved futile and accordingly a diary entry was recorded. However, a detailed report was not filed by him by way of

inadvertence and in that regard already departmental inquiry has been initiated. He has further stated that he had acted in a bona fide manner and had accordingly submitted his report for classifying the said ADR as a summary report. He has also objected for the petitioner approaching this Court in writ jurisdiction referring to the judgment of the Apex Court in (Prakash Singh Badal and another Vs. State of Punjab and others), reported in 2007 (1) S. C. C. 1. Referring to the said judgment, is sought to be reminded to us in the affidavit that the High Court cannot direct registration of an FIR or direct to take cognizance of an offence in its extraordinary writ jurisdiction under article 226 of the Constitution of India. It has been further stated in the affidavit that all along since the registration of the ADR no. 12/2006 the Senior Officers had been directing the junior officers like the respondent No. 10 and the investigation was being supervised by the Senior Officer and that, therefore, it cannot be said that he had committed any offence or has aided the perpetrators of the crime. Since the other respondents have already admitted their negligence in handling the aforesaid case and have filed affidavit before this Court admitting their negligence, no criminal offence could be levelled against him. He has denied the contention that there was wilful act on his part or that he had tried to shield any offender and has stated that his negligence and inadvertence has already been the subject-matter of the departmental proceedings and the competent authority would pass appropriate order if he is held negligent in performing his duties.

(12.) THE respondent No. 11 PSI Murad abdul Mulani in his affidavit has stated that he carried out the investigation to the best of his ability. On 17-1-2006 he was posted as the Day Station House Officer and as such officer is required to visit the spot of incident and record statements of the witnesses and submit the report to the Senior police Inspector, if any incident was to occur within the jurisdiction of the concerned police Station. On 17-1-2006 he was at the kurla Police Station and at 1:00 p. m. he received information from Police Constable no. 31761, posted at the Lokmanya Tilak hospital, Sion, Mumbai that a girl by name yasmin Babu Shaikh, aged about 18 years was admitted with severe burn injuries. As soon as he received the information, he rushed to the Sion Hospital with Police Constable no. 30224 and a social activist Smt. Ruksana Begum Nazir Hussain Sayyed. Yasmin was found injured upto 95% due to burns and the doctor had stated that she was in condition to give her statement and therefore he recorded the statement of the victim in the presence of her mother as well as the said social worker. In her statement, the victim stated that she had appeared for the unit test examination on 16-1-2006 for english subject and she had faced difficulty in answering the said paper and therefore she was under mental pressure. She was required to appear for unit test on 17-1-2006 at 1:00 p. m. However, as she was unable to answer the English paper effectively, she poured kerosene from the stove and set herself ablaze and that she had no complaint against anyone. After he recorded the statement, the said social activist also recorded the statement of Yasmin and the victim gave similar version to the said social activist. He also recorded the statements of the parents on the same day. Yasmin succumbed to her injuries on the very day at about 10:00 p. m. and PSI Bhosale prepared the accidental death report and registered the adr No. 12/2006 and he prepared the incident report and submitted the same to the Senior Police Inspector, Kurla police Station. Thereafter the matter was assigned to him for the first time on 21-1-2006 by the instructions of the Senior Police Inspector, kurla. The petitioner had expressed suspicion about Umesh Arote for pressurising Yasmin and driving her to commit suicide. He therefore called Umesh Arote for the purpose of investigation and instructed Police Head Constable Patil for surveillance staff and subordinate staff to call the said Umesh Arote for interrogation. In addition to the said investigation, he was entrusted with some other assignments. On 20-1-2006 he was assigned night station house duty. On 21-1-2006 ADR No. 12/2006 was

assigned to him for investigation and on the very day he was posted to Shri siddhivinayak Temple at Prabhadevi, mumbai on protection duty. He was on medical leave from 23-1-2006 to 25-1-2006 as he was suffering from high blood pressure. He attended the Republic Day ceremony on 26-1-2006 and attended the Sessions court on 27-1-2006 as well as the protection duty during the afternoon hours. He also recorded the statement of Yasmin's teacher and the Head Mistress of the school. It is his case that Yasmin had stated in her dying declaration the reason for committing suicide was her poor performance in her study which found corroboration from her teacher's statement. He also recorded the statements of the neighbours of Yasmin including Kausar who in her statement has stated that Yasmin set herself ablaze only after she had talked with Umesh Arote on his mobile phone which was given to her by Ganesh Galshetwar on 17-1-2006 at about 11:00 a. m. to 11:30 a. m. On 28-1-2007 after recording the statement and further investigation he was deputed on protection duty at Tanaji Chowk, Kurla. From 29-1-2006 to 31-1 -2006 he was deputed on different assignments and on 1-2-2006 he was relieved from the Kurla Police Station to join the Central Control Room, Mumbai.

(13.) IT is also to be noted that it is the case of the respondents themselves which is revealed from the affidavit filed by PI Dilip yadav on 18-1-2006 that there were about 11 other similar cases filed against Umesh arote and he was also arrested in relation to those cases.

(14.) REFERRING to the materials on record, it is the contention on behalf of the petitioner that the police not only failed to perform their duties in relation to the investigation in the matter but acted in such a manner that it could help the offender to evade the legal process and consequently the punishment which he would have otherwise faced if there had been proper investigation and placement of all the materials before the criminal Court. The learned advocate appearing for the petitioner submitted that inspite of consistent effort on the part of the petitioner to bring to the notice of the police authorities about the involvement of Umesh Arote in the incident of death of her daughter, the police did not make any investigation in that regard and obviously tried to shield the said Umesh arote from being prosecuted in the matter. According to the learned Advocate for the petitioner, it is not unintentional but lacks bona fide and, therefore, the respondent-Police Officers are liable to be prosecuted for the offence punishable under section 201 and others under the Indian Penal Code as well as section 145 (2) (c) and (d) of the Bombay police Act, 1951 and therefore the respondents should be directed to register FIR in that regard and take appropriate steps in accordance with the provisions of law against the said police personnel.

(15.) THE learned Public Prosecutor, on the other hand, submitted that the department is already seized with the matter and even the preliminary inquiry has disclosed negligence on the part of the concerned officers and therefore necessary departmental proceedings are contemplated and the authorities will take appropriate action against the concerned officers. As far as the allegation of criminal negligence is concerned, the learned P. P. submitted that it may be left to the officer of the status of the Deputy Commissioner of Police to hold preliminary inquiry in that regard and in case they are found to have committed criminal negligence, certainly the State would not hesitate to take appropriate action.

(16.) THE learned Senior Counsel appearing for the respondent No. 11 submitted that the respondent No. 11 has done whatever was required to be done in the matter in the facts and circumstances of the case and as he was transferred to some other department on 1 -2-2006, he had no occasion to continue to be a party to the investigation proceedings in the matter in hand. However, the records disclose that he had recorded the statement of various witnesses in the process of investigation and therefore he cannot be

blamed of having committed any criminal negligence as such. In fact, according to the learned Senior Counsel the records do not even disclose negligence on the part of the respondent No. 11 and within whatever time span which was available at his disposal, he had collected as much as evidence as was possible. He further submitted that the Court has to consider the difference between civil liability and criminal liability in cases where there are allegation of failure to perform the duty. Even assuming that there is failure to perform the duty in the sense that there is some delay in recording some statements, it would not per se amount to criminal negligence so as to warrant prosecution. In any case, since the department is already seized with the matter, according to the learned Senior counsel, there is no case made out by the petitioner for the relief asked for.

(17.) THE learned Advocate appearing for the respondent Nos. 9 and 10 while reiterating the submissions made on behalf of the respondent No. 11 submitted that though the records may disclose some inadvertence on the part of the respondents in pursuing with the investigation, that itself cannot be construed to be a negligence so as to warrant their prosecution in the matter neither the respondents can be accused of having failed to perform their duties as they have conducted the investigation in the best possible manner and whatever evidence which could be collected by them was collected by them. The fact that umesh Arote had sent a mobile phone to have conversation with the victim girl prior to her death was revealed to the investigation authorities only on 28-1-2006 pursuant to the statement of the sister of the victim and therefore they cannot be blamed for not taking any steps to locate the mobile phone or to get the necessary details in relation to the conversation between the victim girl and Umesh Arote till that time. In any case, mere failure to gather the necessary evidence as was expected by the petitioner, that itself cannot lead to the conclusion that the police authorities were negligent in collecting the necessary evidence.

(18.) THE grievance of the petitioner in the matter in hand is two-fold. On the one hand, it is the case of the petitioner that inspite of failure on the part of the police authorities to investigate the matter properly and to apprehend the offender, the higher authorities are reluctant to take appropriate steps for proper investigation as well as to take appropriate disciplinary action against those persons. Secondly, it is the case of the petitioner that there is not only failure in performance of duty on the part of the police personnel attached to the Kurla Police Station at the relevant time, but the inaction on the part of the police personnel has been with the intention to shield the offender umesh Arote from being subjected to the process of law and inspite of the fact that his involvement in the matter of death of the daughter of the petitioner was disclosed to the police authorities at earliest, the police authorities have openly exhibited callous attitude and gross criminal negligence in the matter of investigation relating to the death of her daughter which warrants criminal prosecution of such police, personnel. It is for this purpose that the petitioner seeks necessary direction for initiating necessary disciplinary proceedings, and on the other hand, for initiating criminal proceedings against the police personnel responsible or who is/are guilty of criminal negligence in the matter.

(19.) AS regards the law on the point relating to the jurisdiction of the High Court under Article 226 of the Constitution of India for issuance of direction for initiating criminal proceedings or to set criminal law in motion in relation to the offence and the offender, it was strenuously argued that in case of failure on the part of the police authorities to register the FIR or to take cognizance of the offence, the remedy lies in the form of a complaint to the Magistrate and therefore the remedy in writ jurisdiction is barred and in that regard reliance was placed in the matter of Prakash Singh badal (supra) and specific attention was drawn to para 73 of the judgment. The para 73 of the judgment reads that

"73. At this stage it needs to be clarified that the obligation to register a case is not to be confused with the remedy if same is not registered. Issue of the remedy has been decided by this Court in several cases. See (Gangadhar Janardan Mhatre Vs. State of Maharashtra), 2004 DGLS (soft) 670 :
2004 (7) S. C. C. 768 : A. I. R. 2004 S. C. 4753. "
(20.) ATTENTION was also drawn to the decision in Gangadhar Janardan Mhatre Vs. State of Maharashtra and others, reported in 2004 (7) S. C. C. 768, and particularly to para 13 of the judgment wherein, referring to its earlier decision in the matter of (All India institute of Medical Sciences Employees' union (Regd.) Vs. Union of India,) reported in 1996 DGLS (soft) 1718 : 1996 (11) S. C. C. 582, it was observed that "it was specifically observed that a writ petition in such cases is not to be entertained. ". The said observation was in relation to the entitlement of the complainant to seek relief by resorting to the provisions of section 190 r/w section 200 of the Criminal Procedure code by filing a complaint before the Magistrate. In such cases, the Magistrate is required to inquire into the complaint as provided in Chapter XV of the Cri. P. C. and in those context the Apex Court had said that writ petition would not be maintainable.
(21.) IN Prakash Singh Badal's case when the matter came up before the Apex Court, while contending that the cases which were initiated on the basis of complaints lodged were mala fide and an act of political vendetta and the issue before the Apex Court was that in view of the fact that the information disclosing cognizable offence having been laid before the officer in-charge of the Police Station for the purpose of satisfying the requirements of section 154 (1) of the Cri. P. C. , was there any option to the police Officer except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information and further in case of failure in that regard, what would be the next step available to the complainant. Similarly, in gangadhar Janardan Mhatre's case (supra), the Apex Court was dealing with a matter regarding the right of the informant to be heard before disposal of the summary report submitted by the investigating agency as also whether there is requirement of notice to the party while dealing with the matter under section 173 of the Cri. P. C.
(22.) ATTENTION has also been drawn to the recent decision in the matter of (Sakiri Vasu Vs. State of U. P. and ors.), reported in 2007 DGLS (soft) 1247 : A. I. R. 2008 S. C. W. 309 : 2008 (2) S. C. C. 409 : A. I. R. 2008 S. C. 907. Therein it was held thus:
"25. We have elaborated on the above matter because we often find that when someone has a grievance that his FIR has not been registered at the Police Station and/or a proper investigation is not being done by the police, he rushes to the High Court to file a writ petition or a petition under section 482, Cri. P. C. We are of the opinion that the High Court should not encourage this practice and should ordinarily refuse to interfere in such matters, and relegate the petitioner to his alternating remedy, firstly under section 154 (3) and section 36, Cri. P. C. before the concerned Police Officers, and if that is of no avail, by approaching the concerned magistrate under section 156 (3). "
At the same time, it was also observed by the Apex Court in the same decision that
"28. It is true that alternative remedy is not an absolute bar to a writ petition, but it is equally well settled that if there is an alternative remedy the High Court should not ordinarily interfere. "

(23.) IT was a case wherein the son of the appellant in the said case, who was in the army as a Major, his body was found on 23-8-2003 at Mathura Railway Station and the G. R. P. , Mathura investigated the matter and gave a detailed report on 29-8-2003 stating that the death was due to an accident or suicide. The Army officials at mathura also twice held Court be Inquiry and both the times submitted the report that the deceased had

committed suicide at the railway track at Mathura junction. The Court of Inquiry relied on the statement of the domestic servant who had stated that the deceased never looked cheerful; he used to sit on a chair in the verandah gazing at the roof with blank eyes and deeply involved in some thoughts and used to remain oblivious of the surroundings. The Court of inquiry also relied on the deposition of the main eye-witness, gangman Roop Singh, who had stated that the deceased was hit by a goods train that came from Delhi. The appellant who was the father of the deceased alleged that in fact it was a case of murder and not suicide. He alleged that in the mathura unit of the Army there was rampant corruption about which the deceased came to know and he made oral complaints about it to his superiors and also to his father. According to him, it was for this reason that his son was murdered. Considering those facts, the Apex Court ruled that

"34. In the present case, we are of the opinion that the material on record does not disclose a prima facie case calling for an investigation by the CBI. The mere allegation of the appellant that his son was murdered because he had discovered some corruption cannot, in our opinion, justify a CBI inquiry, particularly when inquiries were held by the Army authorities as well as by the G. R. P. at Mathura, which revealed that it was a case of suicide. "

(24.) IT is a settled law that the ratio of a decision is to be understood with reference to the facts of the case and the points for consideration which arise in the matter. A sentence in a judgment cannot be read as a statutory provision. It is also equally settled that decision is what it decides and not what may follow from it and being so, every observation in the judgment has to be understood with reference to the facts of the case and the point involved for consideration therein. This has been repeatedly held by the Apex Court and elaborately discussed in the decision in (Union of India and others vs. Dhanwanti Devi and others), reported in 1996 DGLS (soft) 1252 : 1996 (6) S. C. C. 44 and also in (State of Orissa Vs. Sudhansu Sekhar Misra and ors.), reported in 1967 dgls (soft) 301 : A. I. R. 1968 S. C. 647. The law on the point as to whether in a given case writ jurisdiction is to be exercised or not even for the purpose of directing initiation of criminal proceedings is that it would depend upon the facts of each case. Mere availability of alternative remedy is not an absolute bar for exercise of writ jurisdiction, though ordinarily it has to be avoided when efficacious alternative remedy is available to the party and is appropriate in the facts and circumstances of the case.

(25.) IN the case in hand, undisputedly, the facts which have come on record would reveal that on 16-1-2006 the petitioner had been to various police chowkies in the locality with her grievance about harassment to her daughter by the said Umesh Arote. Though in the affidavit of the respondent no. 9 there is a solemn statement that a n. C. in that regard was registered against umesh Arote on 16-1-2006 at 9:30 p. m. , and further that there were about eleven such similar cases against him and he was also arrested in those cases, apart from the statement that Beat Marshal No. 5 was deputed for searching the said Umesh Arote but he could not be located at his residence, no other efforts seem have been made to locate him. At the same time, it is undisputed fact that on 17-1-2006 Umesh Arote was not available at his residence. The petitioner had been making grievance about the involvement of Umesh Arote in the death of her daughter right from the day one and this was to the knowledge of the Investigating Officers, yet the Investigation Officers nowhere disclose to have taken any step to make any sort of investigation in that regard at any point of time. We have been only told that there were efforts made to locate Umesh Arote. What were those efforts? how those efforts were made and in what manner? The respondents are totally silent about the same. There is no explanation forthcoming in that regard. At the same time, the affidavit of the respondent No. 9 discloses that Umesh Arote was involved in eleven other similar cases and he was even arrested in those cases. In

such circumstances, what prevented the investigating agency from apprehending him in the present case and in making necessary inquiry with Umesh Arote in relation to the case in hand. It is neither known nor we find any material placed before us in that regard disclosing to be part of investigation.

(26.) THE affidavit of the respondent No. 11 discloses that he was fully aware of the fact that the provision of section 174 of the cri. P. C. were attracted in the matter in hand. Before arriving at any finding about the accidental death, it was also necessary for the Investigation Officers to ascertain the involvement of any other person in relation to the death of the daughter of the petitioner and therefore the suspicion expressed by the petitioner could not have been brushed aside nor could have been ignored in the manner the Investigation officers have ignored and discarded the same in the case in hand. In case of criminal offences, when the police authorities are approached by the citizens complaining about the involvement of any third person or expressing suspicion in that regard, it is the duty of the Police Officer to investigate into the matter taking into consideration the information imparted to him in that regard, albeit, question of taking action against the person against whom suspicion is expressed may not arise immediately. Nevertheless, once suspicion is expressed, the Investigation Officer cannot be heard to say that he would remain silent and will do nothing to verify the suspicion expressed by the relative of the deceased. It would not be mere failure to perform the duty but it can lead to cause grievous injury to the informant, the relative of the deceased as failure in that regard may help the offender in shielding himself from the process of law and avoiding the punishment. As also, may give opportunity to destroy the relevant piece of evidence which the Investigation officer would be otherwise required to collect. Being so, failure in such cases cannot be presumed to be mere lapses on the part of the Investigation Officers. The Investigation Officers are not laymen but are trained in the matter of investigation and they are made aware of the requirement which are to be complied with for effective investigation relating to criminal offences. Failure to perform his duty by an Investigation Officer may help or may result in helping the offender in avoiding the process of law against him in one way or the other and therefore certainly could be construed as gross criminal negligence.

(27.) IN the case in hand, it is a matter of record that the petitioner had informed the police authorities that she had suspicion about the involvement of Umesh Arote in the death of her daughter. The records before us, however, do not disclose anything except recording by the police authorities that the some police personnel were deputed to locate Umesh Arote. Investigation does not include mere search of the person who is suspected to be involved in a criminal offence. When the involvement of certain person is disclosed, it is also necessary for the Investigation Officer to inquire about his acts and activities preceding which have preceded the commission of the offence. The investigation papers nowhere disclose any efforts having been made by the police authorities in this regard.

(28.) AS already observed above, the affidavit of pi Dilip Yadav clearly discloses that the said Umesh was involved in similar eleven other offences and he was even arrested in respect thereof. The records placed before us are however silent about the date of such offences, the date of the arrest of umesh Arote as well as what prevented the investigating agency from conducting necessary inquiries from him in relation to the case in hand when he was arrested in relation to similar other offences.

(29.) THE records disclose that on 28-1-2006 the respondent No. 11, who was in-charge of the investigation at the initial stage, had recorded the statements of the neighbour of the deceased as well as the sister of the deceased. At the same time, his affidavit discloses that he had been to the scene of offence i. e. at the residence of the deceased on 17-1-2008. Neither the affidavit nor the investigation papers disclose as to what prevented him

from recording the statement of the sister of the deceased on 17-1-2006 itself or immediately thereafter and why he had to wait till 28-1 -2006 to record the statement of the sister of the deceased. Undisputedly, the statement of the sister of the deceased disclosed that a person by name Ganesh Galshetwar had approached the deceased on 17-1-2006 at about 11:00 a. m. along with a mobile phone with the message that the same was sent by Umesh Arote to enable the latter to have conversation with the deceased and accordingly, the deceased had conversation with umesh Arote from 11:00 a. m. to 11:30 a. m. and immediately thereafter the deceased ran inside the house and set herself ablaze. Inspite of the fact that this information could have been availed of by the Investigation officer on 17-1-2006 itself, what was the reason for the Investigation Officer to wait till 28-1-2006 to record the statement of the sister of the deceased. There is no explanation forthcoming in any manner. The police authorities are fully aware of the fact that investigation has to be conducted expeditiously as the same not only helps the investigating agency to identify the culprit and to establish his offence but it also avoids giving time to the culprit to manipulate and/or to destroy the relevant piece of evidence. What is further more surprising is that inspite of the fact that the investigation agency was informed on 28-1-2006 that prior to the death of Yasmin she had a talk on the mobile phone with Umesh Arote, there was no effort on the part of the investigating agency to ascertain about such telephonic conversation by contacting the telephone agency nor there was any effort made to seize the mobile phone which was used in such conversation. It is also pertinent to note that Ganesh Galshetwar, in his statement, has clearly confirmed about giving of mobile phone of Umesh Arote to the deceased. Undoubtedly, it was sought to be pointed out to us that the mobile phone was given only on 14-1-2006 and not on 17-1-2006. It is true that the statement of ganesh discloses that the that mobile phone was given to Ganesh by Umesh arote on 14-1-2006. However, his statement recorded under section 161 of the cri. P. C. is totally silent as to the timing and date on which the mobile phone was given to the deceased. Obviously, the police must have either not asked anything on this aspect, or can it be a case wherein having asked, the answer being not favourable to the culprit, the same is not recorded? There is no explanation why it was not asked for, nor any explanation for absence of recording of the same.

(30.) IT is pertinent to note that right from the beginning and particularly even prior to the death of Yasmin, from 16-1-2006 itself it was the grievance of the petitioner that Umesh Arote had been harassing her daughter and immediately after her death, expressed suspicion about his involvement in the death of Yasmin. All the affidavits consistently refer to the fact that though the alleged dying declarations did not refer to the involvement of Umesh Arote in the death of Yasmin or the whole incident that had occurred on 17-1-2006, yet while the alleged dying declarations were being recorded, not only the petitioner but both the parents of Yasmin had expressed their suspicion about the involvement of Umesh arote to the Investigation Officer. This was not merely to the knowledge of the respondent no. 11 to whom the same was initially stated to have been expressed on 17-1-2006 but it was also to the knowledge of the respondent Nos. 6 and 9 as the affidavits clearly disclose that importation of such information by the petitioner formed part of the investigation proceedings right from the beginning and it is a matter of record. As already observed above, the respondent no. 11 had visited the scene of offence on 17-1-2006 itself. There is neither explanation from the respondent No. 11 nor the other respondents as to what prevented and what was the reason for non-recording of the statements of the other inmates of the house of the petitioner particularly the sister of the deceased and the neighbours including Ganesh Galshetwar on the very day. The learned P. P. fairly conceded that the investigation in relation to the mobile which was stated to have been used by the deceased prior to setting herself ablaze was absolutely necessary. Inspite of

that and the affidavit of the respondent No. 11 being totally silent about his activities between 17-1-2006 to 20-1-2006 and there being no disclosure in that regard whatsoever manner in his affidavit as well as in the affidavits of the other respondents, can it be said to be a mere lapse or simple negligence as is sought to be argued on behalf of the respondents which will not amount to any criminal liability? The inaction in that regard is not by a layman. It is by the authority who is trained and who is required to conduct the investigation in relation to all criminal offences as expeditiously as possible and in the best possible manner. It cannot be disputed that for enquiring about the mobile phone and recording of the statement of the sister of the deceased, it need not require any expertise in the investigation. The incident had occurred inside the house. The police could have immediately ascertained who were the persons present at the time of the incident and those who had visited the place prior to and immediately after the incident. Even a layman would know the need of such investigation. In such circumstances, the inaction in that regard, in our considered opinion, can by no stretch of imagination be said to be a mere negligence or lapse. Prima facie, it would be a gross criminal negligence. It is more so when the statement recorded on 28-1-2006 of the sister of the deceased elaborately disclose that Ganesh galshetwar had been acting as an agent of umesh Arote and he had brought the mobile of Umesh Arote and handed over the same to Yasmin asking her to have conversation with Umesh Arote with the help of the said mobile and in fact she had conversation with Umesh Arote on the said day and immediately thereafter she rushed inside, closed the door and poured kerosene on her body and set herself ablaze. The statement of Ganesh Galshetwar also discloses that Umesh Arote had given his mobile to Ganesh Galshetwar in order to give the same to Yasmin. It is true that the statement of Ganesh Galshetwar nowhere discloses the date and time when such mobile was handed over to Yasmin. Here again it can hardly be said to be a mere lapse on the part of the investigation agency to investigate into this aspect knowing well that the incident of setting herself blaze had occurred immediately after the conversation with Umesh with the help of the mobile which was given to her by Ganesh galshetwar and Ganesh having confirmed that the said mobile was given to him by umesh Arote to be given to Yasmin for necessary conversation by her with Umesh arote, it was absolutely necessary for the investigating agency to find out as to at what time and date the said mobile was handed by Ganesh Galshetwar to Yasmin. We cannot believe the same to be mere lapse on the part of the investigation agency to investigate in this regard knowing well the circumstances in which the incident had occurred and the same having occurred immediately after the use of the said mobile. The inaction cannot be said to be mere negligence or lapse but prima facie has to be considered as gross criminal negligence.

(31.) THE affidavits in reply filed by these police Officers certainly make interesting reading. The affidavit of the respondent No. 9 discloses a clear admission about signing endorsement without even reading the same, leave aside ascertaining the truthfulness of the contents of the endorsement. It is pertinent to note that the report was submitted for necessary decision about closure of the investigation on the ground that there was no case against Umesh Arote. It was in the circumstances where the said umesh Arote was already involved in eleven other similar cases to the knowledge of such officer and yet the Police Officer blindly signed the endorsement for closing the matter, ignoring the necessity for investigation regarding the alleged involvement of umesh Arote in the offence. He did not even bother to read the endorsement. Can this be said to be a mere negligence or lapse? what is further disturbing is that the officer further states in his affidavit that the failure to pay necessary attention to the incorrect notings made by the ADR clerk was not deliberate or mala fide. The very officer who confirms on oath that there were eleven other similar cases against the said umesh Arote at the relevant time had audacity to say on oath that

his failure to pay the necessary attention to the incorrect nothings made by the ADR Clerk were not deliberate and were not mala fide.

(32.) AS regards the affidavit of the respondent no. 10 is concerned, the said officer has attempted to knock out the petitioner out of the Court on technical grounds rather than placing on record the true facts. In his affidavit he has stated that "in front of her father the said girl had stated the reasons for the injuries sustained on her body. However, at the said time the said father had not expressed any doubt on any person/s in respect of the said incident occurred and only after the demise of the said victim on 18. 6. 06, the father started expressing doubts in relation to her death. "Undisputedly, the respondent No. 10 took over the investigation only on 1-2-2006. He has no personal knowledge about the investigation prior to 1-2-2006. Whatever statement he could make in relation to the investigation prior to 1-2-2006 has necessarily to be the basis of the investigation records. In view of the categorical statement on the part of the respondent No. 11 that the petitioner was right from the beginning had expressed suspicion about the involvement of Umesh Arote, apparently the statement of the respondent No. 10 quoted above appear to be contrary to the records, or for that matter is a false statement. It was, therefore, with the help of the learned P. P. we had tried to go through the records to ascertain whether anywhere any such record is to be found in relation to the investigation proceeding prior to 1-2-2006 which could reveal that the father of Yasmin had not expressed any doubt in relation to any person at the time of the alleged recording of the dying declaration of Yasmin. The learned P. P. , however, has fairly conceded that there is no such recording found in the investigation records. Before making the said statement, the learned P. P. had taken assistance of the Investigation Officer present in the Court to go through the records. This apparently shows that the respondent No. 10 has no hesitation even to tell lies on oath.

(33.) THE affidavit of the respondent No. 10 further states in para 9 thereof as under:

"9. On 18th January, 06 the father of the victim whilst taking charge of the body of the girl, also expressed a doubt on the said umesh Yellapa Arote and said that the act committed by his daughter could be on account of frustration caused by the one sided love of the said Umesh and requested that action be taken against him. However no evidence proof was advanced by him to substantiate the said statements. "

Indeed, it is surprising and shocking that the Investigation Officer of the stature of Police Sub-Inspector at the relevant time is expecting the complainant to collect evidence for the investigating agency, totally forgetting that it is the duty and obligation of the investigation agency to collect the evidence in criminal matters and not of the complainant. He is totally silent about what efforts he had made to make any investigation in relation to the suspicion expressed by the father of the deceased, nor the investigation records placed before us could reveal any efforts in that regard on the part of this officer.

(34.) THE officer appears to have completely forgotten that the investigation in criminal matters is not by arm-chair method but by actual field work. In para 11 of his affidavit he states thus:

"11. I say that in the course of events that have occurred one thing surfaces clearly is that the victim girl caused to commit suicide on account of less marks obtained, this fact was corroborated by her statement, the statement of her father and mother made before PSI MULANI and Smt Ruksana. In the initial stage i. e. 17. 1. 06, there was no whisper about Umesh Arote. Further even later there was no proof advanced to link up the said Umesh Arote or show any direct nexus between the cause of death and the said Umesh Arote. I respectfully submit that the statements recorded at the initial stages are vital documents which speak for itself about the state of affairs existing then. "

On the one hand the officer has expressed full knowledge about the law regarding the relevancy of the statements which are recorded immediately after the incident and on the other hand has conveniently tried to satisfy himself with the alleged dying declarations of the deceased without bothering to conduct any further investigation while making yet another false statement on oath. The statement is the one in the above quoted para that the alleged statement of the deceased was corroborated by "the statement of her father and mother made before PSI MULANI and Smt. Ruksana". It is evidently false and contradictory to the records. There is no statement either of the father or the mother corroborating the statement of the deceased. Therefore there was no occasion for this officer to make a statement on oath that the statement made by the deceased girl was corroborated by the statement of her parents. At the same time, the officer gives no explanation, inspite of the knowledge that the statements recorded at the initial stages are of vital documents, and therefore why the statement of the sister and neighbours were not recorded immediately after the incident and if he was not in-charge at the relevant time, what investigation he had done to find out what prevented the then Investigation Officer from recording the statements immediately after the incident.

(35.) FURTHER, in para 12 the officer has stated that since the parents expressed doubt about Umesh Arote, PSI Mulani took steps to find out his whereabouts. However, there were no traces of Arote and "accordingly diary entry was made". The diary entry speaks only about deputing certain officers to locate Umesh Arote. The diary nowhere discloses any efforts having been made by PSI Mulani himself to find out the whereabouts of Umesh Arote and yet this officer makes a solemn statement on oath about there being entry made about the efforts made by PSI Mulani.

(36.) THE officer has further stated in para 12 of his affidavit that "further it is pertinent to note at this juncture that the said victim girl had not caused to raise any complaint against the said Umesh Arote whilst she was alive and on her proper senses in the statements given. "

It is pertinent to note that the records every where disclose that the girl had suffered 97% burn injuries, which injuries she had suffered immediately after having conversation with Umesh Arote with the help of a mobile which was sent to her through Ganesh Galshetwar. Added to this, the mother had expressed suspicion about the involvement of Umesh Arote. Besides, on the previous night Umesh Arote had attempted to pull the girl out of her house, and that too, during late night hours. There was also a piece of paper found in the belongings of the deceased which makes reference to one Umesh Arote. Inspite of these materials being available, the officer claims the alleged dying declarations to be gospel truth, ignoring the circumstances under which the statement, if at all was given by the deceased.

(37.) AS regards the dying declarations, at the outset it is to be noted that all the observations hereinafter regarding the same, are essentially in relation to the conduct of the Police Officers in the course of the investigation and shall not influence in any manner the courts below while dealing with any matter arising out of the FIR lodged in relation to death of Yasmin. As regards the said dying declarations, this Court (Coram: Smt. Ranjana P. Desai and D. B. Bhosale, JJ.)by order dated 13-6-2007 had already observed that prima facie the said dying declarations do not appear to be genuine. Indeed, perusal of the dying declaration stated to have been recorded by the Police officer bear a thumb impression whereas the dying declaration stated to have been recorded by Smt. Ruksana do not bear any thumb impression. Neither of the declarations appear to be in the handwriting of Smt. Ruksana. The signature of the said lady smt. Ruksana on the dying declaration alleged to have been recorded by her is itself sufficient to note that the said dying declaration is in the hand-writing of some other person. The declaration on the face of it nowhere discloses

as to who has written the same. As regards the dying declaration recorded by the police, there is an endorsement in the margin column on the first page of the alleged declaration and it shows the date as 17. 1. 06 and timing as 3. 30 a. m. The hand-writing on both the declarations appears to be of the same person. The endorsement also shows that there were 95% burns suffered by the patient. The further endorsement also clarifies that the patient's both the hands and legs were burned so could not sign and no finger impression obtained. As regards this endorsement and also the endorsement relating to the date, the same do not appear to be in the same hand-writing as that of the doctor who is stated to have made the endorsement that the patient is in condition to give valid statement. The inquest -panchnama states that the body of the patient was 100% burnt.

(38.) IF one peruses the first dying declaration, it states that at the relevant time the deceased was alone at her residence as her brothers Irfan and Firoze had gone to play and on that occasion being depressed she poured kerosene on her body and set herself ablaze. The investigation has revealed pursuant to the statement of the sister as well as the neighbour that the deceased was not alone at her residence at the relevant time. This was to the knowledge of the respondent No. 10 who had taken over the investigation on 1-2-2006 along with the investigation papers including the statements of the sister and the neighbour of the deceased which were recorded on 28-1 -2006. As far as the performance of Yasmin in the English paper which she had answered on 16-1-2006, undisputedly, no in vestigation has been carried out even though the Investigation Officer has examined two teachers from the same school where she was studying. Both the statements recorded - one of Smt. Rajeshree Vilas kulkarni and another of Shri Purushottam dinkar Talere, refers to the performance of yasmin during the IXth standard. Both of them confirm the fact that she had answered the English paper on 16-1-2006. However, there is no statement recorded of any of the teachers or person/s from the school regarding the evaluation of the answer book of Yasmin in relation to the English paper which she had answered on 16-1-2006 and yet the officer wants us to believe him when he states that the alleged dying declaration was the fool-proof of non-involvement of any third person in the incident. It is also pertinent to note that all the above referred statements have been made by PSI Vishwanath Tanaji Tambe in his affidavit inspite of knowing the fact that with the passage of time pursuant to the agitation by the petitioner and her husband and consequent to filing of the present writ petition, already cognizance has been taken about the alleged involvement of Umesh arote in the said incident and he was even arrested and the investigation is going on. All these statements of this officer in his affidavit, the stand taken by him and the contentions raised while showing no hesitation to make incorrect and false statements on oath apparently disclose a clear attempt to hoodwink and mislead the Court while attempting to give lame excuses for his deliberate inaction, as revealed from the records. Albeit these findings are prima facie findings which can sufficiently disclose the need for investigation against this officer for his criminal negligence in the matter in hand.

(39.) THE above observation is inevitable in view of further statement which the officer is unable to substantiate in any manner. In para 5 of his further affidavit dated 4-2-2008, the officer has stated thus:

"i say that subsequent to the death of the said deceased (Yasmin), statements of several people were recorded by the respective officers and thereafter, the said A. D. R. was handed over to me. I say that I perused the statements and also directed my subordinates to search for one Umesh Arote. But, however, my chase in the search was futile and the said Arote was untraceable and accordingly, a diary entry was recorded and a detailed report was not filed by me to my supervisory officer and/or Senior P. I. of the said Police Station. "

As the affidavit is not accompanied by any material in support of the statement and the claim of the officer that he had given directions to his subordinates to search umesh Arote and that he had himself made such search but it proved futile and there was a diary entry made in that regard, the learned P. P. was asked to get the necessary information from the concerned officer, who is also present in the Court, with the help of perusal of the diary in that regard. On having gone through the necessary exercise in that regard, the officer could not locate any such entry in the diary. The learned p. P. thereupon fairly conceded that he is not in a position to produce any material nor there is any such entry by the concerned police Officer in the case diary. This further discloses that the officer is so shameless that he has no hesitation in making false statements on oath.

(40.) AS regards the respondent No. 11 is concerned, as already observed above, there is no explanation forthcoming for inaction on his part to conduct any investigation between 18-1-2006 to 20-1-2006. He has claimed in his affidavit that he was on medical leave from 23-1-2006 to 25-1-2006 as he was suffering from high blood pressure. No medical evidence in that regard is attached to the affidavit. He has also stated that on 27-1-2006 he attended the Sessions court from 10:00 hours to 14:00 hours and thereafter he had attended demonstration at Indiranagar Zopadpatti.

(41.) THE affidavit of this officer is yet another classic example of how all these three police Officers are in connivance with each other in attempt to justify their deliberate inaction and it is apparent from para 9 of the affidavit of this officer. The relevant portion of para 9 reads thus:

"I state that Kousar in her statement stated that Yasmin set herself blaze only after she had talk with Umesh Arote on his mobile phone and that mobile phone was given by ganesh Galshetwar to her on 17. 1. 2006 at about 11 am to 11. 30 am. Then Yasmin returned the mobile to Ganesh and after short time Yasmin pour kerosene on her person and set on fire herself. I state that but Ganesh in his statement stated different story that he was returned from school on 17. 1. 2006 at about 12. 30 pm. I state that I found contradiction in the statement of Kousar and Ganesh. "

At the outset, it is to be noted that the deponent nowhere discloses what was the contradiction in the statement of Kausar and Ganesh on the relevant aspect of the matter. In the first supplementary statement ganesh Galshetwar had admitted that on 16-1-2006 he had handed over the mobile phone to the deceased as per the instructions of Umesh Arote whereas in the second supplementary statement he has given a contradictory statement. But the fact remains that in the two earlier statements ganesh Galshetwar had confirmed that he was acting as a mediator between Umesh arote and Yasmin at the instance of Umesh and used to deliver mobile phone of Umesh to Yasmin to enable them to have conversation with each other. In the back ground of these facts having come on record, we fail to understand what was that contradiction in the statement of Kausar and ganesh which persuaded the respondent no. 11 not to conduct the investigation in the manner it was required to be conducted and to try to locate the mobile phone and make further investigation as regards the conversation which took place between yasmin and Umesh Arote on 17-1-2006 itself. There is no explanation forthcoming in this regard in his affidavit.

(42.) IN the above circumstances, though the learned P. P. had strenuously tried to argue that the matter should be left to the concerned authorities to conduct the necessary preliminary inquiry and to take appropriate decision, with utmost respect, we are unable to agree with the said suggestion. We find that the Police Officers who were entrusted with the investigation in the case in hand, who were expected to conduct the investigation honestly, sincerely and to the best of their ability, have not only failed to perform their duties accordingly but unfortunately and shockingly their conduct reveal to be those of the

persons acting with the sole purpose of shielding the real culprit and allowing him to go scot-free and there was not even an attempt to collect the evidence which was to their knowledge available and could have been collected much earlier. An Investigation officer who is required to conduct investigation in relation to a cognizable offence when intentionally avoids to collect the required evidence, or even fails to take appropriate steps which in normal circumstances any Investigation Officer is expected to take, without any justification and explanation in that regard, then the only conclusion which can be drawn is that the inaction in that regard was deliberate and intentional and with the sole intention to help the wrongdoers unless otherwise is established. Certainly, such an inaction on the part of the police authorities cannot be ignored nor can be pardoned. It will send not only wrong message but it will result in great prejudice to the public and will hamper the process of law and lead to lawlessness. The members of the public who approach the police authorities with the hope and expectation that the wrongdoers should be booked for the commission of offences and should be punished, would stand to loose trust in the police department, if such officers for their serious inactions are allowed to go scot-free. Mere disciplinary action in that regard would not be sufficient answer. Shielding or trying to shield any wrongdoer is itself a serious offence and assumes more seriousness when it is committed by a person none other than from the police department. Therefore, we do expect the Government to take a serious note of this and to take appropriate action against the erring Police Officers and personnel, failing which the petitioner is at liberty to approach the Court afresh.

(43.) WE, therefore, direct the respondent no. 1 to take immediate action in the matter and in any case within twelve weeks, in accordance with the provisions of law for disciplinary action as well as for criminal proceedings against the concerned officers. The respondent Nos. 9 to 11 to pay costs of rs. 10,000/- to the petitioner. The costs shall be paid from the personal account of those respondents and shall not be a burden on the Government treasury. The costs to be paid within twelve weeks. Needless to say that all the observations made herein above are in relation to the conduct of the investigation Officers and shall not in any way weigh in the mind of the courts below while dealing with the matter arising out of the FIR lodged in relation to the death of yasmin. The action taken report should be placed before the Court within two weeks after twelve weeks for necessary further orders, if any, in the matter. The rule is made absolute accordingly in above terms.

(44.) AFTER the pronouncement of the judgment, the learned Advocates appearing for the respondent Nos. 9 to 11 prayed for stay of the judgment. Considering the facts and circumstances of the case, we do not find any case for stay of the judgment. The request for stay is rejected. Rule made absolute.

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Cross Citation : 2004 CRI. L. J. 2278

BOMBAY HIGH COURT

Hon'ble Judge(s) : J. G. CHITRE AND A. M. KHANWILKAR, JJ.

(Division Bench)

Sudhir M. Vora, …Vs… Commissioner of Police for Greater Bombay and others,

Crl. Writ Petn. No. 1647 of 2000, D/- 16 -1 -2004.

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(A) Criminal P.C. (2 of 1974), S.154 - FIR - F.I.R. against police - Written complaint to Commissioner of Police disclosing information regarding commission of cognizable offence against Police Officers - It has to be registered as F.I.R. in terms of S.154 of Code. In such type of cases , Commissioner of Police should ensure that inquiry was done by independent agency such as C.I.D. - Enquiry by officers associated with same Police Station should not be ordered if done is illegal (Para 14,15)

"We make it clear that we are not endorsing the action of the Commissioner of Police directing the inquiry into the matter instead of registering the offence under Section 154 of the Code and of further actions under Chapter XII of the Code. Suffice it to observe that inquiry as made, has no legal efficacy so as to ignore the complaint made by the petitioner in writing which discloses the commission of a cognizable offence. In view of the foregoing discussion, we have no hesitation in directing the respondent No. 1 Commissioner of Police to cause to reduce the written complaint sent by the petitioner dated 22-11-2000 in the appropriate book maintained for the purpose of registering crime as per Section 154 of the Code and further to cause investigation into the said complaint by an independent agency such as DCB CID, having regard to the fact that serious allegations have been made against the police officers of having committed acts of commission or omission constituting cognizable offence; and the matter ought to be taken to its logical end in accordance with law after investigation is completed and report in that behalf is filed before the appropriate Court.

(A)Criminal P.C. (2 of 1974), S.41 - ARREST - Arrest - Question regarding arrest of accused-petitioner was subjudice in writ petition filed by accused - Matter was adjourned at instance of police officers who had filed affidavit - Causing arrest of petitioner during pendency of petition is illegal.(Para 16)

" Indeed, the injustice caused to the petitioner has been salvaged because of the release order passed by the Magistrate on 16th January, 2001 when the petitioner was produced before him for remand. We are not however, entering into the allegation regarding handcuffing of the petitioner after the arrest till he was produced before the Magistrate. It appears from the record that issue regarding

handcuffing, has been raised by the petitioner before the Magistrate. That aspect can be considered in those proceedings and we express no opinion thereon. Even with regard to the grievance of manhandling or mishandling of the petitioner while in custody till he was produced before the Magistrate, even that issue will have to be considered in the proceedings before the Magistrate or in such other appropriate proceedings, if filed by the petitioner. We also clarify that one of the other serious allegations made by the petitioner against the Police Officers is that when the petitioner was arrested, he was threatened to withdraw this writ petition or face the consequences. If that allegation is established, obviously it will be a serious matter and by itself would constitute the contempt of Court. The petitioner may take recourse to appropriate remedy in that behalf by giving specific details. If so advised. If such proceedings are taken out, the same can be enquired into and decided in accordance with law."

(D) Criminal P.C. (2 of 1974), S.24 - PUBLIC PROSECUTOR - Public prosecutor - Should not defend police officer against whom allegations of acts of commission or omission are made. (Para 17)

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Cases Referred : Chronological Paras

Suresh Jain v. State of M.P., 2001 Cri LJ 954 : 2001 AIR SCW 189 : AIR 2001 SC 571 : 2001 (2) SCC 628 13

Kannapan v. Abbas, 1986 Cri LJ 1022 (Madras) (Rel. on) 17

Adv. S. V. Marwadi, for Petitioner; Pravin Singhal, APP, for Respondents.

JUDGEMENT

KHANWILKAR, J. :- This writ petition under Article 226 of the Constitution of India is filed for direction to the respondent No. 1 to take suitable action against respondent No. 2 and his associates in respect of the subject-matter stated in the complaint of the petitioner dated 22-11-2000.

2. Briefly stated, the petitioner is a practising Chartered Accountant. He came in acquaintance with one K. A. Rashid and Smt. Sitabai Govind Joshi. The petitioner facilitated the said persons to conclude some transaction regarding land. However, later on said K. A. Rashid started blaming the petitioner for the said deal and called upon the petitioner to pay him Rs. 4.50 lakhs. As the petitioner denied his liability to pay that amount, the petitioner was threatened by the said K. A. Rashid and his wife that they would take the assistance of local police officers. The petitioner asserts that the petitioner was picked up from his office at 10.45 a.m. on 14-11-2000 by plain clothes police constables of the Bandra Police Station at the behest of said K. A. Rashid. The petitioner was told that respondent No. 2 who is Assistant Police Inspector of Bandra Police Station had called him urgently. No cause was disclosed to the petitioner. The petition then graphically explains the events that unfolded after the petitioner reached the police station, which ultimately led to the issuance of five cheques in the name of the said Shri K. A. Rashid, totalling Rs. 4.50 lakhs. The petitioner was allowed to leave the police station only after the petitioner had made over said five cheques totalling Rs. 4.50 lakhs to K. A. Rashid. It is stated that the petitioner was forced to remain in police station for almost four hours and had to suffer humiliation, torture and threats as stated in the writ petition. The petitioner was terribly disturbed with the said experience. Apprehending further trouble, the petitioner immediately took up the matter with the Commissioner of Police for Greater Bombay, by his complaint in writing dated November 22, 2000. In this complaint, all the events that unfolded till the making of the said complaint about the manner in which the petitioner was picked up from his office and handled till he was allowed to leave the police station, have been mentioned. We think it apposite to advert to the relevant extract of the said complaint from para 7 to para 18, which reads, thus :

"7. On the 14th November 2000, when I was doing auditing of my corporate clients accounts as the last date of filing of income-tax returns was approaching fast i.e. 30-11-2000, at around 10.45 a.m. Mr. K. A. Rashid an old friend of mine residing at Lokhand-wala complex, walked in my office, along with two plain clothes police constables from Bandra Police Station and asked me to accompany them to the Bandra Police Station there and then itself. I asked them to sit down and tell me what was all this about. They told me that Mr. Bhargode, API of Bandra Police Station had called me urgently to see him. I told them to proceed to the Police Station and I shall reach there in next ten fifteen minutes as I had to instruct my staff about that day's schedule. They said nothing doing. I will have to come along with them leaving all my work standstill immediately. They took me to Bandra Police Station walking with two Constables on my either side.

8. As soon as we reached Bandra Police Station, I was asked to sit on the Bench in Mr. Bhargode's cabin as he was not present, Mr. Rashid sat on the chair opposite Mr. Bhargode's table. In or around ten fifteen minutes, one Mr. Rajesh Kamble entered Mr. Bhargode's cabin in plain clothes and asked me what was the problem of Mr. Rashid with me. He talked to me for about 20-25 minutes threatening me to repay the money which I was supposed to have taken from Mr. Rashid or face dire consequences of C.R. having filed against me, not only at Bandra Police Station but also ten twelve other fake C.R.s. shall be filed in other police stations of Mumbai. I tried to convince him that I had not taken any money from Mr. Rashid but he himself had invested the said money in a plot of land at Sarasole Village Nerul, New Bombay through a friend of mine one Mr. Ashwin Thakker who is a Chartered Accountant having office at Vashi. Mr. Rajesh Kamble kept on abusing me in filthy language and kept on repeating that there are three more complaints filed against me in Bandra Police Station. He also accused me that I am a cheater and had

eaten up the money of Mr. Rashid. He insisted that I should return the money of Mr. Rashid who was an NRI earlier, and has lost a large amount of money in the stock market. He also accused me that because of me, Mr. Rashid's relation with his wife and children have been strained and that he might commit suicide and was in a great need of his money.

9. After twenty-twenty five minutes, another Police Officer came and sat on the chair of Mr. Bhargode and started abusing me left and right. I could not get his name but surely I will be able to identify him on seeing him in person or his photograph. He also insisted that I have eaten up Mr. Rashid's money and I should be beaten up like other criminals after removing my clothes. He demanded of me to repay Mr. Rashid's money in 24 hours time or else I will be put behind bars.

10. Then at around 12-12.15 p.m., Mr. Bhargode walked in his cabin like a big lord and sat on his chair which the previous police officer immediately vacated. As soon as he saw me sitting on the bench in front of his table, he asked my name. I replied to him that I am Sudhir Vora and that I have been summoned to your office by Mr. Rashid along with two plain-clothes policemen to see you. He started shouting on me that who told you to sit and angrily ordered me to stand up immediately. I had to stand up as per his wish. He also started abusing me and called me a cheater, a rogue of the society and that at lest three to six complaints have been filed against me in the Bandra Police Station. He told me that the policemen of Bandra Police Station as has been observing my activities for the last two three months because of the above complaints and of Mr. Rashid, who is a thorough gentlemen. He insisted that if I pay up Mr. Rashid's money which he had invested to buy the said plot of land at Sarsole Village, Nerul. New Bombay I shall be able to go back to my office or otherwise, to the lock-up. On my trying to argue with him that I had not taken the money and that Mr. Rashid had paid the money in the name of the owner of the plot who had sold the same to Mr. Rashid, Mr. Bhargode asked me to go to behind the partition in his office and asked other constables present there to prepare a CR and take me on remand. One of the Constables started preparing the CR and asked me various details of myself and my family. On the clause of writing any identification mark, I told that I do not have any such mark on my face, M. Rajesh Kamble asked me to remove my shirt for the same.

11. In the meanwhile, other police men kept on prompting me that I should seek pardon from Mr. Bhargode and Mr. Rashid and pay up his amount and get rid of all this. I was made to stand for more than 2 hours in front of Mr. Bhargode listening to all their bad words, abuses and threatening statements about my career being ruined. They also threatened me to visit my house at 2.30/3.00 a.m. in the morning and harass and trouble me till the time I pay up Mr. Rashid's money. Mr. Bhargode also took down my office and residence address along with telephone Nos. in his diary. I requested umpteen number of times to Mr. Bhargode to please give me 2/3 months time to use my good offices to convince Mr. Ashwin Thakker/Mr. Bhagat to resolve Mr. Rashid's plot problem at New Bombay, though I had no responsibility for the same. I also insisted that the original agreement for the purchase of the said plot was prepared by a renowned Advocate Mr. M. T. Thakkar of Vashi between Mr. K. A. Rashid as purchaser and Smt. Sitabai Govind Joshi and the same is with Mr. Rashid and that he should go to the Court against the seller for not giving him a clear title of the said plot. Whenever I used to open my mouth. I used to get abuses or scolding from any one of the policemen in the cabin and they did not allow me to say my side of the story. Never in my life of 38 years, I have faced such a grave

situation and got very nervous and confused. I pleaded with Mr. Rashid also that I will use my good offices to intervene in the matter and see if I could get the problem solved as soon as possible and he being an old friend of mine. I kept on requesting him to tell Mr. Bhargode to stop torturing me. But he also insisted that now the ball is in Mr. Bhargode's court and hence he shall abide by Mr. Bhargode's decision when I told Mr. Bhargode that I shall not be able to pay Mr. Rashid's amount today itself, or within 24 hours, he threatened me with dire consequences including imprisonment and third degree treatment.

12. In the meanwhile, other constables got two petty criminals in the back side of Mr. Bhargode's cabin and started beating them miserably, Mr. Bhargode told me that if I do not pay up Mr. Rashid today itself, I shall be treated like other criminals and taken on remand.

13. I was carrying my mobile phone with me in the pocket. when I received two or three phone calls on the same, I was not allowed to answer them nor be used to call help/advice from my Advocates.

14. At around 1.30 p.m. a person from my staff Mr. Pravin Pawar came to the police station inquiring about my whereabouts. On seeing him Mr. Rashid told Mr. Bhargode that he has come to help his boss. So Mr. Bhargode asked my man also to come in the cabin and started asking him questions about my business and that I am a big and renowned cheater and that he shall also be jailed along with me.

15. My man Mr. Pravin Pawar was told by Mr. Rashid and Mr. Rajesh Kamble to get my cheque book from the office and come back soon to the police station and I was told to sign the cheques in favour of Mr. Rashid. However, Mr. Rashid was asking for Rs. 13 lakhs in his amount due along with interest etc. On seeing all this type of treatment to a learned person and to a law-abiding citizen of this country, I was forcibly and under threat of being put behind bars, made to issue post-dated cheques of Rs. 4.50 lakhs to Mr. Rashid.

16. Mr. Bhargode compelled me to issue cheques of Rs. 4.50 lakhs, I informed him that I do not have any such amount in my Bank Account. He asked for post-dated cheques. Under the said threat of unlawful imprisonment, torture, man handling, humiliation and intimidating I was compelled to sign five cheques in name of Mr. K. A. Rashid totalling Rs. 4.50 lakhs. Mr. Bhar-gode asked me to hand over the said post-dated cheques in his presence to Mr. Rashid. He also give me a warning that I should see to it that the said cheques given to the Mr. Rashid clears on the date of issue and to report him about the clearances of the cheques by coming to the Police Station personally. After handing over the cheques and also after receiving some more abuses, I was allowed to go back to my office at around 3.00 p.m.

17. In the premises, I had no alternative but to leave all these things and returned to my office. From that day till today, I am still under dreadful fear that if I stop the payment, there will be some attack on me and my family members and I will be implicated in false cases as threatened by the officer and Mr. Rashid, I have informed about this incident to my parents and other relatives and friends but looking to the atrocity with which I have met, they advised me that if I do any complaining against the police, the consequences will be serious. I have been mentally and physically ill and incapable to attend to my work since then. However, now ultimately I have decided that since I have

not committed any offence and since I was also not responsible for the loss of money of Mr. Rashid and since I do not owe him any money, I will stop payment on the cheques. The cheques taken by them are in my handwriting and now I have informed the Bank to stop the payment of the said cheques.

18. From the events that took place on the 14th November, 2000, it is crystal clear that now the police are acting as recovery agents and they want to recover Rs. 4.50 lakhs from me which is not due from me. The conduct of the officers kept me under terror for the last one week and that I could not attend to my office or do my clients work. I am also afraid that thereafter I give this complaint to you, there is every likelihood of my arrest in a false case or there is every likelihood that they will prepare a false complaint now of Mr. Rashid and they will involve me in a case under cheating. I also know now that the purpose of all this was to obtain post dated cheques so that I could be prosecuted under Section 138 of the Negotiable Instruments Act. May I therefore request you to kindly make a detailed inquiry and give me protection from the officers of Bandra Police Station and/or Mr. Rashid who are bent upon to involve me in a false case."

3. It is not in dispute that this communication was received in the office of respondent No. 1 on 23-11-2000. As the petitioner did not receive any response from respondent No. 1, he rushed to this Court by way of the present writ petition on 27-11-2000, praying for the following reliefs :

"(a) Rule be issued and respondent No. 1 be called upon to produce the papers of enquiry with regard to the complaint of the petitioner dated 23-11-2000.

(b) By issuing a proper writ, order or direction under Article 226 of the Constitution of India, the enquiry into the complaint of the petitioner dated 22-11-2000 made to respondent No. 1 be directed and suitable action be initiated against the respondent No. 2 and his associates.

(c) Pending the hearing and final disposal of this petition, the respondent No. 2 be directed not to arrest the petitioner in the complaint of the said Shri K. A. Rashid in respect of sale of land and plot No. 208 situated at Village Sarsole, Nerul, New Bombay.

(d) For such other and further reliefs as may be deemed just, fit and proper."

4. This writ petition was circulated for admission on December 4, 2000 when the learned Assistant Public Prosecutor, appearing for the respondents, prayed for time to file affidavit-in-reply. On that day, according to the petitioner, relief in terms of prayer clause (c) was prayed for. But as the matter was being adjourned at the instance of the learned A.P.P., the Court orally mentioned to the learned A.P.P. not to precipitate the matter. This stand taken by the petitioner is however, denied by the respondents. We shall make reference to this aspect a little later. The matter was once again listed on 11-12-2000, when the following order came to be passed :

"Leave to amend. Ld. A.P.P. sought adjournment for a week stating before us that affidavit-in-reply would be filed on behalf of respondent No. 1 as also on behalf of the concerned authorities to whomsoever the petitioner has lodged the complaints so far including the complaint dated 24th November, 2000. Post this matter on Tuesday the 19th Dec., 2000."

On 11th December, 2000, affidavit of Dattatray Pandurang Bhargude, respondent No. 2 came to be tendered which was taken on record, at page 31. The matter was posted on 19-12-2000, when the following order came to be passed :

"The learned A.P.P. sought time for explaining as to why the affidavit in reply could not be filed on behalf of the other concerned authorities mainly Deputy Commissioner of Police, Zone VII, Bombay as contemplated by order dated 11-12-2000 so also for filing the affidavit in reply on his behalf. Accepting the request, we adjourn the hearing on 21-12-2000."

The matter was then posted on 21-12-2000, on which date, the affidavit of Mr. Rajender Singh. I.P.S. Deputy Commissioner of Police, attached to Zone VII, Greater Bombay was tendered, which was taken on record at page 59. In the meantime, however, the petitioner also filed his rejoinder in response to the affidavit of respondent No. 2 sworn on 12-12-2000 at page 43 onwards. On 21-12-2000, the Court noted that the affidavit filed by Rajender Singh. Deputy Commissioner of Police, offered no explanation as to why the affidavit as ordered, could not be filed in time. The Court made the following order :

"Perused the affidavit dated 20-12-2000 filed by Rajendra Singh, Deputy Commissioner of Police. In the said affidavit there is no explanation - as to why he was not in a position to give instruction to A.P.P. from 14th December onwards till 19th December, 2000 when the matter was listed before us.

The learned APP therefore made a request that the matter may be adjourned to 22nd December, 2000 so that necessary affidavit will be filed in this regard as well.

At the request of the learned APP we adjourn the hearing of this matter till tomorrow. Post it on 22nd December, 2000."

Accordingly, the matter was posted on 22-12-2000 when the said officer filed further affidavit which is at page 65, explaining the reasons as to what prevented him from filing the reply affidavit in time. The petitioner, thereafter, filed rejoinder sworn on January, 2001 which is at page 71, reiterating the assertions made and further placing on record that in spite of the oral directions given by the Court, the Police Officers caused arrest of the petitioner in connection with the same offence complained by K. A. Rashid and notwithstanding the assurance given on affidavit dated 8-12-2000 by respondent No. 2 that only if a fresh complaint is given by Mr. K. A. Rashid and his wife, necessary action will be taken according to the provisions of law. It is stated in this affidavit that no fresh complaint was given by K. A. Rashid but in spite of that the petitioner came to be arrested. Not only that, the petitioner was handcuffed, manhandled, paraded and humiliated while producing before the concerned Magistrate. Moreover, the petitioner was pressurised by the concerned Officer of Bandra Police Station to withdraw the pending writ petition or else face the consequences. Along with this affidavit, the petitioner also placed on record the order passed by the Magistrate releasing the petitioner on bail, who, in turn has recorded prima facie opinion that the petitioner has been booked in the alleged offence to subserve the ulterior design. We shall refer to this aspect little later. Accordingly, after the Winter Vacation, the matter was listed on January 16, 2001, when the Counsel for the petitioner made grievance before this Court that the police had arrested the petitioner in spite of the direction given by the Court to refrain from doing so. On January 16, 2001, the Court passed the following Order :

"Leave to Amend. It is submitted by counsel for the petitioner Mr. Mundargi that a Division Bench consisting of G.D. Patil and A. M. Khanwilkar, JJ., had on 4-12-2000 orally directed the learned A.P.P. Mr. Singhal to inform the police not to arrest the petitioner. Mr. Mundargi submits that in spite of the said direction, the petitioner was arrested on 14-1-2001. In view of the above circumstances, we feed it appropriate that this matter be heard by the same Division Bench consisting of G. D. Patil and A. M. Khanwilkar, JJ."

Thereafter, the matter once again appeared before the Bench, of which one of us (A. M. Khanwilkar, J.) was a party, on 22-10-2002. The same was, however, adjourned to 30-10-2002. The matter was then notified for 31-10-2002, when the following order came to be passed :

"The matter was posted today to enable the Public Prosecutor to place on record the stand of the concerned officer providing justification for the arrest of the petitioner during the pendency of this writ petition. Today when the matter is called out we are informed that the concerned officer has not come in spite of repeated messages given to him by the learned A.P.P. counsel for the petitioner states that the concerned officer A.P.I. Joshi was fully aware that the matter is posted today as he was personally present on the date of the last hearing. If this is correct, then it is a matter of concern for us. We post this matter on 22-11-2002 in view of the request made by the learned A.P.P. as a last opportunity. Before the next date of hearing, the learned A.P.P. shall file an affidavit of the concerned officer in the context of the allegation made against the officer including the one mentioned in the application filed before the learned Magistrate. An advance copy of the affidavit be supplied to the petitioner four days in advance. The concerned officer to remain personally present on the next date of hearing."

Thereafter, the Bench was reconstituted due to retirement of Shri G. D. Patil, J. The matter was listed on 13-8-2003 before us, when the following order came to be passed :

"Today Shri Gole prayed for adjournment by submitting that Shri Marwadi had gone out of Mumbai prior to 2-3 days and has not returned and, therefore, is unable to attend the Court. He placed the apologies on behalf of Shri Marwadi in this context.

Shri Singhal, Additional Public Prosecutor, submitted the affidavit of Dinesh B. Joshi Assistant Police Inspector which was sworn in on 9th December, 2002. We are shocked to see such delay in filing this affidavit. When the allegations embodied in the petition are serious, the State should have filed the affidavit of a responsible police officer. But instead of that, for reasons best known to State, API has been chosen to explain the situation. We deprecate this. We expect that affidavit should be of a senior responsible officer concerned with the allegations made in the writ petition. He should be Additional Commissioner of Police connected with crime in question - Zone VII, Mumbai having supervisory power over concerned subordinates. His affidavit should be submitted if at all State wants to file it, within two weeks.

In the meanwhile, papers of the investigation done so far be called for the perusal of this Court for considering the merits of the petition and the arguments which are likely to be advanced on behalf of the litigating parties. Take on Board after three weeks."

In the meantime, however, the said Rajendra Singh, Deputy Commissioner of Police filed an affidavit placing on record the affidavit dated 12-1-2001 which, is paginated at pages

71 to 79. Along with affidavit, the report of the Assistant Commissioner of Police, Bandra Division Mumbai, purported to be dated 11-1-2001 has been filed. The Assistant Police Inspector attached to Bandra Police Station also filed affidavit dated 9-12-2002, defending the allegations, in particular with regard to the handcuffing of the petitioner. Thereafter, one more affidavit has been filed by Bipinkumar Singh, the Dy. Commissioner of Police, Zone - IX, Mumbai dated 27-8-2003.

5. The sum and substance of the reply filed on behalf the respondents is that the allegations made against the Police Officers in the complaint dated 22-11-2000 are false. On the other hand, there is ample material on record to suggest that the petitioner has cheated the said R. A. Rashid. Besides the respondents have denied the allegations made by the petitioner regarding the humiliation, threats etc. while in police custody.

6. We shall briefly advert to the averments in the affidavits filed before us explaining the manner in which inquiry was undertaken and its outcome. The first affidavit is of respondent No. 2 himself, dated December 8, 2000. He has indeed denied the allegations in the writ petition. It is stated that on 4-11-2000 the said K.A. Rashid and his wife gave an application alleging the case of cheating to the tune of Rs. 4.5 lakhs by the petitioner. This application was received by Shri Subhash D. Jadhav, Senior Inspector of Police who marked it to the respondent No. 2 for inquiry. The respondent No. 2 on receiving the said complaint on 7-11-2000 called the parties to the Police Station. After some deliberation in the presence of respondent No. 2, the parties (K. A. Rashid) informed the respondent No. 2 that he was not interested in pressing the complaint but was interested in getting back his money from the petitioner; and that the petitioner promised to pay the amount to said K. A. Rashid in his presence. As a result, necessary remark was made on the said application which was communicated to the Senior Inspector of Police Shri. Subhash D. Jadhav. It is further stated that after 7-11-2000, the respondent No. 2 did not call any party to the Police Station in connection with the said application of K. A. Rashid dated 4-11-2000 and no case was registered against the petitioner. It is also denied that any humiliating treatment was meted out to the petitioner by him (respondent No. 2) or that he had sent any constable in plain clothes with K. A. Rashid to fetch the petitioner on 14-11-2000. The stand taken in the affidavit is that the petitioner was not called to the Police Station on 14-11-2000, but on 7-11-2000. The affidavit further records that the petitioner has sent an application to the Commissioner of Police dated 22-11-2000 and the same was received by Senior Inspector of Police. Bandra Police Station. It is stated that Shri. Subhash D. Jadhav, Senior Inspector of Police submitted his report on this application on 5-12-2000 to the Deputy Commissioner of Police. Zone-VII, Mumbai. In paragraph 9 of this affidavit, it is clearly stated that no case was registered against the petitioner and that if a fresh complaint was given by K. A. Rashid and his wife then necessary action will be taken according to the provisions of law. Along with this affidavit, the letter addressed by K. A. Rashid to the Commisssioner of Police purported to be dated 19-9-2000 is produced as Exhibit-A. However, there are certain discrepancies in this document which according to the petitioner, would question the genuineness of this document. Although, the letter is stated to be dated 19-9-2000, the same is signed on 4-11-2000. Endorsement has been out by Subhash D. Jadhav Senior Inspector of Police, Bandra Police Station of having received this letter on 4-11-2000. On the reverse, endorsement of respondent No. 2 is recorded indicating that the parties have decided not to press the complaint which is mentioned as 7-11-2000. Besides only Xerox copy of this document has been produced before us.

7. Be that as it may, the petitioner filed rejoinder affidavit dated 12-11-2000 reiterating the stand taken in the writ petition. The affidavit also clearly records that after the petitioner gave complaint in writing to the Commissioner of Police on 23-11-2000, he has been receiving threats. One of the person who has administered the threat is named as Rajesh Kamble for which reason another complaint was sent by the petitioner to the Commissioner of Police as well as to Khar Police Station on 29-11-2000. The affidavit also records that the petitioner informed his banker to stop payment of the post dated cheques issued by the petitioner in favour of Rashid, which according to the petitioner, were obtained forcibly from him on 14-11-2000 while in Police Station. The rejoinder also explains other matters. However, it is not necessary for us to burden those aspects with this judgment. However, in paragraph 9 of the rejoinder clear assertion is made that the petitioner was never called on 7-11-2000 as alleged by the respondent No. 2 but was taken to the police station on 14-11-2000 by the constables in plain clothes of the Bandra Police Station.

8. The Deputy Commissioner of Police attached to Zone-VII Shri Rajender Singh has filed affidavit dated 20th December, 2000. In substance, it is stated that application was received from K. A. Rashid on 19-9-2000 requesting to register a cheating case against the petitioner. That application was sent for inquiry on 3-11-2000 to the Senior Inspector of Police, Bandra Police Station. Inquiry report was however, awaited. Affidavit also records that an application was received from the petitioner dated 22-11-2000 addressed to the Commissioner of Police alleging therein extortion of Rs. 4.5 lakhs committed by respondent No. 2 along with his staff at the behest of K. A. Rashid. It is stated that this application was received on 28-11-2000 from the office of Commissioner of Police which was then forwarded to the Senior Inspector of Bandra Police Station Shri Subhash D. Jadhav, who in turn carried out an inquiry and submitted his report dated 5-11-2000. It is then stated that after going through the said report, the said senior Inspector of Police was directed to re-enquire into the matter and submit his final report which was awaited. The affidavit then records that report was received from the Senior Inspector of Police on 11-12-2000 along with one application given by one Dr. Rajesh Kamble against the petitioner. It is stated that the said report was returned to the Senior Inspector of Police with direction to complete the inquiry into the petitioner's application dated 22-11-2000. It is stated that final report was awaited. In paragraph 5 of this affidavit, it is stated that petitioner had also given application dated 22-11-2000 to Special Inspector General of Police (P.C.R.) which application was forwarded to A.C.P. Bandra for inquiry and the report which was awaited.

9. Further affidavit has been filed by said Rajender Singh, Deputy Commissioner of Police, dated 21-11-2000 explaining the reasons for delay in filing the earlier affidavit.

10. Further affidavit has been filed by Rajender Singh, Deputy Commissioner of Police attached to Zone VII dated 12th January, 2001 which mentions that after the receipt of the complaint from the petitioner, the same was inquired jointly under the supervision of Assistant Commissioner of Police, Bandra Division, Mumbai. During the inquiry, Senior Inspector of Police, Bandra Police Station, had recorded statements of certain persons named in the affidavit. It is then stated that during the inquiry, police also obtained various documents from said K. A. Rashid, which were being verified by the Assistant Commissioner of Police, Bandra Division. The Assistant Commissioner of Police in the meantime submitted interim report dated 11th January, 2001 and on going through the said report, a prima facie, conclusion was reached that K. A. Rashid was cheated by the

petitioner and others. It is then stated that after receiving final report in the matter, necessary action as per the provisions of law will be taken against the petitioner and others. Again in this affidavit, no disclosure has been made that the police was contemplating to arrest the petitioner in connection with the complaint filed by K. A. Rashid which presumably was inquired into along with the complaint filed by the petitioner dated 22-11-2000. Moreover, it is unambiguously stated that further action against the petitioner would be taken only after receipt of final report. The interim report dated 11th January, 2001 prepared by the Assistant Commissioner of Police with the assistance of Senior Police Inspector and other police officers of Bandra Police Station is appended to this affidavit as Exhibit-A. Notwithstanding the above, it is seen that the petitioner was arrested by the local police station on 14th January, 2001.

11. The petitioner has filed rejoinder affidavit in January, 2001 making serious grievance about the arrest of the petitioner contrary to the oral directions given by this Court. The affidavit also highlights the humiliation meted out to the petitioner after the arrest including that he was handcuffed and made to sit in white Maruti van while being taken to the Magistrate's Court and pressurised to withdraw this writ petition.

Further affidavit has been filed by Shri Dinesh B. Joshi, Assistant Police Inspector attached to Bandra Police Station dated 9-12-2002 which refers to the interim report prepared by ACP Bandra, Division, Mumbai dated 11th January, 2001. It is then stated that on receiving the said report, the Deputy Commissioner of Police Zone-VII, Mumbai directed on 12-1-2001 by written order to take action as per law. On 13-1-2001 Senior Inspector of Police Mr. Subhash D. Jadhav directed said Dinesh Joshi Assistant Police Inspector to go through the papers and register an offence as per law. On the basis of those written instructions, the offence came to be registered against the petitioner and P.S.I. Gujjar was sent to arrest the petitioner who in turn fetched the petitioner to the Police Station whereupon the petitioner came to be arrested and kept in the Bandra Police Station lock-up. The factum of petitioner having been handcuffed is disputed in this affidavit.

12. There is one more affidavit filed on behalf of respondent sworn by Bipinkumar Singh, Deputy Commissioner of Police, Zone-IX Mumbai dated 27th August, 2003 which more or less reiterates the position stated in the aforesaid affidavits filed on behalf of respondents.

13. Having perused the pleadings and the record produced before us as well as the oral submissions canvassed before us by the counsel appearing for the parties, in our opinion, it will not be appropriate for this Court to scrutinize the veracity of the rival claim because, any opinion in that behalf may affect the merits of the allegations one way or the other. Moreover, that inquiry is not required to be undertaken by this Court having regard to the limited relief that needs to be considered. We would, therefore, confine our decision only to the limited issues which will be required to be adjudicated by this Court in writ jurisdiction. The first question that arises for our consideration is, whether the written complaint as sent by the petitioner to the Commissioner of Police discloses information regarding the commission of any cognizable offence? We have no hesitation in observing that on fair reading of the complaint, relevant portion whereof as extracted above, discloses the information regarding the commission of a cognizable offence. If that is so, the next question is, whether it was obligatory to register the said information/complaint in the book kept by the Police Officer as is required by the mandate of Section 154 of Code of Criminal Procedure? It is well settled that registration of an F.I.R. involves only the process

of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the Officer- in-charge of the Police Station as indicated in Section 154 of the Code. (See 2001 (2) SCC 628 :2001 Cri LJ 954) Suresh Jain v. State of Madhya Pradesh para 10). It is also well established position that it is the bounden duty of the Officer incharge of the Police Station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter. It is will be useful to advert to the dictum of the Apex Court in the case of State of Haryana v. Ch. Bhajan Lal in AIR 1992 SC 604 : (1992 Cri LJ 527) paras 29 to 32 thereof read thus :

"29. The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined under Section 2(c) of the Code) if given orally (in which case it is to be reduced into writing) or in writing to an officer in charge of a police station" (within the meaning of Section 2(o) of the Code) and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case.

30. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of a Section 154(1) of the Code, the concerned Police Officer cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer-in-charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. ..... In case, an officer in charge of a police station refuses to exercise the jurisdiction vested on him and to register a case on the information of a cognizable offence, reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code.

31. ..... An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a First Information Report is that there must be an information and that information must disclose a cognizable offence.

32. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

(Emphasis supplied)

14. In the present case, since the allegations regarding of the commission of offence was against the Police Officers of the concerned Police Station, the petitioner thought it

appropriate to forward the complaint in writing to the Commissioner of Police which option was exercised presumably in terms of such remedy provided in sub-section (3) of Section 154 of the Code. On receipt of such complaint, surely the Commissioner of Police was obliged to ensure that the information so received in the shape of the written complaint was registered as F.I.R. as it disclosed the commission of a cognizable offence. That is not the course adopted by the Commissioner in spite of the statutory obligation to do so. Be that as it may, the Commissioner then forwarded the complaint to the Deputy Commissioner of Police, Bandra Division, Mumbai, to enquire into the matter who in turn directed his subordinates to record statements of the concerned persons. We shall deal with this aspect a little later. In our opinion, when the information relating to the commission of a cognizable offence is reported either orally or in writing as in this case and as the information was vague or irresponsible rumour it surely required registration under Section 154 of the Code and further steps in terms of Chapter XII of the Code. In such matters, there is no scope for informal inquiry because such inquiry would partake the colour of investigation. It is only when the information received were to be vague information, anonymous or irresponsible rumour, it would not in itself constitute information within the meaning of Section 154 of the Code or the basis for an investigation under Section 157. However, in the present case, written complaint sent by the petitioner, who is a practicing Chartered Accountant. Besides, it is very specific and replete with requisite information. Accordingly, in such circumstances, the same ought to have been reduced into the book maintained for recording of information relating to the commission of a cognizable offence in terms of Section 154 of the Code. We would only observe that if the allegations made in the complaint are found to be true, the same are not only serious but, prima facie, cannot be said to have been done by the concerned Police Officers in discharge of their official duty. The allegations in substance inter alia, are that the Police Officers have played active role to facilitate recovery of certain amounts from the petitioner at the instance of K. A. Rashid, obviously it is not the duty of the Police Officer to facilitate the recovery of amounts or act as a recovery agent using weight of their office.

15. In our opinion, there is not only failure of recording F.I.R. in respect of complaint sent by the petitioner but what is intriguing is that some inquiry is directed which is only reduced to a farce of an inquiry. We say so because, it appears from the record that on receipt of complaint from the petitioner dated 22-11-2000, the Commissioner of Police referred the matter to the Deputy Commissioner of Police, Bandra Division, Mumbai. It would have been a different matter if the Deputy Commissioner of Police, Bandra Division, was to cause inquiry but instead, he, in turn, referred the matter to the Assistant Commissioner of Police, Bandra Division, Mumbai. The Assistant Commissioner of Police then depended on the assistance of Senior Inspector of Police and other police officers of Bandra Police Station which fact has been recorded in the interim report dated 11-1-2001 submitted by the Assistant Commissioner of Police. From the explanation offered on behalf of respondents before us, we are persuaded to take the view that the inquiry so conducted was only a show cause without anything more. Inasmuch as the same has been undertaken by the officers of the same Police Station with a seal of approval put by the Assistant Commissioner of Police, Bandra Division by way of his interim report. The gist of the statements of concerned persons recorded in the interim report would clearly show that the main focus about the allegations in the complaint sent by the petitioner to the Commissioner of Police, has been glossed over and instead opinion rather a finding of guilt, is recorded against the petitioner that he has made a false and mischievous allegation against respondent No. 2 with ulterior purpose. In the matter of such serious allegations, the Commissioner of Police should have at least, ensured that the inquiry was

done by an independent agency and responsible officer and not by the officers associated with the same Police Station. We make it clear that we are not endorsing the action of the Commissioner of Police directing the inquiry into the matter instead of registering the offence under Section 154 of the Code and of further actions under Chapter XII of the Code. Suffice it to observe that inquiry as made, has no legal efficacy so as to ignore the complaint made by the petitioner in writing which discloses the commission of a cognizable offence. In view of the foregoing discussion, we have no hesitation in directing the respondent No. 1 Commissioner of Police to cause to reduce the written complaint sent by the petitioner dated 22-11-2000 in the appropriate book maintained for the purpose of registering crime as per Section 154 of the Code and further to cause investigation into the said complaint by an independent agency such as DCB CID, having regard to the fact that serious allegations have been made against the police officers of having committed acts of commission or omission constituting cognizable offence; and the matter ought to be taken to its logical end in accordance with law after investigation is completed and report in that behalf is filed before the appropriate Court.

16. The next question that needs to be addressed in this petition is, whether it was appropriate for the police to arrest the petitioner on 14th January, 2001 in spite of the oral direction given by this Court as contended by the petitioner and at any rate, contrary to the assurance given in the affidavit filed by the respondents and especially when the matter was subjudice before the High Court. In this context, it needs to be mentioned that the counsel for the petitioner vehemently states that when the writ petition was listed before this Court on 4th December, 2000 ad interim relief in terms of prayer clause (c) was specifically pressed but as the matter was adjourned at the instance of the learned A.P.P. the Court orally observed that the respondents shall not precipitate the matter. Counsel for the respondents however, submits that no such oral observation was made by the Court. According to him, even if an oral observation is made by the Court, the same would have been communicated by him to the respondents in writing - But there is no material to support this position. It is not necessary for us to enter into this controversy but, in our view, the action of the respondents to cause arrest of the petitioner on 14th January, 2001 cannot be countenanced at all, for this Court was represented by the respondents in the form of affidavits filed before this Court that further action will be taken against the petitioner only if fresh complaint was to be filed by K. A. Rashid. On the one hand the affidavit filed before this Court as late as 12th January, 2001 (of the Deputy Commissioner of Police) makes a categorical statement that upon receiving final report necessary action will be taken against the petitioner, however, in utter breach of that stand taken on affidavit, the police proceeded to cause arrest of the petitioner on 14th January, 2001 - not because of fresh complaint filed by K. A. Rashid or any final report, but on the basis of the original complaint which it is stated, was enquired along with the complaint filed by the petitioner; and direction issued by the Officer to arrest the petitioner having found sufficient material against him (petitioner) in respect of complaint filed by K. A. Rashid, in the interim report. Moreover, when the question regarding arrest of the petitioner in connection with the original complaint filed by K. A. Rashid was incidentally subjudice in the writ petition which was pending before this Court and the matter having been adjourned at the instance of the respondents, in our opinion, there can be no tangible justification for causing arrest of the petitioner on 14th January, 2001. The explanation given by the respondents in our opinion, is unacceptable and is obviously an afterthought. Understood thus, we hold that the action of arrest of the petitioner is inappropriate. Indeed, the injustice caused to the petitioner has been salvaged because of the release order passed by the Magistrate on 16th January, 2001 when the petitioner was produced

before him for remand. We are not however, entering into the allegation regarding handcuffing of the petitioner after the arrest till he was produced before the Magistrate. It appears from the record that issue regarding handcuffing, has been raised by the petitioner before the Magistrate. That aspect can be considered in those proceedings and we express no opinion thereon. Even with regard to the grievance of manhandling or mishandling of the petitioner while in custody till he was produced before the Magistrate, even that issue will have to be considered in the proceedings before the Magistrate or in such other appropriate proceedings, if filed by the petitioner. We also clarify that one of the other serious allegations made by the petitioner against the Police Officers is that when the petitioner was arrested, he was threatened to withdraw this writ petition or face the consequences. If that allegation is established, obviously it will be a serious matter and by itself would constitute the contempt of Court. The petitioner may take recourse to appropriate remedy in that behalf by giving specific details. If so advised. If such proceedings are taken out, the same can be enquired into and decided in accordance with law.

17. While parting, we may observe that although concerned police officer (Respondent No. 2) has been impleaded in writ petition as respondent by name and the allegations against him are personal to him, nevertheless, the Public Prosecutor has thought it appropriate to defend the respondent No. 2. In such a situation, in our view, the Public Prosecutor ought not to defend the officer against whom the allegations of acts of commission or omission are made. (See 1986 Cri LJ 1022 (Madras)) Khannapan v. Abbas).

18. For the aforesaid reasons, we allow this writ petition in the above terms with liberty to the petitioner to take recourse to appropriate remedy on the issues kept open by us, as permissible by law, if so advised. If any further proceedings are instituted by the petitioner, the same will be decided in accordance with law without being influenced by any of the observations made herein. All questions in that behalf are left open.

Accordingly, we issue a writ of mandamus directing the respondent No. 1 Commissioner of Police for Greater Bombay to cause to register said complaint of petitioner Sudhir M. Vora dated 22-11-2000 in appropriate register as is maintained for the purpose of Section 154 of Code of Criminal Procedure. If such register is not maintained, to open a register as required under Sec-tion 154 and then to register the said complaint. We further direct him to then cause investigation into the matter in accordance with necessary provisions of law as observed by us above. Further, if the offence is made out during the investigation, a report in that context be submitted to the appropriate Court of Magistrate as per the provisions of Section 173 of Cr.P.C., 1973. If no offence is disclosed, an appropriate summary be sought from the concerned Magistrate.

Rule made absolute on the above terms.**Petition allowed.**

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Cross Citation : 2009 CRI. L. J. 1318

SUPREME COURT OF INDIA

Hon'ble Judge(s) : ALTAMAS KABIR AND MARKANDEY KATJU, JJ.

Choudhury Parveen Sultana ….. V/s …. State of W. B. and Anr.
Criminal Appeal No. 8 of 2009 (@ SLP (Cri.) No. 2864 of 2007), D/- 7 -1 -2009.

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Criminal P.C. (2 of 1974), S.197 - SANCTION FOR PROSECUTION – Abuse of power by police during investigation - No sanction is required – Held -- the Deputy Suprintendent of police was alleged to have - In respect of prosecution for excesses or misuse of authority, no protection can be demanded by the public servant concerned - Where the Deputy Superintendent of Police was alleged to have committed acts of extortion and criminal intimidation while conducting investigation of case the acts cannot be said to be part of the duties of the Investigating Officer while investigating an offence entitling him to get protection of S. 197- No sanction is required.

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Pijush K. Roy and Sunil Kumar Verma, for Appellant; Suchit Mohanta, Amit Sharma, Anupam Lal Das, Avijit Bhattacharjee and Saumya Kundu, for Respondents.

JUDGEMENT

1. ALTAMAS KABIR, J. :- Leave granted.

2. The short point involved in this appeal is whether in view of Section 197 of the Code of Criminal Procedure, previous sanction of the State Government was necessary for prosecuting the respondent No. 2, Sahabul Hussain, under Section 384/506 of the Indian Penal Code.

3. The respondent No. 2 belongs to the West Bengal Police Service and was posted as Deputy Superintendent of Police (D.N.T.) at Behrampore, District Murshidabad, West Bengal. On 9th September, 2005, at about 9.15/9.30 in the morning one Samiul Choudhury, the husband of the appellant herein, was shot at and suffered grievous injury to his right eye. Thereafter, in a statement given by him to the Inspector in-charge of Behrampore Police Station, he claimed that the assailants were the associates of Mohan Lal, Jalal, Kamal, Babul and Kabir of Zamindar para. On the basis of the said statement Behrampore Police Station Case No. 348 dated 9.11.2005 was registered under Sections 326/307/120-B/34 IPC read with Sections 25/27 of the Arms Act. Subsequently, the appellant herein filed an application before the Chief Judicial Magistrate, Murshidabad, alleging commission of offences by the respondent No. 2 and another punishable under Sections 387/504/34 IPC and the said complaint was registered as C.R. Case No. 543 of 2005.

4. In the aforesaid complaint it was alleged that on 9.11.2005 Samiul Choudhury was shot at near his house and thereafter he was admitted to the Behrampore New General Hospital and police investigation was started. It was also alleged that on the pretext of conducting investigation the respondent No. 2 and his co-accused used to come to the house of the appellant and on 18th December, 2005 and also on 19th December, 2005, the respondent No. 2 and the other accused came to the house of the appellant and threatened her husband and wanted the husband of the appellant to make a tutored statement and under threat even tried to obtain his signature on a blank paper. It was also claimed that the appellant's husband lodged a complaint with the local police authorities and higher authorities also but no action was taken and the appellant was, therefore, compelled to move the Chief Judicial Magistrate Murshidabad by way of the said complaint. The learned Magistrate took cognizance of the offence by his order dated 26.9.2004 and transferred the case to the 2nd Court of Judicial Magistrate, Behrampore, for inquiry and trial. After transfer of the case the appellant and her husband were examined on solemn affirmation by the learned Magistrate on 14.2.2006 and summons were directed to be issued under Sections 384/506, IPC.

5. Being aggrieved by the cognizance taken and the issuance of process the respondent No. 2 moved the High Court under Sections 397/401 read with Section 482, Cr.P.C. for quashing the cognizance taken and also the issue of process. The main ground of challenge was that being in the employment of the State Government the respondent No. 2 enjoyed the protection of Section 197, Cr.P.C. and that no Court could take cognizance of the offence alleged to have been committed by the respondent No. 2 except with the previous sanction of the State Government. It was also contended that the complaint disclosed that the offence was alleged to have been committed by the respondent No. 2 during the course of investigation in connection with Behrampore Police Station Case No. 348 dated 9.11.2005, and, accordingly, such offence, if at all committed, had been committed by the respondent No. 2 while discharging official duties which brought him within the protective umbrella of Section 197, Cr.P.C. In support of the aforesaid contention made on behalf of the respondent No. 2 reliance was placed on the decision of this Court in Sankaran Moitra vs. Sadhna Das and another [(2006) 4 SCC 584] wherein after considering various case law on the subject the majority view was that the important criteria to be applied with regard to the invocation of Section 197 of the Code was that the act complained of must have been performed in discharge of or in the purported discharge of duty. This Court ultimately, came to the conclusion that dispensing with jurisdictional or statutory requirements could ultimately affect the adjudication itself and could result in loss of public confidence in the institution. The High Court was, therefore, of the view that in the facts of the case it was quite clear that the proceedings before the Magistrate had been vitiated in the absence of sanction having been obtained for prosecution of the respondent No. 2 in terms of Section 197, Cr.P.C. The High Court, accordingly, quashed the proceedings and the cognizance taken on the basis thereof. The appellant is before us against the said order of the High Court. 2006 AIR SCW 1695

6. Mr. Pijush K. Roy, learned advocate who appeared for the appellant, submitted that even in Sankaran Moitra's case (supra) this Court had held that committing a criminal offence, which was not part of the duties of the officer concerned, could not be said to be an act performed in the course of discharge of official duties. Mr. Roy submitted that in the instant case the acts complained of against the respondent No. 2 could never be said to have been part of his official duties. In other words, even if the acts complained of were done during investigation, it could not be said that the same were part of the respondent's

official duties and hence the protection of Section 197, Cr.P.C. was not available to the respondent No. 2.

7. In support of his submissions Mr. Roy firstly referred to the decision of this Court in Pukhraj v. State of Rajasthan [AIR 1973 SC 2591] where the same question was dealt with and it was held that assaulting the complainant and abusing him when the complainant came to submit his representation for cancellation of his transfer could not by any standard be said to be part of the official duties to be exercised by the authority concerned.

8. A similar view was taken in Bhagwan Prasad Srivastava v. N.P. Misra [(1971) 1 SCR 317] where a complaint had been filed that the accused, who was a civil surgeon, used defamatory and abusive words and got the complainant pushed out by the cook of the hospital. The question posed was whether the case was covered by Section 197, Cr.P.C. and whether previous sanction of the superior authority was necessary before the trial Court could take cognizance of the case. In the facts of the case, this Court was of the view that the case was not covered by Section 197, Cr.P.C. and that the object and purpose underlying Section 197, Cr.P.C. to afford protection to public servant against frivolous, vexatious or false prosecution for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duty. It was also observed that the Section 197 has been designed to facilitate effective and unhampered performance of their official duty by public servants by providing for scrutiny into the allegations of commission of offence by them by their superior authorities and prior sanction for their prosecution was a @page-CriLJ1321 condition precedent to the taking of cognizance of the cases against them by the Courts. It was finally observed that the question whether a particular act is done by a public servant in the discharge of his official duties is substantially one of fact to be determined in the circumstances of each case. AIR 1970 SC 1661

9. Reference was also made to the decision of this Court in the case of Parkash Singh Badal v. State of Punjab [(2007) 1 SCC 1] where the same question was considered and similar observations were made. 2007 AIR SCW 1415

10. Mr. Roy submitted that in the facts of this case also, since the acts complained of were not part of the official duties of the respondent No. 2, they did not attract the bar of Section 197, Cr.P.C. and the Magistrate had quite lawfully taken cognizance of the offence and had issued process.

11. Mr. Suchit Mohanta, who appeared for the respondent No. 2 supported the judgment of the High Court and submitted that since the acts complained of were alleged to have been committed during investigation it had been rightly held by the High Court that the same had been done in the discharge of official duties by the respondent No. 2.

12. The same stand was taken by Mr. Avijit Bhattacharjee, appearing for the State of West Bengal. He urged that in view of the decision in Sankaran Moitra's case there was no scope to contend that the bar under Section 197, Cr.P.C. did not apply to the facts of the case. Mr. Bhattacharjee submitted that the acts complained of had been performed by the respondent No. 2 during the course of investigation, which was part of the official duties required to be discharged by him and hence his case came squarely within the protective umbrella of Section 197, Cr.P.C. 2006 AIR SCW 1695

13. Having considered the submissions made on behalf of the respective parties, we are inclined to agree with the submissions made by Mr. Pijush K. Roy on behalf of the appellant.

14. The direction which had been given by this Court, as far back as in 1971 in Bhagwan Prasad Prasad Srivastava's case (supra) holds good even today. All acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197, Cr.P.C. On the other hand, there can be cases of misuse and/or abuse of powers vested in a public servant which can never be said to be a part of the official duties required to be performed by him. As mentioned in Bhagwan Prasad Srivastava's case (supra), the underlying object of Section 197, Cr.P.C is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment to the said official. However, as indicated hereinabove, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197, Cr.P.C. and have to be considered de hors the duties which a public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned. AIR 1970 SC 1661

15. In the instant case, certain deeds and acts have been attributed to the respondent No. 2 and another accused, which cannot be said to have been part of the official duties to be performed by respondent No. 2. Hence, in our view, the respondent No. 2 was not entitled to the protection of Section 197, Cr.P.C. in respect of such acts.

16. While dealing with the aforesaid question, the High Court appears to have been swayed by the submissions made on behalf of the respondent No. 2 that since in the complaint the acts of extortion and criminal intimidation were alleged to have been committed by the respondent No. 2 and co-accused while conducting investigation in connection with Behrampore Police Station Case No. 348 dated 9.11.2005, such offences were purported to have been committed by the respondent No. 2 while discharging official duties.

17. We have already indicated that we are unable to accept such a view. In our view, the offences complained of cannot be said to be part of the duties of the Investigating Officer while investigating an offence alleged to have been committed. It was no part of his duties to threaten the complainant or her husband to withdraw the complaint. In order to apply the bar of Section 197, Cr.P.C. each case has to be considered in its own fact-situation in order to arrive at a finding as to whether the protection of Section 197, Cr.P.C. could be given to the public servant. The fact- situation in the complaint in this case is such that it does not bring the case within the ambit of Section 197 and the High Court erred in quashing the same as far as the respondent No. 2 is concerned. The complaint prima facie makes out offences alleged to have been committed by the respondent No. 2 which were not part of his official duties.

18. We, accordingly, allow the appeal and set aside the judgment and order of the High Court. The trial Court shall proceed with the trial of all the accused, including the respondent No. 2 herein. Appeal allowed.

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Cross Citation :1971-SCC-3-945 , 1972-SCC(Cr)-0-193

SUPREME COURT OF INDIA

Hon'ble Judge(s) : M.HIDAYATULLAH, C.J.,A.N.RAY, I.D.DUA,JJ

(FULL BENCH)

RAJA RAM Vs State of Haryana

Criminal 62 Of 1968 Mar 26,1970

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India Penal code sec. 341, 342 – Conviction of Police Officer for illegally Summoning a accused/witnesses – Held –The Police Officer cannot Summon a woman or a male under fifteen years of age – Such persons must be asked to attend interrogation at the place where they reside – This is mandatory provision of section 160 of Cr. P.C. – The Police Officer by calling the witnesses at police station kept them under wrongful restraint - The Police Officer is guilty under section 341 of I.P.C. – His conviction is proper.

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Hidayatullah, C.

(1) In February and March, 1964, the appellant Raja Ram was working as Assistant Sub-Inspector of Police at Rohtak. He was committed to the court of Sessions, Rohtak, for trial under S. 331 and 342 of the Indian Penal Code. He was acquitted of the charge under Section 331 but was convicted under S. 342, Indian penal code and sentenced to six months' rigorous imprisonment. His appeal 'to the High court was dismissed and he has now appealed to this court by special leave. The charge against him read as follows:

"I, K. S. Sindhu, Additional Sessions Judge, Rohtak, hereby charge you Raja Ram son of Charan Dass as follows:

Firstly, that you on or about in the month of March, 1964 at G. I. A. Police post, Jhajjar, while investigating a theft case in F. I. R. No. 2 of 1964 of P. S. Sampla, as A. S. I. Police voluntarily caused grievous hurt to Ranbir Singh, a minor son of Lakshmi Dutt for the purpose of extorting from Lakshmi Dutt a person interested in the said Ranbir Singh as his father a confession in respect of the offence of theft in the house of Ram Dhan of village Silana and thereby committed an offence punishable under Section 331 of the Indian Penal Code and within my cognizance.

Secondly, that you on or about in the month of March, 1964, at the C. 1. A. Police post, Jhajjar wrongfully confined Lakshmi Dutt, Devi Dutt, Chand Kaur, Ranbir Singh minor and Jagbir Singh and thereby committed an offence punishable under S. 342 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried under the said charges by this Court."

(2) No dates were mentioned in the charge. The finding against him was that he had confined persons mentioned in the second charge for a period of two days and that formed the basis of the conviction. In this appeal Raja Ram contests the correctness of this finding.

(3) Ordinarily this court does not consider the evidence for the third time but there are several special features in this case, such as rejection of a considerable mass of evidence charging the appellant with causing of grievous hurt, outraging the modesty of Chand Kaur and also rape. This made us look into the evidence to see how far the case as found against the appellant could be held to be proved and whether the evidence was reliable. The facts of the case are as follows.

(4) On 11/01/1964, information was received by the police of an offence under S. 457 and 380, Indian penal code This case was registered at Police Station, Sampla. In the course of investigation the police arrested Devi Dutt on 6/03/1964. Two successive remands were taken, first for ten days and the second for four days and he was held in custody till 21/03/1964, when he was admitted to bail. Devi Dutt's son Lakshmi Dutt was also arrested on 20/03/1964, and was remanded till 1/04/1964, and was then released on bail on the following day. On 6/04/1964, a written complaint was made to the Home Minister, Punjab State, by Devi Dutt, who is a retired teacher. That report may be read here : 947

"To Shri Mohan Lai, Home Minister, Punjab State, Chandigarh. It is submitted that I am going to relate a painful story. The facts of the story are as under: On the election of Sarpanchship of Panchayat in village Silana, Tehsil and District Rohtak Ex-Sarpanch was defeated in the election got implicated falsely my son and myself accusing in a theft case by the police. They have sent us to the staff Jhajjar where, we were enoughly beaten. Finding no way of in (sic) justice, I was compelled to approach your honour with this application. I am retired teacher, as such did not commit any misdeed nor do I expect to do so in future. Even our family did not do such thing, as it would have put a slur to the family. The enquiry should be made by a special person by collecting the all villagers' and Panchayat. A great injustice has been done to me. My eldest son, aged twenty-seven years was beaten seriously by the policeman, as a result of which the blood circulation of the legs stopped. It rendered him incapable of walking. It is better to die than to live. I cannot provide him medical owing to poverty. I hope you will help me sympathetically in this behalf. (Sd.) Devi Dutt, Retired Teacher."

(5) The report was also signed by one of the panches. It was first sent to Hazara Singh, a Deputy Superintendent of Police. In the course of his investigation he recorded statements of Devi Dutt, Chand Kaur, Jagbir, Ch. Ranpat, Sarpanch, Rai Singh, Amir Singh, Lamberdar, Ram Dhan, Dharam Singh and Daryao Singh, etc. Ranpat, Sarpanch was present throughout the investigation and signed all the statements as they were made. Signatures of the deponents were also taken. Later, a second enquiry was made by Sardar Dalip Singh, a Deputy Superintendent of Police who drew up a report on the basis of which the First Information Report was recorded. The case was then investigated a third time by Amar Nath Sharma, District Inspector Police, Rohtak, who presented the charge-sheet against the appellant.

(6) The charge-sheet disclosed in addition an offence under S. 325, Indian penal code against the appellant. The allegation was that the appellant bad attempted to hit Chand Kaur with a danda and bad caused fracture of the arm of her infant son in her lap. The Committing Magistrate did not commit the appellant on that charge and it was because the medical evidence proved that the injury to the arm of the infant was very old and probably not connected with the present incident.

(7) The prosecution examined 15 witnesses, and the appellant examined four witnesses on his side. The story as unfolded by the prosecution witnesses in so far as there is agreement between them may now be narrated. We have already stated that Devi Dutt and Lakshmi Dutt were arrested, kept in detention on remand by the magistrate and later released on bail. Devi Dutt was admitted to bail on 21/03/1964, and Lakshimi Dutt on

2/04/1964. It is also clear that on 6/04/1964, a report of whatever had 948 happened was made to the Home Minister. That report speaks of only two things, namely, that Devi Dutt and his son were beaten. There was no mention of any outrage against Lakshmi Dutt's wife Chand Kaur or indeed any other person. The story of Lakshmi Dutt was that after his release on bail one day two constables came to him when he was sitting in court for some work and asked him to go to the police station House called C. I. A. Staff. According to him he was taken hand-cuffed to the C. I. A. Staff, Jhajjar. He was beaten at night by the appellant 'and the constables and tortured in various ways. Next day Devi Dutt was also called to the C. I. A. Staff. He was stripped naked by the accused. Lakshmi Dutt stated that he did not know for how many days his father was kept in custody but was ultimately released on bail. This shows that there is some confusion in the narration of events. The event of which Devi Dutt and Others speak was after the release of Devi Dutt on bail that is to say in a period following 21/03/1964, and not earlier. However, Lakshmi Dutt goes on to say that his latter, his wife Chand Kaur and his infant Ranbir and his brother Jagbir were also called to the thana. All of these persons were stripped naked in the presence of one another and then were asked to dress again. The appellant then tried to give a danda blow to Chand Kaur but it hit the infant Ranbir in her lap. Lakshmi Dutt was further tortured and then sent to the lock up. Lakshmi Dutt also stated that his sister Dhanpati and his brother-in-law were also called to the police station and were insulted. His sister was stripped naked in his presence. Next day the members of the panchayat came to the C. I. A. Staff. The appellant beat him in the presence of the panches also and then released him on the intercession of the panches. Lakshmi Dutt denied that he had ever served in police or was dismissed from that service because of epilepsy. He admitted that there was a party faction in the village and that Ranpat and Daryao and four others stood for election for the offices of Sarpanch. He also stated that while he was in the police lock-up, the Sub-Inspector had called the doctor to examine him but not for epilepsy. He, however, did not show the doctor his injury because he was threatened that he would be beaten.

(8) This statement of Lakshmi Dutt serves as a basis for examining the statements of other persons who claim to have been molested, insulted or tortured. Devi Dutt gave him a lie by staling that his son Lakshmi Dutt was in the police service and was discharged because he was an epileptic. Devi Dutt stated that he himself was arrested and was in the custody for nearly 28 days. This was wrong because he was in custody only for 15 days from the 6th to the 21st of March, 1964. He stated that he was beaten while he was in custody almost every day. After his release one day a constable took him again to the C. I. A. Staff, Jhajjar and he went there with his son, Jagbir, his daughter-in-law Chand Kaur and infant Ranbir in her lap. He described how they were all stripped naked in one another's presence and how the police wanted to beat Chand Kaur but instead hit Ranbir and fractured his arm. According to him, the appellant released him and his son Jagbir but they kept sitting outside C. I. A. Staff throughout the night. Next day the members of the panchayat came and got them released. He stated that Chand Kaur and Jagbir were detained separately. The witness does not speak of the detention of Jagbir and himself in any way after they had been questioned a second time. In fact he says that they passed the time outside the C. I. A. Staff after they had been released.

(9) Mst. Chand Kaur repeated the same thing except that she was detained in a separate kothri and was raped in the night, first by the appellant and then by the two constables. She stated that her husband, her 949 father-in-law and her brother-in-law were all turned out of the C. I. A. Staff. Jagbir also stated that they were called and stripped naked and beaten but he stated that at night Devi Dutt and he were detained in a separate kothri.

(10) It will be seen from the above discrepant statements that there is much doubt about wrongful confinement as such. To begin with there were many charges-rape, outraging the modesty of Chand Kaur, assault, torture to extract confession, causing of grievous and simple hurts and wrongful confinement. The police itself did not send up the appellant for trial for rape and outraging the modesty of a women. From this it follows that this part of the story was treated as an exaggeration and false. When the case was tried, the charge of causing hurt "was dropped by the committal court. The Sessions Trial proceeded on two charges and of these the charge under Section 331, Indian penal code also failed. We are, therefore, left with a single charge of wrongful confinement.

(11) Unfortunately no dates are mentioned either in the charge or in the evidence of witnesses. We can only be sure that on the 6/04/1964, Devi Dutt and his family were free. That day a report was made to the Home Minister but there is no mention of wrongful confinement but only of harassment. Lakshmi Dutt was released on bail on the 2nd April and, as be says he was recalled after his release, it must be some day between the 2nd and the 5th April. Lakshmi Dutt's evidence is unsatisfactory because) according to him, the second call was after his release but 'some time after that'. This is very vague and there is not much time left between 2nd April and 5th April for detention for two days. Devi Dutt is also very difficult to understand. He said that he was detained for 28 days. If he was arrested on the 6th March, and detained for 28 days, it will take us to the 4th April. That cannot be correct because on the 6th he was free. We also know that be was admitted to bail on the 21st March. The evidence of Chand Kaur and Jagbir does not serve to clear this matter and panches also mention no dates.

(12) Although the case is very unsatisfactory from this point of view, there is no doubt that Devi Dutt's family was summoned to the C. I. A. Staff. It is difficult to believe the testimony of Chand Kaur that she was detained in a kothri because her evidence of rape on her and the fracture of her infant son's arm cannot be believed. The evidence of Lakshmi Dutt and of Jagbir also cannot be believed that they were locked up in a kothri. Devi Dutt said that they were turned out and were released and passed the night outside the C. I. A. Staff.

(13) All the same the evidence of these witnesses that they were under a wrongful restraint can be believed since it is corroborated by the panches. It is clear that they were not free. Now a police officer can certainly summon a person to be questioned but he cannot summon a woman or a male under fifteen years of age. Such persons must be asked to attend interrogation at the place where they reside. This is what the proviso to S. 160, Cr. P. C. says. By summoning Chand Kaur, a woman, and Jagbir, a boy aged thirteen years, the appellant was guilty of the infringement of this provision. There is no doubt that he kept these persons and also Devi Dutt and Lakshmi Dutt under wrongful restraint. The appellant could not keep them under restraint. We do not find any independent evidence of wrongful confinment. But there is evidence of restraint. This evidence gets corroboration from the evidence of panches. The appellant was thus guilty of an offence under S. 341, Indian penal code but not under S. 342, Indian penal code

(14) We accordingly set aside his conviction under S. 342, Indian penal code and instead sentence him under S. 341, Indian penal code The sentence of six months rigorous imprisonment is also set aside. We sentence him under Section 341, Indian penal code to a fine of Rs. 250.00. In default of payment of fine he shall undergo simple imprisonment for one week. With this modification the appeal fails and will be dismissed.

Cross Citation : 2007 ALL MR (CRI.)2737;2007-AIRBomR-5-547;

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : C. L. Pangarkar, J.

NANDKUMAR S.KALE .. Vs .. BHAURAO CHANDRABHANJI TIDKE

Cri.Rev. 86 of 2007 , Jul 26,2007

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(C) Cri. P.C., S. 156 (3) – Registration of F.I.R. against police officer on the complaint sent to police station by Magistrate – Held- Police officer bound to register an offence and proceed to investigate in to crime.

(D) Cr. P.C. 197 – Sanction – Held- for investigation no sanction is required – Preparation of false record of investigation cannot be a part of duty done in discharge of official duty –IF in such cases protection is granted to the police officer then they can show the investigation having been carried out even sitting at home.

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JUDGEMENT

(1.) RULE. Returnable forthwith. Heard finally with consent of parties.

(2.) THIS is a revision by an accused. A few facts may be stated thus : the applicant is a police officer. At the relevant time he was working as in-charge of the Police Station Civil Lines, Akola. On 2-12-1996 the non applicant no. 1 had lodged a report with the police station Civil Lines, Akola. He had alleged that his daughter-in-law along with her relative had committed robbery, trespass and theft. The police refused to take cognizance of the said complaint of bhaurao i. e. non-applicant No. 1. Non-applicant No. 1, therefore, filed criminal complaint case bearing No. 1280/01 in the Court of Judicial Magistrate, First class. The Judicial Magistrate First Class in the said criminal complaint passed an order under section 156 (3) of the Criminal Procedure Code and directed the police to investigate into the matter. On this an offence was registered by the police. Initially the offence was investigated by P. S. I. Aney and later since the offence is of a serious nature the investigation was taken over by the present applicant. The present applicant filed an application under section 169 Criminal procedure Code before the Magistrate after the investigation and prayed for discharge of the accused therein. The present applicant also filed a summary before the Judicial Magistrate. Judicial Magistrate First Class did not accept the summary and issued a process against the accused named in that complaint case. It is after that order was passed that Bhaurao the present non-applicant No. 1 instituted a criminal complaint against the present applicant under section 468, 471 and 218 of the Indian Penal Code.

(3.) IN the said complaint case the present applicant filed an application to dismiss the complaint. The said application was dismissed on the ground that no sanction was obtained by the complainant to prosecute the present applicant. The magistrate after

hearing the parties dismissed the complaint on the ground that sanction was not obtained and the complaint was barred by limitation under section 161 of the Bombay Police Act. The present non-applicant No. 1 therefore preferred a revision before the Sessions Judge. The revision was allowed and the matter was remanded back to the Magistrate with a direction that he will deal with the question of sanction under section 197, Criminal Procedure Code and section 161 of the Bombay Police Act after recording the evidence before charge and on hearing both the sides. Being aggrieved by that order the accused/applicant has preferred this revision.

(4.) I have heard the learned counsel for the applicant and the non-applicant.

(5.) FROM the facts narrated above it is clear that the complaint was referred to police under section 156 (3) of the Code of Criminal Procedure and an offence came to be registered against the present applicant/accused. It is also clear that one Sujata and Vijay were arrested in that case and later the investigation was taken over by the present applicant. It also appears that soon thereafter discharge report under section 169 of Criminal Procedure Code was filed before the magistrate and later B Summary was filed instead of a charge-sheet. B Summary covers the following cases :

Class 'b' cases : Wherein no offence has been committed at all either by the accused or by any one else, but wherein the complaint is found to be "false and maliciously false. "

Along with the said summary was sent a statement of one Deepak said to be recorded under section 161. The learned Magistrate rejected the summary and recorded statement of complainant and his witnesses and issued process against the accused. It is the contention of the non-applicant that Deepak gave a statement before the Magistrate that no police officer had ever come to record his statement. It is the contention that although Deepak never gave a statement to police a statement purporting to be given by him was sent with B Summary. It is also contended that this was done with a view to help the accused who are said to be relatives of the present applicant. The undisputed fact is that a complaint was sent to police station under section 156 (3), Criminal Procedure Code. It cannot be disputed that whenever such complaint is sent under section 156 (3) police officer is bound to register an offence and proceed to investigate into the crime. In this case after arrest of two accused the investigation was taken over by the applicant herein. It is not disputed that he investigated the said offence and after completion of investigation he forwarded the statement purporting to be that of deepak to the magistrate along with B Summary. Learned counsel for the applicant contended that this statement can be said to be recorded in discharge of the official duty or purported discharge of duty and as such provisions of section 197 of the Code of Criminal Procedure are attracted. There is no doubt that whenever a statement is being recorded an officer the concerned officer must be said to be acting in discharge of duty. Their Lordships of the Supreme Court in rakesh Kumar Mishra vs. State of Bihar and others, (2006) 1 SCC 557 have made the following observations :

"it has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty; that is under the colour of office. Official duty, therefore, implies that the act or omission must have been done by the public servant in the course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The section has, thus, to be construed strictly, which determining its applicability to any act or omission in the course

of service. Its operation has to be limited to those duties which are discharged in the course of duty. But once any act or omission has been found to have been committed by a public servant in the discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the section has to be construed narrowly and in a restricted manner. But once it is established that an act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the section in favour of the , public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance a police officer in the discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in the course of service but not in the discharge of his duty and without any justification therefor then the bar under section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in the discharge of his duty can be deemed to be official was explained by this Court in matyajog Dobey vs. H. C. Bhari thus : 'the offence alleged to have been committed (by the accused) 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 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 duty. "

If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of section 197 of the Code cannot be disputed. " obviously therefore if there is a reasonable connection of act done with discharge of his duty it must be held to be official duty. In the present case what is alleged against the applicant is that although witness Deepak never gave a statement to the police a statement said to be given by him in his name was made part of investigation. Obviously Deepak had not appeared before the investigating officer and he had not recorded any statement of Deepak. The statement said to be that of Deepak is therefore, not a statement and therefore the said statement which is on record can in no case be said to be recorded in discharge of the official duty. In fact this is therefore a case of preparation of false record of investigation and preparation of false record of investigation cannot be a part of the duty and it cannot be said to be done in discharge of the duty. If that is so treated then perhaps a police officer can show the investigation having been carried out even sitting at home.

(6.) THEREFORE, when any false document is prepared by the investigation officer during the course of investigation such an act would not be saved. He can be certainly said to be acting out of bounds and therefore this brings the case out of clutches of section 197. It is different thing when there is wrong exercise or excessive exercise of power and it is a different thing to manipulate a record to save somebody from being punished. In a case reported in Shambhoo Nath Misra vs. State of U. P. and others, AIR 1997 SC 2102, it is held that fabrication of record and misappropriation of public fund by public servant is not the official duty and therefore sanction is not necessary.

(7.) THE learned counsel for the applicant contended that in the complaint itself respondent has pleaded that he has applied for sanction and the same is awaited. It was contended that even the applicant admits that sanction is necessary and now he cannot

resile from the same. There cannot be any estoppel against law. If sanction is required it is required. The Court has to look into the question if such sanction is necessary or not if the accused is a public servant. It was contended on behalf of the respondent complainant that this question cannot be considered at the threshold but has to be considered along with the merits of the case. The contention is not correct. In a recent decision of the Supreme Court in Sankaran Moitra vs. Sadhna Das and another, 2006 (1) Mh. L. J. (Cri) (SC) 903 = (2006) 4 SCC 584, it is observed as follows :

"learned counsel for the complainant argued that want of sanction under section 197 (1) of the Code did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate time. We are not in a position to accept this submission. Section 197 (1) its opening words and the object sought to be achieved by it, and the decisions of this Court earlier cited, clearly indicate that a prosecution hit by that provision cannot be launched without the sanction contemplated. It is a condition precedent, as it were for a successful prosecution of a public servant when the provision is attracted, though the question may arise necessarily not at the inception, but even at a subsequent stage. We cannot therefore accede to the request to postpone a decision on this question. "
It is thus clear that the question can be decided at the threshold.
(8.) IT was contended on behalf of the applicant that the Court could not take cognizance of the offence after a period of 6 months due to the prohibition contained in section 161 of the Bombay Police Act. Section 161 reads thus : 161. Suits or prosecution in respect of acts done under colour of duty as aforesaid not to be entertained, or to be dismissed if not instituted (within the prescribed period).

(1) In any case of alleged offence by (the Revenue Commissioner, the commissioner), a Magistrate, Police Officer or other person, or of a wrong alleged to have been done by (such Revenue Commissioner, commissioner), Magistrate, Police Officer or other person, by any act done under colour or in excess of any such, duty or authority as aforesaid, or wherein it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted, more than six months after the date of the act complained of : (Provided that, any such prosecution against a Police Officer may be entertained by the Court, if instituted with the previous sanction of the state Government within two years from the date of the offence.)

In suits as aforesaid one month's notice of suit to be given with sufficient description of wrong complained of (2) In the case of an intended suit on account of such a wrong as aforesaid, the person intending to sue shall be bound to give to the alleged wrong-doer one month's notice at least of the intended suit with sufficient description of the wrong complained of, failing which such suit shall be dismissed. Plaint to set forth service of notice and tender of amends (3) The plaint shall set forth that a notice as aforesaid has been served on the defendant and the date of such service, and shall state whether any, and if any, what tender of amends has been made by the defendant. A copy of the said notice shall be annexed to the plaint endorsed or accompanied with a declaration by the plaintiff of the time and manner of service thereof.

This section to my mind does not apply at all since it is found that the offence is not committed in discharge of the official duty or purported discharge of the official duty. It is only if the action is required to be taken for offence committed in discharge of duty or

purported discharge of the duty that the section would apply. Hence I do not find any substance in the revision. It is dismissed. Magistrate shall now proceed to try the accused.

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Cross Citation :1975-AIR(SC)-0-1925 , 1975-SCC-2-570

SUPREME COURT OF INDIA

Hon'ble Judge(s) : Y. V. CHANDRACHUD, P. N. BHAGWATI AND R. S. SARKARIA, JJ.

[FULL BENCH]

KODALI PURNACHANDRA RAO Vs PUBLIC PROSECUTOR,ANDHRA PRADESH

Criminal 392 Of 1974 Sep 02,1975

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A] Penal Code section 201,218,468 – Prosecution of police Officer – Preparation of incorrect and forged record of investigation of the case with the fraudulent and dishonest intention of misleading his superior officers and inducing them to do or omit to do the legal and lawful actions – Held – The accused police officer framed the record in a manner which he knews to be incorrect with intent to save or knowing

to be likely that he will thereby save the true offender from legal punishment is liable to be punished u.s 218/ 468 of I.P.C. – The Co-accused who facilitated and intentionally aided in preparation of the false and forged record is also liable to be convicted

B] The position of accused A-2 was very different. He was a Police officer and as such was expected to discharge the duties entrusted to him by law with fidelity and accuracy. He was required to ascertain the cause of the death and to investigate the circumstances and the manner in which it was brought about. His duty was to make honest efforts to reach at the truth. But he flagrantly abused the trust reposed in him by law. He intentionally fabricated false clues. laid false trails, drew many red herring across the net smothered the truth, burked the inquest, falsified official records and shortcircuited the procedural safeguards. In short, he did everything against public justice which is by Section 201, Penal Code. The other circumstantial evidence apart the series of these designed acts of omission and commission on the part of A-2, were eloquent enough to indicate in no uncertain terms that A-2 knew or had reasons to believe that Kalarani's death was homicidal.

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R.S. SARKARIA

(1.) This appeal is directed against a judgment of High Court of Andhra Pradesh, converting appeal by the State - the acquittal of the appellant into conviction. Appellant No. 1(for short. A-1) was an arrack contractor doing liquor business inter alia within the territorial jurisdiction of Police Station Indukurpet, District Nellore, while Appellant No. 2 (for short, A-2) was a Sub-Inspector of Police in charge of this Police Station.

(2.) The appellants and one other person were tried by the First Additional Sessions Judge Nellore on charges under Sections 120-B. 366, 376,302/34, 201. 218. 468/34, 324, Penal Code relating to the abduction rape and murder etc. of two sisters, named Kalarani and Chandrika Rani of Nellore. The Sessions Judge acquitted the three accused of all the charges. Against the acquittal of the appellants only the State preferred an appeal. The High Court partly allowed the appeal, set aside the acquittal on charges 7, 8, 9 and 11 and convicted A-2 and A-1 under Sections 201, 201, /34, Penal Code and sentenced each of of them to five years rigorous imprisonment.A-2 and A-1 were further convicted under Sections 318 (sic) (S. 218?) and 318/109. (sic) (218/109?). Penal Code and sentenced to two years rigorous imprisonment each. They were also convicted under Sections 468 and 468/34, Penal Code and sentenced to two years rigorous imprisonment each. The sentences on all the counts were directed to run concurrently. Their acquittal on the remaining charges, including those of abduction, rape and murder was upheld.

(3.) The facts of the prosecution case as they emerge from the record are as follows: Kalarani and Chandrikarani deceased were two of the Six daughters of P.W.1, a legal practitioner of Nellore, Kalarani was aged 21 and a graduate from the local Women's College, Nellore. She used to be the President of the College Union and as such was well known. Chandrika Rani was, aged 17 and a B. A. student in that very college. On 6-6-1971 in the morning the deceased girls along with their parents and other sisters attended a

marriage in the house of a family -friend (Prosecution witness 2). In the afternoon they went away from the marriage house saying that they were going out to have coca-cola. At about 4 p. m. they boarded a bus bound for My paud which is a seashore resort at a distance of 11 miles from Nellore. At about 5-40 p. m. they were seen alighting from the bus at Mypaud and then proceeding towards Sagarvilla, a Travellers' Bunglow situated near the seashore. They were last seen at about 6-30 p. m. on the seashore by P. Ws. 11, 12, 13 and 14. Shortly thereafter, Prosecution witness 18, a rickshaw puller was attracted to the seashore by the outcry of a woman. When he proceeded in that direction, Chandrika Rani came running to him for help. Prosecution witness 18 saw 4 persons, including A-1 and A-2 carrying away Kala Rani who was groaning. On seeing Prosecution witness 18, A-1 and A-2 turned on him. A-1 first slapped and then stabbed Prosecution witness 18 on his right arm with a penknife, while A-2 gave blows on his back. Out of fright, Prosecution witness 18 took to his heels while Chandrika Rani was draggqd away by the appellants.

(4.) On 6-6-1971 Chamundeshwari Festival was being celebrated in Gangapatnam and neighbouring areas at about 9 p. m. It was bright moonlight. On learning that the dead body of a girl had been seen on the beach of Pallipalem which is a hamlet of Gangapatnam, many persons went there. Prosecution witness 23, a fisherman of Pallipalem and Prosecution witness 2, an employee of Electricity Department were also among those persons. It was the body of a girl, aged about 21 or 22 years, of fair complexion and stout build. Blood was oozing from a reddish abrasion on the forehead. There was a gold ring with a red stone on the finger of the body. Next morning, P.W.23 went to Prosecution witness 26, the Sarpanch of Gangapatnam and informed the latter about the corpse on the seashore. Prosecution witness 23 and Prosecution witness 26 then went to the village Karnam (Prosecution witness 27) as they found the village Munsiff absent. The Karnam scribed a report to the dictation of Prosecution witness 23. The Sarpanch signed it and sent it at about 7-30 a. m. through a bus driver (Prosecution witness 29) to the Police Station Indukurpet. The report was handed over in the Police Station at about 8-30 a. m. to the Head Constable (Prosecution witness 34), as A-2, the Sub-Inspector was away. The Head Constable (Prosecution witness 34), read the report and returned it to Prosecution witness 29 with the objection that the bearer should fetch a report drawn up on the printed form and signed by the village Munsiff. Within a few minutes of the return of the report, between 8-30 and 8-45 a.m., A-2 returned to the Police Station. Just at this juncture Prosecution witness 49 a Personal Assistant to P.W.38, a cine actor of Madras, and A-1, arrived there in Car No. M. S. V. 1539, driven by a motor driver. The car had met an accident on the 4th June within the jurisdiction of this Police Station. The car was therefore - at least theoretically - in the custody of the Police.

(5.) A-1 was a mutual friend of A-2 and of the owner of the car. Prosecution witness 49 therefore, had brought A-1 to the Police Station to help the former in getting the car released. A-1 introduced Prosecution witness 49 to A-2. A-1 then asked A-2 if he knew that the dead body of a girl was found floating on the sea-shore. A-2 then asked the ' Head Constable (Prosecution witness 34) if any report regarding the dead body was received. The Head Constable replied that a report from the Sarpanch about the dead body seen on the seashore at Pallipalem had been received but had been returned, as it was not from the village Munsiff. A-2 said some person might have been drowned as it usually happened on the seashore; The Head Constable and A-1 told A-2 that the body found on the shore was said to have been wearing drawers and might be of a person of high-class family. A-2 said that he himself would go and enquire about it. A-2 asked Prosecution witness 4 to take him in his car to the spot. Thereupon, A-1, A-2, Prosecution witness 49, two constables and two others in addition to the driver, proceeded in the car. After going some distance, the two "others" got down. A-1 and A-2 had a talk with them. The car was then

taken to Ramudupalem. There at about 11.30 A. M. A-1 and A-2 met the Sarpanch (Prosecution witness 26) and, asked him to follow them to Pallipalem. The car was then taken to Gangapgtnam. There the Constables were dropped. They left a message for the Karnam of the village to reach Pallipalem. Thereafter, they proceeded to the sea-shore of Pallipalem. The car was left at the canal before the sea.

(6.) A-2, A-1, Prosecution witness 49 and Prosecution witness 26 then at about Noon, went to the beach where the dead body lay. Prosecution witness 23 and Prosecution witness 25 were guarding the dead body. It was the body of a fair, stout girl aged about 20 years, who was wearing brassiers, blouse, striped drawers and a white petticoat. Prosecution witness 23 handed over the ring M. O. 9 to A-2 after removing the same from the body. On being directed by A-2, Prosecution witness 23 washed the face of the corpse. There was a mark on the forehead from which blood was oozing out. There was a reddish abrasion on the thigh, and blood marks on the drawer of the dead body. On seeing the blood marks on the drawer, A-2 said that she might be in menses, A-2 further remarked that the body appeared to be of a girl from a high class family who had been out of doors. A-2 did not hold any inquest there on the dead body. He did not prepare any record there, He directed the village vettis (menials) to bury the dead body forthwith while he himself proceeded along with his companions towards the village. In the distance they saw the Constables coming towards them. A signaled them not to come near the dead body but to proceed to the Travellers' Bungalow at Mypad, while A-2 and Party went to Mahalaxamma Temple in village Pallipalem, There A-2 secured the signatures of Prosecution witness 25. Prosecution witness 26. Prosecution witness 28 and A-1 on a blank sheet of paper. A-2 and his companions then went to the car. The Karnam (Prosecution witness 27) was there, A-2 reproached the Karnam for coming late and added that he had finished all the work for which he (Karnam) had been sent for. He further told the Karnam that he had got the body buried. The Karnam asked as to why A-2 did not send the body for post-mortem examination. A-2 replied that the body was of a prostitute who had committed suicide and that he did not suspect any foul play and so he ordered burial. The Karnam then enquired if any relation of the deceased had come. A-1 replied: "yes", while A-2 pointed towards Prosecution witness 49 and said that he was the person connected with the deceased. A-1, A-2. Prosecution witness 26. Prosecution witness 27 and Prosecution witness 49 then got into the car and proceeded. P. Ws. 26-and 27 were dropped near their houses. On the way. Prosecution witness 49 asked A-2 as to why he had represented him (Prosecution witness 49) as a relation of the deceased. A-2 assured Prosecution witness 49 that there was nothing to worry.

(7.) According to the prosecution this dead body found ashore near Pallipalem - which is about 2 miles from Mypad - was of Kala Rani deceased who was well-known to A-2. In spite of it, in the inquest report (Ex. P-11) which was not prepared on the spot but sometime later. A-2 wrote that the body was of a prostitute, named Koppolo Vijaya, daughter of Chandrayya. Baliya by caste of Ongole Town who had on 6-6-1971, come to Mypad alone with her prostitute friend Nirmala by Bus A. P. N.1400 at 5.45 P. M. and thereafter both these girls committed suicide by entering sea at about 6-30 P. M. A-2 ended the report with an emphatic note:

"It is conclusive that the deceased (Koppulu Vijaya) died due to drowning." Despite the presence of injuries noticed on the dead body A-2 recorded: "There are no injuries on the dead body."

In order to support his version as to the cause of death A-2, according to the prosecution falsely noted that the "stomach is bloated due to drinking of water."

(8.) The prosecution case further is that A-2 fabricated sometime after the burial of the dead body, a false report (Ex. P-25) purporting to have been made to him on 7-6-1971 by

one Nuthalapati Subba Rao who despite the best efforts of the investigators has remained untraced and is believed to be a fictitious person. As this report has an important bearing on the points for determination, we will reproduce it in extenso:
"Statement of Nuthalapati Subbarao, son of Venkateswarlu, aged about 30 years. Vysya of Patha-Guntur:
"Being an orphan for about 10 years. I have been doing brokerage in supplying extras in the cine field. Day before yesterday i. e. on Friday at Chirala near Lodges two girls Koppulu Vijaya d/o Sundarayya of Ongole and Paranjapi Nirmala d/o Raghavayya of Chilekaluripeta were met by me. I came to know that they live by prostitution. When I told them that I would join them in Cinema they believed me and came with me. On Sunday i.e. on 6-6-1971, in the morning we came to Nellore and stayed in Venkateswara Lodge till 3.30 p.m. There demand came for the girls. I booked two males for these two girls. Afterwards dispute arose between me and the girls in respect of my brokerage, sharing of the money got by such prostitution out of the money collected. They scolded me in an angry tone and went away crying and weeping and saying that I took them away from their places promising to join them in Cinema, cheated them and committed rowdyism without giving them money due to them. They had only wearing apparel with them. Vijaya is short, stout and fair. Nirmala is lean, tall and fair. They did not come back. I waited for a long time. I searched for them at the railway station, bus stand and lodges. When I was inquiring at Atmakur Bus Stand I came to know that the girls went by Mypaud bus at 4.30 p. m. I went to Mypaud and enquired. It was learnt that the two girls went towards north of Pattapulalem and entered the sea at 6 p.m. Having learnt that the body of Vijaya was washed ashore I went and saw the dead body. She had died and appears to have committed suicide. It was also learnt that the second girl also committed suicide but her dead body was not washed ashore. Other facts about them are not known.
Sd/- N, Subbarao

Taken down by me, read over to the person and admitted by him to be correct on this 7 th day of June 1971 at11-30.
Sd/- B. Manoharam
S.I.,E-3, dt 7-6-1971.
H. C. 1212 Issue F. I. R. under Section174. Code of Criminal Procedure and send copy to me for investigation.
Sd/- B. Manoharan,
S.I. E-3. Camp Mypaud
dt. 7-6-1971.
(9.) The dead-body of the other girl Chandrika Rani was not washed ashore. But in the morning of 7-6-1971, Prosecution witness 38. fisherman saw the dead body of a girl aged 16 or 17 years floating in the sea at a distance of about 21/2 or 3 miles from Pallipalem. Prosecution witness 36 saw a piercing wound on the left arm and black marks, indicating throttling on the neck of the dead body. Prosecution witness 36 removed a wrist watch, ring and an ear-ring from the dead body and allowed it to drift away. These articles were later handed over by Prosecution witness 36 to the Investigating Officer and were identified to be of Chandrika Rani
(10.) The disappearance of the deceased girls caused a sensation. The local newspapers took up the matter. Representations were made to the Home Minister to get the matter investigated by the C. I. D. The Superintendent of Police directed Prosecution witness 59, a Probationer D.S.P., to investigate the matter. On 18-6-1971, at the request of Prosecution witness 59. the Tehsildar (P. W, 40) proceeded to exhume the deadbody of Kalarani. The place was pointed out by Prosecution witness 33. A-2 was also present

there. On digging the pit only some clothes were found in it. But close to it, was found a skeleton, No marks of violence were detected on the skeleton by the Medical Officer, P, W. 45, who examined it at the spot, The skeleton was sent to Prosecution witness 44. Professor of Forensic Medicine, who opined that it was of a female aged between 18 to 25 years, Further investigation of the case was taken over by Prosecution witness 60, the C. I. D. Inspector who, after completing it laid the charge-sheet against A-1, A-2 and one other person in the Court of the Magistrate.

(11.) A-1 pleaded that he had been falsely implicated. He stated that he knew nothing about the deceased girls. He added that on 7-6-1971, he was in the Travellers' Bungalow at Mypad and went away from that place in the afternoon. He admitted that he had accompanied Prosecution witness 49, to the Police Station on 7-6-1971 to assist the latter in getting the car released, and from the Police Station both of them (A-1 and Prosecution witness 49) on being asked by A-2. went with the latter in the car to the spot, He further admitted that he had slab-signed on a sheet of paper like others but he expressed ignorance if any inquest was held by A-2.

(12.) The plea of A-2 was that he had duly made an inquiry as to the cause of the death and prepared the inquest report Ex. P-11. He denied that there were injuries on the dead body. Pleading alibi for the 5th and 6/06/1971, he said that on these dates he was away on casual leave to attend the marriage of a cousin at Chirala which is at a distance of about 100 miles from Indukurpet .He said that he had proceeded to Chirala in a car on the 5 th morning, and after attending the marriage returned to Nellore on the 6th by 5-30 p.m. and then on the morning of the 7th June, resumed duty at Indukurpet Police Station. On receiving information about the corpse of a female washed ashore, he went to Mypad and enquired about a person named Nathelapati Subba Rao. The latter gave the information. Ex.. P-25, which he (A-2) reduced into writing and then held the inquest in the presence of this Subba Rao and other Panchitdars at the spot. He did not know if Vijaya and Nirmala mentioned in Ex. P-25 and Ex. P- 11 were fictitious persons. He further admitted that he was unable to produce this Subba Rao in response to the memo dated 15-6-1971, issued by the D. S. P. (Prosecution witness 59) during the stipulated time of 48 hours.

(13.) The Additional Sessions judge held that the dead bodies found floating near the sea shore were of Kala Rani and Chandrika Rani. He further found that P. W.18, who claimed to be an eye-witness of the occurrence, was not worthy of credit and consequently the charges of abduction, rape and murder had not been proved against the accused . Regarding the charge under S. 201. Penal Code.,the trial Judge held that the prosecution had failed to prove that an offence had been committed in respect of the deceased, while holding that the identity of the deceased was wrongly mentioned in Ex. P-25 and Ex, P-11 as Vijaya and Nirmala, prostitutes, he did not rule out the possibility of suicide. In the result, he acquitted the accused of all the charges. In appeal by the State, the learned Judge of the High Court, after an exhaustive survey of the evidence, upheld the acquittal of the accused in respect of the charges of abduction, rape and murder, but reversed the findings of the trial Judge in regard to the charges under Sections 201, 318 and 468. Penal Code against A-1 and A-2.

(14.) In order to bring home an offence under Section 201. Penal Code the prosecution has to prove:

(1) that an offence has been committed:

(2) that the accused knew or had reason to believe the commission of such offence;

(3) that with such knowledge or belief he

(a) caused any evidence of the commission of that offence to disappear, or

(b) gave any information respecting that offence which he then knew or believed to be false:
(4) that he did so as aforesaid, with the intention of screening the offender from legal punishment.
(5) If the charge be of an aggravated from as in the present case, it must be proved further that the offence in respect of which the accused did as in (3) and (4). was punishable with death, or with imprisonment for life or imprisonment extending to ten years.
(15.) The High court has found that all these ingredients of Section 201, were established in the present case.
(16.) Mr. Bassi Reddy, learned Counsel for the appellant assails the finding of the High Court with particular reference to the first and the last ingredients enumerated above. Counsel contends that the conviction under Section 201, cannot be sustained as there is no credible evidence on record to show that an offence had been committed. It is maintained that the prosecution has been unable to prove that the two girls met a homicidal death. In all probability proceeds the argument, the deceased girls committed suicide by jumping into the sea and were drowned. '
(17.) For reasons that follow we are unable to accept these contentions.
(18.) The concurrent finding of the Courts below that the dead body washed ashore near Pallipalem was of Kala Rani deceased and that seen floating in the sea two miles away was of Chandrika Rani deceased, has not been disputed before us. It is also not controverted that these two girls died an unnatural death on the night between the 6th and 7th of June, 1971 sometime after 6-30 P. M. at Mypad. Only the cause of their death is in issue. In regard to such cause, there could be only three possibilities, the choice of any of which would lead to the exclusion of the other two. First the girls committed suicide by drowning. Second that their deaths were accidental. Third, that they were done to death by some person or persons.
(19.) After a careful consideration of these alternatives in the light of evidence on record, the learned Judges of the High Court firmly ruled out the first and the second possibilities, and concluded in favour of the third.
(20.) In our opinion the credible circumstantial evidence on record reinforced by the inferences available from the incriminating conduct of the appellants, particularly of A-2 in deliberately preparing false records to suppress the identity and cause of the deaths of the deceased girls. fully justifies the conclusion reached by the learned Judges. We therefore, do not feel the necessity of embarking upon a reappraisal of the entire evidence. It would be sufficient to survey and consider the salient circumstances bearing on the alternatives posed above.
(21.) First, we lake up the possibility of suicide. Mr. Reddy submits with reference to the, statement of Prosecution witness 1, the father of the deceased girls, that on a previous occasion both these girls had without the permission of their parents run away from home and were ultimately traced to the Rescue Home in Madras: that Kala Rani deceased had about 4 or 5 years before the occurrence taken an overdose of tranquillizers presumably to end her life: that they did not feel happy in their parental home hand once attempted to join the Ashram. This background, according to the learned counsel, shows that the deceased had a predisposition to commit suicide. In the alternative, suggests Mr. Reddy. something might have happened at Mypad on the 6/06/1971 which impelled them to commit suicide. Might be the girls got themselves into such a situation that they thought suicide was the only course left to them to get out of the same.
(22.) We are not impressed by these arguments. It is wrong to assume that these girls were very unhappy in their paternal house, or their relations with their parents were

estranged. Kala Rani, particularly was a mature graduate girl of 22 years. She used to be the leader of the College Union. On the day of occurrence, the deceased girls alone with their parents and sisters had participated in the festivities of a marriage in the house of a family friend. They took their meals in the marriage house. From Nellore, these girls brought change of clothes for two or three days stay. Thereafter they came happily to Mypad. They first went to the Travellers' Bungalow and were then last seen together at about 6-30 p.m. on the sea-shore. It is in evidence that the evening of the 6th June, was an occasion of Channdamma Festival. Procession of the deity accompanied by festivities was being taken out by the devotees of the neighbouring villages. These circumstances unmistakably show that the deceased girls had come to enjoy and stay at the sea-side resort of Mypad for 2 or 3 days. They were not suffering from any mental depression or schizophrenia with suicidal tendencies.

(23.) Another circumstance in the case of Kala Rani which is contra-indicative of suicide is that her dead body though seen within an hour or two of the occurrence on the beach was in a semi-nude condition. The sari was not on her dead body, which she was wearing when last seen at about 6-30 P. M. It can be argued that the Sari was washed off her body by the sea-waves. But considering that her dead body was detected only within a couple of hours of the occurrence and the fact that it is customary for women living in or near the coastal towns to tie their saries tightly the possibility of the sari having been swept off by the sea-waves was remote. The inference is that in all probability she was not wearing this sari when her body was immersed in water. Ordinarily, no Indian woman would commit suicide by jumping into the sea by getting into such a near-nude condition and thereby expose her body to the risk of post-mortem indignity.

(24.) Another important circumstance which militates against the suggestion of the death of Kala Rani from drowning is that when the body was first seen at 9 P. M., its stomach was not in a bloated condition; nor was any froth seen coming out of the mouth of the corpse. The fact was vouched by Prosecution witness 23. a fisherman, who was rightly found worthy of credence by the High Court. It may be added that contrary to what Prosecution witness 23 has testified A-2 has in the inquest report said that the stomach was bloated with water and froth was coming out of the mouth. But as shall be presently discussed, these notes regarding the condition of the dead body were invented by A-2 to support his false report that the deceased had committed suicide and her death was from drowning. Medical jurisprudence tells us that in a case of death from drowning the stomach is ordinarily found bloated with air and water which is instinctively swallowed by the drowning person during the struggle for life (see Taylor's Medical Jurisprudence, 12th Edn. Vol. I pp. 374-375).

(25.) The facts that the stomach was not filled with water and bloated and no froth was coming out of the mouth of the deceased, are important symptoms which go a long way to exclude the possibility of death being as a result of suicide by drowning.

(26.) Then there were injuries and blood-marks on the dead body. P. Ws. 23. 25, 26 and 27, all testified with one voice that they had seen one injury, from which blood was oozing out on the forehead, another on the thigh and blood marks on the drawer (under-garment) of the deceased. In examination-in-chief even Prosecution witness 49. who in cross-examination tried to dilute his version in a possible attempt to favour A-2, stated that he had seen a reddish strain (stain ?) on the forehead and blood marks on the drawer of the deceased. Out of these P. Ws. 23, 25 and 26 were present near the dead body when A-2, accompanied by A-1 and Prosecution witness 49, went there to hold the pretence of an inquest. Prosecution witness 23 was a fisherman of Pallipalem. Prosecution witness 25 was also a resident of the same hamlet. He was an employee of the Electricity Department. Prosecution witness 27 was the Karnam of Gangapatnam. P. Ws. 23 and 25

were among those villagers who had seen the dead body washed ashore at about 9 P. M, on 6-6-l971. The High Court found that the version of these witnesses in regard to the injuries and blood-marks on the dead body was entirely reliable. No reason has been shown why we should take a different view of their evidence.

(27.) It is further in the evidence of P. Ws. 23. 25. 26 and 49 that when the blood-marks on the drawer were pointed out to A-2, the latter ignored it saying that the girl had been out of doors and was in menstruation. Contrary to what he and the P. Ws, had observed at the spot. A-2 wrote in the inquest report, P-11 Col. VII : "There are no injuries on the dead body."

(28.) Having excluded the possibility of suicide. we may now consider, whether the deaths of these girls were accidental. It is nobody's case that on the 6/06/1971, any sea-craft, vessel or boat met with an accident off or near about Mypad resulting in loss of human life. No suggestion of accidental death of any person, much less a woman, off/or on the sea-shore near or far from Pallipalem was put to any of the prosecution witnesses. Nor such a plea has been put forward by the accused in their statements recorded under Section 342. Code of Criminal Procedure Indeed, the learned Counsel for the appellants has not pursued any such line of argument. We have, therefore, no hesitation in negating the possibility of accidental death.

(29.) This process of elimination inevitably leads us to the conclusion that in all probability the death of these girls, at any rate of Kala Rani was due to culpable homicide.

(30.) Now we come to the last but the most telling circumstance which not only confirms this conclusion and puts it beyond doubt, but also unerringly establishes, by inference, the other ingredients of the offence, including that the accused knew or had reason to believe that culpable homicide of Kala Rani had been committed. This circumstance is the conduct of A-2, in intentionally preparing false records and its abetment by A-1.

(31.) From its very start the investigation conducted by A-2 was dishonest and fraudulent. He intentionally indulged in suppressio veri and suggestio falsi at every step. He had been informed by the Head Constable (Prosecution witness 34) at about 8 or 8-45 A.M. in the Police Station that a report from the Sarpanch had been received about the dead body of a girl bearing injuries, found washed ashore near Pallipalem. This information which was passed on to A-2 and on receiving which he proceeded from the Police Station for investigation, was the real F. I. R. It was the duty of A-2 to enter faithfully and truly the substance of this information in the Station Diary and to record further that he was proceeding for investigation on the basis thereof. Instead of doing so, he intentionally suppressed the factum and substance of this first information and the real purpose of his departure from the Police Station in the records prepared by him or by his subordinates in his immediate presence or under his supervision. Instead of retrieving the written report that had been first received at 8 A. M. in the Police Station and was returned by the Head Constable to the Sarpach. he fabricated the document Exhibit P-25, purporting to be the First Information Report given to him at Mypad by one N. Subba Rao. The false story contained in this document has been substantially revealed in the inquest report, Ex. P-25.

(32.) P. Ws. 23. 25. 27 and 49 discount the presence of any such person named N. Subba Rao either at the inspection of the dead body in the sea-shore by A-2 or at the Temple, where according to A-2, he prepared the inquest report. None of these P. Ws, has sworn that a statement of any N. Subba Rao was recorded in their presence, by A-2. No specific question was put by the defence to P.W.49 in cross-examination to establish that the report Ex. P-25 was scribed by A-2 at Mypad at about 11.30, to the dictation of N. Subba Rao or any other person, although the witness was generally questioned as to the number of persons carried in the car. Prosecution witness 27. the Karnam has definitely

excluded the presence of any informant named Subba Rao. Prosecution witness 27 testified that after the inquest. A-1. A-2. P.W.26 and "a new person" implying P.W.49, met him and thereafter all the five (including Prosecution witness 27) got into the car and proceeded to the village. Prosecution witness 27 did not vouch the presence of a sixth man in the car. Only Prosecution witness 26 has stated that A-2 had recorded the statements of witnesses, including that of a person named N. Subba Rao. Prosecution witness 26 had reason to tell a lie on this point. Prosecution witness 26 admitted that at the time of the inquest, he was an accused in a criminal case of Indukurpet Police Station. A-2 was at the material time In-charge of that Police Station and was presumably concerned with the investigation of that case against Prosecution witness 26. Prosecution witness 26 therefore, appears to have deviated from truth in regard to the presence of N. Subba Rao, under the influence of the accused. In any case the evidence of Prosecution witness 26 on this point stands contradicted by the reliable testimony of P. Ws. 23, 25, 27 and 49.

(33.) In the inquest report, as also in Ex. P-25, the address of this mysterious person is recorded as "Nuthalapatti Subba Rao son of Venkateswarlu. aged about 37 Years. Vysya of Patha Guntur." Despite efforts, the Investigating Officers. P. Ws. 59 and 60, could not trace on the basis of this address any person bearing the said particulars at Pata Guntur or anywhere else in the District. In response to the memo issued by the D. S. P. (Prosecution witness 59) A-2 could neither produce this N. Subba Rao. nor give any indication about his existence though A-2 claimed to have known him . For these reasons, the High Court was right in holding that this Nathalapatti Subba Rao was a fictitious person of A-2's imagination. Similarly, during investigation all efforts made by P. Ws. 59 And 60 to trace and find if Vijaya and Nirmala prostitutes, represented in Ex. P-25 and Ex. P-11 as the deceased persons ever existed in flesh and blood, remained futile. In these premises the High Court was right in concluding that Vijaya and Nirmala prostitutes were also the coinage of the brain of A-2.

(34.) It is necessary to say something more about Ex. P-25 because the entire story was spun around it by A-2. It did not see the light of the day till the 11th June. A-2 did not send it to the Police Station for registration before that date. It is in the evidence of Prosecution witness 55, who at the material time was a Head Constable posted in this Police Station, that after his departure on the morning of the 7th, A-2 returned to the Police Station on the 10th evening and it was then that he handed over this document to the witness with the direction that the latter should enter that report in the relevant register, dating it as the 7/06/1971. The Head Constable after slight hesitation agreed and inserted this report in the blank space meant for the entries of the 7th June, and thereafter as required by A-2 handed over to the latter, a copy of that report. A-2 also made an entry (Exhibit P-34) in the General Diary of the Police Station, dated 10-6-1971 on 11-6-l971 at 2 A.M. It reads :

"Returned to P. S. after leaving it on 7-6-1971 at 9-30 a.m, visited Mypadu enroute to Gangapatnam at 11-00 hours at 11-30 a.m, recorded statement of N. Subba Rao, sent to Police Station for issuing First Information Report under S. 174, Cr. P. C. then visited Pallipalem at 12-30 p.m investigated, held inquest over dead body of K. Vijaya. At 20-30 p.m. left village reached Mypadu at 21-30 hours, made enquiries in Cr. 48/71 and halted. On 8-6-1971 visited Gangapatnam detailed duties for bandobust and united Ravur, investigated into Cr. 47/71, visited Nellore at 12-30 hours, did bandobust for festival and halted for the night. On 9-6-l97l visited Mypadu for petition enquiry and investigated into Cr. 48/71 41. 42 and 44/71 and halted. On 10-6-1971 visited Gangapatnam, supervised and did bandobust for car festival at 00-30 hours, received First Information Reports in Cr. 49 to 51/71 at 00-45 hours. left the village with men and reached Police Station."

(35.) A mere glance at this report betrays its falsity. This shows how in his anxiety to suppress the truth he tried to reinforce and cover up one falsehood with another. In this connection, it may be noted that the D. S. P. persistently pressed A-2 to send the copies of the F. I. R. and the Inquest Report. A-2 was unable to supply any copy of the F. I. R before the 12th of June, when the D.S. P. himself came to the Police Station and collected it. The D.S.P. (Prosecution witness 591 testified that on the 11/06/1971, he had questioned A-2 about the first Information Report and the inquest report. As a result he received a copy of the F. I.R. on the 12th but did not receive any copy of the inquest report. Consequently on 14-6-1971, he telephoned to A-2 to send the case diaries and inquest report without further delay. Despite these efforts the D. S. P. did not receive those records on that day. On 15-6-1971, he issued a memo. to A-2 directing the latter to produce immediately the complaint of N. Subba Rao, the inquest report and the case diaries. It was only then that A-2 produced the persistently requisitioned records.

(36.) These inordinate delays in sending the records prepared by A-2, confirm the testimony of P. Ws. 23, 25 and 49 that no inquest on the dead body was held at the spot, nor was the inquest report or any other record prepared there and then and that their signatures were obtained by A-2 on a blank sheet of paper. Of course Prosecution witness 26 stated that A-2 had recorded statements of witnesses and had prepared the inquest report at the Temple. As already noticed it is not prudent to accept this version of Prosecution witness 26. He had a motive to favour A-2. Moreover his version stands inferentially falsified by the circumstances, including the unusual delay in registering the report Exhibit P-25 in the Police Station and in sending the copies of the records to the D.S. P.

(37.) Section 174, Code of Criminal Procedure peremptorily requires that the officer holding an inquest on a dead body should do so at the spot. This mandate is conveyed by the word "there" occurring in Section 174 (1). Sub-section (3) of the Section further requires the Officer holding the inquest to forward the body with a view to its being examined, by the medical man appointed by the State Government in this behalf if the State of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless. The sub-section gives a discretion to the Police Officer not to send the body for post-mortem examination by the medical officer only in one case, namely, where there can be no doubt as to the cause of the death. This discretion however is to be exercised prudently and honestly. Could it be said in the circumstances of the case, that there was no doubt as to the death of Kala Rani being from drowning ?

(38.) In this connection it is important to note that Kala Rani was not a total stranger to A-2. It is in evidence that A-2 used to go to Nellore for Bandobust and there he had had sufficient opportunity to come across Kala Rani who was a prominent student-leader. The testimony of Prosecution witness 47 is to the effect that when on 17-7-1971, A-2 came to him and requested the witness to dissuade the father of the deceased from getting the dead body exhumed, he (A-2) admitted that Kala Rani deceased was wellknown to him.

(39.) The body was not in an unidentifiable condition. A-2 therefore could be under no mistake that it was the body of Kalarani deceased, particularly when he inspected it after its face had been washed by Prosecution witness 23 under the orders of A-2. Despite such knowledge, he laid a false trail and prepared false record mentioning that the dead body was of a prostitute named Vijaya.

(40.) Medical jurists have warned that in the case of a dead body found floating in water, the medical man from a mere observance of the external condition of the body, should not jump to the conclusion that the death was from drowning. Only internal examination of the body can reveal symptoms which may indicate with certainty as to

whether the death was from drowning or from unlawful violence before the body was immersed in water. This is what Taylor, the renowned medical jurist has said on the point:
"When a dead body is thrown into the water, and has remained there sometime water,fine particles of sand, mud weeds etc, may pass through the windpipe into the large air-tubes. In these circumstances, however, water rarely penetrates into the smaller bronchi and alveoli as it may by aspiration and even the amount which passes through the glottis is small. If immersed after death the water is found only in the larger airtubes and is unaccompanied by mucous froth .Water with suspended matters can penetrate even to the distant air-tubes in the very smallest quantity, even when not actively inhaled by respiratory efforts during life. The quality or nature of the suspended matter may be of critical importance, When decomposition is advanced the lungs may be so putrefied as to preclude any opinion as to drowning but the demonstration of diatoms in distant parts of the body inaccessible except to circulatory blood, provides strong evidence of immersion in life if not of death from drowning." (emphasis supplied)
(41.) A-2 was a Police Officer of standing and experience. He knew the deceased. He saw injuries on her dead body. He must have known - if he were honest - that in the circumstances of the case autopsy of the dead body by a medical officer was a must to ascertain the cause of her death. Instead of sending the dead body for post-mortem examination he in indecent haste purposely got it buried without holding any inquest at the spot. He did not send for the relations of the deceased. Even a layman like the Karnam (Prosecution witness 27) felt something strangely amiss in this conduct of A-2. In response to the queries made by the Karnam, A-2 made false excuses. He intentionally misrepresented (in concert with A-1) that Prosecution witness 49 was a relation of the deceased. He flouted all the salutary requirements of Section 174, Code of Criminal Procedure A-2's conduct in distorting and suppressing material evidence and in preparing false records (Exs. P-11 and P-25) as to the identity of the dead body the cause of the death and the falsification of the data bearing on that cause could not be explained on any reasonable hypothesis save that of his guilt. The circumstances established in this case unmistakably and irresistibly point to the conclusion that within all human probability accused No. 2 knew or had reasons to believe that Kala Rani had been done to death by some person or person . All the elements of the charge under Section 201 had thus been proved to the hilt against him.
(42.) Before considering the case of A-1, we may notice here the decision of this Court in Palvinder Kaur v. State of Punjab, 1953 SCR 94 = (AIR 1952 SC 354 = 1953 Cri LJ 154). This decision was cited by the learned Counsel for the appellants in support of his argument that the circumstances: that the deceased died, that the appellant prepared false record regarding the cause of her death or caused post-haste disposal of the dead body without any autopsy or its identification by the relations of the deceased, do not establish the cause of Kalarani's death or the manlier and the circumstances in which it came about. Counsel laid particular stress on the observation of this Court in that case that in cases depending on circumstantial evidence Courts should safeguard themselves against the danger of basing their conclusions on suspicions howsoever strong.
(43.) The decision in Palvinder Kaur's case, (AIR 1952 SC 354 1953 CH LJ 154) (supra) is a precedent on its own facts. The observations of this Court to the effect, that "Jaspal died, that his body was found in a trunk and was discovered from a well and that the appellant took part in the disposal of the body do not establish the cause of his death or the manner and circumstances in which it came about" cannot be construed as an enunciation of a rule of law of application. Whether the cicumstantial evidence in a particular case is and safe enough to warrant a finding an offence has been committed, is a question which belongs to the realm of and not of law. So is the question whether the

accused knew or had reasons believe that such an offence has committed. It is true that this further depends on an assessment of accused's mind. Nevertheless, it is question of fact. "The state of a man's mind," quoth Lord Bowen. "is as a fact as the state of his digestion,"

(44.) In Palvinder Kaur's case (AIR 1952 SC 354 = 1953 Cri LJ 1541 (supra) there was, in the first place, no material direct or indirect, justifying a finding that the death of Jaspal was caused by the administration of potassium cyanide and it the defence version was believed his death would be the result of an accident If that version was disbelieved then there was absolutely no proof of the cause of his death. In the method and the manner in which the dead body of Jaspal was dealt with and disposed of by the accused did rake some suspicion but from these facts, the Court found it unsafe to draw a positive conclusion that he necessarily died an unnatural death. Nor could the possibility of the commission of suicide by Jaspal be totally ruled out.

(45.) The position of A-2 in the present case was very different. He was a Police officer and as such was expected to discharge the duties entrusted to him by law with fidelity and accuracy. He was required to ascertain the cause of the death and to investigate the circumstances and the manner in which it was brought about. His duty it was to make honest efforts to reach at the truth. But he flagrantly abused the trust reposed in him by law. He intentionally fabricated false clues. laid false trails, drew many a red herring across the net smothered the truth, burked the inquest, falsified official records and shortcircuited the procedural safeguards. In short, he did everything against public justice which is by Section 201, Penal Code. The other circumstantial evidence apart the series of these designed acts of omission and commission on the part of A-2, were eloquent enough to indicate in no uncertain terms that A-2 knew or had reasons to believe that Kalarani's death was homicidal.

(46.) It is not disputed that A-1 was a friend of A-2. It was A-1 who had supported A-2's idea that the latter should himself go to the spot to investigate as the deceased girl appeared to be from a high class family. Standing alone, this circumstance is not of a conclusive tendency. But in the context of his subsequent conduct it assumes significance. He wilfully conducted himself in such a manner that there could be no doubt that he was a guilty associate of A-2. When in the context of the burial of the dead body ordered by A-2 without sending the body for post-mortem, the Karnam (Prosecution witness 27) asked whether any relation of the deceased had come, A-2 pointed towards Prosecution witness 49 saving that he was related to the deceased. Simultaneously. A-I said: "Yes." This concerted conduct of A-1 in fraudulently representing Prosecution witness 49 to be a relation of the deceased,when he knew that Prosecution witness 49 was not such a relation, clearly marks him out as an intentional abettor and a guilty partner in the commission of the offence under S. 201. Penal Code.

(47.) There can be no doubt that on the basis of the facts found, the charges under Sections 218,468,Penal Code had been fully established against the appellant A-2 being a public servant charged with the preparation of official record relating to the investigation of the cause of the death of Kalarani, framed that record in a manner which he knew to be incorrect with intent to save or knowing to be likely that he will thereby save the true offender or offenders from legal punishment. Obviously, he prepared this false and forged record with the fraudulent and dishonest intention of misleading his superior officers and inducing them to do or omit to do anything which they would not do or omit if they were not so deceived or induced. A-1, as discussed already, facilitated and intentionally aided A-2 in the preparation of the false and forded record.

(48.) For the foregoing reasons we uphold the convictions and sentences of the appellants on all the counts, as recorded by the High Court and dismiss the appeal.

Appeal dismissed.

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Cross Citation :2004-ALLMR(CRI)-0-65 , 2003-TLMHH-0-112

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : J.G.Chitre, J.

G.B.Nayyar …Vs.. Ashok Satyadev Mishra and State of Maharashtra
CrI.Writ Petition 218 of 1997 Of Mar 20,2003

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CASE NOTE : I.P.C. 499, 500 – False entries by Police officer in the enquiry report – Complainant filed complaint at Police station – The Police investigatin Officer send 'B' summary report stating that the complaint was mischivious, vexatious and flase – The said 'B' summary report was challenged before High Court- High Court held that the complaint was not flase and 'B' summary report prepared by the I.O. was not proper – Thereafter the complainant filed complaint u.s. 500 of I.P.C. – The trial Court issued the process against the accused police officer – The order of issue process is challenged on grund of exception

embodied in S. 499 – Defence of action done in good faith was taken – Held – No case of exceptions is made out to grant any relief to accused police officer – Proceeding against him not to be quashed.

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(1.) SHRI Anil Singh submitted that the petitioner company filed a complaint in D. N. Nagar Police Station against Respondent No. 1 alleging that he committed the theft of articles belonging to and in possession of the said company after investigation, the Investigating officer formed the opinion that it was a mischievous, vexatious and a false complaint and, therefore, he prayed for issuing "b Summary" against the present petitioner. The said prayer and the report was challenged by the petitioner by filing a writ petition in the High Court. It was heard and finally decided. The High Court held that the said complaint was not false, mischievous and vexatious and, therefore, "b Summary" report prepared by the Investigating Officer was not proper. The stamp of false, mischievous and vexatious complaint was expunged. It was directed that it be not treated as "b Summary".

(2.) AFTER this, the present respondent filed complaint in the concerned Court alleging that by such publication in Trade Diary, the petitioner committed the offence of defamation which happens to be punishable in view of provisions of Section 500 of IPC. The Trial Court issued the process against the petitioner in view of provisions of Section 500 of IPC and the challenge is being put to that order by the petitioner by way of this writ petition.

(3.) SHRI Anil Singh submitted that the judgment and order passed by the High Court in Writ Petition No. 639 of 1997 by itself proves that the complaint filed by respondent No. 1 was not entertainable. He submitted that the said publication was in larger interest of the public and was the truthful account of the activities of respondent No. 1. He submitted that the said publication was published by the present petitioner in good faith and for protecting his and others interest and, therefore, keeping in view this aspect of the matter, the trial Court should not have taken the cognizance of the complaint filed by respondent No. 1 and should not have issued the process against the petitioner. He submitted that such order of issuing of the process be quashed.

(4.) SHRI Saste, Additional Public Prosecutor, submitted that the impugned order is correct, proper and legal and the writ petition deserves to be dismissed.

(5.) SECTION 499 of IPC defines the offence of defamation. It provides four explanations, ten exceptions and some illustrations. Shri Singh attempted to bring his case within first, ninth and 10th exceptions. First exception provides that it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. It has been provided that whether or not it is for the public good is a question of fact. Ninth exception provides that it is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it or of any other person, or for the public good. The tenth exception provides that it is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

(6.) THE judgment and order passed by the High Court in the writ petition quoted supra was revolving around the grant of "b Summary" which would result in a prosecution. There is a difference between issuance of process and the adjudication that filing of a complaint is necessitating the issuance of "b Summary" by the Court. But that does not by itself stamp or vouchsafe its correctness, genuineness or falseness, mischievousness. It by itself

would not vouchsafe it to have been made in good faith, made for protecting the interest of oneself or others or published for a cause intended for public good. When a person makes an imputation by words spoken or intended to be read, or by making signs or by visible representation, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said to defame that person subject to explanations, provided by the section, exceptions and the illustrations given. If the accused in such case wants to raise a plea as indicated by the exceptions he has to make out a case for bringing himself within four corners indicated by those exceptions. He may do it by relying on the averments made in the complaint by which he has been brought in the Court as an accused or by producing material for perusal or the consideration of the Court by himself. He has to raise a plea for bringing his case within four corners of the exceptions. He has to bring it to the notice of the Court that the complainant has not made out the case as indicated by Section 499 or its explanations. Unless he does it, the Court would not be considering his defence suo motu. A plea has to be raised before the trial Court or may be in higher court. But there has to be a case already made or in existence for allowing such person to agitate such points before higher Courts. In the absence of that, the higher Courts would not be able to consider his plea as he wishes to be considered.

(7.) IN the present matter, there is no case made out by the petitioner which would allow him to take the advantage of the limits provided in the exceptions embodied in Section 499. There is no case for permitting him to sort out the averments in complaint by taking the advantage of the explanations provided and the illustrations given. Hence, the petition stands dismissed. Rule stands discharged. No order as to costs. The Petitioner should appear before the trial Court on 22. 4. 2003 during working hours. The trial Court to proceed with the case in accordance with the provisions of law. The petitioner is entitled to move an application or raising the plea permitted by the provisions of Section 499 of IPC. If such application is preferred, the trial Court should adjudicate on it as early as possible.

Cross Citation :AIR 1996 SC 2326

SUPREME COURT OF INDIA

Hon'ble Judge(s) : K. RAMASWAMY AND G. B. PATTANAIK, JJ.

AFZAL …Vs .. State of Haryana

Writ Petition (Criminal) 356-57 Of 1993 Jan 17,1996

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A] I.P.C. 193 – Prosecution of S.P. and other Police personnel – I.O. during enquiry illegally detained a minor boy and warned that he could be released only when his father surrender before Police - Petition filed before Supreme Court – Report is called form S.P. – False and misleading report submitted by S.P. – Supreme Court being doubtful of report called the report from C.B.I. – It proved the malafides of S.P. – S.P. is guilty u.s. 193 of I.P.C. and convicted for 1 years rigrous imprisonment – Supreme Court appreciated the work done by the C.B.I.

B] Contempt of Court – S.P. first filed a false fabricated counter affidavit to get favourable order from Court – After his falsity disclosed then perceiving adverse atmosphere he again fabricated further false evidence to misled the Court – S.P. Not making can did admissions nor tendering unqualified apology – He is guilty of committing contempt of Judicial process – Sentenced to rigrour imprisonment for 6 month – Police Officers Randhir Singh (ASI), Ishwar Sigh (SI) and M.S. Alhawat (superintendent of police) convicted – DGP is directed to take the convicts in to custody forthwith and send them to central Jail – And submit the compliance report to the Registry within one week

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RAMASWAMY, J

(1.) F.I.Rs. were registered with Government Railway Police, Faridabad by the Station House Officer, Ambala Cantonment, Randhir Singh (ASI) against the prime accused, Rahim Khan for offences of fraud and forgery of the railway receipts and cheating and misappropriation. In connection therewith, a police team headed by Ishmad, Inspector, C.I.A.G.R.P., Ambala had gone to Agra to apprehend Rahim Khan. When he alluded the investigation team, they took away two minor boys viz., Afzal son of Rahim Khan and Habib son of Ahmad and kept them in wrongful confinement at different places. Consequently, above writ petitions under Article 32 of the Constitution were filed in this Court for habeas corpus of the minor boys. This Court issued rule nisi on 29/10/1993 to Ms. Indu Malhotra, Standing Counsel for State of Haryana and directed the matter to be listed on 1/11/1993. On Nov 1/11/1993, this Court directed the Home Secretary, Government of Haryana to personally examine the complaint of illegal detention of two minor boys and to submit a report by 5/11/1993 and the matter was directed to be posted on that day at 2.00 p.m. On 2/11/1993, when Ms. Indu had pointed out the Court that the Home Secretary was on leave, this Court had modified the order and directed the Director General of Police (DGP) to make investigation and to submit the report on 5/11/1993. In the meantime, on 1/11/1993, Ms. Malhotra wrote a letter to the Home Secretary thus :-

"... ... Two minor children namely Afzal and Habib have allegedly been illegally detained at Ambala Respondents No. 3 and 4 i.e., the Superintendent of Police G.R.P. (C.I.A.), (Haryana) have filed two separate affidavits stating that the children are not in illegal custody.

However, an affidavit of an Advocate of U.P. has been filed in support of the Hebeas Corpus petition in the Supreme Court stating that Inspector Ishaque Ahmad, G.R.P. (C.I.R.), Ambala Cantt. had informed him that the minor children would be released only if their father surrenders. He has stated that he saw the children in the custody of Ishaque Ahmad".

(2.) She enclosed in the said letter complete copy of the petition along with the copy of the affidavits etc. She also informed that the case was posted "for hearing on 5-11-93" and that the Court had directed him to personally investigate into the case and file an affidavit before the Court. She requested him to be present in Delhi with the above details by 5/11/1993. On Nov 2/11/1993, she wrote another letter to Shri Kalyan Rudra, DGP, Haryana wherein while reiterating the facts of earlier letter, she stated thus :

"The Court had issued notice to the Standing Counsel for the State of Haryana on 29/10/1993. On receiving a copy of the said petition, we contacted the 3rd and 4th respondents and filed affidavits on their behalf. The affidavits filed on behalf of

respondents Nos. 3 and 4 along with the copy of the Habeas Corpus petition are enclosed herewith for your ready reference. The Court, however, was not satisfied with the facts stated by respondents Nos. 3 and 4".

(3.) She further stated that the Court had directed him to personally investigate into the matter and file an affidavit by 4/11/1993 and that the case would be heard on 5/11/1993. She also requested him to talk to her personally on the telephones and numbers thereof had been given. This Court by order dated 8/12/1993 in Afzal v. State of Haryana, (1994) 1 SCC 425, noted that the first affidavit of M.S. Ahlawat, Superintendent of Police was filed in this Court on 2/11/1993 and another affidavit was filed on 5/11/1993. The Court also had noted that Inspector Ishaq Ahmad was primarily responsible for wrongful and illegal confinement of two minor boys. This Court opined that a detailed enquiry was necessary to find out the truth and the tenor of the averments made in two affidavits of Ahlawat and that the forgery of his signature was made in the first one; veracity of allegations and counter-allegations by the officers and the role played by each of the respondents would be ascertained. Therefore, this Court had directed the District Judge, Faridabad to make an enquiry and to submit the report within six weeks from the date of the receipt of that order. The District Judge, had given opportunity to all the persons and he opined and concluded that "the assertion of Ishwar Singh, S. I. did not appear to be veracious and impeccable. The trend and tenor of the statements made by various police officers/officials during the course of the enquiry tended to suggest that they tried to toe the line of one or the other group of two factions of the Railway Police branding each other with charges and counter charges. Themanner in which Ishwar Singh, the senior most in the group of police officials concerned with the preparation of counter-affidavits and briefing the Standing Counsel did not object to the filing of a forged affidavit, spoke volumes of the tendentious nature of the stand taken by him". He also held that M.S. Ahlawat was not responsible in the episode. On receipt of the report, by order dated 19/10/1994 in Afzal v. State of Haryana, (1994) 7 JT (SC) 167, this Court opined that "the affidavit of Ahlawat dated 5/09/1993, his evidence before the Dist. Judge, and the report of the latter do establish that the signature of Ahlawat is forged on the affidavit dated 30/09/1993 and the question as to who had forged it needs thorough investigation to take deterrent action. It cannot be lightly brushed aside of the tendency to file false affidavits or fabricated documents or forgery of the document and placing them as part of the record of the Court and they are matters of grave and serious concern. Therefore, we are of the view that a thorough investigation is necessary in this behalf". Accordingly, Director of Central Bureau of Investigation (CBI) was entrusted with the task of investigation, if necessary, with the assistance of hand-writing expert and report was directed to be submitted as expeditiously as possible within three months from the date of the receipt of this Court's order.

(4.) Shri V. K. Khanna, Senior Scientific Officer, Grade-I examined the documents and assisted the CBI in the enquiry conducted by Shri N. K. Pathak, Inspector. He stated in the report submitted to this Court that Head Constable, Krishan Kumar forged the signatures of Shri M. S. Ahlawat on the carbon copy of the counter affidavit dated 30th October, 1993 and that that "it was committed in the presence of S.I. Ishwar Singh and ASI Randhir Singh" on 30/10/1993. It is also stated in that report that "It may be added that they first visited the chamber-cum-residence of Ms. Indu in the evening of 30/10/1993, and not on the evening of 31/10/1993, as stated by them in their statements. The junior Officers had nothing to gain by forging the SP's signature on the counter-affidavit. There is evidence to indicate that it was within the knowledge of Shri M.S. Ahlawat, SP, Railways that 2 boys had been detained illegally. His conduct raises a strong suspicion that the junior officers acted with his consent either implied or express". During examination by Shri N. K. Pathak,

Ms. Indu had stated that after getting a copy of the impugned writ petition, she had instructed her junior, Smt. Dania Pradhan to brief Shri M. S. Ahlawat, S.P. about the said writ petition and the five officials named in paragraph 1 of the petition. The five officials met her in the evening of 30/10/1993. On their instruction, she had vetted the counter-affidavits to be filed on behalf of M.S. Ahlawat impleaded as third respondent and A.S.I., Randhir Singh impleaded as fourth respondent and handed them over to the aforesaid police personnel. In the morning of 1/11/1993, one of her personal staff informed her that two counter-affidavits affirmed on behalf of M.S. Ahlawat and A.S.I. Randhir Singh had been received for being filed in this Court on the same day. Accordingly she tendered the aforesaid two counter affidavits in the Court on 1/11/1993, but directed to be filed in the Registry which were filed accordingly. This Court was not justified with the averments made in the counter-affidavits of respondent Nos. 3 and 4 and had directed the DGP, Haryana to personally investigate into the matter and to file a report. She further stated that on 2/11/1993, Shri G.S. Malhi, DIG (Railways), Haryana contacted her in the Court chamber and she told them that this Court was not satisfied with the counter-affidavits filed by Ahlawat and Randhir Singh. She also wrote a letter to DGP, Haryana in that behalf and handed over the same to Shri Malhi requesting him to fax the letter immediately since time was very short. The said letter was dictated in the presence of M.S. Ahlawat. He did not tell her that he did not sign the counter-affidavit in which the allegation of illegal detention of the two boys had been denied. She also stated that M.S. Ahlawat did not even faintly hint that he had not affirmed the counter-affidavit filed in this Court and as such she filed extra copies of the aforesaid two counter-affidavits as required under the rules in the Registry of this Court on 4/11/1994.

4-A. Randhir Singh, ASI, GRP, Faridabad, respondent No.4 was also examined by the C.B.I. and he admitted that he had gone to Amabla on 30/10/1993, to attend Crime meeting convened by M.S. Ahlawat who later directed him to proceed to Delhi and contact Ms. Indu and have the counter-affidavits of him and M.S. Ahlawat prepared. He stated that "Shri Ahlawat had told him to deny the allegations regarding illegal detention of two boys in the counter-affidavit". As such, he met Ms. Indu, got the counter-affidavits vetted. He, however, did not tell anything about the preparation of counter-affidavit to be filed on behalf of M.S. Ahlawat and did not reveal the names of the personnel who had accompanied him to Delhi on 30/10/1993. (5.) Head Constable, Krishan Kumar during his examination admitted that he attended the Crime meeting held at Amabla Cantonment on 30/10/1993 along with Randhir Singh. He also stated that in his presence A.S.I. Randhir Singh was directed by Ahlawat to deny allegations of illegal detention of the two boys in the counter-affidavit to be filed in this Court.

(6.) Ishwar Singh, being the In-charge of C.I.A. Staff, GRP, Ambala Cantt. had stated during his examination that he was called by Shri Ahlawat on 30/10/1993 and instructed him to meet Ms. Indu to assist her in the preparation of the counter-affidavit to be filed in this Court. He stated that he reached Delhi on 31/10/1993, and contacted Ms. Indu. "Two counter-affidavits were drafted, vetted and typed at the residence-cum-office of Ms. Indu. After the preparation of the above two counter-affidavits, he sent a folder containing original counter-affidavit in the name of Shri M. S. Ahlawat through H.C. Kartar Singh to Rewari as Shri Ahlawat was camping at Rewari". He admitted that in his presence and in the presence of Randhir Singh and Constable Paras Ram, "H.C. Krishan Kumar forged the signatures of Shri M. S. Ahlawat on the carbon copy of the counter-affidavit to be filed in the Supreme Court on behalf of Shri Ahlawat" and that "forgery was committed by H.C. Krishan Kumar on the instructions of A.S.I. Randhir Singh. H.C. Krishan Kumar had used his right hand while signing".

(7.) When M.S. Ahlawat was examined, he reiterated all what he had stated in his second affidavit. He also stated that 'he had directed S.I. Ishwar Singh and A.S.I. Randhir to brief Ms. Indu at her residence in Delhi on 31-10-93. On the evening of 31st Oct., 1993, he had gone to Rewari for official work". It is not necessary to reiterate his version since he has stated the same as in the second affidavit. But he admitted that he reached Delhi on the evening of 1/11/1993 and contacted Ms. Indu and requested her for a meeting. She called him to her chamber next day morning. On the evening of 2/11/1993, he along with Shri G. S. Malhi, DIG, Railways met Ms. Indu in her chamber and he stated to her that "he had not filed any counter-affidavit in the Supreme Court on 1-11-93". On Smt. Malhotra's asking as to who had signed the counter-affidavit on his behalf he could not answer the same as he knew nothing about it. Ms. Malhotra called him again on 4-11-93 and he had signed the Vakalatnama and gave the "affidavit dated 5/11/1993" and asked her to file next day. In that counter-affidavit he had disowned the earlier counter-affidavit dated 30/10/1993, purported to have been signed by him. He further stated that she refused to file the same in the Court as his signature in the vakalatnama and other documents did not tally with the signature he had put in the counter-affidavit dated 30/10/1993. (8.) In paragraph 19 of the report, CBI Officer has stated that "S.I. Ishwar Singh took the forged counter-affidavit from HC Krishan Kumar and kept it with him. Subsequently, he handed it over to HC Paras Ram with the instructions to deliver it to Ms. Indu, knowing fully well that the counter-affidavit was a forged one. HC Paras Ram has confirmed that SI Ishwar Singh handed him an envelop on 1st Nov., 1993 and that he delivered the same at the residence of Ms. Indu as instructed. His conduct becomes all the more questionable as he was responsible for the delivery of the forged affidavit at Ms. Malhotra's residence. SI, Ishwar Singh, ASI Randhir Singh, HC Krishan Kumar, HC Kartar Singh, and HC Paras Ram have admitted that they met Ms. Indu on 31/10/1993 at her residence and got the counter-affidavits vetted by her. This statement is inconsistent with the statement of Ms. Malhotra that they visited her on 30/10/1993. The police officers seem to have manipulated the Daily Diary entries to support their contention. It appears that all of them had met Ms. Indu on 30/10/1993. She is an independent witness and is a Govt. Standing Counsel and has no axe to grind in the matter. Further, she had, as per the practice, noted down the names of the persons who visited her on the reverse of the office copy of the writ petition and that document was handed over by her to the CBI Investigating Officer". In paragraph 22 of the report, he concluded that there are indications to show that detention of the two boys in the GRP was within the knowledge of Ahlawat, though none of the concerned police officer has stated that Ahlawat had instructed them to sign on his behalf. "There is no explanation by Shri Ahlawat not signing the counter-affidavit which was to be submitted in the Hon'ble Supreme Court on 1-11-1993. In the statement he has stated that he received the counter-affidavit at 2.00 a.m. on 1-11-1993 while he was in Rewari... Further, he was aware that this counter affidavit was necessary. Although Ms. Malhotra had discussed the case with Ahlawat and Malhi, at no stage had Ahlawat informed her that he had not signed the counter affidavit which was submitted before the Court on 1/11/1993. This was also corroborated by G.S. Malhi's statement. It is also a moot point as to why subordinate officers like SI, Ishwar Singh, HC Krishan Kumar and ASI, Randhir Singh would take decision to forge their SP's signature on document being submitted to the Court. As Ahlawat was not in Delhi, these officers may have taken his instructions on telephone. There is, however, no evidence as to what transpired".(9.) On receipt of the report, notices were issued on 17/04/1995 to HC Krishan Kumar and SI, Ishwar Singh and ASI, Randhir Singh as to why they would not be convicted for forgery of signature of M.S. Ahlawat and counter affidavit dated 30/10/1993 and also for the contempt of the Court for filing false affidavit. Pursuant thereto, they appeared before the Court, Randhir Singh has

stated that : "On 1/11/1993, I along with Krishan Kumar reached Delhi and met Ishwar Singh who gave a carbon copy of the affidavit of Shir M.S. Ahlawat to Krishan Kumar. The said affidavit was to be filed in this Hon'ble Court in connection with the writ petition filed by one Afzal". Ishwar Singh asked Krishan Kumar to sign the affidavit on behalf of Ahlawat who was not able to reach Delhi. Krishan Kumar refused to sign the affidavit, Ishwar Singh thereafter phoned Shri M. S. Ahlawat and asked Krishan Kumar to talk to Shri M. S. Ahlawat. After talking to M.S. Ahlawat on phone, Krishan Kumar took the carbon copy of the affidavit of Shri M. S. Ahlawat and signed it and both them went away. They met only on 1/11/1993 in this Court.

(10.) HC Krishan Kumar has stated in his affidavit that Ishwar Singh, SI directed him, in the presence of Randhir Singh, to sign the carbon copy of the affidavit typed in the name of Ahlawat for official use. "When I refused to sign the carbon copy Shri Ishwar Singh contacted Shri Ahlawat on phone and Shri Ahlawat ordered me over telephone to sign the carbon copy of the affidavit in his name on the plea that the said carbon copy is only for official use while the original is to be filed before the Hon'ble Supreme Court. In these circumstances,... I had no alternative except to sign the carbon copy of the said affidavit in the name of Ahlawat and handed it over to Shir Ishwar Singh, Sub-Inspector, thereafter I got no information about the said affidavit". He has also stated that on 1/11/1993, he along with other police constables went to Haryana Bhavan, New Delhi at 12.45 p.m. Shri Udey Singh Head Constable, Driver of the Staff car of Shri Ahlawat was in Haryana Bhavan. All the team assembled at the rear side of Haryana Bhavan. "Shri M. S. Ahlawat discussed about the pending writ petition with Ishwar Singh and Randhir Singh and assured me not to worry about signature on the carbon copy of his counter-affidavit". He has further stated that Shri Ahlawat remained in Delhi on 1/11/1993. He was in the premises of this Court from 2.30 p.m. onwards when the hearing of the case took place. To substantiate his version, he has also filed the affidavit of the Driver of Ahlawat, which is marked as Annexure-2 before the District Judge. He had explained for his omission to state these facts of forgery before the District Judge, Faridabad in paragraph 13 stating that M.S. Ahlawat threatened him that if he would disclose the truth before the DistrictJudge, he would make an enquiry and then would terminate his service and dismiss him from service. Due to that threat he had kept mum.

(11.) After reading these averments in the affidavits, by order dated 10/09/1995, this Court issued notice to M. S. Ahlawat to show cause as to why he would not be considered for conviction for forgery and making false statement at different stages in this Court and also for contempt of the proceedings of this Court. M. S. Ahlawat and Ishwar Singh, SI have filed the affidavits. Ishwar Singh has denied all the allegations. He has, however, admitted that he attended the Crime meeting on 30/10/1993 at Ambala Cantt. along with Randhir Singh, Krishan Kumar etc. He has also admitted that he was asked by Ahlawat to go to Delhi and brief Ms. Indu. According to him, he reached Delhi on 31/10/1993 and proceeded to meet Ms. Malhotra along with others. At about 6.30 p.m. Ms. Indu handed over the cover to Randhir Singh containing two affidavits, one to be filed by him and the other to be filed by M. S. Ahlawat. Randhir Singh handed over the original draft to Kartar Singh and asked him to proceed to Rewari immediately and contact M. S. Ahlawat for his signature as the case was listed the next day, i.e., 1/11/1993. Kartar Singh left Delhi at 6.35 p.m. Thereafter, Randhir Singh asked Krishan Kumar to append the signature of M.S. Ahlawat on the carbon copy of the draft affidavit. Krishan Kumar then forged the signature of M.S. Ahlawat on the said carbon copy. He has further stated that he objected to the same but Randhir Singh and Krishan Kumar did not pay any heed to it. He did not inform about this to any one thinking that M. S. Ahlawat had already sent instructions to them.

(12.) M. S. Ahlawat in his affidavit filed on 5/11/1993 has denied his role in the wrongful confinement of two minor boys.He has stated that he received the counter-affidavit at 2.00 a.m. on 1/11/1993. He had gone through the affidavit and found them to be not correct. On coming to know of the forgery of signature he informed the same to Ms. Malhotra on 2/11/1993. He also informed the Director General of Police on the same day, about the forgery of his signature committed by Krishan Kumar. On 4/11/1995 he brought these facts to the notice of this Court and filed an affidavit. In the departmental enquiry conducted against Krishan Kumar, he was found to have committed forgery of his signature and accordingly disciplinary action was taken against him.

(13.) We have elaborately narrated the facts and the proceedings of this Court from which it would emerge that initially Afzal and Habib, two minor boys were taken into custody by Ambala Cantonment police party consisting of Ishaq Ahmad and others who put the boys in wrongful confinement to coerce the accused Rahim Khan to surrender. On filing writ petition under Article 32, this Court had issued notice and directed investigation at highest level in the State. M. S. Ahlawat, the Superintendent of Police, Railways, Ambala, in-charge of the investigation, and SHO Randhir Singh, ASI were impleaded as respondent Nos. 3 and 4. They were required to file counter-affidavits in this Court on 1/11/1993. Ahlawat Directed SI, Ishwar Singh, ASI Randhir Singh and HC Krishan Kumar and others to go over to Delhi and contact Ms. Malhotra and to instruct her to draft the counter-affidavits. On the basis of instructions given to her, she had drafted the counter-affidavits and handed them over to Ishwar Singh, he being the senior most among the police personnel. Randhir Singh signed it. The original counter-affidavit was sent to Rewari where M. S. Ahlawat was camping. M. S. Ahlawat along with Randhir Singh was required to file the counter-affidavit by 1/11/1993. M. S. Ahlawat attended the Court on 1/11/1993 and was in the Court premises from 2.30 p.m. onwards. The carbon copy of the counter-affidavit on behalf of M. S. Ahlawat and counter-affidavit of Randhir Singh was tendered in the Court. They were filed in the Registry. The Court was not satisfied with the averments made therein. Therefore, an enquiry was directed to be made initially by the Home Secretary, Haryana and in his absence by the DGP, Shri Kalyan Rudra. Ms. Malhotra wrote a letter first to Home Secretary and then to the DGP enclosing the copies of the counter affidavits filed on behalf of the Ahlawat and Randhir Singh informing that the Court was not satisfied with the averments made therein and an independent personal investigation was directed to be made by DGP who was required to file an affidavit and report on or before 4/11/1993, and writ petitions were directed to be posted for hearing at 2.00 p.m. on November 5, 1993. On 2/11/1993, Ahlawat and G. L. Malhi, DGP had met Ms. Indu and in their presence she had dictated the letter to the DGP, Shri Kalyan Rudra stating that she had already filed two counter affidavits on behalf of Ahlawat and Randhir Singh. Though Ahlawat was present when the letter was dictated, he did not point out that he had not signed any counter affidavit already filed in the Court on his behalf. The copy thereof along other material was handed over to Shri Malhi for onward transmission to the DGP. The letter was desired to be faxed immediately to the DGP. When Ahlawat met Ishwar Singh after the Court proceedings on 1/11/1993, they had discussed the matter. Ahlawat appears to have thought that things were not going on the lines he had charted out and he thought he would be required to retract from his stand in the counter-affidavit dated 30/10/1993 and to file another affidavit with a different version. When he got prepared another affidavit dated Nove 5/11/1993, and asked Ms. Malhotra to file it along with Vakalatnama she refused to do the same. She had already filed copies of the counter-affidavit dated 30/10/1993 in the Registry of the Court as per the rules on 4/11/1993, as directed by this Court. On 5/11/1993, Ahlawat filed another affidavit in which he stated

that HC Krishan Kumar had forged his signature and has filed the counter affidavit on his behalf.

(14.) Admittedly Krishan Kumar has not been made a respondent to the writ petitions, though he was a member of the investigation team which had gone to Agra to apprehend the accused Rahim Khan. In the enquiry conducted by Shri Kalyan Rudra, DGP, Ahlawat did not come out with the version that he had not signed the counter affidavit prepared on 30/10/1993, and filed on 1/11/1993 nor did he point out the forgery committed by Krishan Kumar. His counter-affidavit filed on 5/11/1993, would, therefore, obviously be an after thought to ditch his subordinate and save his skin. When this Court directed the enquiry and save his skin. When this Court directed the enquiry by the District Judge. Faridabad to find out the truth or the counter-version in the matter, all the persons including Ahlawat were examined. In the said enquiry, the main thrust was the forgery and as to who had committed the forgery. But it was not clear to the District Judge. Therefore, he castigated the conduct of Ishwar Singh but exonerated Ahlawat. This Court as well as the District Judge prima facie were impressed with the averments made by Ahlawat in his second affidavit filed on 5/11/1993, and his version was acted upon. This Court then directed the CBI to enquire into as to who actually was responsible for the forgery which was registered as a crime on 11/11/1994, and the task was entrusted to Shri N. K. Pathak, Inspector.

(15.) In the enquiry conducted by Shri N. K. Pathak, Ms. Malhotra, as a strict professional practitioner has stated the facts that had transpired in her office and the action taken by her in defending the officers and the affidavits filed by the officers etc. The CBI officers has concluded that HC Krishan Kumar had nothing to gain by forging the signature of Ahlawat. It was forged in the presence of Ishwar Singh who had kept the carbon copy in his custody and directed Paras Ram to deliver the signed copies in the office of Ms. Malhotra for being filed in the Court. Before Shri Pathak, Ishwar Singh admitted that Krishan Kumar had forged the signature in his presence and he had custody of the forged documents. Had he not had any prior instructions from Ahlawat, as a responsible officer to whom the duty of getting the counter-affidavit drafted on behalf of Ahlawat was entrusted, he would not have permitted Krishan Kumar to forge the signature and should have proceeded to Rewari to have the counter affidavit approved and brought the same back and given to Ms. Indu to be filed in the Court. Ahlawat being a respondent in the writ petition, he was bound to file the counter-affidavit by 1/11/1993, and had he not instructed his junior officers to forge his signature and to file the counter-affidavit, he would haveinstructed Ms. Malhotra to seek further time for filing the counter-affidavit. What is more, he himself was present in the Court premises on 1/11/1993. These circumstances clearly would indicate that Ahlawat had instructed Ishwar Singh to have the counter-affidavit of him and Randhir Singh drafted and that the two affidavits must be consistent. Since he knew that two minors were in wrongful confinement, he did not want to commit himself by signing the counter-affidavit and had instructed Ishwar Singh to direct Krishan Kumar to forge his signature. When Ahlawat attended the chambers of Ms. Indu on 2/11/1993 along with Shri G. L. Malhi, DIG, a letter was dictated in their presence to DGP to the effect that counter-affidavit on behalf of Ahlawat and Randhir Singh were already filed on 1/11/1993 and that the Court was not satisfied with the tenor of the averments made therein. If Ahlawat really had not instructed the junior officers to forge his signature on the counter-affidavit and file an affidavit on his behalf, nothing prevented him to mention to her that he had not signed any counter-affidavit and that he had not instructed anyone to sign the same on his behalf; he would have asked her as to why she had allowed filing such counter-affidavit without any instructions from him. He did not do that. That version of Randhir Singh and of Ahlawat in the counter-affidavits dated 30/10/1993, was consistent, namely minor boys were not in wrongful confinement. On the

other hand, when the report submitted by Shri Kalyan Rudra, the DGP was found against them, he thought that he must salvage himself from the earlier stand to avoid charge of perjury and decided to file another counter-affidavit making his subordinate officer the scape goat.

(16.) In this background, we have to consider the averments made by HC Krishan Kumar and ASI Randhir Singh that when Ishwar Singh asked Krishan Kumar to sign the affidavit of Ahlawat on his behalf on the carbon copy, he objected to sign and immediately Ishwar Singh contacted Ahlawat who had ordered Krishan Kumar on the phone to sign the counter-affidavit. There is nothing intrinsically improbable to disbelieve the version of Krishan Kumar that he was asked by Ahlawat to forge his signature assuring him that he would not be in trouble for forging his signature. In view of the admitted facts that Ahlawat was in supervision of the investigation of the cases registered against Rahim Khan, it would be obvious that minor boys brought by Ishaq Ahmad from Agra were kept in wrongful confinement with his connivance and that he thought that by denying the averments, the Court would be prepared to accept his version, used this authority as Superintendent of Police and directed his subordinate Krishan Kumar to forge his counter-affidavit. When Ishwar Singh asked Krishan Kumar to sigh the counter-affidavit forging the signature of his senior officer, he might have thought that it would not be proper to do so but when Ishwar Singh contacted, obviously on phone and had informed Ahlawat of unwillingness of Krishan Kumar to forge his signature on the carbon copy of the counter-affidavit, obviously on his instructions, Krishan Kumar forged his signature and, as seen, that the same was filed in the Court on 1/11/1993. When things were not going on the line charted out by Ahlawat and the report of the DGP was contrary to the stand taken by Ahlawat, he obviously thought over and decided to file another counter-affidavit making Krishan Kumar a scapegoat. Without his prior knowledge that Krishan Kumar had forged his signature, how was it possible for him to conclude that Krishan Kumar had forged the carbon copy of the counter-affidavit to be filed by him. It is not his case nor of Ishwar Singh before this Court that Ishwar Singh informedAhlawat of forging his signature on the carbon copy of the counter-affidavit or that he made an enquiry in which he came to know that Krishan Kumar had forged his signature. Though Krishan Kumar was a member of raiding party headed by Inspector Ishaq Ahmad, which had taken into custody two minor boys and kept them in wrongful confinement, he being not a party to the writ petitions, there was nothing for him to gain by forging the signature of Ahlawat on the carbon copy of the counter-affidavit and filing the same in the Court. Under these circumstances, our inescapable conclusion is that Ahlawat had instructed Ishwar Singh and others to meet Ms. Malhotra, to instruct her to draft the counter-affidavit on his behalf and Randhir Singh denying the wrongful confinement of minor boys and when counter-affidavit were drafted it was obviously only on the instructions given by the Ishwar Singh as the senior-most of the team, denying the wrongful confinement of the minor boys. The letters written by Ms. Indu and her professional conduct is transparently consistent with professional duty and she had truthfully and promptly discharged it in defending the officers.

(17.) When Ms. Indu expressed her inconvenience to continue as Standing Counsel for the State and sought permission of the Court to withdraw from the case due to the stand of Ahlawat and orally stated that the averments made in the affidavit of Ahlawat filed on 5/11/1993, were not correct, we directed her to file an affidavit stating as to what actually had transpired when she dealt with the cases. She has filed the affidavit to which Ahlawat has also filed another counter-affidavit to it. In her affidavit she has narrated the facts that had transpired in this case. She has also produced correspondence she had with the officials. Ahlawat even did not make any averments against Ms. Indu's actions and

conduct. Her affidavit is consistent with the conclusion we have reached and it corroborates the stand taken by Krishan Kumar and Randhir Singh.

(18.) As regards the directions issued by Ahlawat to Krishan Kumar pursuant to a telephonic call made by Ishwar Singh to forge his signature his counter-affidavit dated 30/10/1993 to be filed in this Court on 1/11/1993, the CBI Officer has also concluded in his report that Ahlawat having had a duty to the counter-affidavit and his not signing the affidavit prepared by Ms. Malhotra is highly unbecoming of a responsible officer and Krishan Kumar had nothing to gain by forging his signature and it appears to have been done on instructions from Ahlawat. We approve of his conclusion. (19.) Shri Sanyal, learned senior counsel appearing for Krishan Kumar contended that in view of the affidavit of Ms. Indu and the circumstances of the case the stand taken by Krishan Kumar is correct as he was threatened not to disclose these facts during the enquiry conducted by the District Judge, Faridabad at the pain of dismissal from service. Consequently, he did not come out from the red at that stage but when, after enquiry, the CBI in its report found against him, he had necessarily to come out with the truth. Consequently, he has truthfully stated in his affidavit whatever had transpired. His version and statement, therefore, is more probable and consistent and he had no intention to forge the signature of Ahlawat and to fabricate the record for being filed in this Court since he had nothing to gain from the proceedings before this Court. He was not a respondent. We find that there is justification in his contention. Though, Krishan Kumar was a member of the investigation team which visited Agra headed by Ishaq Ahmad who had played principal role in abducting the minor boys and kept them in wrongful confinement to coerce Rahim Khan to surrender, he was not made a respondent to the writ petitions. Being a member of the investigation team and having been asked to attend the crime meeting at Ambala Cantonment convened by Ahlawat on telephone who directed him, Randir Singh, Ishwar Singh and two others to go over to Delhi and brief Ms. Indu to have the counter-affidavits drafted, he had accompanied the party and accordingly followed the instructions issued by Ahlawat. When counter-affidavit of Ahlawat was drafted, as per the instructions, Ishwar Singh had asked Krishan Kumar to forge the affidavit of Ahlawat and when he had refused to do so. Ishwar Singh had contacted Ahlawat who had directed Krishan Kumar to sign the carbon copy of the counter-affidavit and assured him that nothing would be done to him. In these circumstances, Krishan Kumar came to forge signature of Ahlawat on the carbon copy of the counter-affidavit, but not with an intention to forge the signature of Ahlawat but in obedience to the command of Ahlawat. Thereafter SI Ishwar Singh had taken custody of the carbon copy of the counter-affidavit and instructed Paras Ram to hand it over to Mrs. Indu Malhotra for being filed in the Court. We, therefore, hold that he had no intention to forge the signature of Ahlawat on the carbon copy of the counter-affidavit dated 30/10/1993 filed in this Court.

(20.) The question then is : What is the role played by ASI Randhir Singh ? Shri Mehta, learned counsel appearing for him contended that Randhir Singh had no intention to fabricate the affidavit of Ahlawat nor had he filed in the Court. Though Randhir Singh was a member of the raid party headed by Ishaq Ahmad, which illegally took two minor boys into custody and wrongfully confined them, as regards forgery of signatures of Ahlawat by Krishan Kumar, from the circumstances of the case admittedly he dated 4th respondent to the writ petitions, he and Ahlawat obviously have taken aconsistent stand in there counter-affidavits dated 30/10/1993 tendered on 1/11/1993 that they had not taken the minor boys into custody nor had they wrongfully confined them. That statement is now proved to be false from two enquiries conducted by Shri Kalyan Rudra, DGP and the District Judge, Faridabad. He was present along with SI Ishwar Singh at the time Krishan Kumar had forged signature of Ahlawat on the carbon copy of the counter affidavit of Ahlawat.

Consequently, it must be held and that it is difficult to accept his version that the minor boys were not taken into custody and kept in wrongful confinement. He also abetted Krishan Kumar to forge the signature of Ahlawat. He would stand to gain by it as his version gets corroborated from that of Ahlawat. He thus filed false counter-affidavit dated 30/10/1993 in the judicial proceedings before this Court. Thereby he is liable to conviction under Section 193, Indian Penal Code, 1860 (IPC) for intentionally giving false affidavit in the judicial proceedings in this Court abetting Krishan Kumar to forge the signature of M. S. Ahlawat.

(21.) Ishwar Singh in his affidavit dated 10/07/1995 filed in this Court on 11/07/1995 has stated that he neither forged the signature of Ahlawat in the counter-affidavit dated 30/10/1993, nor filed any counter-affidavit before this Court as he had no motive for committing the act of forgery. He denied to have any knowledge affidavit that the carbon copy of the counte-affidavit of Ahlawat signed by Krishan Kumar was given to Ms. Indu for being filed in this Court and he believed that it was not filed. He has come out with false version toeing the line of Ahlawat. He deliberately omitted certain crucial facts relevant for the decision. He appears to have thought that ditching his subordinates and being consistent with the stand taken by Ahlawat would accelerate his promotional prospects and accordingly he had fallen in line with Ahlawat which is now found to be false. He admitted that he was asked by Ahlawat to go along with the party to instruct Ms. Indu to draft the counter-affidavits. He handed over the counter-affidavit given by Ms. Indu to Kartar Singh, and asked him to immediately proceed to Rewari whereat Ahlawat was camping, for his signature on the counter-affidavit since the case was posted for hearing on 1/11/1993. He stated that he had met Ms. Indu on 31/10/1993 which on its face is false. The counter-affidavit of Randhir Singh and Ahlawat bear the said date and were attested with that date. Ahlawat received draft on 31/10/1993, at 2.00 a.m. He went to Ms. Indu to instruct her to draft the counter-affidavit. He admitted that Krishan Kumar forged the signature in his presence and in the presence of Randhir Singh. He has further stated that he had no motive to abet the forgery committed by Krishan Kumar. It is contended by his learned counsel that since he was not a member of the raid party who took the minor boys into illegal custody and put them in wrongful confinement, there is no reason for him to file false evidence or to commit forgery of signature of Ahlawat. There is nothing to show that he committed any offence nor is he liable for contempt of this Court.

(22.) At the cost of repetition, we may reiterate that to the crime meeting held on 30/10/1993 at Ambala Cantonment, convened by Ahlawat, Ishwar Singh had admittedly attended. Ahlawat had instructed him to proceed along with Randhir Singh, Krishan Kumar and two others to meet Ms. Malhotra and have the counter-affidavits drafted. Admittedly, he proceeded and met Ms. Malhotra. She drafted the counter-affidavits on 30/10/1993, andhanded them over to the parties. He being senior-most officer among the party, obviously he had taken the originals of the counter-affidavits to be signed by Ahlawat and Randhir Singh and directed Kartar Singh to proceed to Rewari and deliver the same to Ahlawat. It is now an admitted fact that Krishan Kumar forged the signature of Ahlawat in the carbon copy in his presence. On what date it was forged is not the material point. But it is the definite case that after the counter-affidavit was handed over to them in the office of Ms. Indu, Ishwar Singh had sent the original draft. When he asked Krishan Kumar to forge but he refused to forge the signature of Ahlawat, he contacted Ahlawat who had directed Krishan Kumar to sign the carbon copy of his counter-affidavit. On command from Ahlawat, Krishan Kumar had forged it. From these facts, it is clear that Ishwar Singh acted in concert with Ahlawat to fabricate counter-affidavit with facts false to his knowledge that minors were not in wrongful confinement or illegal custody and induced Krishan Kumar to forge the signature of Ahlawat on the carbon copy of the counter affidavit to be filed on

behalf of Ahlawat and after forgery, as admitted before the CBI officer, he had taken custody of the forged carbon copy of the counter-affidavit, sent them to Ms. Malhotra through Paras Ram for being filed in the Court. He was present on 1/11/1993, in the Court premises along with Ahlawat. Though he disclaimed knowledge of the forged document having been filed in the Court, in view of the evidence on record that he appeared in the Court when the proceedings were going on, he had seen through the filing of the same in the Court. When this Court was not satisfied with the tenor of the averments made in the counter-affidavits filed by Ahlawat and Randhir Singh, he informed the same with a disturbed mind to Ahlawat. Thus he is a party to the fabrication of false record and abetted Krishan Kumar to forge the signature of Ahlawat and after taking custody of the carbon copy of the counter-affidavit with forged signature, he had entrusted the same to Paras Ram for delivery in the office of Ms. Indu and the same was filed in this Court. He falsely denied the facts in his affidavit filed in this Court. Thus he not only actively participated in the fabrication of the false counter-affidavit dated 30/10/1993, with false averments that minors were not in wrongful detention or illegal custody but also entrusted the same for being filed in the judicial proceedings of this Court. He abetted Krishan Kumar to forge the signature of M. S. Ahlawat. Thus he committed an offence under Section193, Indian Penal Code

(23.) The question then is : Whether Ahlawat has committed contempt of the proceedings of this Court and has committed the offence under Section 193, Indian Penal Code by making false statement and directing forgery of his signature and filing of forged documents in this Court ? Shri U. R. Lalit, his learned senior counsel, strenuously contended that immediately on coming to know that his signature was forged on the carbon copy of the counter affidavit purported to be dated 30/10/1993, he had informed the learned counsel Ms. Indu on 2/11/1993. He also informed the same to the DGP., Shri Kalyan Rudra on the same day. He also had brought to the notice of this Court on the first available opportunity, namely, on 5/11/1993. He had also taken disciplinary action against Krishan Kumar and Randhir Singh respectively for forging his signature and filing the affidavit with false averments in this Court. He had stated in this counter-affidavit filed on 5/11/1993 the true facts. The allegation that he instructed Krishan Kumar, when Ishwar Singh had contacted him on phone to forge his signature on the counter-affidavit, is a fabricated version to buttress the stand of Randhir Singh and sought shelter behind the shadow of superior officer.

Since Ahlawat had already taken disciplinary proceedings against Randhir Singh and Krishan Kumar, the version set up by Krishan Kumar and Randhir Singh is to defend themselves in those proceedings. The version that Ishwar Singh telephoned to Ahlawat on 31/10/1993 informing Ahlawat thatKrishan Kumar refused to sign in the carbon copy of the counter-affidavit is ex facie false for the reason that the affidavit was attested by the Notary on 30/10/1993 which tends corroboration from the counter affidavit dated 30/10/1993 filed by Randhir Singh. They have an axe to grind against Ahlawar. Therefore, they have made false averments to implicate Ahlawat. In the representation made by Krishan Kumar to the Government to expunge the adverse remarks made by Ahlawat against him, this version has not been stated. The story of authorising to file an affidavit dated 30/10/1993, is inconsistent with the true state of facts. He was not a party to the raid at Agra at the house of Rahim Khan and he would not have filed an affidavit with such a wrong fact. When original counter-affidavit was received by M. S. Ahlawat a 2 a.m. on 1/11/1993 on going through the contents thereof, he found to be incorrect since he was not a member of the raid party to take the minors into the illegal custody and for wrongful detention. Therefore he would not have instructed to make such an averments in his counter-affidavit. Therefore, he instructed Ms. Indu to file another counter-affidavit with

the correct averments which was not done . Consequently, he had engaged another counsel and got the counter-affidavit filed on 5/11/1995, with true facts. He contends that from these circumstances, it is clear that Ahlawat has not made any false averment not instructed anybody to forge his signature. He did not commit any contempt of the Court. He fairly conceded that he has no argument on the contents of the affidavit filed by Ms. Indu in this Court. He says that Ahlawat may be of mistaken impression in not correcting Ms. Indu, at the time, when she had dictated in her letter addressed to DGP, Shri Kalyan Rudra that counter-affidavits on behalf of Randhir Singh and Ahlawat were already filed. But, in view of the facts stated and the above circumstances, Ahlawat had not committed any offence nor is he liable for contempt proceedings nor has he pleaded with any false averment in the affidavits filed in this Court. (24.) As to when, for the first time, Ahlawat had come to know that his signature was forged in the affidavit dated 30/10/1993, has been kept delightfully vague. He brought to the notice of this Court at the earliest opportunity, namely, 5/11/1995, the date to which this Court had posted the case for hearing of the factum of forgery of his signature.

(25.) We have given our anxious and careful consideration to his forceful contention. On 29/10/1993, this Court had taken up the case upon motion on Board and had issued notice to the respondents. Dasti Service in addition was ordered. Dasti service to the standing counsel was also ordered. The case was directed to be posted on 1/11/1993. Ms. Indu on 1/11/1993, wrote a letter to the Home Secretary informing that minor children by name Afzal and Habib were illegally detained at Ambala by the 3rd respondent. Ahlawat, and the 4th respondent Randhir Singh. Two separate counter-affidavits stating that the children were not in their illegal custody were filed by Randhir Singh and Ahlawat. On the basis of the affidavit of an advocate of U.P. (copy enclosed thereto), the Court was not inclined to believe the statements made by Ahlawat and Randhir Singh. She enclosed all the records since the Court had directed the Home Secretary to conduct an enquiry and to submit his report by 5/11/1993. She requested him to be personally present in the Court on the date of posting. On information that he was availing leave, a mention was made to the Court and the Court by proceedings dated 2/11/1993 directed enquiry by DGP and to submit the report by 5/11/1993, at 2.00 p.m. She also wrote on the same day a letter reiterating the entire contents and enclosed the counter-affidavits filed on behalf of 3rd and 4th respondents. This letter admittedly was dictated in the presence of M. S. Ahlawat and DIG., G.S. Malhi. No denial on the part of Ahlawat, i.e. he did not authorise anybody of file a counter-affidavit on his behalf was made at that time. It is already seen that on perusing the affidavits, the Court was not inclined to accept their stand and ordered an enquiry. On 1/11/1993, on which date the case was posted these counter-affidavits were tendered and were later filed into Court. It is clear from the record and affidavit of his driver that Ahlawat was present in the Court premises on 31/10/1993. His driver made the affidavit long before our issuing the notice produced before enquiry held by the District Judge, Faridabad that Ahlawat was present in the Court premises. There is nothing to disbelieve the version of the driver which corroborates the statement of Krishan Kumar and Randhir Singh. As a responsible officer, he was to file a counter-affidavit with true and facts. Instead, since he knew that two minor boys were in illegal and wrongful confinement, he did not want to commit himself to that position and by signing the counter-affidavit with false facts, he would be exposed to perjury etc. So, he disowned responsibility and directed Krishan Kumar to forge his signature so as to use the same in judicial proceedings. The CBI Officer also has commented upon the conduct of Ahlawat. When Ahlawat was required to file an affidavit on 1/11/1993, being a respondent unless he had already got filed a counter-affidavit, the legitimate thing that could be done was to seek time to file a counter-affidavit as he was not satisfied with the averments in the draft

counter-affidavit received at Rewari whichwas not according to his stand. The least that can be said is that having allowed the counter-affidavit filed on his behalf, he was watching the proceedings to know how the things were going on and whether they are on the lines which he had charted out.

(26.) Admittedly, he deputed Ishwar Singh and 4 Constables to proceed to Delhi from Ambala to meet Ms. Indu and to give instructions to draft the counter-affidavits. The counter-affidavit filed by Randhir Singh is consistent with the one filed on behalf of Ahlawat dated 30/10/1993. It would thus be clear that Ms. Indu, obviously prepared the counter-affidavits on the basis of information furnished by Ishwar Singh which contain denial of taking the minors into custody and wrongfully confining them at Ambala etc. From these facts, we can unerringly draw the conclusion that as per his instructions which receive corroboration from the stand of Randhir Singh that the counter-affidavit dated 30/10/1993, was drafted with false averments that the minor boys were not taken into custody nor are they kept in illegal detention.

(27.) The question then is : Whether Ahlawat had given any investigation to Ishwar Singh to direct Krishan Singh to forge his signature on the carbon copy of the counter-affidavit and on refusal, whether he had directed Krishan Kumar to forge the same. It stands to reason that he had given such directions. Admittedly Ishwar Singh had taken the counter-affidavit of Ahlawat drafted by Ms. Indu and sent the original through Kartar Singh to Rewari for delivery to M. S. Ahlawat and Krishan Kumar forged the signature of Ahlawat on the carbon copy of the counter-affidavit in his presence. We have already held that Krishan Kumar had nothing to gain in forging the signature of M. S. Ahlawat. Unless Ishwar Singh had prior instructions in this behalf from Ahlawat, as responsible officer, he would have prevented Krishan Kumar to forge the signature of Ahlawat or immediately would have contacted and put Ahlawat on notice of it. That was not the case of either of Ishwar Singh or Ahlawat. It stands to reason to accept the version stated by Krishan Kumar and Randhir Singh that Ishwar Singh had asked Krishan Kumar to forge signature of Ahlawat on the carbon copy of counter-affidavit for being filed in this Court on behalf of Ahlawat. When M. S. Ahlawat was duty-bound to file the counter-affidavit in this Court before 1/11/1993, in the absence of any request for extension of time, it would be obvious that he had decided to get the counter-affidavit, as instructed by him, drafted by Ishwar Singh and to have the same filed in the Court. He did not want to commit himself by signing the counter-affidavit to the false version, viz., that minor boys were not taken into illegal custody and were not in wrongful confinement. He had also used his office as a Superintendent of Police and directed his subordinate Krishan Kumar to forge his signature. When the record was admittedly in the custody of Ishwar Singh, obviously Ishwar Singh had asked Krishan Kumar to sign it. Otherwise, how it would be possible for Krishan Kumar to take it into his custody and to forge the signature of Ahlawat ? It would, therefore, be likely that on the instructions by M. S. Ahlawat, Krishan Kumar had forged it. In the absence of any explanation for not seeking adjournment to file his counter-affidavit on 1/11/1993, and, as to when, for the first time, he had come to know of the forgery, committed by Krishan Kumar, it stands to reason that Ishwar Singh must have informed him that Krishan Kumar had forged his signature and got his counter-affidavit filed in the Court and that he was satisfied that it would be sufficient to buttress the stand he had taken. When the things were not going on the lines charted out by him, due to the report of the DGP., after 4/11/1993, he obviously must have thought that he must come out from the red and make a statement before the Court by filing yet another counter-affidavit which was accordingly filed on 5/11/1995. He had stated in the second counter-affidavit that on 2/11/1993, he informed Shri Kalyan Rudra, DGP., that he did not sign the counter-affidavit. It is ex facie false since neither in the report filed by Shri Kalyan Rudra nor in the

affidavit sworn by him and filed on 5/11/1995, we find such an averment having been made. It is an obvious falsehood. It would be clear that he abused his office as a Superintendent of Police, directed his subordinate Head Constable Krishan Kumar to forge his signature or at least abetted it and got the carbon copy of the counter-affidavit filed with forged signatures in the Court while he retained the original draft with him. The reason is obvious that he did not want to commit himself to the false stand which he had taken in the earlier affidavit, since he knew that the minors were illegally detained and were in wrongful confinement. Therefore, he filed the second counter-affidavit on 5/11/1993, with false averments pretending of the forgery of his signature.

(28.) The question then is : Whether the averments made in the counter-affidavit dated Nov 5/11/1993, are correct ? In view of the above conclusion, the obvious answer would be that since he knew that the report submitted by Shri Kalyan Rudra, DGP, that the minors boys were wrongfully detained and were in wrongful confinement, the averments made in the counter-affidavit dated 30/10/1993, were obviously false to escape strictures to be passed against him or to avoid prosecution for perjury. He came with the version in the counter-affidavit making Krishna Kumar a scapegoat. If he really had no knowledge of Krishan Kumar forging and signature and he had not directed to file the Carbon Copy of the counter-affidavit earlier, as found earlier, though he was available in the Court, one would expect that he would have sought further time on 1/11/1993, to filehis counter-affidavit which was not done. Therefore, his counter-affidavit dated 5/11/1993, to the effect that the averments made in counter-affidavit dated 30/10/1993, were not to his knowledge is also a false affidavit. Here one more circumstance that could be taken note of is that, as rightly remarked by CBI Officer, whether subordinate officer could be dare enough to fabricate the counter-affidavit to be filed by Ahlawat and forge signature of his superior officer, particularly, in judicial proceedings of this Court and for what gain ? It is highly unbecoming on the part of responsible Superintendent of Police like Ahlawat to play hide and seek game in the judicial proceedings and make use of his subordinates to fabricate false affidavits and give instructions to forge his signature for use in the judicial proceedings. It is true that the affidavit dated 30/10/1993, was attested by a Notary on 30/10/1993, and the telephonic conversation with Ahlawat by Ishwar Singh made on 31/10/1993, was ex facie improbable. The CBI Officer has fairly commented upon the Notary Mr. Bhat of his abdication of duty to have the signatory identified to be the deponent and in allowing the people to sign without proper verification of the identity. When the counter-affidavit was prepared, admittedly, on 30/10/1993, and when the respondent Ahlawat was not in Delhi, it stands to reason that having sent draft through Kartar Singh to Ahlawat, who was camping at Rewari, Ishwar Singh was incharge of this duty. Obviously he had a contract with Ahlawat to know as to what is to be done on the counter-affidavit. It would obviously be only on 31/10/1993, though exact time is not of material consequence, but the fact remains that it must have been signed only after Ahlawat perused the counter-affidavit he had ensured that it was drafted according to his instruction and thereafter he had obviously instructed Ishwar Singh to have his signature fabricated and forged by Krishan Kumar on the carbon copy and Ahlawat deliberately kept back the original counter-affidavit. Carbon Copy after forged signature was admittedly filed in the Court on 31/10/1993, and Ahlawat was present in the lawn of this Court waiting for the result of the case. It would thus be clear that it was attested only on 31/10/1993, and the Notary had obliged them to give the date of his attestation as 30/10/1993.

(29.) The disciplinary action taken against Krishan Kumar and Randhir Singh by Ahlawat is only as a self-serving step. The fact that he did not take any disciplinary action against Ishwar Singh, who was admittedly present at the time of forging the signature of M. S. Ahlawat itself is a positive proof that both Ahlawat and Ishwar Singh were in collaboration

and used the subordinate to forge the signature of Ahlawat. It would thus be clear that Ahlawat made further false statement in his second affidavit. (30.) It is seen that the crucial evidence on record is the affidavit of Ms. Indu. the learned Standing Counsel for Haryana and her letters which bear great relevance. They are part of the record and they fully support the stand of Krishan Kumar as found by us earlier. She has no axe to grind against Ahlawat and in fairness Shri Lalit had nothing to comment upon the stand taken by Ms. Indu Malhotra and acted as a responsible and true professional practitioner. The fact that M. S. Ahlawat did not even mildly suggest, let alone violently protest of Ms. Indu Malhotra's filing a counter-affidavit on his behalf is a positive fact that he knew that his counter-affidavit was, as a fact, forged by Krishan Kumar. But he made a false averment in this affidavit which is called "fifth counter-affidavit" that he had objected and informed Ms. Indu Malhotra that he did object to her filing the counter-affidavit on 2/11/1993, and informed her that he had not sworn any counter-affidavit nor was he aware of the averments and the allegations made in the writ petition. These are obviously false averments which induced this Court and also the District Judge to believe that he was not responsible for the forgery of his signature and as to who had committed the forgery was not known to him. These statements are now proved to be false. Therefore, he intentionally gave false affidavit evidence from stage to stage in these judicial proceedings punishable under Section 193 Indian Penal Code

(31.) The question then is : whether he committed contempt in the proceedings of this Court ? Section 2(b) defines "Contempt of Court" to mean any civil or criminal contempt. "Criminal contempt" defined in Section 2(c) means interference with the administration of justice in any other manner. A false or a misleading or a wrong statement deliberately and wilfully made by a party to the proceedings to obtain a favourable order would prejudice or interfere with the due course of judicial proceedings. It is seen that Ahlawat, respondent No.3 to the main writ petition and incharge of the criminal administration, with his connivance caused two minor boys' wrongful detention. He made an averment in the counter-affidavit dated 30/10/1993, that they were not in wrongful detention nor are they taken into custody which was later found to be false. He first used fabricated counter-affidavit, forged by Krishan Kumar in the proceedings to obtain a favourable order. But when he perceived adverse atmosphere to him, he fabricated further false evidence and sought to use an affidavit evidence to show that Krishan Kumar had forged his signature without his knowledge and filed the fabricated document. Thereby he further committed contempt of the judicial process. He has no regard for truth. From stage to stage, he committed contempt of the Court by making false statements. Being a responsible officer, he is required to make truthful statements before the Court, but he made obviously false statements. Thereby, he committed criminal contempt of judicial proceedings of this Court.

(32.) From the above discussion and conclusions the question is : what punishment is to be imposed on Randhir Singh (ASI), Ishwar Singh (SI) and M. S. Ahlawat (Superintendent of Police) ? None of them made any candid admission nor tendered unqualified contrite apology. Police officers, who are supposed to be the so-called disciplined force, have deliberately fabricated false records placed before this Court without any compunction. It is, therefore, of utmost importance to curb this tendency, particularly, when they have the temerity to fabricate the records with false affidavit and place the same before the highest Court of the land. Their depravity of the conduct is writ large. M. S. Ahlawat is unworthy to hold any office of responsibility. Therefore, Randhir Singh (ASI) and Ishwar Singh (SI) shall be punishable under Section 193 Indian Penal Code and accordingly there are convicted and sentenced to undergo rigorous imprisonment for a term of 3 months and 6 months respectively. Ahlawat, the Superintendent of Police, is punishable under Section 193 Indian Penal Code He also committed contempt of the proceedings of this Court

punishable under Article 129 of the Constitution. Accordingly, he is convicted and sentenced under Section 193 Indian Penal Code to undergo rigorous imprisonment for a term of one year. He is convicted and sentenced to undergo rigorous imprisonment for a term of 6 months under Article 129 of the Constitution. Both the sentences are directed to run concurrently. Krishan Kumar, Head Constable is exonerated of the charge under Section 193 Indian Penal Code with warning to show exemplary conduct hereafter. His bail bonds are discharged.

(33.) The Director General of Police, Haryana is directed to take the convicts M.S. Ahlawat, Superintendent of Police, Ishwar Singh, Sub-Inspector and Randhir Singh, Assistant Sub-Inspector forth with into custody and have them consigned to Central Jail, Chandigarh to undergo the sentences and submit a report of compliance to the Registry within one week from the date of the receipt of this order.

(34.) We place on record our appreciation for prompt investigation conducted and the report submitted, within the time given, by the CBI Officers.

(35.) Though this unfortunate episode has landed the police officers in conviction, we have no reason to believe that the real offenders in the original crime would be tried and dealt with according to law and these orders will not have any effect on the trial of those cases and must be dealt with according to law.

(36.) The writ petitions stand closed.Order accordingly.

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Cross Citation :1996-AIR(SC)-0-1925 , 1996-SCC-9-74

SUPREME COURT OF INDIA

Hon'ble Judge(s) : A. M. AHMADI, C.J.I. AND S. C. SEN, J.

SECRETARY,HAILAKANDI BAR ASSOCIATION

Vs.

State of Assam

Writ Petition (Criminal) 209 Of 1993 May 09,1996

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Prosecution of Police Officer (S.P.) for filing false affidavit/ enquiry report before Court – A undertrial prisoner was brutally beaten by Police who died up – Bar Association send letter to Supreme Court – Treated as writ – Court called report from S.P. – S.P. A.K. Sinha Kasshyap filed a false report to save guilty police officer – Court not satisfied with reply

called report from C.B.I. – C.B.I. pointed out the disdendful role played by S.P. said to be against all tenents of law and morality – The report and affidavit submitted by S.P. ound to be false/ fabricated – Supreme *Court* issued a Show cause notice to S.P – In reply to the notice S.P. again try to mislead to court and try to justified his illegal acts – S.P. is guilty of ontempt of Court sentenced to imprisonment for three months.

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J U D G M E N T

SEN, J.

This case arises out of a notice issued to A K. Sinha Cassyap, Superintendent of Police, Hailakandi to show cause why he should not be held guilty of Contempt of Court. The allegation against the contemner is that a shocking case of police brutality leading to the death of an undertrial prisoner was sought to be covered up by him by an untrue and misleading report sent to this Court followed by a false affidavit.

The Secretary, Hailakandi Bar Association, forwarded to this Court a copy of the resolution passed by the Association at an emergent meetings held on 16th March, 1993 condemning the brutal assault leading to the death of an undertrial prisoner Nurul Haque.

Having regard to the serious nature of the complaint, this Court by an order dated 20th August, 1993 decided to treat the copy of the resolution forwarded by the Secretary, Hailakandi Bar Association as Writ Petition under Article 32 of the Constitution of India. The Director General of Police, State of Assam, was directed to inquire into the matter and send a detailed report in regard to the events leading to the death of Nurul Haque. Pursuant to the said order, the Director General of Police forwarded his report under letter No.C-150/91/107 dated 13th September, 1993. In the letter it was stated that the Director General of police got the matter investigated by the Superintendent of Police, Hailakandi, who prepared a report which was forwarded to this Court along with a medical certificate dated 10th March, 1993 and particulars of medical examination of Nurul Haque done on 11th March, 1993. In the report prepared by the Superintendent of Police, it was specifically stated, "Nurul Haque neither died in police lock-up nor in police custody. He died while in judicial custody as UTP (undertrial prisoner). He was not tortured during the period of police custody."

To say the least, the report was not satisfactory. The inconsistency in the statement of facts made in the report was pointed out in the Order of this Court dated 24th January, 1994. It was noted in the Order that the report of the Superintendent of Police that "the P.M. Report did not indicate any external injury over the dead body" was factually incorrect and misleading. The Superintendent of Police, A.K. Sinha Cassyap, was asked to explain the same by affidavit and he stated the word 'not' had inadvertently appeared for which he tendered apology. This explanation was also found to be unsatisfactory. It was pointed out that deletion of not' will leave the sentence grammatically incorrect. The senior police officers were reminded to show extra care while forwarding their comments to this Court and not to mechanically forward the information collected by their subordinates. The Court had called for the report of the Director General of Police because the Court reposed

confidence in the objectivity of a person holding such a high office. It was further noted in the Order that another disturbing feature of the case was that the police had registered the offence under Section 302 I.P.C. against unknown members of the public. The story given out by the police that the members of the public had beaten Nurul Haque before he was apprehended by the police was not borne out by the reaction of the public and also the Bar Association which had taken up the cause of Nurul Haque. Neither the report of medical examination done on 12th March, 1993 nor the laboratory report on the viscera had been forwarded. Having regard to the facts and especially to the fact that the deceased had suffered a fracture, the possibility of the injuries having been caused by the police could not be ruled out altogether. It was ordered:-

"Since the local police at the highest level have taken a stand that the assault on the deceased was by members of the public and not the police after the apprehension of the deceased, it is futile to expect an independent and wholly objective investigation by the State Police. Even otherwise, the people will have little confidence in the investigation no matter how honest and objective the investigation be. In the circumstances, we deem it most appropriate that the investigation of the crime in regard to the murder of the deceased under CR Case No.275/93 and/or F.I.R. No.120/93 should be undertaken by the Central Bureau of Investigation (CBI). In doing so, the CBI will bear in mind the allegation of the wife and other relations of the deceased that he died on account of the beating given to him after his apprehension on 9.3.1993, without being influenced by the fact that in the F.I.R. No.120/93, it is alleged that the assault was by the members of the public. The Registrar General will write a letter to the Director of CBI to take immediate steps to take over the investigation of the crime from the local police and try to complete the same at an early date and bring the real culprits to book. This petition will stand so disposed of."

After the Writ Petition was disposed of on 24th January, 1994. a report was received from Superintendent of police, CBI, SPE Division, Silchar. Along with the report he sent a forwarding letter dated 5th June, 1995 in which he stated that the disdainful role played by Shri A.K. Sinha Cassyap, the then Superintendent of Police, Hailakandi District, was against all tenets of law and morality. He submitted a false/fabricated affidavit/report to the Hon'ble Supreme Court. The falsity of his report submitted to the Hon'ble Supreme Court is evident in every sentence, if not every word of the report of said Shri A.K. Sinha Cassyap, S.P. On consideration of the letter and the report submitted by the Superintendent of Police, CBI, a Show Cause Notice was served upon A.K. Sinha Cassyap for showing cause why he should not be punished for the criminal contempt of this Court for filing a false and fabricated report/affidavit in this Court.

Since the allegation against Shri A.K. Sinha Cassyap is that he had given an untrue report and filed a false affidavit about the death of Nurul Haque to mislead the Court, it is necessary to set out the facts found by the Superintendent of Police, Central Bureau of Investigation, in detail.

On 9th March, 1993 being Tuesday was a market day. It was the month of Ramzan. Nurul Haque, resident of Boalipar under P.S. Hailakandi, was coming back from the market towards his house at about 7.00/7.30 P.M. He was 35 years of age and in good health. A Police party, led by Abdul Hye Choudhury, S.I., arrested Nurul Haque. His house was about 400 yards from the market. As per the version of eye witnesses, Nurul Haque was overpowered by S.I. Abdul Hye Choudhury and party, who were all in plain clothes, and took him into a Police Jeep to Hailakandi Police Station. Although the Police later claimed

that Nurul Haque was assaulted by members of the public at the time of the arrest, neither the villagers nor relatives nor market people, who were eye witnesses to the incident, noticed any such assault, nor was there any record of Nurul Haque being treated for injury on 9th March, 1993. On 10th March, 1993, in the early morning, Azizur Rahman, brother of Nurul Haque, his wife and mother went to meet Nurul Haque at Hailakandi Police Station, but were not allowed to meet him. On 11th March, 1993, Azizur Rahman and some other relatives of Nurul Haque went to the Court of the Chief Judicial Magistrate, Hailakandi, where they met Nurul Haque, who told them that he had been brutally beaten up by S.I. Abdul Hye Choudhury, Roy Daroga (Rajan Roy S.I.) and Home Guard Dalim in the lock-up. On 11th March, 1993, Nurul Haque was produced before the Chief Judicial Magistrate, Hailakandi, with a prayer for 72 hours police remand It was also prayed that since Nurul Haque was assaulted by members of the public, medical treatment may be provided to Nurul Haque. The prayer was granted.

Even before this, on 10th March, 1993 Nurul Haque had been taken to Hailakandi Civil Hospital at about 5.30 P M. for treatment. He was brought back to the Police Station after receiving treatment. Dr. M.L. Bhattacherjee, the Medical Officer on duty, examined the patient and recorded his findings in the Emergency Register as follows:- "(i) Abrasion in cheek 1 cm x 1 cm.

This may be caused either by hitting of a blunt object or by falling.

(ii) One abrasion in left leg 2'5 cm x 1 cm. This might be due to fall or some blunt object.

(iii) Abrasion on fore-head, 2 cm x 2 cm. It may be due to the same reason as mentioned earlier.

(iv) Deep tenderness on right leg. The patient was complaining that he was having a severe pain on right leg. As far as he remembers this was just below the medial side. But there was no external injury at the spot."

The patient complained that he had been beaten up by the police. The police said that he was a dacoit and was brought for medical treatment after arrest. The Doctor advised X-Ray, A.P. and lateral view of right Tibia and the Fibula. The Doctor noticed that all the injuries were fresh and had been received within 24 hours. The patient was healthy and could walk freely with a slight limp for pain on the right leg. The patient was treated at Emergency Ward for about 15 minutes and then discharged. As the X-Ray machine of the Civil Hospital was not in order, the Doctor advised the police party to get a X-Ray done outside. There is nothing on record to show that Nurul Haque was given any treatment thereafter nor any X-Ray was done as advised by the Doctor. But, he was interrogated thoroughly. On 11th March, 1993 at 1.15 P.M. Nurul Haque was taken from Hailakandi Police Station to Civil Hospital for treatment. The Doctor on duty, Dr. H.A. Ahmed, recorded the following injuries suffered by the patient: "(i) One lascerated injury present

over the left thumb of size 2'5cm x l'5cm x skin deep.

(ii) One abrasion over the left forearm at middle third of size 1 cm x 2 cm.

(iii) One abrasion present over the left arm of size 2'5cm x 2cm.

(iv) One abrasion present over the left leg. Over the tibin of size 2 cm x 2 cm.

(v) One lascerated wound present over the right leg at upper third over tibia of size l'5cm x l'5cm x bone deep and causing severe tenderness."

At 2.15 P.M. Nurul Haque was brought back from the hospital and kept in the lock-up of the Police Station. He was produced before the Chief Judicial Magistrate, Hailakandi, on 12th March, 1993, with a prayer for holding Test Identification Parade. The prayer was allowed. In the order of the Chief Judicial Magistrate, Hailakandi, it was recorded that Nurul Haque had been given medical treatment and that the jail doctor should provide treatment to Nurul Haque. The jail doctor checked Nurul Haque and found that he was suffering from multiple injuries and due to lack of facilities he referred the patient to Civil Hospital, Hailakandi. At 6.45 P.M. Nurul Haque was once again brought to Hailakandi Civil Hospital. He was taken to the Casualty Ward. In the Casualty Ward Register it was recorded that he was suffering from multiple injury. Dr. Tapan Kumar Bhattacharjee was the doctor on duty. However, later on an extra word 'old' was inserted in between 'multiple' and 'injury' to give a wrong impression about the period when the injuries were suffered. He was admitted at 7.20 P.M. in the Indoor Ward. In the treatment report, the time of the injury was apparently corrected from 12 hours to 40 hours. It was recorded that the patient was healthy and fully conscious and the following injuries were found:-

"(i) One lascerated injury in left thumb.

(ii) One abrasion over left forum at middle third.

(iii) One abrasion over left arm.

(iv) One abrasion over left leg over Tibin.

(v) One lascerated injury present in the right leg upper third to Tibia. And the all injuries were found infected and there was no record/report available for having conducted X-ray examination."

The patient received some treatment but he collapsed on 13th March, 1993 at 5.25 A.M. Dr. Gautam Pal, who was on duty, noted that the patient was deeply unconscious, pulse rate rapid and thready, blood pressure could not be felt. The patient was injected Decadrum, a life saving drug. He was put on oxygen and cardiac massage was also given. At 5.30 A.M. Nurul Haque died.

The Superintendent of Hailakandi Civil Hospital informed the Superintendent, District Jail, Hailakandi, that the undertrial prisioner Nurul Haque admitted on the previous day with the multiple injuries had expired at 5.30 A.M. on 13th March, 1993 due to Cardio Respiratory failure as per hospital record. The death was also recorded in the Undertrial Prisioners Register of Hailakandi District Jail. The deadbody was sent for burial. There was no record of intimating family members.

Hailakandi police registered a case under Section 302 IPC in respect of the death of Nurul Haque against the members of the public on the basis of complaint filed by S.I. A.H. Choudhury. The case was to be investigated by Dinanda Phukan. O.C. The inquest was conducted by N. Borborah, S.I., Hailakandi Police Station on 13th March, 1993 in the Civil Hospital. There were eight injuries in the lower portion of the right hand, in the right hand joint etc. There was swelling and lasceration in the right hand and also the right side of the waist. There was swelling on the right and left knees.

On 14th March, 1993 the deadbody was sent to Hailakandi Civil Hospital for post mortem examination which was done by Dr. S.R. Roy who was only an L.M.F. doctor and not qualified for the job. According to his finding the injuries were ante mortem in nature and the death was due to Mayocardial Infraction with heart failure.

The deadbody was collected and sent to family members of Nurul Haque. It was refused by the family members. The Superintendent of District Jail, Hailakandi, wrote to the C.J.M., Hailakandi, that as the relatives of the deceased were unwilling to take the deadbody for burial, he may be allowed to dispose of the deadbody as per Jail Manual Rule and Muslim Religious Rite. The prayer was allowed by the C.J.M.

On 15th March, 1993, the Superintended of District Jail, Hailakandi, requested the C.J.M. that no relative of the deceased had come to take the deadbody from the Civil Hospital for burial. The deadbody was getting decomposed gradually and bad smell coming out from it. A prayer was made for disposal of the body as per Muslim Religious Rites. The prayer was allowed. The wife of the deceased, Fatema Begum, filed an application for recalling the order and to pass order for the post mortem examination of the deadbody by a medical team in Silchar Medical College. The C.J.M. called for a report from the Jail Superintendent about the. disposal of the deadbody immediately. The Superintendent reported that the deadbody was sent to Government land near Basic Training Centre, but the public of that area strongly objected to the burial of the deadbody. The deadbody was lying in front of Police Station Hailekandi at the time when the matter was reported.

The C.J.M. thereupon passed an order on the application of the widow of Nurul Haque and noted the fact that a number of lawyers appeared in his court and prayed for further post mortem examination at Silchar Medical College. The C.J.M. thereupon directed the deadbody to be sent to Silchar for further medical examination. The wife of the deceased was directed to accompany the deadbody and take delivery of the deadbody after post mortem was over. On 16th March, 1993, the deadbody was brought to Silchar Medical College and the post mortem was conducted by Dr. B.K. Barah carried out the post mortem examination and sent the viscera for further examination. In the report of the Superintendent of Police, CBI, it has been stated:-

" ....an accused who was arrested in healthy condition was a dead person at the hands of police and the attending doctors. They neither gave him food nor proper medical treatment throughout this period.

In the C.D. of the I. O. nowhere it is mentioned that he was provided with even a glass of water, less to say of food. Despite repeated

suggestion of the doctor to get him X-rayed, no X-ray was got done though his right leg was fractured. The inevitable result was the death of deceased Nurul Haque at the hand of the Police to which all others including doctors and the Magistracy lent support. The cause of death was ostensibly shown as Cardiac Respiratory Failure which was not a correct fact The deceased had no history of Cardiac problem, nor any ECG of him was got done during his police custody nor he had ever complained about this problem to the police However, anything could have happened to a person subjected to physical torture, shock and lack of sleep, lack of food and having been kept in the lock-up for last 72 hours."

Commenting on the report submitted by the Superintendent of Police, Hailakandi, to this Court, it has been stated:- "The report submitted by the S.P., Hailakandi, is full of inaccuracies, lack of evidence and false instances some of which are as follows:-

1) Para 1, page-l of the report says that Bheru Mia, Akkadas Ali and others have confessed that under the leadersbip of Nurul Haque they committed 5/6 dacoities cannot be proved and name of Nurul Haque does not appear in any of the charge sheet or FIR of the cases The above mentioned persons were examined by the I.O. and by the Hon'ble Court and they have not stated the above allegation.

2) The allegation of the S.P. that Nurul Haque committed many dacoity and rape in the locality and he was beaten by the members of the public do not have any evidence to support it. That he was arrested on 10.3.93 is also wrong and clearly shows wrongful confinement, The C.J.M., Hailakandi, allowed police custody for 72 hours and not 24 hours. The statement of the SP that Nurul Haque was again forwarded to the Court on 12.3.93 after completing his interrogation is slightly mistaken because Nurul Haque was reproduced before the Court only to conduct TIP for which the C.J.M. Hailakandi fixed the date on 15.3.93. The report of the SP that the UTP was referred to Hailakandi Civil Hospital on making complaint of chest pain is also false

3) The statement of the S.P. that the P.M. report revealed that death was due to Myocardial Infection with Heart Failure and that the P.M. report did not indicate any external injury over the dead body is also false as mentioned earlier.

4) That the re-post mortem examination is conducted by a team of doctor and that no opinion could be given because of highly decomposed state is also wrong/inaccurate. In fact the re- post mortem examination was conducted by Police Surgeon and Mediocolegal Expert Professor B.K. Borah of S.M.C.

5) On para 1 page 3 the S.P. has written that the viscera was preserved and sent to F.S.L. for chemical examination is not correct because it was never sent to S.F.S.L. It was kept at P.S. Hailakandi only. Recently, it has been traced at Police Station, Hailakandi, itself and seized by CBI and now it has been sent to C.F.S.L. for opinion."

In reply to the notice why action should not be taken for contempt of court against him, A.K. Sinha Cassyap has stated that he never intended to disobey or defy an order of the Court or to mislead the Court. He has tendered his unconditional and unqualified apology for this. It has been stated that he was in a shocked state of mind because of certain developments, particulars of which have been stated in the affidavit. He has referred to a final report of the CBI dated 24/25.8.1995 in which prosecution has been recommended

against certain police officers, but so far as A.K. Sinha Cassyap is concerned, only recommendation is conveying of displeasure by Government. It has been stated by A.K. Sinha Cassyap that he was on leave at the time when this incident took place. When he joined service, he got only 48 hours time to make his report. He has made his report on the basis of the material available. But A.K. Sinha Cassyap has not only sent a report but has also filed an affidavit pursuant to the order of this Court when the report was found unsatisfactory. He had ample time to bring the facts to the notice of the Court by that affidavit. There is no explanation for the reason why he did not bring the true facts to the notice of the Court which was his duty to do,

It is true that the CBI Report has not recommended any criminal proceeding against him. But the allegation against A.K. Sinha Cassyap is that he suppressed true facts from the Court and gave a false report to mislead the Court as to what was the real cause of the death of Nurul Haque. It has been stated by A.K. Sinha Cassyap that he had no personal knowledge of the sequence of events from apprehension to the death of Nurul Haque. He had returned from leave and had resumed duty only in the afternoon on 16th March, 1993 when Nurul Haque had already died. This explanation on the face of it is not acceptable. As a responsible police officer it was his duty to make proper investigation and give a report to this Court. Assuming within the time frame of 48 hours he could not prepare a report properly, he should have stated that in his report. He could have even prayed for longer time for furnishing a report. But the allegation against him is that he deliberately gave a false report. In the affidavit filed by him he had ample opportunity to make good the lapses made in the report and bring the true facts to the notice of the Court which he did not do. The affidavit filed by A.K. Sinha Cassyap in this Court is dated 26th November, 1993 pursuant to the direction given by this Court on 29th October, 1993. As a responsible police officer it was his duty to bring to the notice of the Court the police brutality that had taken place and the false documentation that was prepared by the various police personnel to suppress the truth and to give a misleading picture. The glaring inconsistencies in the affidavit filed by him have been pointed out in the report of the CBI, particulars of which have been set out hereinabove. A.K. Sinha Cassyap has not dealt with those particulars. He has only stated that that was not the final report of the CBI. The final report does not contain anything to the contrary to what has been stated in the report submitted to this Court. In our view, A.K. Sinha Cassyap, the contemner, has committed gross contempt of court by trying to mislead the Court as to the cause of death of Nurul Haque. He has also tried to cover up the excesses committed by the police which brought about the death of Nurul Haque by narrating untrue facts and giving false particulars.

We, therefore, hold that A.K. Sinha Cassyap is guilty of contempt of this Court. The belated apology given by A.K. Sinha Cassyap cannot be accepted because it has not been given in good faith. He has tendered this apology only after his report was found out to be misleading and his affidavit was found to be false. He had unnecessarily highlighted in his report that Nurul Haque was a dacoit for which there was no clear evidence. He had stated in his report categorically after reciting some misleading fact, "From the above facts and circumstances, it is clear that, Dacoit, Nurul Haque neither died in Police Lock-up nor in Police custody. He died while in Judicial custody as UTP. He was not tortured during the period of Police custody."

A.K. Sinha Cassyap has stated that he had to make his report on the basis of the records of the case as he had no personal knowledge of this case. But the records reveal that the particulars of injuries noted by Dr. H.A. Ahmed on 10th March, 1993 at 1.50 P.M. were

more than what were noticed by Dr. M L Bhattacharya on 10th March, 1993 at 5.30 P.M. This can only mean that more injuries had been inflicted upon Narul Haque after he was examined by Dr. M L Bhattacharya. It appears that the contemner has ignored even tell-tale evidence available on the record.

We are of the view that this was a highly irresponsible report regardless of the truth and also against the records of the case. In spite of the nature of the injuries detected and reported from time to time by Various doctors who examined Nurul Haque after his apprehension by the police and regardless of the recommendations for X-ray examination of the injured leg, which was never done, the contemner has boldly reported to this Court that Nurul Haque was not tortured during the period of police custody. His report begins under the heading "Death of veteran dacoit Nurul Haque" and ends with the summing up "Dacoit, Nurul Haque died neither in Police Lock-up nor in Police Custody". This goes to show that the contemner was trying to highlight the fact that Nurul Haque was a veteran dacoit and possibly deserved the treatment that he got at the hand of the police. The CBI report indicates that there is no record of any conviction of Nurul Haque in any dacoity case. Not only that the story of saving Nurul Haque from public wrath by the police party on 9th March, 1993 is also not borne out by facts. He was not taken for medical examination on the 5th March immediately after the alleged assault by the members of the public. He was taken to Hailakandi Civil Hospital at 5.30 p.m. on 10th March when various fresh injuries were noted on his body by the doctors. No case of assault was also registered after rescuing Nurul Haque from alleged public wrath. This case was made only after Narul Haque's death. The report from the very beginning has tried to mislead the Court as to the cause of death of Nurul Haque and the alleged events that led to his apprehension by the police. The emphasis that he was a veteran dacoit was also obviously with a view to create prejudice. Far from trying to help the Court to do justice in this case, his report has tried to mislead the Court and prevent the Court from finding out the truth about the allegations made by the Bar Association of Hailakandi.

We, therefore, hold that the contemner deliberately forwarded an inaccurate report with a view to misleading this Court and thereby interfered with the due course of justice by attempting to obstruct this Court from reaching a correct conclusion. In the facts and circumstances of the case, we cannot accept his apology and hereby reject it. We hold him guilty of contempt under Article 129 of the Constitution read with Section 12 of the Contempt of Courts Act, 1971. Having regard to the gravity of the case, we sentence the contemner A.K. Sinha Cassyap to undergo simple imprisonment for a term of three months. The contempt rule is disposed of finally as above.

The Director General of Police, Assam is directed to ensure that this order is carried out forthwith and the contemner is taken into custody and imprisoned to serve the sentence. The Registrar General will communicate this order to Director General of Police, Assam, with a direction to report compliance to him.

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Cross Citation :1995-AIR(SC)-0-117 , 1994-SCC-6-565

SUPREME COURT OF INDIA

Hon'ble Judge(s) : S. MOHAN AND S. B. MAJMUDAR, JJ.

ARVINDER SINGH BAGGA Vs. State of Uttar Pradesh
Writ Petition (Criminal) 271 Of 1993 Oct 06,1994

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A] Police Torture – Torture is not merely physical, there may be mental torture and psychological torture calculated to create fright and submission to the demands or commands - When the threat proceeds from a police officer the mental torture caused by it is even more grave.

B] Physical and mental torture by Police – Supreme Court observed that – We are really pained to note that such things should happen in a country which is still governed by the rule of law – State directed to launch criminal prosecution against all the Police officers involved in this sordid affairs – The state shall pay a compensation of Rs. 10.000/- to Nidhi, Rs. 10,000/- to Charanjit Singh and Rs, 5,000/- to each of the other persons who were illegally detained and humiliated by police – It will be open for state to recover the amount from guilty Police Officer.

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Judgement

(1.) Pursuant to our order dated 16/11/1993, the District Judge of Bareilly has submitted his report. Mr. R.S. Sodhi, learned counsel for the petitioner and Mr. A.S. Pundir, learned counsel for the state of Uttar Pradesh perused the reports.Mr. R.S. Sodhi would submit that erring Police officers should be prosecuted and compensation should be given to such of those who have been illegally detained and suffered humiliation at the hands of the police.

(2.) Learned counsel for the State, through was present on an earlier occasion did not choose to appear inspite of the matter having been passed over twice.

(3.) We have carefully perused the report.we are appreciative of the good work done by the learned District Judge. He had held a thorough inquiry by examining several witness to arrive at the truth. In our considered opinion the report is a fair one and deserves to be accepted. It is accordingly accepted.

(4.) The report in no uncertain terms indicts the police. It inter alia states:"On a careful consideration of all the evidence on record in the light of the surrounding circumstances I accept the claim of Nidhi that she was tortured by the police officers on 24th,25th and 26/07/1993. On 24-7-93she was pressurised by J.C. Upadhyay S.H.O., Sukhpal Singh, S.S.I. and Narendrapal Singh S.I. and threatened and commended to implicate her husband and his family in a case of abduction and forcible marriage thereafter. She was threatened with physical violence to her husband and to herself in case of her default and when she refused her family members were brought in to pressurise her into implicating them. On 25/07/1993 she was jolted out of sleep by Sukhpal singh S.S.I and made to

remain standing for a long time. She was abused and jostled and threatened by J. C. Upadhyay, Sukhpal Singh and Narendrapal singh with injury to her body if she did not write down the dictated note. Sukhpal Singh SSI even assaulted her on her leg with Danda and poked in her stomach. She did not yield to the pressure. Then, on 26-7-1993 she was given fifty abuses and threatened by J.C. Upadhyay and Sukhpal Singh for writing a dictated note. She was pushed and jostled by them both.Sukhpal Singh S.S.I hit her with a Danda on her leg and made threatening gestures aiming his Danda on her head. Ultimately they both succeded in making her write a note dictated by them whose contents were those which were incorporated by the investigating officer in his case diary as her statement under Section 161, Cr.P.C. Thereafter on 27th July she was purported to be taken by K.C. Tyagi to the Court for the recording of her statement under section 164, Cr.P.C. but was taken by J.C. Upadhyay, S.H.O. to Chauki Chauraha Police outpost and kept there and brought to the police station and kept there. She was despatched from the Nari Niketan only at 5 P.M. when A.C.J.M. II had passed orders for Nidhi being kept at Nari Niketan Bareilly K.C. Tyagi I.O. was under obligation to take her from Court to Nari Niketan straightway without any delay whatsoever but she was brought back to the police station and lodged there and only afterwards she was despatched from there for Nari Niketan. Then on 29-7-93 while being taken to the Court for the recording of her statement under section 164, Cr. P.C. Nidhi was brought from Nari Niketan to the police station and there J.C. Upadhyay S.H.O. commanded her to speak that wick he had asked her to speak and if she did not make her statement accordingly and went with Charajit Singh thenShe would not be spared by him and he would ensure that she underwent miserable life time. He further told her that if she cultivated enmity with the police its consequences were only too obvious. So the torture extended up till 29-7-93. Torture is not merely physical, there may be mental torture and physchological torture calculated to create fright and submission to the demands or commands. When the threats proceed from a person in Authority and that too by a police officer the mental torture caused by it is even more grave."

(5.) This clearly brings out not only high-hadedness of the police but also uncivilised behaviour on their part. It is difficult to understand why Sukhpal Singh, S.S.I. assaulted Nidhi on her leg with Danda and poked it in her stomach. Where was the need to threaten her? As rightly pointed out in the report that torture is not merely physical but may even consit of mental and psychological torture calculated to create fright to make her submit to the demands of the police?

(6.) A further reading of the report shows:

(i) fabrication; (ii) illegal arrest;

(iii) without personal knowledge or credible information that the arrested persons were involved in a congnizable offence; and (iv) illegality of verbal order of arrest not contemplated under Section 55, Cr. P.C.

This again is a blatant abuse of law.

(7.) . The report clearly holds Narendrapal Singh S.I. of incdulging in illegal arrest and detention in arresting Charanjit Singh Bagga and Rajinder Singh Bagga. Further, both of them were tortured as they were given Danda blows at police station on 23/07/1993. The report blames J.C. Upadhyay, S.H.O.and K.C. Tyagi, I.O. for the wrongful detention of Nidhi. It cocludes:

"The detention of a married woman in custody who is not an accused on the pretext of her being a victim of abduction and rape which never was to her knowledge and to the knowledge of the police officers concerned aforesaid is itself a great mental torture for her which cannot be compensated later but here we have found that she was tortured otherwise also by threats of violence to her and to her husband and his family and was given physical violence calculated to instil fear in her mind and compel her to yield and to

abondon her marriage with Charanjit Singh Bagga which had been duly performed in Arya Samaj Bhoor and which had been duly performed in Arya Samaj Bhoor and which had been duly registered inthe officer of Registrar of Hindu Marriages under the U.P. Hindu Marriage Registration Rules, 1973 framed by the Governor in exercise of the powers conferred by section 8 of the Hindu Marriage Act, 1955 (Act No. xxv of 1995). She was made to write a statement as commanded by J.C. Upadhyay S.H.O. and Sukhpal Singh SSI on 26-7-93 which was reproduced by the I.O. in the case diary as her statement under Section 161, Cr.P.C. The physical and mental torture was given to Nidhi on 24/07/1993 and 25/07/1993 by J.C. Upadhyay S.H.O., Sukhpal Singh and SSI and Narendrapal Singh S.I. but on 26-7-93 it was done by only J.C. Upadhyay S.H.O. and Sukhpal Singh and there was no participation of K.C. Tyagi I.O. in the torture and harassment dated 24-7-93, 25-7-93 and 26-7-93."

(8.) On a perusal of all the above, we are really pained to note that such things should happen in a country which is still governed by the rule of law. We cannot but express our strong displeasure and disapproval of the conduct of the concerned police officers. Therefore, we issue the following directions:

1. The State of Uttar Pradesh will take immediate steps to launch prosecution against all the police officers involved in this sordid affair.

2. The State shall pay a compensation of Rs. 10,000 to Nidhi, Rs. 10,000.00 to Charanjit Singh Bagga and Rs. 5,000.00 to each of the other persons who were illegally detained and humiliated for no fault of theirs. Time for making payment will be three months from the date of this Judgement. Upon such payment it will be open to the State to recover personally the amount of compensation from the concerned police officers.

(9.) Writ Petition shall stand disposed of in view of the above terms. Order accordingly.

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Cross Citation :2005-All MR(Cri)-0-1638

HIGH COURT OF BOMBAY

Coram : J.N.PATEL, S.T.KHARCHE,JJ(Division Bench)

Baliram Daulatrao Shendre ….Vs…. State of Maharashtra

Criminal Writ Petition 40 of 1999 Of Jan 14,2005

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Constitution of India – Art. 21 – Torture and harassment by police officer – Compensation of Rs. 2 Lacs - A boy was summoned by Police – The investigation was going to be done without registering of offence –

The boy did not return to home – National Human Rights Commission called enquiry from S.P. of Amravati Gramin – S.P. filed enquiry report and try to defend guilty police officers – The commission did not find police version convincing – Commission ordered a sopot enquiry on 5/03/1998 – During enquiry commission recorded finding that without registering the offence at the police station the boy was called at the police station which is illegal and there was a manipulation in the entries recorded in the station diary – High Court ordered investigation by C.I.D. by officer not below the rank of S.P. – Held that – Though the boy was picked up by police no ground of arrest were informed to him and instead doubtful entries have been made in the stationdiary to show that boy absconded from the police station

"ON careful analysis of the facts and circumstances brought on record, what we find is that it is not disputed that the boy Sunil was picked up from the house of his grand mother and was brought to the police station and though actually he was arrested, no grounds of arrest were informed to him and instead doubtful entries have been made in the station diary to show that the boy had absconded from the police station. It would clearly reveal that Sunil was physically handicapped and could not have run away from the police station. It is relevant to note that though Shah Noorbi had lodged oral report with respondent no. 4, the same was not reduced into writing and no offence was registered against the boy Sunil. The station dairy entry at Sr. No. 19 recorded on 16-3-1996 would clearly show that Sunil was found missing from the police station during interrogation. Sunil was arrested without following the guidelines issued by the Hon'ble supreme Court in D. K. Basu' case and when a missing report has been lodged by PSI tayade on 25-3-1996 after ten days, it will have to be presumed that the respondents are responsible for causing disappearance of the boy and it is just possible that the boy must have been beaten by the police and that the boy must have died while he was in police custody and that his body has been disposed of. The

circumstances of last seen coupled with the fact that the whereabouts of the body are not known to anybody, would show that the police personnel wanted to hush up the matter by registering a false missing report on 25-3-1996 after ten days of the incident. In such circumstances, we are of the considered opinion that the respondents are liable to pay compensation."

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JUDGEMENT

(1.) INVOKING the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner filed criminal Writ Petition No. 111/96 claiming writ of Habeas Corpus for production of his son Sunil Shendre aged about 14 years which was disposed of by this Court vide order dated 06-12-1996. The said order reads as under :

"the petitioner claimed a writ of habeas corpus for production of his son Sunil shendre, aged about 14 years. The allegations were that the boy was taken in custody by the Police Authorities in connection with some theft on 15-3-1996 and as such, they are liable to produce the boy. After notice, it is revealed that the boy was never taken in custody. He was called for interrogation and thereafter he was asked to go home. The boy is missing since then according to parties. To trace the boy, this Court on 21-8-1996 directed the respondent Authorities to give due publicity about missing of the boy. Shri. Naik, the learned 'a' panel counsel appearing for the respondents, made a statement that in compliance of the order, due publicity has been given. Further, superintendent of Police, Amravati filed an affidavit and made a statement that all possible efforts are being made to trace the boy. In view of this, the grievance of the petitioner does not survive. We, therefore, dispose of the petition. However, we further direct that the Authorities shall continue their venture to trace the boy vigorously."

(2.) THE boy could not be traced and, therefore, the petitioner has filed the present criminal writ petition claiming compensation of Rs. Three lacs on the contentions that on 15-3-1996 one Shah Noorbi had lodged oral report with Shri. Tayade. Police Station officer, Police Station Mangrul Dastgir respondent no. 4 alleging therein that the son of the petitioner by name Sunil, aged about 14 years, had committed theft of Rs. Three thousand from her shop. According to the petitioner, his son Sunil was physically handicapped and was suffering from polio and the Civil Surgeon had issued a certificate dated 4-5-1991 to that effect. It is contended that after receiving the oral report from Shah noorbi, on 15-3-1996 itself the police personnel arrived at the house of the petitioner and made enquiries regarding the whereabouts of Sunil who was not present at the home as he had gone to Arvi at the house of his uncle. The police personnel slapped the petitioner and directed him to produce his son at the police station and so saying they left. Thereafter the petitioner had gone to Arvi and brought back his son Sunil in the night of 15-3-1996 and informed the respondent no. 4 about the arrival of Sunil. On 16-3-1996 the police personnel arrived at the house of venutai the grandmother of Sunil where he was allowed to stay by his father. The police personnel started mercilessly thrashing Sunil outside the house and thereafter the boy was taken away by the police personnel. The boy was subjected to

physical torture at the police station. On 16-3-1996 at about 2-00 p. m. two police constables by name Mate and Gaikwad arrived at the house of the petitioner and informed him that he was called by respondent no. 4 and he should accompany them to the police station. The petitioner accordingly went to the police station where respondent no. 4 was present. The latter informed the petitioner that Shah Noorbi has lodged a complaint against his son Sunil in respect of theft and accordingly at about 7-00 a. m. Sunil was brought to the police station and he has absconded and is untraceable. Thereafter respondent no. 4 offered cold drink to the petitioner and told him that the Police Station officer would pay him Rs. 1,000/- and he should bring the boy to the police station. The petitioner suspected that there was something fishy and, therefore, asked the respondent no. 4 to take his report and register the first information report about missing of the boy who was physically handicapped and was unable to walk or run away from the police station. The respondent no. 4 or the police personnel did not pay any heed to his request and on the contrary threatened him that he should not disclose anything to the people in the village. The petitioner then left the police station in a disturbed state of mind. He tried to trace out the boy but was unsuccessful and, therefore, on 28-3-1996 he made a written complaint to the District Superintendent of police, Camp at Amravati.

(3.) THEREAFTER the petitioner filed criminal writ petition No. 1 11/96 which came to be disposed of by this Court vide order dated 06-12-1996. Thereafter the petitioner had lodged a complaint before the National Human rights Commission, New Delhi, which was registered as case No. 88/18/97-98. The national Human Rights Commission held enquiry and recorded a finding on 26-8-1998 that without registering the offence at the police station the boy Sunil was called at the police station and there was a manipulation in the entries recorded in the station diary.

(4.) THIS Court had issued directions from time of time and even on 05-12-2002, this Court passed the following order :

"till today, the State has not been able to trace out Sunil Baliram Shendre who was produced by his mother in the police station and since then he is missing. According to the version of the police officials to whom the said Sunil Shendre was surrendered, he has run away from the police custody. After the matter was disposed of by the High Court, it appears that the petitioner approached the National human Rights Commission. The National human Rights Commission has made an independent enquiry in the matter and in the proceedings dated 26-8-1998, has made certain observations pursuant to which this proceedings have been initiated. In our opinion, the matter requires to be investigated by an independent agency so as to assist Court in arriving at a proper conclusion. Therefore, in the facts and circumstances, we direct the State to hand over the investigation to State C. I. D. and the same is to be done by an officer not below the rank of Superintendent of Police, and submits the report to this Court within a period of six weeks. After examining the report and hearing the counsel for the parties, we will take a decision as to what further steps are required to be taken in the matter. S. O. six weeks. Copy of the order be furnished to the learned A. P. P. for being communicated to the Principal Secretary, Home, for issuing necessary orders in accordance with the directions of this Court to the State C. I. D. "

(5.) THE respondent no. 2 contended that there was no manipulation at all in the entries recorded in the station diary. On interrogation Sunil admitted to have committed theft and he informed the police that he has lost all the money while he had slept at Arvi.

He was called in the police station and was given an understanding that he should not indulge in the theft. On asking sunil informed that he was studying in VIIth standard and believing his words the P. S. O. thought that Sunil was a minor. However on enquiry from the school the date of birth of sunil was found to be 30-7-1980 and, therefore, his age was 15 years. 7 months and 16 days as on 16-3-1996. It is contended that the finding recorded by the National Human rights Commission is absolutely erroneous and the entry recorded in the station diary would clearly reveal that Sunil was allowed to leave the police station as no offence was registered against him and, therefore, none of the police officials are responsible for disappearance of Sunil. Though sincere effort have been made to trace out Sunil, they were unsuccessful.

(6.) MR. Sambre, learned counsel, for the petitioner contended that the station diary entry recorded at Sr. No. 19 at 12-35 on 16-3-1996 is a manipulated entry and it is admitted position that Sunil was arrested without registering the offence against him and he was mercilessly beaten in the police station. He contended that the Entry No. 19 itself shows that Sunil was brought to the police station, but there appears to be manipulation in the said entry wherein a show has been made that the boy was allowed to go home after the interrogation was over. He contended that the findings of National Human Rights commission would clearly reveal that the respondents have violated the guidelines given by the Apex Court in the case of D. K. Basu vs. State of W. B. reported in (1997)1 SCC 416. He contended that in absence of any plausible explanation from the respondents it will have to be presumed that the respondents are responsible for the death of Sunil while he was in the police custody and, therefore, the petitioner is entitled to compensation of rs. Three lacs. In support of these submissions, he relied on the Division Bench decision of this Court in Shobha wd/o Anil londase Vs. State of Maharashtra reported in 2003 (4) Mh. LJ. 436 : [2003 ALL MR (Cri) 1491] and also on the decision of Single bench of Delhi High Court in Smt. Geeta Vs. Lt. Governor and others reported in 1999 cri. LJ. 1099.

(7.) THE learned counsel for the respondents contended that the findings of national Human Rights Commission are erroneous and by no stretch of imagination the respondents/police officials could be held responsible for the alleged custodial death especially when the boy Sunil is still missing and in spite of vigorous search could not be found.

(8.) WE have given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. It is not in dispute that the proceedings were started upon a complaint of the petitioner before the national Human Rights Commission which were concluded on 26-8-1998 wherein it has been mentioned as under :

"pursuant to the Commission's directions, the Investigation Division sought and obtained a report from Supdt. of Police, amravati, Maharashtra and stated as follows: report brings out that on 16-3-96 (not 16-3-97) as mentioned in the case file, one shahanoorbi lodged an oral complaint with ps Mangrul, regarding theft of grocery items worth Rs. 3,000/- in which she suspected Sunil Baliram Shendre (aged 14 years). She however, did not lodge any written complaint to PS. The suspected boy agreed to return stolen property in the presence of his mother. The police did not pursue with the charge on the assurances that he will not indulge in such an offence in future. According to the police, compromise was worked out primarily keeping in view of the tender age of the boy. An entry was made in

the Station dairy on the same day i. e. 16-3-96. In the evening at about 1700 hrs. the father of Sunil came to PS and he said that his son has run away from the home. Entry was made in the register. Police parties were deployed but he could not be located. His photograph was published in several newspapers but till date he is not traceable. Baliram Shendre, father of missing boy also filed a Habeas Corpus petition No. 111/ 96 dated 19-6-96, before the Nagpur Bench of the Bombay High Court. Search parties were sent to various places like Bombay, nagpur and Pune where some of the boy's relatives are staying. The High Court discharged the Habeas Corpus petition on not finding any substance in the allegations. against the police. According to the police, Sunil Shendre is a spoiled boy, who had run away from his home few years back. He was caught by Bhusawal police and was kept in remand Home and then handed cover to his parents. "

As the Commission did not find police version convincing, the Commission ordered a spot inquiry on 5-3-1998. Inspector K. K. Arora and Shri. R. K. Sharma from the Commission's investigation Division conducted a spot -inquiry and submitted a report which stated :

"enquiry reveals that the complainant hails from the backward community and is engaged as a casual labour. His 14 years old disabled son Sunil Shendre was hauled up by the police on the basis of an informal complaint made by Smt. Shanoor Bee, a neighbour, concerning a theft in her house. Police party led by PSI Tayade went to the house of Shendre and since the boy was not available, they had threatened them to produce him in the P. S. On 16-3-96, the complainant's wife produced Sunil before st Tayade and came to home. It is quite likely that the boy may have been beaten by the police. Later in the afternoon, the police party again came to the residence and asked for the whereabouts of the boy sunil as he was not traceable in the PS. (a) No formal report of FIR with regard to the theft was lodged by PSI. A. B. Tayade of PS Mangrul on 15-3-96, when the matter was reported to him, hence calling the boy sunil was blatantly an act of illegality. (b) The GD has been manipulated, as entry at serial No. 19 dated 16-3-96 written by the SHO shows that Sunil was found missing from the Police Station during questioning (c) Petitioner has expressed his grave fear and apprehension that his son, who was handicapped, was not in a position to escape from the Police Station and it is quite likely due to assault, he may have died in police custody and his body has been disposed of. (d) Missing report was lodged by PSI tayade on 25-3-96 after 10 days of delay for which he has no plausible explanation to offer. The police action to call Sunil Shendre without any complaint or registration of fir is a gross illegality and they are answerable for the boy's disappearance. What is surprising is that no action has been taken against any of the police officials even when it is being admitted that the boy was called to the PS for questioning in a theft matter. PSI Tayade and the other policemen cannot be absolved themselves for the disappearance. "

(9.) IN D. K. Basu's case - (1997)1 scc 416, cited supra, the Apex Court has in para no. 35 issued the following guidelines to be followed in case of arrest or detention till legal provisions are made in that behalf as preventive measures :

"we, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures : (1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of arrestee must be recorded in a register. (2) That the police officer carrying out the arrest

of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest. (3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or relative of the arrestee. (4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest. (5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained. (6) An entry must be made in the diary at the place of detention regrading the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is. (7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "inspection memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee. (8) The arrestee should be subjected to medicalexamination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director. Health Services of the State or Union territory concerned. Director, Health services should prepare such a panel of all tehsils and districts as well. (9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record. (10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation. (11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on conspicuous notice board. "

(10.) IN Shobha Vs. State of maharashtra - 2003 (4) Mh. LJ. 436 : [2003 all MR (Cri) 1491], cited supra, this Court awarded compensation of Rs. Three lacs to the legal heirs of the deceased victim and relied on the observations made in the case of D. K. Basu, cited supra. Those observations are as under:

"as regards the torture and custodial violence, the Apex Court in D. K. Basu vs. State of W. B. Reported in (1997)1 scc 416 has clearly ruled thus : "torture" has not been defined in the constitution or in other penal laws. "torture" of a human being by another human being is essentially an instrument to impose the will of the "strong" over the "weak" by suffering. The word torture today has become synonymous with the darker side of human civilisation. "custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward flag of humanity must on each such occasion by half-mast. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station of lock-up. Whether it is physical assault

or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law. "custodial violence" and abuse of police power is not only peculiar to this country, but it iswidespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal declaration of Human Rights in 1948, which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that: "no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. " despite the pious declaration the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication. Custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law The rights inherent in Articles 21 and 22 (1) of the Constitution require to be zealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. It the functionaries of the government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law upto himself thereby leading to anarchanism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him ? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights' jurisprudence. The answer, indeed, has to be an emphatic "no". The precious right guaranteed by Article 21 of the constitution of India cannot be denied to convicts, undertrials. detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. " (emphasis supplied)The very fact that the respondents have arrived at the conclusion about the involvement of the jail guard in death of anil and, therefore, has initiated criminal proceedings against him apparently discloses the cause of death of Anil being that he was subjected to custodial torture and that would also justify the claim of the petitioner for compensation in this petition. "

(11.) THE Single Bench of Delhi High court in Smt. Geeta Vs. Lt. Governor -1999 cri. LJ. 1099, cited supra held in para 7 as under:

"in view of the above discussion I consider it to be an imminently fit case for grant of compensation to the petitioners. While granting compensation it must be kept in view that Sonu, a young man of 22 years of age, was picked up by the police even though there was no allegation of his involvement in any criminal activity. It is not the case of the respondents that when he was arrested he was having injuries on his person. No explanation has been rendered for fifty-one-juries which was found on his person as a result of which he died in police custody. It must also be taken into consideration that despite several judgments of the Supreme Court and this court, the State has not been able to prevent custodial deaths. Torture is still preferred to scientific techniques for the purposes of eliciting information from accused and witnesses. "

(12.) ON careful analysis of the facts and circumstances brought on record, what we find is that it is not disputed that the boy Sunil was picked up from the house of his grand mother and was brought to the police station and though actually he was arrested, no grounds of arrest were informed to him and instead doubtful entries have been made in the station diary to show that the boy had absconded from the police station. It would clearly reveal that Sunil was physically handicapped and could not have run away from the police station. It is relevant to note that though Shah Noorbi had lodged oral report with

respondent no. 4, the same was not reduced into writing and no offence was registered against the boy Sunil. The station dairy entry at Sr. No. 19 recorded on 16-3-1996 would clearly show that Sunil was found missing from the police station during interrogation. Sunil was arrested without following the guidelines issued by the Hon'ble supreme Court in D. K. Basu' case and when a missing report has been lodged by PSI tayade on 25-3-1996 after ten days, it will have to be presumed that the respondents are responsible for causing disappearance of the boy and it is just possible that the boy must have been beaten by the police and that the boy must have died while he was in police custody and that his body has been disposed of. The circumstances of last seen coupled with the fact that the whereabouts of the body are not known to anybody, would show that the police personnel wanted to hush up the matter by registering a false missing report on 25-3-1996 after ten days of the incident. In such circumstances, we are of the considered opinion that the respondents are liable to pay compensation.

(13.) IN the result, we do find that the award to Rs. two lacs as compensation would not be either exorbitant or unreasonable and, therefore, the petition succeeds and the State is directed to pay the compensation of Rs. two lacs to the petitioner within a period of six weeks from today in default the said amount shall carry interest at the rate of 10% per annum from the date of petition till realisation. However, the respondents are required to hold necessary inquiry to fix up the responsibility to contribute the said compensation and shall take necessary steps in accordance with the provisions of law to recover the same from those persons. Rule as made absolute accordingly with costs of Rs. Two thousand in favour of the petitioner. C. C. expedited. Petition allowed

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Eq. Citation : 2006 SCC OnLine Bom 15, 2006 Cri.L.J. 2202, 2006 ALL MR (Cri.)1018

IN THE HIGH COURT OF BOMBAY

Cri.W.P. 191 of 2004 Of Jan 10,2006

Parbatabai Sakharam Taram

Vs.

State Of Maharashtra

CORAM :J.N.Patel, R.C.Chavan,JJ

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CASE NOTE :

A] Constitution of India, Arts 21, 226 – Police atrocities – A triabal girl of 13 years age falsely implicated by police in Criminal case by

alleging that she is having links with naxalites – Court acquitted her for want of evidence – Detention found to be illegal – Victim entitled to compensation – Rs. 5 lakhs awarded as compensation.

B] Police Attrocities – There is lack of accountability of the Police force is also major factor in custodial violence – The Police are policed mostly by themselves and therefore the police personnel committing excesses on citizen are not going to be punished – They succeed to manage in getting away slot free – In present case the illegal detention of the minor girl cannot be said to have been done without facit consent of senior police officials – The state was expected to conduct fair enquiry and made offer before the court their willingness to punish all those officer who were connected with the investigation and prosecution – It is unfortunate that instead doing so the state tried to cover their misdeeds therefore they are bound to compensate petitioner.

C] Police Torture – Delay in filing petition – Held – Victim approaching Court after some assistance from organization (NGO) – State can not oppose the petition on ground of delay and latches – state is supposed to protect fundamental and human rights of a citizen.

Further we have no hesitation to add that the fact brought on record does go to show that the petitioner had no access to justice though she suffered flagrant violation of her fundamental rights under Articles 21 and 22 of the constitution of India and human rights till Non-governmental Organisation intervened in her matter and look her issue not only with the State Government but also sought assistance of the National and States Human Rights commissions.

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(1.) THE petitioner has approached this Court seeking compensation from the respondents and officials in the police department by invoking its extraordinary jurisdiction under Articles 226 and 227 of the constitution of India to issue appropriate writ, order or direction for conducting an inquiry against the erring Police Officers and specifically against respondent no. 4-Shri A. B. Chavan, Police Officer, Arjuni (Mor) and Shri Suryavanshi, police Officer Chichgarh, Tq. Deori and others, including the State for her wrongful detention in police custody, false implication in serious offences, custodial torture and for violation of her fundamental and human rights including the protection for which the petitioner was entitled to under the Juvenile Justice act, 1986, Juvenile Justice (Care and Protection of Children) Act, 2000 and the scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The petitioner further claims compensation for violation of her fundamental and human rights in the sum of Rs. 10,00,000/- with costs.

(2.) IT is the case of the petitioner that she is tribal belonging to caste Gond and resident of Arjuni (Mor) in Gondia District and that they come from a very poor family.

According to the petitioner, she was born on 15-4-1977 and was a minor and also juvenile at the time she was arrested, wrongfully detained and tortured in police custody and thereafter falsely implicated in three cases on serious charges including the TADA (P) Act, 1987.

(3.) THE case of the petitioner is that some time in the year 1990 while petitioner was studying in 5th standard and was hardly 13 years of age, P. S. O. A. B. Chavan (since deceased), who was at the relevant time attached to Police station Arjuni (Mor) visited the petitioner's house at 12 O'clock at mid-night along with other police constables and brutally assaulted the petitioner and her mother and took away the petitioner to the Police Station without there being any lady constable. At the Police Station, the petitioner was severely beaten thereafter she was dumped in a Police van and taken to the dense forest of Keshori at 1 a. m. and hanged to a tree by tying her both hands upwards and then was beaten by belt till the petitioner lost her consciousness. The petitioner regained consciousness and found that she was in hospital from where she was again taken to the Police station and illegally detained during which period she was tortured by police officers, who used to beat her with their boots and she was forced to take whatever meal supplied to her by spreading it on the floor and when she resisted such inhuman treatment, she had to bear beatings by kicks and other means for which the petitioner primarily holds P. S. O.-A. B. Chavan responsible along with other police officials. It is the case of the petitioner that though there were lady constables but they were helpless and could not do anything except for sympathizing with her. It is the case of the petitioner that the police merely on the basis of suspicion that the petitioner was working with Naxalites have wrongfully detained her and tortured her in police custody in order to extort information about the Naxalites.

(4.) THOUGH the petitioner repeatedly informed them even told them that she is not at all concerned with any Naxalites and that she is innocent, she was not released and continued to be tortured in cruel and inhuman manner in police custody.

(5.) IT is the case of the petitioner that from time to time she was moved from one police lock-up to another and was treated with utmost cruelty and inflicted acts insulting to woman in the police station. The petitioner was kept in lock-up at Police Stations Arjuni (Mor), Chichgarh and then Deori. Along with petitioner there were four other girls who were also treated with cruelty and tortured on the basis of similar allegations that they were associates of Naxalites. It is the case of the petitioner that as she was arrested and wrongfully detained by the police, no record of such arrest and detention was maintained in any of the Police Stations and the petitioner was illegally detained in lock-up for years together in violation of Articles 21 and 22 of the Constitution of India. It is the case of the petitioner that it is only in the year 1993, for the first time, the petitioner's arrest was brought on official record and she was implicated in three cases for having committed offences under various sections of the Indian Penal Code and TADA (P) Act and for the first time officially the petitioner's arrest was shown on 1-3-1993 and was produced before the Magistrate and came to be remanded to Police custody as well as judicial custody and ultimately landed in Central Jail.

(6.) IT is the case of the petitioner that in the year 1996 one Nongovernmental organisation i. e. Tejswi Adiwasi Mahila Mandal and at the instance of the National Women's Commission and Smt. Mohini Giri three cases of the petitioner came to be transferred before the Juvenile Court and she was released on bail. The petitioner has suffered torture in police custody which has left deep scars on her mind having undergone the life which was as if she was in hell in such a tender age which has spoiled not only valuable period of her childhood but even for future she lost all hopes for which the petitioner particularly blames respondent Nos. 4 and 5 and the officials of the State and,

therefore, seeks high level enquiry so that they can be punished and she should be duly compensated for the atrocities committed on her by the officials of the state under colourable exercise of their powers.

(7.) THE petitioner has also highlighted the fact that police has arrested so many other girls like her and wrongfully detained them in custody on the suspicion that they were working for Naxalites and out of them, four girls who were with her, are missing and a petition seeking writ of habeas corpus has been filed before the Supreme Court and is pending though the petitioner has no further information about the fate of those girls. The petitioner, therefore, claims that this Court should direct the State to take action against the erring Police officers and prosecute them for the offences committed by them for wrongful arrest, detention, custodial torture of the petitioner and for false implicating her in serious cases and sending her to prison in spite of knowing the facts that the petitioner was innocent and suitably compensate her.

(8.) IN support of her petition the petitioner has annexed documents regarding her prosecution before the Juvenile Board, Bhandara in all the three cases which acquitted her for want of evidence.

(9.) IN response to the petition, the State has filed affidavit of Shri P. P. Shrivastava, Principal Secretary to the Government of Maharashtra, Home department (Special), Mantralaya, Mumbai and of one of the Police Officers i. e, respondent No. 5 Shri Suryavanshi. Insofar the State is concerned, preliminary issue has been raised that though the petitioner claims to have suffered arrest, illegal detention and custodial torture from the year 1990 and being implicated in false cases but she has filed the petition in the year 2004 i. e. almost after fourteen years and, therefore, the petition deserves to be dismissed merely on the ground of delay and laches, as no ground is made for entertaining this petition.

(10.) DURING the pendency of the petition we have already made clear by our order dated 16-12-2004 that such a plea is not available to the State in the facts and circumstances of the case, as petitioner's grievance relates to violation of her fundamental and human rights and so also being prosecuted in violation of the provisions of the Juvenile Justice Act in force at the relevant time and has suffered atrocities, being a tribal, for which even provisions of the Scheduled castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 stands attracted. **Further we have no hesitation to add that the fact brought on record does go to show that the petitioner had no access to justice though she suffered flagrant violation of her fundamental rights under Articles 21 and 22 of the constitution of India and human rights till Non-governmental Organisation intervened in her matter and look her issue not only with the State Government but also sought assistance of the National and States Human Rights commissions.** It is now well settled that right to legal aid to such person is part of right to life and liberty as enshrined in Article 21 of the Constitution of the India. Therefore, it does not lie in the mouth of the State, who is supposed to protect the fundamental and human rights of a citizen to take ground of delay and laches for dismissing the petition.

(11.) IN the affidavit-in-reply filed on behalf of the State of Maharashtra an attempt has been made to demonstrate before us that the State has taken all the necessary steps by constituting a special team to conduct a detailed inquiry into the matter and the Special Team has investigated the record of the Police Station and also visited village Jambhali (Porla) where petitioner at the relevant time was residing, and recorded the statements of respectable persons residing in that village, concerned officials and police personnels, who had been posted at the respective police station during the period the petitioner claimed to have been illegally detained and tortured in the police custody. The inquiries have also

been made with the jail authorities and the Primary Health Centre at Keshori but that special Team could not find any incriminating material to substantiate the claim of the petitioner. To sum it up, it has given clean chit to the State.

(12.) IT is also contended that the respondent No. 4 Shri A. B. Chavan was not working during the year 1990 in Police Station Arjuni (Mor) and similarly respondent No. 5 named as Shri Suryawanshi who was also not working at the relevant time in the police station Chichgarh. Therefore, according to them, these allegations against the respondents are not well founded. Further it has been stated that the record shows that the petitioner was first time arrested by respondent No. 4 in the year 1993 when she had confessed of having involved in naxal activities and other accused persons who were arrested along with the petitioner also corroborated that petitioner was involved in the naxal activities and petitioner along with other accused were produced before the Magistrate from time to time.

(13.) THE Respondent/state admits that at the relevant time the petitioner was below the age of 18 years when she was shown arrested in the year 1993, but, when she was produced before the Magistrate and remand was obtained by respondent No. 4 Shri A. B. Chavan, the record does not show that the petitioner had raised any objection for not producing her before the Juvenile Court. It is only when the charge-sheet came to be filed in Crime No. 82/90 before the juvenile Court, it was noticed that the petitioner was below the age of 18 years and it is on 24-2-1996 by the order of Special Court designated under TAD A (P)Act, 1987 petitioner came to be released on bail. It is admitted that the petitioner was also co-accused in Crime Nos. 100/92 and 44/92 and charge-sheet in these two cases were subsequently filed before the Juvenile Court on 30-5-1996 against the accused. It is not disputed that the respondent No. 4 was Investigating officer in all these three cases. It is contended that the fact that the petitioner was juvenile was not noticed by the Magistrate before whom the petitioner was produced. It has been brought on record that the respondent No. 4 Shri A. B. Chavan has expired on 10-2-2004, as he met with an accident and as such no further inquiry could be made with said Shri Chavan.

(14.) ON facts, it is the contention of the Respondent/state that the petitioner was involved in Naxal activities and she was arrested only in 1993 and not in 1990. Further the claim of the petitioner that her father has died, is also not true and he is residing at Sukli Ramgad, Taluka Deori. It has been specifically denied on the basis of inquiry conducted by the Special Team that the petitioner was arrested and brought to Police Station Arjuni (Mor) in 1990. The Special Team has also conducted inquiry, recorded the statement of Police Patil, Sarpanch and other villagers, however, did not reveal that petitioner was brought to the police station in the mid-night and she was tied with the tree as alleged and, therefore, the allegations made by the petitioner are not borne out during inquiry. It is specifically denied that the petitioner was ill treated by the police. It has been further contended that the Special Team has verified that lock-up register and did not discover that the petitioner along with four other girls were kept in police lock-up during that period and as such question of ill-treatment to the petitioner does not arise. The prosecution of the petitioner in three cases i. e. Crime Nos. 100/92, 44/92 and 82/90, according to the Respondent/state, is sufficient to show that the petitioner was involved in various serious offences, and that as and when it came to the notice of the authorities that the petitioner was below the age of 18 years i. e. at the time of filing charge-sheet her case was transferred to Juvenile court at Bhandara. The State has shown ignorance about the efforts made on the part of Tejaswi Adiwasi Mahila Mandal and National Human Rights commission but it has admitted that there was one application dated 21-5-1996 found on record which was received from the said Mahila Mandal after the release of the petitioner on 24-2-1996. It has been submitted that on earlier occasion two writ petitions were filed

in this Court i. e. Writ Petition No. 244 of 1993 and 59 of 1994 but same came to be dismissed by this Court by order dated 22-11-1993 and 18-1-1996 respectively but the respondent/state has not placed on record any such order in support of this contention.

(15.) BY way of rejoinder, the mother of the petitioner Sayatrabai w/o sakharam Taram has filed an affidavit explaining the position insofar as her husband Sakharam Taram is concerned, wherein she does not claim that he has died but has stated that he has abandoned her and the petitioner when she was three years' old. The mother supports the claim of the petitioner made in the petition that she was picked up forcefully in between the year 1991-92 by Police authorities and was never informed of the reason of her arrest and at that time she was studying in 5th standard in the school at Tukum Saygaon, Tq. Morgaon (Arjuni) and since then the petitioner remained absent from School and compelled to show her absence due to illness for about two months. The petitioner has also filed her reply on affidavit denying all the allegations and submitted that she has claimed that her father is dead because since the time she was 3 to 4 years old her father had abandoned her, her mother and, therefore, she was always told that her father is dead and petitioner is and was never aware about her father.

(16.) IN order to appreciate the case of the petitioner, we have requisitioned the original record and proceedings from the Juvenile Court, Bhandara whereby petitioner was tried in three cases and acquitted for want of evidence of serious charges under the Indian Penal Code, TADA (P) Act and Arms Act. Xerox copies of the communication sent by Tejaswi Adivasi Mahila Mandal dated 19-2-1996 to the President, Maharashtra State Women's Commission, copy of which was also forwarded to the Minister, Tribal Development, acknowledged on 12-3-1996 and also letter dated 12-3-1996 written by the then Minister for Tribal development, Government of Maharashtra, addressed to the Hon'ble Deputy chief Minister, Home Department are placed on record and the internal correspondence amongst police authorities, so also the Birth Certificate of the petitioner issued by the Head Master, showing that the petitioner was admitted in the school on 1-9-1983 and as per the school record her date of birth is 15-4-1977. What we find from the facts is that - admittedly the petitioner was not only a minor but a juvenile even at the time she was officially shown as arrested by the police for the first time on 31-1-1993 in Crime No. 100/92 and subsequently implicated in two more cases i. e. Crime No. 44/92 and Crime No. 82/90. In all these cases, in addition to the offence under the I. P. C. Act and the Arms Act, the petitioner has also been charged for having committed offence under sections 3 and 4 of the TADA (P) Act. It is pertinent to note that first case in which the petitioner came to be arrested, the offence alleged to have been committed on 15-10-1990 and for which the petitioner was charged by the Juvenile Court that -on 15-10-1990 at about 6. 30 to 13 hrs. at village Yarandi Talao in furtherance of common intention with them committed murder of deceased Moreshwar, the alleged informant to police, and further you made the activities against State being members of people war groups Naxalite Organisation and further you were possessing one fire arm in your possession with intention to commit offence as such, and committed offences under sections 302, 107, 109, 216 (a), 121 and 122 read with 34 of the I. P. C. and offences under section 3 read with 25 of Arms Act and under sections 3 and 4 of the TADA (P) Act.

(17.) THE fact that the petitioner was charged for having committed offence on 15-10-1990, which was registered by P. S. O. Morgaon (Arjuni) substantially corroborates the contention of the petitioner that she was picked up by the Police in the year 1990 itself and was in their illegal detention and suffered torture in order to get information about Naxalites. The record and proceedings of the juvenile Court in this case i. e. JCC No. 40 of 1996 and the evidence recorded by the Juvenile Court as well as the judgment clearly indicates that the petitioner was required to be acquitted as it was a case of no evidence

and similar was the fact in respect of other two cases in which the petitioner has been prosecuted.

(18.) IN our considered opinion, the contentions of the petitioner that she was arrested, illegally detained and tortured and thereafter falsely implicated in these three cases stand well corroborated and there is no reason to disbelieve her on this count.

(19.) THE very fact that the Special Team constituted by the State after petitioner approached this Court to inquire into her allegations, could not lay hands on any record. It also goes to show that arrest and detention of the petitioner being illegal, question of making any record of the same in the concerned Police station would not arise, otherwise it would have been obligatory for the police to have produced the petitioner before Magistrate within 24 hours of her arrest. One can well appreciate the position and status of the petitioner, who belongs to very poor family and being a tribal (Gond). It was only her mother to stand by her side without having any access to justice. No one is expected to come forward in support of the petitioner and therefore, merely the Special Team has verified the claim of the petitioner by examining the Sarpanch, Police Patil and villagers does not in any manner dislodge the petitioner's claim. Further the fact that the petitioner was tried and acquitted for want of evidence in three cases and probably last acquittal was by judgment and order of the Juvenile Court in JCC No. 40 of 1996 delivered on 15-3-2002, one can understand that the petitioner was under constant pressure and fear of being prosecuted of serious offences in spite of the fact that she was found to be innocent and there was no evidence against her. The respondent/state have put up a case before this Court that petitioner came to be arrested, as she herself confessed of her complicity in these cases and being associated with Naxalites, which was confirmed by the confessions given by the co-accused arrested in the case. The past experience goes to indicate that the petitioner could not have gathered courage to approach any court of law and it is after her last acquittal on 15-3-2002, in the year 2004 she has knocked the doors of this Court to seek action against the police Officials of the Respondent/state, who were responsible for arrest, illegal detention and custodial torture.

(20.) THE learned counsel appearing for the petitioner has placed reliance for the purpose of seeking compensation against the State on the two decisions of this Court. The first being rendered in the case of Rajeev Shankarlal Parmar and another vs. Officer-in-Charge, Police Station Malad, Mumbai and others, 2003 (5) Mh. LJ. 820 and after considering the case Their Lordships found that the petitioner Rajeev who was a juvenile was arrested and detained in prison by the state and found that he was entitled for compensation. The relevant part of the reported judgment in Rajeev's case aptly sums up the case for which the petitioner has knocked the doors of this Court and for the said purpose we are reproducing para Nos. 15 to 21 of the said Judgment as under :-

15. The learned counsel for the petitioners in this connection referred to two decisions of the Hon'ble Supreme Court in Rudal Sah vs. State of bihar, AIR 1983 SC 1086 and Bhim Singh vs. State J. and K. , AIR 1986 sc 494. She also relied upon a decision of the Division Bench of this court (Aurangabad Bench) in Baban Khandu Rajput vs. State of maharashtra and others, 2002 ALL MR (Cri) 1373. In Baban Khandu rajput, though the person was kept in illegal custody only for a period of two and half days, the Court awarded an amount of Rs. 10,0007- to the petitioner therein which was ordered to be paid by the State of maharashtra. It was, therefore, submitted that in the facts and circumstances, an amount of Rs. 10,0007- per month may be awarded by way of compensation.

16. Considering the facts and circumstances, however, that an offence had been registered against the first petitioner and as stated by the complainant, the accused was of 22 years age, who alleged to have committed offence punishable under sections 302 and 307 of the Indian penal Code, and according to the Police Officer, the accused himself had stated his

age to be 20 years at the time of arrest (which was disputed by the accused) coupled with the fact that the order dated 7th March, 2003 could not be implemented in view of non-availability of police escort, in our considered opinion, the action cannot be termed mala fide or malicious.

17. In the facts and circumstances, therefore, ends of justice would be met, if the respondent-State is ordered to pay to petitioner No. 1 an amount of compensation of Rs. 15,000/- (Rupees Fifteen thousand only). Let such amount be paid within a period of three months from today. Order accordingly.

18. Regarding general guidelines, our attention was invited by the learned counsel to three decisions referred to above i. e. Sheela Barse, gopinath Ghosh and Bhola Bhagat.

19. In Sheela Barse, the Apex Court stated : "if a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with children provide that a child shall not be kept in jail. Even apart from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to beneful influences, coarsening his conscience and alienating him from the society. It is a matter of regret that despite statutory provisions and frequent exhortations by social scientists, there are still large number of children in different jails in the country as is now evident from the reports of the survey made by the District Judges pursuant to our order dated 15th April, 1986. Even where children are accused of offences, they must not be kept in jails. It is no answer on the part of the State to say that it has not got enough number of remand homes or observation homes or other places where children can be kept and that is why they are lodged in jails. It is also no answer on the part of the State to urge that the ward in which the other prisoners are detained. It is the atmosphere of the jail which has a highly injurious effect on the mind of the child, estranging him from the society and breeding in him aversion bordering on hatred against a system which keeps him in jail. We would therefore like once again to impress upon the State Governments that they must set up necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial. On no account should the children be kept in jail and if a state Government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail. The problem of detention of children accused of an offence would become much more easy of solution if the investigation by the police and the trial by the Magistrate could not expedited. The report of survey made by District Judges show that in some places children have been in jail for quite long periods. We fail to see why investigation into offences alleged to have been committed by children cannot be completed quickly and equally why can the trial not take place within a reasonable time after the filing of the charge-sheet. Really speaking, the trial of children must take place in the Juvenile Courts and not in the regular criminal Courts. There are special provisions enacted in various statutes relating to children providing for trial by Juvenile Courts in accordance with a special procedure intended to safeguard the interest and welfare of children, but, we find that in many of the States there are no juvenile Courts functioning at all and even where there are juvenile courts, they are nothing but a replica of the ordinary criminal courts, only the label being changed. The same Magistrate who sits in the ordinary criminal Court goes and sits in the Juvenile Court and mechanically tries cases against children. It is absolutely essential, and this is something which we wish to impress upon the state Governments with all the earnestness at our command, that they must set up Juvenile Courts, one in each district, and there must be a special cadre of Magistrates who must be suitably trained for dealing with cases against children. They may also do other

criminal work, if the work of the Juvenile Court is not sufficient to engage them fully, but they must have proper and adequate training for dealing with cases against Juveniles, because these cases require a different type of procedure and qualitatively a different kind of approach. We would also direct that where a complaint is filed or First information Report is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than 7 years, the investigation shall be completed within a period of three months from the date of filing of the complaint or lodging of the First Information Report and if the investigation is not completed within this time, the case against the child must be treated as closed. If within three months, the charge-sheet is filed against the child in case of an offence punishable with imprisonment of not more than 7 years, the case must be tried and disposed of within a further period of 6 months at the outside and this period should be inclusive of the time taken up in committal proceedings, if any. We have already held in Hussainara Khatoon vs. Home Secretary, State of Bihar, (1979) 3 SCR 169 : (AIR 1979 sc 1360) that the right to speedy trial is a fundamental right implicit in Art. 21 of the Constitution. If an accused is not tried speedily and his case remained pending before the Magistrate or the sessions Court for an unreasonable length of time. It is clear that his fundamental right to speedy trial would be violated unless, of course, the trial is held upon account of some interim order passed by a superior Court or the accused is responsible for the delay in the trial of the case. The consequence of violation of the fundamental right to speedy trial would be that the prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental right. One of the primary reasons why trial of criminal cases is delayed in the Courts of Magistrates and Additional sessions Judges is the total inadequacy of judge-strength and lack of satisfactory working conditions for Magistrate and Additional sessions Judges. There are Courts of Magistrates and Additional sessions Judges where the workload is so heavy that it is just not possible to cope with the workload, unless there is increase in the strength of Magistrates and Additional Sessions Judges. There are instances where appointments of Magistrates and Additional sessions Judges are held up for years and the Courts have to work with depleted strength and this affects speedy trial of criminal cases. The Magistrates and Additional Sessions Judges are often not provided adequate staff and other facilities which would help improve their disposal of cases. We are, therefore, firmly of the view that every State Government must take necessary measures for the purpose of setting up adequate number of Courts, appointing requisite number of Judge and providing them the necessary facilities. It is also necessary to set up an Institute or Academy for training of Judicial Officers so that their efficiency may be improved and they may be able to regulate and control the flow of cases in their respective courts. The problem of arrears of criminal cases in the Courts of Magistrates and Additional Sessions Judges has assumed rather disturbing proportions and it is a matter of grave urgency to which no State Government can afford to be oblivious. But, here, we are not concerned with the question of speedy trial for an accused who is not a child below the age of 16 years. That is a question which may have to be considered in some other case where this Court may be called upon to examine as to what is reasonable length of time for a trial beyond which the Court would regard the right to speedy trial as violated. So far as a child-accused of an offence punishable with imprisonment of not more than 7 years is concerned, we would regard a period of three months from the date of filing of the complaint or lodging of the First information Report as the maximum time permissible for investigation and a period of 6 months from the filing of the charge-sheet as a reasonable period within which the trial of the child must be completed. If that is not done, the prosecution against the child would be liable to be quashed. We would direct every State government to give effect to this principle or norm laid down by us insofar as any future cases are concerned, but so far as

concerns pending cases relating to offences punishable with imprisonment of not more than 7 years, we would direct every State Government to complete the investigation within a period of 3 months from today if the investigation has not already resulted in filing of charge-sheet and if a charge-sheet has been filed, the trial shall be completed within a period of 6 months from today and if it is not, the prosecution shall be quashed. We have by our order dated 5th August, 1986 called upon the state Governments to bring into force and to implement vigorously the provisions of the Childrens Acts enacted in the various States. But we would suggest that instead of each State having its own childrens Act different in procedure and content from the Childrens act in other States, it would be desirable if the Central Government initiates Parliamentary Legislation on the subject, so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country. The Childrens Act which may be enacted by Parliament should contain not only provisions for investigation and trial of offences against children below the age of 16 years but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of the children who were either accused of offences or are abandoned or destitute or lost. Moreover, it is not enough merely to have legislation on the subject, but it is equally, if not more, important to ensure that such legislation is implemented in all earnestness and mere lip sympathy is not paid to such legislation and justification for non-implementation is not pleaded on ground of lack of finances on the part of the State. The greatest recompense which the State can get for expenditure on children is the building up of a powerful human resource ready to take its place in the forward march of the nation. "

20. In Gopinath, the Court said : "before we part with this judgment, we must take notice of a developing situation in recent months in this Court that the contention about age of a convict and claiming the benefit of the relevant provisions of the Act dealing with Juvenile delinquents prevalent in various State is raised for the first time in this Court and this Court is required to start the inquiry afresh. Ordinarily this court would be reluctant to entertain a contention based on factual averments raised for the First time before it. However, the Court is equally reluctant to ignore, overlook or nullify the beneficial provisions of very socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in this Court. A way has, therefore, to be found from this situation not conducive to speedy disposal of cases and yet giving effect to the letter and the spirit of such socially beneficial legislation. We are of the opinion that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where Special Acts dealing with Juvenile delinquent are in force. If necessary, the magistrate may refer the accused to the Medical Board or the Civil surgeon, as the case may be, for obtaining creditworthy evidence about age. The Magistrate may as well call upon accused also to lead evidence about his age. Thereafter, the learned Magistrate may proceed in accordance with law. This procedure, if properly followed would avoid a journey up to the Apex Court and the return journey to the grass-root Court. If necessary and found expedient, the High Court may on its administrative side issue necessary instructions to cope with the situation herein indicated. "

21. In Bhola Bhagat, referring to Gopinath Ghosh and reiterating the principle laid down therein, the Court issued the following directions :

"before parting with this judgment, we would like to reemphasis that when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the Court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination

of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially-oriented legislation, it is an obligation of the Court where such a plea is raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The Court must hold an enquiry and return a finding regarding the age, one way or the other. We expect the High Courts and subordinate Courts to deal with such cases with more sensitivity, as otherwise the object of the acts would be frustrated and the effort of the legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated. The High Courts may issue administrative directions to the subordinate Courts that whenever such a plea is raised before them and they entertain any reasonable doubt about the correctness of the plan, they must as a rule, conduct an inquiry by giving opportunity to the parties to establish their respective claims and return a finding regarding the age of the accused concerned and then deal with the case in the manner provided by law. "

Let the administrative side of the High Court take appropriate action in accordance with law in the light of the observations made and directions issued by the Hon'ble Supreme Court.

(21.) ANOTHER decision on which reliance is placed for the purpose of claiming compensation for illegal detention of juvenile has been rendered in the case of Salim Ikramuddin Ansari and another vs. Officer-in-charge, Borivali police Station, Mumbai and others, 2004 (4) Mh. LJ. 725 wherein Their lordships after dealing with the provisions of the Juvenile Justice Act found that the petitioner was wrongfully confined behind the bar for almost three years because of sheer negligence, indifference and inhuman attitude adopted by the authorities and awarded compensation of Rs. 1 lakh on consideration of the totality of the facts and circumstances of the case.

(22.) FROM the facts which have surfaced before the court from the Record and Proceedings of the three cases in which petitioner was tried before the juvenile Court at Bhandara that too for serious offences under I. P. C. and TADA (P) Act, 1987. We have no hesitation to draw the conclusion that the police officers involved in the investigation of these cases were bound to come across the fact that the petitioner at the time of commission of offences was of 13 years of age as she was taking education in a school which had record of her date of birth and it was obligatory on their part to bring it to the notice of the Magistrate before whom she was produced for the first time. On the other hand, they misrepresented her age as 18 and above and sought her remand, now the State cannot blame the petitioner or the concerned Magistrate for this serious lapse for which the State will have to compensate the petitioner.

(23.) WE have no hesitation to arrive at a conclusion that this is the case where the State has acted in violation of Articles 21 and 22 of the Constitution of india and Juvenile Act of 1986 and Juvenile Justice (Care and Protection of children) Act, 2000 and its officials have committed offences punishable under section 3, sub-section (2) (i) (ii) and (vii) of the Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act, 1989 and for that the State is bound to compensate the victim as provided under Rule 12 (4) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 and particularly in respect of Item No. 18 in the serial number of the schedule, which provides for full compensation on account of damages or loss or harm sustained in victimization at the hands of a public servant. Here, we would like to add-as the original respondent No. 4 having expired, though the State is not able to proceed against him, it is to prosecute all concerned police officers who were part of the investigation team for the offence under section 3 (2) (vii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)

Act, 1989 but the State overlooked violation of these provisions of the said Act and it has failed to prevent atrocities suffered by the petitioner, at the hands of its officials.

(24.) WE have plethora of cases to support our findings, which we would like to refer the first being the case of Joginder Kumar vs. State of U. P. and others, (1994) 4 SCC 260 in which the Hon'ble Supreme Court was required to make the following observations.

"the law of arrest is one of the balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other, of weighing and balancing the rights, liberties and privileges of the single individual and those of individual collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first the criminal or society; the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law that society came first and that criminal should not go free because the constable blundered. "

"no arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of the protection of constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. "

"the next case which requires to be referred is that of D. K. Basu vs. State of West Bengal, (1997) 1 SCC 416 wherein the Supreme Court has observed -"custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever the human dignity is wounded, civilization takes a step backward the flag of humanity must on each such occasion fly half mast. "

a crime suspect must be interrogated indeed subjected to sustained and scientific interrogation - determined in accordance with the provisions of law. He cannot however be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. Challenge to terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That would be bad for the State, the community and above all for the rule of law. The state must therefore ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of human rights except in the manner permitted by law. And the court was required to issue the following directions -

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the

locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or detained and is being held in custody in a police station or interrogation Centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the Police Station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
7. The arrestee should, where he so requests be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee. "
8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the state or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.
9. Copies of all the documents including the memo of arrest, referred to above should be sent to the Illaqa Magistrate for his record.
10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
11. A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board. "
All these directions are inherent in Article 22 of the Constitution of India.
(25.) IN the case of Kishor Singh Ravinder Dev vs. State of Rajasthan, AIR 1981 SC 625 in reference to the 'third degree' method is concerned about police atrocities the Supreme Court has examined the matter in detail and deprecated use of 'third degree' method by the police and observed as under :-no police life style which relies more on fists than on wits, on torture more than culture can control crime because means boomerang on ends and refuel the vice which it seeks to extinguish. Secondly the state must re-educate the constabulary out of their sadistic arts and inculcate a respect for the human person - a process, which must begin by example than by precept if the lower rungs are really to emulate. Thirdly if any policemen are found to have misconducted themselves no sense of police solidarity or inservice comity should induce the authorities to hide the crime. Condign action, quickly taken is surer guarantee of community credence than bruting about that "all is well with the police and their critics are always in the wrong. " Nothing is more cowardly and unconscionable that a person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a State official running berserk regardless of human rights.

(26.) WHAT one can gather from the aforementioned cases is that lack of accountability of the police force also adds to the custodial violence. The Police is policed mostly by themselves and hence police personnel committing excesses on citizens succeed by and large, in getting away scot free. The contention of the respondent/state in this case that the respondent Nos. 4 and 5 were not posted at the relevant police stations within which jurisdiction the petitioner/victim was residing belies the case of the petitioner, cannot be accepted or digested. The record and proceedings of three cases in which the petitioner came to be falsely implicated and ultimately acquitted on the ground of no evidence were all investigated by original respondents Nos. 4 and 5. We may go a step further and observe that such serious offences alleged to have been committed by Naxalites attracting a draconian law like TADA (P) Act, 1987 must have been monitored by Senior Officials of the police and without their tacit consent police could not have arrested and kept in illegal detention a poor helpless tribal girl of 13 years age who was continuously tortured in most inhuman manner and, therefore, the state rather than coming before the court and offering to punish all those Officers who were concerned with the investigation, sanction and prosecution of the petitioner as well as other co-accused, after conducting fair inquiry into the matter, has tried to cover up their misdeeds and therefore, they are bound to compensate the petitioner/victim. The law relating to compensation is now well settled by series of decisions of the Supreme Court. To mention a few first in the line being that of Rudul Sah vs. State of Bihar and another, AIR 1983 SC 1086 wherein a Supreme Court clearly held that the State is liable to pay compensation to the victim and may recover the same from its officers, who are responsible for the misdeeds. The matter was further dealt with by the Supreme Court in the case of Sebastian Hongray vs. Union of India and others, AIR 1984 SC 571, Bhim singh vs. State of J and K and others, AIR 1986 SC 494, Saheli vs. Commissioner of Police Delhi and others, AIR 1990 SC 513. The principles laid down by the supreme Court in all these cases again came for its consideration in the celebrated case of Smt. Nilabati Behera @ Lalita Behera (through the Supreme court Legal Aid Committee) vs. The State of Orissa and others, JT 1993 (2) SC 503. Therefore, there can be no doubt that the law is well settled that the State will have to compensate the victims of atrocities committed by its officials particularly the police in flagrant violation of fundamental rights and human rights of the victim.

(27.) NOW, the only question which remains to be considered is how much compensation should be granted to the petitioner. The victim had been arrested and illegally detained right from the year 1990 when she was of a tender age of 13 years suffered inhumane torture though the petitioner has not in so many words explained that in what manner she was tortured to show that it was an insult to womanhood but one can understand the agony the victim might have suffered in police custody and, therefore, taking all these facts and circumstances into consideration in our opinion a sum of Rs. 5,00,000/- (Rs. five Lakhs) would be reasonable compensation to which the petitioner is entitled.

(28.) THEREFORE, we order the Respondent/state to pay a sum of Rs. 5,00,000/- (Rs. Five lakhs) to the petitioner within a period of four weeks from the date of pronouncement of the judgment along with costs of the petition which we quantify at Rs. 10,000/ -. We further order and direct the State to conduct a thorough and impartial inquiry by setting up Special Investigating Team of the state C. I. D. headed by I. P. S. Officer not below the rank of D. I. G. and it should consist of a lady Police Officer not below the rank of Superintendent of Police and inquiry should be in the direction of the arrest and detention of the petitioner and her prosecution in the three cases. We, by way of abundant caution, would like to observe that none of the Police Officials associated with the inquiry should be

in any manner connected with the investigation of the three cases in which the petitioner was tried.

(29.) THIS exercise has to be undertaken by the State in order to identify police Officers, who were at the relevant time associated with the investigation and prosecution of all accused persons in these three cases where the petitioner was one of the co-accused and also those Senior Officers who have monitored the investigation of these three cases and granted sanction to prosecute the petitioner/victim as well as co-accused and also examine material collected against the petitioner showing her complicity in the crime so that the State can fix responsibility on erring officers and after conducting necessary inquiry if they are found guilty of having committed any offence under any penal provisions, prosecute them for the same and also recover the amount of compensation directed to be paid to the victim. We will highly appreciate it an Action Taken report is submitted to this Court within a period of six months from the date of judgment and order, and for this limited purpose the petition will remain pending on the file of this Court.

(30.) BEFORE parting with this judgment we would also like to observe that pursuant to the direction issued by the Supreme Court in the case of Kartarsingh vs. State of Punjab, (1994) 3 SCC 569 in which the Hon'ble Supreme Court upheld the validity of TADA (P) Act, 1987, had issued direction to the State government to constitute Review Committee. It is unfortunate that though the petitioner is tribal girl with no access to justice was being prosecuted under the provisions of TADA (P) Act, 1987 along with other offences of serious nature under the Indian Penal Code and Arms Act, her case was never referred to the review Committee probably because the State was oblivious of its duty to do so because the petitioner/victim who was accused was a non entity so far as the state Government was concerned. Rule is made absolute in the aforesaid terms.

Order accordingly.

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Cross Citation :2008 CRI. L. J. 3281

MADHYA PRADESH HIGH COURT

Hon'ble Judge(s) : A. K. PATNAIK, C.J. AND AJIT SINGH, J. (Division Bench)

Hardeep Singh Anand ….. V/s…. State of M. P."
W. A. No. 1754 of 2007, D/- 14 -5 -2008.

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Constitution of India, Art. 21 – Fundamental rights – Violation by Police – Compensation – Appellant a was prosecuted u.s. 420 of I.P.C. – Raid was conducted in his house – He was handcuffed – Photograph of

handcuff – Published in newspaper – His sister was shocked and expired when she saw his photograph with handcuff in newspaper – He was unnecessary handcuffed by the police – After trial the applicant was acquitted – Held – Compensation of Rs. 70,000/- awarded to the appellant to be paid by state.

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W.P. No. 4638 of 2007, D/-24-08-2007, Reversed.
(1996) 6 SCC 354; 1980 Cri LJ 930 (SC); 1983 Cri LJ 1644 (SC); 1991 AIR SCW 871; 1997 Cri LJ 743 (SC), Relied on. (Paras 8, 13, 17)
Cases Referred : Chronological Paras
1997 Cri LJ 743 : AIR 1997 SC 610 : 1997 AIR SCW 233 (Rel. on) 16
(1996) 6 SCC 354 (Rel. on) 11
1991 AIR SCW 871 (Rel. on) 15
1983 Cri LJ 1644 : AIR 1983 SC 1086 (Rel. on) 14, 15
1980 Cri LJ 930 : AIR 1980 SC 1535 (Rel. on) 12
Appellant-in-person; Kumaresh Pathak, Deputy Advocate General, for the State.

Judgement

A.K. PATNAIK, C.J. :- This is an appeal filed under Section 2(1) of the M. P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 against the order dated 24-8-2007 passed by the learned single Judge in W.P. No. 4638 of 2007.

2. The relevant facts briefly are that the appellant was running a Coaching Centre named "Deepika Classes" preparing students for taking Pre-Medical Test, Pre-Engineering Test and other tests for admissions to MBBS, Dental, Engineering, IIT courses. On 8-6-1992, a raid was conducted in the house of the appellant at the instance of Shri Raghava Chandra, the then Collector, Jabalpur and thereafter a Criminal Case No. 314 of 2004 under Sections 420 read with Section 34, IPC was registered against the appellant. After investigation, a charge-sheet was filed and after trial, the appellant was acquitted on 26-8-2004. The appellant then filed Writ Petition No. 4368 of 2004 contending inter alia that although the appellant was in police custody in Police Station, Gorakhpur since 10.00 p.m. on 8-6-1992, he was unnecessarily handcuffed by the Police and a number of daily newspapers published his photographs and his sister, who loved him, on seeing his photographs was shocked and expired on 17-6-1992. The appellant also contended in the writ petition that the prosecution knew right from the beginning that the cases registered against the appellant were false and did not deliberately send notices to the three independent witnesses Jitendra, Shailendra and Arun Chouksey from 1992 up to 2003 and the witnesses were produced before the Court only at the end of 2003 and thus there was violation of the fundamental right to speedy trial guaranteed under Art. 21 of the Constitution. In the writ petition, the appellant prayed that the respondents 2 to 20 should be prosecuted under the relevant sections of law and the respondent No. 21 onwards should be prosecuted for criminal defamation and other sections of law.

3. When the writ petition came up for admission before the Court, a learned single Judge in his order dated 24-2-2005 ordered that he was inclined to admit the matter only with regard to issue regarding grant of compensation for causation of delay in disposal of Criminal Case No. 314 of 2004, which arose in relation to the occurrence of the year 1992 and accordingly directed issuance of notices to respondents 1 and 6 to 17 only.

4. Pursuant to the notices, returns were filed by respondent No. 1 and some other respondents and a learned single Judge of this Court heard the learned counsel for parties,

and after going through the documents filed by the appellant as well as the record pertaining to Criminal Case No. 314 of 2004 held that on a few occasions, time was sought from the trial Court by the prosecution but on most of the occasions trial was adjourned at the instance of the appellant himself and from the proceedings of the trial Court, it cannot be held that unnecessary or deliberate adjournments were sought by the prosecution in order to delay the trial and hence the question of granting compensation for delay in trial to the appellant did not arise and accordingly dismissed the writ petition by order dated 24-8-2007.

5. Thereafter, the appellant filed an application for review of the order dated 24-8-2007 passed by the learned single Judge which is numbered as MCC No. 7325 of 2005 in which the appellant contended that the Additional Advocate General, who appeared on behalf of the State submitted a typed copy of the proceedings of Criminal Case No. 314 of 2004 in which incorrect dates of proceedings were mentioned and for this reason, the learned single Judge held that unnecessary and deliberate adjournments were sought by the appellant in order to delay the trial and dismissed the writ petition. The learned single Judge, however, dismissed the review petition by order dated 12-10-2007 saying that the record of the criminal case was very much available when the matter was argued and the order dismissing the writ petition was passed after perusing the record of the Criminal Case and after scrutinizing the same. Aggrieved, the appellant has filed this appeal.

6. We have heard the appellant in person and Mr. Kumaresh Pathak, learned Deputy Advocate General for the State and we find that the main ground taken in the appeal memorandum is that the learned single Judge has failed to appreciate that the prosecution had delayed the trial by almost six years from 9-3-1998 to 26-8-2004. To consider the aforesaid ground-taken in the memorandum of appeal, we have called for the records of Criminal Case No. 314 of 2004 and on perusal of the same, we find that on 9-3-1998, the Court rejected the prayer of the appellant to modify the charges and on 12-3-1998, the charges were framed. Thereafter on 6-4-1998, the case had to be adjourned because the appellant was absent. On 6-5-1998, the case had to be ad-journed because the witnesses were absent. On 27-6-1998, the witnesses and the appellant/accused were absent. On 27-7-1998, the witnesses and the appellant were absent. On 7-9-1998, the case had to be adjourned because the witnesses and the appellant were absent. The delay up to 7-9-1998 was, therefore, on account of absence of the witnesses as well as the absence of the appellant.

7. The first witness on behalf of the prosecution, namely K. C. Jain (P.W. 1), City Magistrate was examined on 15-3-1999. Thereafter, on a number of dates, the case had to be adjourned because the summons could not be served on the witnesses and on 28-6-2000, the trial Court issued show cause notice to the Station Officer. Even thereafter, witnesses were not served with summons on various dates. On 22-3-2002. Rekha Jain (P.W. 2) and Yogendra Pal Singh (P.W. 3) were examined. On 10-12-2002, although the appellant applied for closing the prosecution case, the trial Court rejected the prayer and fixed the case for 3-2-2003 for examining the remaining witnesses. On 6-3-2003, the trial Court pulled up the prosecution for not producing the remaining witnesses and fixed the case for 5-5-2003 for further evidence. On 5-5-2003, the trial Court again took serious note of the delay caused by the prosecution and directed the prosecution to produce the witnesses on the next date. On 9-10-2003, Arun Kumar (P.W. 4) was examined by the prosecution. To examine the two remaining witnesses Jitendra and Shailendra, the Public Prosecutor took time. On 16-10-2003, Jitendra (P.W. 5) was partly examined and his evidence could not be completed in absence of the seized articles. Although Shailendra (P.W. 6) was also present on 16-10-2003 but he could not be examined.

On 3-12-2003, C. N. Dubey was present but he could not be examined since the record of the trial Court had been called for inspection by the Additional District Judge. On 15-12-2003, Shailendra (P.W. 6) was examined. On 16-1-2004, bailable warrants were issued to two witnesses left for examination. On 22-1-2004, the application filed by the appellant for re-examination of C.N. Dubey was rejected. On 6-5-2004, examination of Jitendra (P.W. 5) was completed and the prosecution case was closed. Thereafter, the defence witnesses were examined on 25-5-2004 and 11-6-2004 and the defence evidence was closed on 13-8-2004. Arguments were heard on 20-8-2004 and the appellant was acquitted on 26 8-2004. The aforesaid discussion would show that the State took four years from 15-3-1999 to 6-5-2004 to produce and examine its witnesses in the trial.

8. We may now examine the returns filed by the State in W.P. No. 4368 of 2004 to find out whether the prosecution had any reasonable explanation for the delay. In para 9 of the return filed by the State in W.P. No. 4368 of 2004, it is stated that the appellant has not filed any documents to show that the delay was caused because of the reasons on the part of the answering respondent and that the appellant ought to have approached the appropriate forum to get directions for speedy trial of the criminal case and having not availed the said remedy, he cannot now raise such a ground in this writ petition. In the additional return filed on behalf of the respondent No. 1 State on 19 2-2007, it is stated that the State was not at all responsible for causing any delay in conclusion of the trial but delay has been caused because the Court has been quite lenient and sympathetic towards the appellant and granted every prayer made on behalf of the appellant and thus, it is not correct that the delay has been caused by any laches on the part of the respondent No. 1-State. But as we have seen from the order-sheets of the Criminal Case No. 314 of 2004, the delay is not on account of the leniency and sympathy shown by the Court towards the appellant but because of the prosecution failing to produce and examine the witnesses on the various dates to which the case was fixed. In the return and the additional, return, therefore, no explanation as such has been furnished by the State for the delay in producing and examining the witnesses on behalf of the prosecution during the period 15-3-1999 to 6-5-2004. We accordingly hold that the delay of five years Was on account of the respondent No. 1 State not taking timely steps in producing and examining the witnesses on behalf of the prosecution and that the findings of the learned single Judge in the impugned order that on most of the occasions trial was adjourned at the instance of the appellant and that from the proceedings of the trial Court, it cannot be said that unnecessary adjournments were sought by the prosecution in order to delay the trial are not correct.

9-10. Speedy trial was held as an integral and essential part of the fundamental right to life and liberty of a person, guaranteed under Article 21 of the Constitution. P. N. Bhagwati, J. (as he then was) speaking for himself and A.D. Koshal, J. held :

".....If a person is deprived of his liberty under a procedure which is not 'reasonable, fair or just', such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is

sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Art. 21."

11. Again in Anukul Chandra Pradhan v. Union of India (1996) 6 SCC 354, the Supreme Court took a view that trial of those involving public men should be concluded more expeditiously and this was the requirement of speedy trial guaranteed under Art. 21 of the Constitution. Para 6 of the judgment of the Supreme Court in Anukul Chandra Pradhan v. Union of India (supra) is quoted hereinbelow ;

"We may also observe, that the Court concerned dealing with the above matters has to bear in mind that utmost expedition in the trial and its early conclusion is necessary for the ends of justice and credibility of the judicial process. Unless prevented by any dilatory tactics of the accused, all trials of this kind involving public men should be concluded most expeditiously, preferably within three months of commencement of the trial. This is also the requirement of speedy trial read into Article 21."

12. With regard to handcuffing, in Prem Shankar Shukla v. Delhi Administration, (1980) 3 SCC 526 : (1980 Cri LJ 930), Krishna Iyer, J. speaking for himself and Chinnappa Reddy, J. made the following observations in para 22 at page 537 of the SCC : (at p. 937 of Cri LJ) :

"Handcuffing is prima facie inhuman and, therefore, unreasonable is over-harsh and at the first flush arbitrary. Absent fair procedure and objective monitoring, to inflict 'irons' is to resort to zoological strategies repugnant to Art. 21. Thus, we must critically examine the justification offered by the State for this mode of restraint. Surely, the competing claims of securing the prisoner from fleeing and protecting his personality claims barbarity have to be harmonized. To prevent the escape of an under-trial is in public interest, reasonable, just and cannot, by itself, be castigated. But to bind a man hand-and-foot, fetter his limbs with hoops of steel, shuffle him, defile his dignity, vulgarise society and foul the soul of our constitutional culture. Where then do we draw the humane line and how far do the rules err in print and praxis?

13. In the instant case, the appellant was well educated person and was coaching students for entrance tests and examinations for admission to MBBS, Engineering, IIT etc. and it is alleged in para 5.6 of the writ petition that when he was already in Police custody in Gorakhpur Police Station at 10.00 p.m. on 8-6-1992, he was unnecessarily handcuffed by the police and number of daily newspapers published the photographs of the appellant handcuffed and his sister, who loved him as son, saw the photographs in the newspapers and was shocked and expired on 17-6-1992. The appellant has produced before us a newspaper in which his photograph with the handcuff has been published. In paragraph 8 of the return filed on 4-2-2006, the respondent No. 1 denied that the appellant was unnecessarily handcuffed, but no reasons have been given in the return why such handcuffing was necessary.

14. The next question is whether the appellant is entitled to any compensation from the respondent No. 1 -State for delay of five years in the trial and for handcuffing in violation of his fundamental rights under Art. 21 of the Constitution. In Rudul Sah v. State of Bihar and another, AIR 1983 SC 1086 : (1983 Cri LJ 1644), the Supreme Court has taken a view that one of the effective ways in which violation of fundamental rights under Art. 21 of the Constitution can reasonably be prevented, is to direct the State to pay compensation to the person whose rights under Art. 21 of the Constitution is affected. In the language of the Supreme Court (Para 10) :

".....Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and the compliance with the mandate of Article 21 secured, is to mulct its

violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

15. In fact, in State of Maharashtra and others v. Ravikant S. Patil (1991) 2 SCC 373 : (1991 AIR SCW 871), the Supreme Court referring to the Rudul Sah v. State of Bihar (1983 Cri LJ 1644) (supra) upheld the award of compensation of Rs. 10,000/- by the High Court of Bombay to an under-trial prisoner who had been handcuffed and taken through the streets in a procession by the police during investigation. We are, thus, of the view that the appellant is entitled to compensation for violation of his fundamental rights guaranteed under Art. 21 of the Constitution to speedy trial and not to be handcuffed without valid justification.

16. The next question is how much compensation the appellant is entitled? In D. K. Basu v. State of West Bengal (AIR 1997 SC 610) : (1997 Cri LJ 743), the Supreme Court, after examining the liability of the State to its citizens for infringement of their fundamental right laid down the principle for assessment of compensation to be paid by the State as under (para 55) :

"In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortuous act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not interrogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit."

17. During the five years of delay in the trial from 15-3-1999 to 6-5-2004 caused by the State, the appellant's liberty was not affected inasmuch as he was not under imprisonment but was on bail. Hence, the appellant will not be entitled to a huge amount of compensation as claimed by him. Nonetheless, the appellant was handcuffed without a valid justification and his dignity as a human being had been seriously affected. In the circumstances, an expeditious trial and his acquittal would have restored his personal dignity as early as possible. But the State instead of taking timely steps to produce and examine the prosecution witnesses delayed the trial for long five years. In the facts and circumstances of the case, we award a compensation of Rs. 70,000/-(Rupees seventy thousand only) to the appellant. This compensation will be without prejudice to any claim that the appellant may make in a civil Court for damages.

18. In the result, the impugned order passed by the learned single Judge is set aside and the appeal is allowed. We accordingly direct the respondent No. 1-State to pay the

appellant a sum of Rs. 70,000/-(Rupees seventy thousand only) as compensation within a period of three months from today. No order as to costs.

Appeal allowed.

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Cross Citation :2010 All MR. (Cri) 2849

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CORAM : P.V. HARDAS AND SHRIHARI P. DAVARE, JJ.

CRIMINAL WRIT PETITION NO.358 OF 2002, **DATE : 8th February, 2010**

Suresh s/o Pochanna Kurollu,…..VERSUS…… The State of Maharashtra and others

Ms Maya R. Jamdhade, Advocate for the petitioner;Mr K.S. Patil, A.P.P. for respondents no.1, 2, 4 & 5;

Mr S.P. Chapalgaonkar, Advocate for respondent no.7.,Respondents No.3, 6, 8 & 9 served.

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Illegal arrest and detention by Police – Writ petition filed before High Court – Superintendent of Police and Home Secretary though served with notice did not appear before High Court in petition – Petitioner was arrested and detained and after some period of time he was allowed to leave Police station – The respondent who did not shown their appearance in the petition said to have admitted allegations against them – The allegations against them are unrebutted – Compensation of Rs. 1,00,000/- (One Lakh) granted to petitioner to be paid by guilty Police officers.

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ORAL JUDGMENT (PER P.V. HARDAS, J.)

This is a petition under Article 226 of the Constitution of India by which the petitioner prays for awarding of compensation on account of the illegal arrest and detention of the petitioner by the Karimnagar police station at Karimnagar (Andhra Pradesh). We may incidentally state here that notice of this petition had been issued to respondents and pursuant to the said notice respondents no.1, 2, 4, 5 and 7 entered their appearance. The Officers of the Karimanagar police station, especially respondent no.6, 8, respondent no.3 Superintendent of Police, Karimnagar and the Home Secretary of the Government of Andhra Pradesh i.e. respondent no.9 though served have chosen not to put in their appearance.

2. According to the petitioner, the petitioner was arrested on 23.1.1998 from his residence at Nanded and was carted all the way from Nanded to Karimnagar. According to the petitioner, the petitioner was detained till 31.1.1998 on which date the petitioner was permitted to leave the police station. During the aforesaid period the petitioner was neither produced before a Magistrate nor any remand order was obtained for continuing the

detention of the petitioner. As pointed out by us above, though notice of this petition had been served on respondents no.3, 6, 8 and 9, the respondents have not turned in their appearance nor have they filed any affidavit in reply. Respondents no.4 & 5 who are Officers of Bhagyanagar police station, Nanded and who are alleged to have accompanied the Karimnagar police station for effecting the arrest of the petitioner, in the affidavit in reply contend that they had not accompanied the Karimnagar police station for effecting arrest. No steps had been taken by them in the process of arrest of the petitioner by the Karimnagar police station. Respondent no.7 contend that he was a Driver of a private vehicle which had been engaged by the officers of the Karimnagar police station for effecting the arrest of the petitioner. Therefore, according to respondent no.7 since he was neither member of the police staff nor is instrumental in effecting the arrest of the petitioner and his eventual illegal detention at Karimnagar, he is not liable.

3. Obviously, respondents no.1, 2, 4 and 5 cannot be held liable for payment of any compensation on account of the illegal arrest and illegal detention of the petitioner by the Karimnagar police station. Similarly, respondent no.7 who was merely a Driver of the vehicle also cannot be saddled with the responsibility of paying compensation. Respondents no. 3, 6, 8 and 9 though served with a notice of this Court have not entered their appearance in the present petition. The allegations against respondents no.3, 6, 8 and 9, therefore, are unrebutted.

4. In that light, therefore, we allow this petition as against respondents no.3, 6, 8 and 9 and determine that the petitioner would be entitled to an amount of Rs.1,00,000/- (Rupees One Lakh) as compensation for his illegal arrest and detention by the Karimnagar police station. The amount to be paid by respondent no.9 and to be recovered, if necessary, from respondent no.3, 6 and 8.

5. Petition is accordingly partly allowed. Rule is made absolute on the above terms with no orders as to costs. The petition would stand dismissed as against respondents no.1, 2, 4, 5 and 7 with no orders as to costs.

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Cross Citation : 1991-Cri.L.J.-0-2344, 1990-BCR-2-242 .

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : R.A.JAHAGIRDAR & R.G.SINDHAKAR, JJ.

Ravikant Patil ….Vs… Director General Of Police

Criminal Writ Petition 1199 of 1989 Of Feb 14,1990

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Constitution of India Art 21 – Personal liberty - Violation of – Handcuffing and parading the accused through streets for investigation

– Held, even though the accused was charged under case of Murder the police have no right to handcuff him and parade through the streets – It was alleged by the police that the accused had long criminal record but not a single case was pointed out in which he was convicted – The accused was subjected to wholly unwarranted humiliation and indignity which cannot be done to any citizen of India irrespective of whether he was accused of minor offence or major offence – the action of Police Inspector was unjustified – Accused entitled to compensation – Rs, 10,000 awarded as compensation would be paid by police Inspector.

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(1.) THIS is a petition under Article 226 of the Constitution of India filed by the petitioner, who has been arrested in connection with a murder of one Ganesh Kolekar, which took place in Solapur on 2nd August, 1989. The petition seeks to censure the 3rd and 4th respondents for the action which they have taken against the petitioner, described hereinafter in greater details. The 1st respondent is the Director General of Police, while the 2nd respondent is this judgment because ultimately what we are called upon to decide is whether the action of the 4th respondent in such as to merit censure and also such as to result in the payment of compensation to the petitioner. The 3rd respondent is the Superintendent of Police. According to the petitioner, the Acts complainted of by the petitioner against the 4th respondent were at the instance of the 3rd respondent. After going through the material on record, it has not been possible for us to accept the case of the petitioner that it was at the instance and the behest of the 3rd respondent that the 4th respondent committed the Acts of which complaint has been made in this petition. Hence, we will also not be referring to the 3rd respondent in this judgment. The 4th respondent is the Inspector of Police, who was a the relevant time in charge of Faujdar Chavadi Police Station, Solapur.

(2.) FACTS which have been clearly established on the basis of the material brought on record through the affidavits may be straight away stated. We have already mentioned above that one Ganesh Kolekar was murdered on 2nd of August, 1980. First Information Report in connection with that murder did not include the name of the petitioner as one of the suspects. However, during the course of the investigation, the police suspected that the petitioner was a party to the said murder and naturally he was to be arrested. The petitioner was in fact arrested later at a place called Tumkar in Karnataka State and was brought to Solapur in the early hours of 17th August, 1989. The police allege that the murder of Ganesh Kolekar was a culmination of a warfare between two gangs in Solapur. One Prakash Narote had already been arrested in connection with the said murder of Ganesh Kolekar.

(3.) A paper called Tarun Bharat, published from Solapur, carried in its issue of 17th of August, 1989 a news item submitted by its correspondent which said that the petitioner would be taken in a procession or a parade from Faujdar Chavadi Police Station through the main squares of the city for the purpose of investigation. This is some what unusual

because the story is detailed 16th August, 1989; the accused was brought to Solapur, according to the affidavit of the 4th respondent, half an hour after midnight of 16th and 17th August, 1989. It may be that the correspondent of this newspaper had come to know that the petitioner had been arrested at Tumkur as mentioned above. The fact that there was a news that the petitioner would be taken out in a perade from Faujdar Chavadi Police Station through the main squares of Solapur is of some significance. There are several other facts mentioned in this copy filed by the correspondent of this paper. However, we are not taking any cognisance of the same because they are strictly of no evidentiary value as far as this petition is concerned.

(4.) ON 17th of August, 1989, as predicted by the paper, Tarun Bharat, the petitioner was handcuffed and both his arms were tied by a rope and he was taken through the streets and squares of Solapur. This fact is admitted on behalf of the respondents, in the middle part of paragraph 9 of his affidavit-in-raply, the 4th respondent has stated as follows:---

"it is true that the petitioner was handcuffed and tied with rope while he was taken to the above-referred place for investigation purpose. "

The places referred to will be mentioned by us in a short while and when, we do so, it would be clear that they are all prominent places in Solapur, being main squares and leading streets. With this admitted fact, namely the fact that the petitioner was handcuffed and roped and then taken through the streets and main squares of Solapur, and with the further admitted fact that this phenomenon was witnessed by large number of people in the city, one has to consider the question as to whether this was done by the 4th respondent for the purpose of investigation, as he contends in his affidavit-in-reply. The 4th respondent says that the petitioner was so taken through the streets and squares of Solapur for the purpose of investigation. He insists that the petitioner was not paraded. However, it was necessary to subject him to the restraints of handcuffs and ropes for the purpose of preenting his escape if the petitioner intended. It has also been mentioned by him that in some of the areas through which the petitioner was to be taken, there were members of the gang to which the petitioner belonged and there was apprehension that the suit members of the gang could make an attempt to secure the release of the petitioner. We will have to examine whether those contentions of the 4th respondent are true or not.

(5.) BEFORE we proceed to examine the material in this regard, we may briefly mentioned that the 4th respondent has in several paragraphs mentioned that the petitioner has a long criminal record. Several cases in which the petitioner is alleged to be an accused have been referred to in this affidavit. We may, however, note that the 4th respondent has not stated that the petitioner has been convicted even in a single case. The 4th respondent, of course, is free to refer to the fact that several criminal cases are pending against the petitioner, but that itself, in our opinion would not entitled an officer of the rank of the Inspector of Police in charge of a police station to subject a person to the indignity and humiliation to which the petitioner has been subjected in this case. It has also been mentioned by the 4th respondent that the murder of Ganesh Kolekar was the result of enmity between two gangs and the petitioner belonged to one gage. This also, in our opinion, has nothing to do with the necessity of handcuffing and roping the petitioner and then taking him through the main streets and squares of Solapur. If the murder of Ganesh Kolekar was the result of a gang welfare we thought that the 4th respondent

would particularly see that the person of the petitioner would not be exposed in the public, as it has been done, when the petitioner was paraded. By taking the petitioner openly, walking through the streets, the 4th respondent in fact took the risk of exposing the person of the petitioner to any possible attack by the members of the rival gang. Here the 4th respondent has committed an act which is devoid of proper caution expected of a senior police officer.

(6.) NOW, we will proceed to examine whether it was necessary for the 4th respondent to take the petitioner through the streets and squares of Solapur city for the purpose of the investigation. What was in fact an investigation which was to be conducted by the 4th respondent in the morning of 17th of August, 1989? The petitioner had been brought to Solapur city from Tumkur in the early hours of 17th of August, 1989, he was yet to be produced before the Magistrate for the first remand in the afternoon. What was the urgency of any steps in the investigation that were contemplated by the 4th respondent? In order to find answer to this question, we will rely independently upon the facts disclosed by the 4th respondent himself. In the second sub-paragraph of paragraph 9 of the affidavit-in-reply, the 4th respondent says that the petitioner was interrogated by him in connection with the offence and, during the course of the said interrogation, the petitioner disclosed that some of the accused were goondas from Bombay and Pune and they were brought by him and lodged in Parijat Lodge, Station Road, Solapur. According to the 4th respondent, the petitioner stated that he would point out the said place. It is also stated that he would point out the house of accused Prakash Narote at Ramlal Chowk and the houses of some other persons at Lobha Master Chawl at Panjarapol Chowk and of another accused at Patra Talim area and the house of another accused near Kali Masjid.

(7.) WITH the object of enabling the petitioner to point out all these places, he was taken from the Police Station first to his bungalow and then to Parijat Lodge and then to various other places as mentioned in paragraph 9 of the affidavit of the 4th respondent. Sai Prasad Lodge owned by Prakash Narote was examined by the 4th respondent and his other staff on being shown by the petitioner. The petitioner was taken to Ramlal Chowk, Panjarapol Chowk, Lobha Master Chawl via Bhayya chowk and Mechanic Chowk. Further he was taken to what is called Patra Talim area and Kali Masjid. He was also taken to Paras Estate, Datta Chowk, Laxmi Market and the Zilla Parishad office. The houses of the persons to be identified by the petitioner were all situated, as the affidavit of the 4th respondent himself shows, at prominent places and Chowks. It is a sad commentary on the efficiency of this Police Officer to require the assistance of an accused person to find out the houses of other persons who were already arrested in connection with the offence houses which are all situated in prominent squares. We presume that these squares are connected with each other by regular streets through which the petitioner was obviously taken. We do not believe that the 4th respondent is so incompetent as to require the assistance of an accused person to identify the houses of these persons who were other wise connected with the offence into which the 4th respondent was investigating. This explanation given by the 4th respondent is, therefore, wholly unacceptable to us.

(8.) THIS is for the additional reason that no contemporaneous record of the so-called investigation done with the assistance of the petitioner has been relied upon by the 4th respondent. It has not been relied upon for the simple reason that no such record exists. We asked the learned Public Prosecutor, Mr. Kachare, who appears for all the respondents, as to whether there is any such contemporaneous record. The answer was in the negative. Was anything recovered? Was anything discovered? Answers to all these questions are in

the negative. It is thus crystal clear to us that the explanation of the investigation, which is now being put forth by the 4th respondent is a false explanation. It is false also because no panchanamas were made of the investigation; the police party which took the petitioner through the streets and squares of Solapur was not accompanied by panchas. There is not even a scrap of writing to the effect that the investigation was to be made with the assistance of the petitioner.

(9.) NORMALLY, if an investigation is to be done, the accused is taken in a quiet and an inconspicuous manner to the place where any investigation is to be made. One would expect that when such a dangerous character as the petitioner is to be taken to some places in the city in which, according to the police, he is playing havoc, he would be taken in a vehicle quietly without inviting the attention of the persons in the area. What has been done in the instant case in exactly the reverse of it. The petitioner was taken openly; he was taken walking; he was taken though the streets accompanied undoubtedly by a large posses of policemen. The petitioner says that there were 100 police constables, but we accept the conservative estimate given by the 4th respondent, namely that at best there were 10 to 15 policemen accompanying the petitioner and the 4th respondent, who was leading the party.

(10.) IT is also an admitted position that behind the petitioner there was a police van. The 4th respondent says that police van was belonging to the State Reserve Police over which he had no control. But why was that police van following him? No answer is available in the affidavit of the 4th respondent to this question. Obviously, the 4th respondent must have requisitioned the said police van. Why was the petitioner not put into that police van? The answer of the 4th respondent is that police van accommodated members of the State Reserve Police and it also contained ammunitions. We do not see how despite this, if the ostensible purpose of taking the petitioner to various places was for the purpose of investigation, the petitioner could not have been accommodated for a short time in the said police van. Assuming that the explanation of the 4th respondent that the petitioner could not have been carried in the van belonging to the State Reserve Police is true, we still refuse to accept the necessity of taking the petitioner through the streets and squares of the city of Solapur in an open manner and by handcuffing him and roping him. The petitioner has annexed copies of news items on which he relies. In some of them, photographs of the incident have been published. In the issue of a paper called Sanchar dated 18th of August, 1989, two photographs have been published. One of them shows the 3rd respondent, namely the Superintendent of Police, looking at the petitioner, who had already been handcuffed in the police station. The second photograph shows the petitioner right in the middle of the road surrounded by policemen in uniform and following the 4th respondent with his two hands raised in such a manner that it appears that he was leading a parade of some importance. In our opinion, this was a highly irresponsible manner in which a person accused of an offence is to be taken to whatever destination that may be.

(11.) WE have already mentioned above that by doing this, the 4th respondent exposed the petitioner to possible retaliatery attacks by members of the rival gang. We are sure that he did not intend to do so because he had taken the trouble of surrounding the petitioner with large number of police constables who were, in turn, accompanied by a police van in which armed members of the State Reserve Police were travelling, it is inconceivable that such a large number of policemen were necessary to prevent the escape of one individual like the petitioner.

(12.) THE explanation given by the 4th respondent, therefore, is unacceptable to us. We have already noted that Prakash Narote had already been arrested. Yet the 4th respondent says that the petitioner was taken out in order to point out the house of Prakash Narote. This and other explanations which have been given by the 4th respondent are so hopelessly implausible that no Court will ever accept the same. If some measure of plausibility were to be found in the explanation given by the 4th respondent, may be certain excessive action on his part could have been considered in a lenient manner. Looking at the incident in the context of a news item appearing in a paper of Solapur on 17th of August 1989, which predicted that there would be a parade of the petitioner through the main squares of Solapur city starting from Faujdar Chavdi Police Station, the conduct of the 4th respondent shows nothing but an eagerness on his part to satisfy the morbid curiosity of a section of the citizens of Solapur. Probably, he won the admission and applause of such citizens as the Bhagalpur Police won the admiration and applause of some citizens of Bhagalpur for their cruel act towards the under trial prisoners at Bhagalpur by blinding them. It is not the function of a Police Officer to play to the gallery or to tickle the popular whims and to do such acts as would gain appreciation or applause from the members of the public. The primary and probably the only function of a Police Officer is to carry out the investigation as quickly and as efficiently as possible and to collect evidence which would commend itself to the Court for the purpose of securing a proper and legal conviction by the Court. By treating under trial prisoners in the manner in which it has been done by the 4th respondent in the instant case, he has brought the system of investigation into disrepute.

(13.) THE 4th respondent has subjected the petitioner to wholly unwarranted humiliation and indignity which cannot be done to any citizen of India irrespective of whether he is accused of a minor offence or of a major offence. The nature of the offence will attract the appropriate punishment from the Court. The past history of a particular undertrial prisoner is wholly irrelevant to the question as to whether he has to be handcuffed and roped in the manner in which the petitioner has been subjected to. It is possible that a particular prisoner might have shown proclivity of escaping from police custody. In such a case, probably the handcuffing to the extent it is necessary to prevent an attempt at escaping there any material before us to show that the petitioner had at any time made an attempt to escape from police custody.

(14.) THE finding, therefore, we record is that the 4th respondent has without any justification taken out the petitioner from Faujdar Chavadi Police Station. He has handcuffed the petitioner without any reason for the same. He has roped the petitioner without any justification for the same. He has also paraded the petitioner through the main streets and squares of Solapur city. This parade attracted large number of citizens of the city either out of curiosity or out of morbidity. This probably earned some popularity for the 4th respondent, but the action was wholly unwarranted. We are specifically recording a finding that the petitioner was taken out of the Police Station and parade through the streets and squares of Solapur there being no need at all for the same. We are also recording a finding that there was no investigation to be carried out and in fact no investigation was carried out from the time the petitioner was taken out of the Police Station to the time he was produced before the Magistrate for the first order of remand.

(15.) THE law relating to the treatment of prisoners, especially undertrial prisoners, has been laid down with sufficient precision by the Supreme Court in (Prem Shankar v. Delhi Administration) A. I. R. 1980 Supreme Court 1535. It is not necessary for us to discuss this

judgment in greater details. It is sufficient for the purpose of this petition only on refer to certain propositions which have been laid down in the said judgment. In the first place it has been laid down, recalling the judgment of the Supreme Court in (Sunil Batra v. Delhi Administration) A. I. R. 1978 Supreme Court 1675, that imprisonment of a prisoner ipso facto does not eclipse the fundamental rights of a citizen under Articles 19, 21 and 14 of the constitution. Secondly, it has been laid down that insurance against escape does not compulsorily require handcuffing unless no other way is practicable. It has been suggested by the Supreme Court that some increase in the number of escorts is an alternative which ought to be considered.

(16.) FROM the facts of the case before us we notice that there was practically an army which was following the petitioner. This shows that handcuffing was totally unnecessary. The Supreme Court has further stated that the reasons for handcuffing must be recorded contemporaneously. It has not been shown to us in the present case that such a course had been adopted by the 4th respondent. What is of more significance in the admonition of the Supreme Court is that merely calling a person desperate and dangerous is not sufficient justification for handcuffing. Labels such as desperate and dangerous are themselves dangerous and should not be used freely for satisfying the punitive passion for retribution through the process of parading undertrial prisoners cruelly clad in hateful Irons.

(17.) THESE are the propositions which we have culled from the leading judgment delivered by Krishna Iyer, J. , on behalf of himself and Chinnappa Reddy, J. The other judgment is delivered by Pathak, J. , which was inclined to give greater latitude to the persons to whom the custody of prisoners is entrusted. Even the Pathak, J. , has observed as follows :--- "the rule, I think, should be that the authority responsible for the prisoners custody, should consider the case of each prisoner individually and decide whether the prisoner is a person who having regard to his circumstances, general conduct, behaviour and character will attempt to escape or distrub the peace by becoming violent. "

(18.) IN the light of the finding which we have recorded above that the 4th respondent had in fact decided to parade the petitioner with a view to satisfy the curiosity and the perverse interest of a section of the citizens of Solapur, another finding which must follow as the necessary corollary is that the handcuffing and the roping of the petitioner was wholly unnecessary. This is apart from the fact that there is no material on record to show that the petitioner would have escaped from the custody of the police especially when he was surrounded by large posse of policemen and followed by a van of State Reserve Police which carried apart from the members of the State Reserve Police a large quantity of ammunitions. The duty to impose a restraint should not be utilised as an opportunity for exposing an undertrial prisoner to public ridicule and humiliation.

(19.) ARTICLE 21 of the Constitution declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. We have no hesitation in holding that life and liberty of a citizen guaranteed under this Article includes life with dignity and liberty with dignity. Liberty must mean freedom from humiliations and indignities at the hands of the authorities to whom the custody of a person may pass temporarily or otherwise under the law of the land. We have already noticed the limitations on the power of the police in respect of handcuffing and of undertrial prisoners. That we must regard as the law of the land. Any provisions in the Rules which are

inconsistent with Article 21 of the Constitution, as interpreted by the Supreme Court, will have to be held to be invalid.

(20.) THE 4th respondent has relied upon certain rules to be found in the Bombay Police Manual which, he thinks, permit him to handcuff undertrial prisoners. Rule 411 deals with a situation where a prisoner has to be taken in custody from a Court premises to a Jail or a Borstal School or vice versa. It provides that whenever a prisoner is to be taken, he shall not be handcuffed or bound unless the Court otherwise directs. However, if the Police Officer escorting such prisoner considers it necessary to do so in exceptional circumstances, then he may handcuff or bind such prisoner after leaving the Court premises. It is also provided that if the officer in charge of the escort finds that a prisoner is violent after going a few steps from the Court, he can handcuff him, but he is under an obligation to rush back to the Court and obtain an order from the Court. No prisoner shall be handcuffed or bound while being taken from a jail or Borstal School to the Court premises, unless the Jailor otherwise directs in writing. Here the question does not arise because the petitioner has been taken from the lock-up to the Court of the Magistrate for obtaining an order of remand.

(21.) MR. Kachare has contended that 4th respondent should be regarded as the one in charge of the petitioner and he must also be regarded as the head of the escort party. Therefore, the 4th respondent was free to use his discretion after judging the facts and circumstances of the transfer of the petitioner from the Police Station to the Court. Even if we accept this contention of the learned Public Prosecutor, on the facts noticed above and in the context of the findings which we have recorded above, we fall to appreciate the so called discretion exercised by the 4th respondents.

(22.) RULE 412 mentions that in securing a prisoner under escort, the primary issue is that the policemen in charge should remain alert. If there be negligence in this respect, no amount or method of toying or handcuffring will prevent a prisoners escape. For securing prisoners certain methods are recommended to be ordinarily adopted. They need not be discussed at this stage. It is sufficient, however, to notice that even the Bombay Police Manual did make provisions to treat prisoners in a humane way. The rules insisted that the prisoners should not be subjected to unnecessary and inhuman restraint. All this has been provided in the rules. Least of all, the rules cannot permit the subjection of a prisoner to ridicule and humiliation in front of large number of people this is what has been done by the 4th respondent in the instant case.

(23.) WE may also refer to another rule to which our attention has been drawn by Mr. Rane. It is Rule 204. It mentions, among other or things, that undertrial prisoners should be treated with such reasonable consideration as is compatible with their safe custody and production before the Court. Their status and the probability of their attempting to escape should be taken into account in deciding the necessity or otherwise of the use of handcuffs and allowing them the use of a conveyance at their expense. The provisions relating to the conveyance for the transport of the prisoners are to be found in Rules 411 and 413. In the instant case, the 4th respondent never made any attempt to secure a vehicle to carry the petitioner if at all it was necessary to carry him to the various places for the purpose of investigation, the purpose which we have discardede after considering the explanation given by the 4th respondent. The 4th respondent says that there was no vehicle available at 10. 30 a. m. In that case, was it necessary to take out the prisoner at 10. 30 a. m. itself from the Police Station? It has not been mentioned by the 4th respondent that no vehicle

was going to be available for some time and because of this the so-called investigation which the 4th respondent has invented would have been defeated or delayed. We have, therefore, no hesitation in holding that the 4th respondent has trampled upon the right conferred upon the petitioner as a citizen of this country under Article 21 of the Constitution.

(24.) WE have also no hesitation in holding that the 4th respondent has done this by disregarding the very rules according to which he must act. Those rules are to be found in the Bombay Police Manual. The necessity of handcuffing and the necessity of roping the petitioner and the necessity of taking him through the streets and squares of Solapur have not been demonstrated in the smallest measure. On the other hand, the 4th respondent has done the impugned acts without there being any necessity for the same. We have already stated above that this has been done probably for the purpose of winning the applause of the citizens of Solapur, but by doing it he has subjected the petitioner to unnecessary, unwarranted and illegal humiliation and indignity. The character of the petitioner is not in question before us. That will be decided by the Courts which will try his cases. The character of the 4th respondent is before us because it is his conduct that is the subject matter of this petition and we find that conduct wholly unbecoming of an officer of the rank of an Inspector in charge of a Police Station. He has acted outside the scope of the law and outside the scope of the authority which has been vested in him as an officer in charge of a Police Station. We may Incidentally mention that there is no bravery or heroism involved in parading an undertrial prisoner, secured by handcuffing and roping, through the streets of a city. This does not reflect well on the qualities of an officer of a Police Station, such as the 4th respondent.

(25.) HAVING come to these findings, can we direct the 4th respondent to pay compensation to the petitioner while exercising our jurisdiction under Article 226 of the Constitution. There is an authority for the proposition that when the fundamental right of a citizen is infringed without excuse and in a manner not warranted by the law of the land, compensation can be directed to be paid in (Bhim Singh v. State of Jammu and Kashmir) A. I. R. 1986 Supreme Court 494, the Supreme Court held that the police obtaining remand of arrested persona and not producing him before the Magistrate within the requisite period was gross violation of the rights of the arrested person under Articles 21 and 22 (2) of the Constitution of India. Refraining from using stronger words to condemn the authoritarian acts of the police, the Supreme Court held that the custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not to abduct. In Bhim Singhs case, an M. L. A. was arrested and not produced before the Magistrate as required by law within the specified time. The Supreme Court observed that if the personal liberty of a Member of Legislative Assembly is to be played with in this fashion, one can only wonder what may happen to lesser mortals. The State of Jammu and Kashmir was directed to pay to the petitioner before the Supreme Court a sum of Rs. 50,000/ -. The order was passed by the Supreme Court in a petition under Article 32 of the Constitution of India, which Article is for the protection of the fundamental rights of the citizens of this country.

(26.) IN another case, namely, (Rudul Shah v. State of Bihar) A. I. R. 1983 Supreme Court 1086, it was found that a person had been kept in illegal detention for nearly 14 years after his release had been ordered. Taking into consideration that great harm had been done to the petitioner before the Supreme Court by the Government of Bihar, the Supreme Court ordered the State Government as an interim measure, to pay to the

petitioner a sum of Rs. 30,000/- in addition to the sum of Rs. 5,000/- which had already been paid. The order which was passed by the Supreme Court, it was made clear, did not preclude the petitioner from bringing a suit to recover appropriate damages from the State and its erring officials. The order of compensation passed by the Supreme Court was in the nature of a palliative.

(27.) IT is, therefore, clear to us that the Court which has got the power of enforcing the observance of the fundamental rights has also got powers to award compensation to the aggrieved party-a-party whose fundamental rights have been violated by the State or the officers of the State Article 226 of the Constitution is also a provision which empowers the High Court to issue directions, orders or writs for the enforcement of fundamental rights. This must necessarily imply a power to give appropriate relief in a case where a fundamental right of a citizen has been violated either by the State or by any official of the State.

(28.) ARTICLE 226 of the Constitution specifically provides that the High Court may issue to any person or authority directions for the enforcement of any of the rights conferred by Part III and for any other purpose. The 4th respondent is a person. He is also a person in whom authority is vested under the Code of Criminal Procedure. He has abused that authority. He has acted outside the scope of that authority. He has acted outside the scope of the law which given him that authority. He has acted outside the rules which he must follow while exercising that authority. We have, therefore, no hesitation in holding that in exercise of the powers of this Court under Article 226 of the Constitution, we can also direct that compensation shall be paid by the State or a person acting on behalf of the State to a citizen whose fundamental rights have been trampled upon.

(29.) HAVING heard Mr. Rane and the learned Public Prosecutor, Mr. Kachare, on the amount of compensation which the 4th respondent should pay to the petitioner and considering the fact that part of the action of the 4th respondent was the result of over enthusiasm, we think that an amount of Rs. 10,000/- should be paid by way of compensation by the 4th respondent to the petitioner. We also direct that the fact that the 4th respondent has been found guilty of violation of the fundamental right of an undertrial prisoner under Article 21 of the Constitution should be entered in the service recorded of the 4th respondent. The 1st respondent in this petition shall inform this Court within two months from the date on which this order is communicated to the 1st respondent that such entry has been made in the service record of the 4th respondent. A copy of this judgment shall be forwarded by the office to the 1st respondent through the learned Public Prosecutor, Mr. Kachare, who has represented him before us. The compensation shall be paid by the 4th respondent to the petitioner on or before 25th of April, 1990.

Order accordingly.

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Cross Citation :2000-AIR (SC)-0-3632 , 2000-ALT(Cri)(SC)-1-36

SUPREME COURT OF INDIA

Hon'ble Judge(s) : DR. A. S. ANAND, AND B. N. KIRPAL, JJ.

G.L.Gupta, Advocate …Vs.. R.K.Sharma

Contempt Petition (Civil) 346 Of 1997 Sep 01,1998

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Hnadcuffing – I.P.C. 220 - Contempt of Courts Act, 1971 – S. 12 – Accused was Hnadcuffed and produced before Magistrate after being paraded from station to District Court – Keeping in view of fact that charges u/s 220, IPC have already been framed against police personal and departmental action also taken against guilty police personal – No need to take further action.

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JUDGEMENT

(1.) The petitioner Shri G.L. Gupta, Advocate is the President of District Bar Association, Ratlam. He has filed this petition alleging that Shri Suresh Chandra Kelwa, a practising advocate at Ratlam was hand-cuffed on 11-9-1995 and produced before the Railway Magistrate, Ratlam on 12-9-1995 after being paraded from Ratlam station to the District Court building while in hand-cuffs. Under orders of the learned Railway Magistrate the hand-cuffs were directed to be immediately removed. Subsequently an inquiry was conducted by Shri B.K. Sharma, Superintendent of Police, Railways and in his report to the District and Sessions Judge, Ratlam he has stated that the respondents had hand-cuffed Shri Kelwa "without any justification" and took him from Neemuch to Ratlam which is about 140 Kms. from Neemuch in hand-cuffs. The Superintendent of Police recommended departmental action as well as legal action to prosecute the officers for an offence under Section 220, Indian Penal Code

(2.) Vide order dated 18-3-1998, we directed the Home Secretary, Government of Madhya Pradesh to file an affidavit to disclose as to what action, if any, had been taken to prosecute the officers for the offence under Section 220, Indian Penal Code and to also disclose the details of the departmental action taken against the police officials. Shri V.N. Kaul, Principal Secretary, Department of Home, Government of Madhya Pradesh has filed an affidavit dated 29/08/1998. According to that affidavit, challan has been filed and charges under Section 220, Indian Penal Code have since been framed against Mr. R.K. Sharma, the then SHO, GRP, Neemuch, Shri I.M. Tiwari, the then ASI, GRP, Shri Radhey Shyam, Constable No. 169, GRP and Shri Amar Singh Constable No. 363 GRP, by learned Chief Judicial Magistrate, Neemuch on 10/08/1998. It is also stated that the State Government of Madhya Pradesh had proposed to the Union Public Service Commission, New Delhi to withhold two annual increments of Shri B.K. Sharma, the then Superintendent Railway Police. The Union Public Service Commission has, however, recommended vide its letter dated 14-8-1998 only to record 'severe Censure' and have not agreed to the withholding of two annual increments. Attached with the affidavit are the

copies of the charges framed against the four above named officers besides a copy of the letter from the UPSC.

(3.) This Court has on occasions more than one deprecated and condemned the conduct of the escort police in hand-cuffing a person or an under trial without any justification : Sunil Gupta v. State of M.P., (1990) 3 SCC 119 and Khedat Mazdoor Chetna Sangathan v. State of M.P., 1994 (6) SCC 260 : (1994 AIR SCW 4026 : AIR 1993 SC 31 : 1995 Cri L.J. 508).

(4.) Apart from the fact that under Article 141 of the Constitution the law laid down by this Court is the law of the land, Article 144 mandates that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court. Hand cuffing of an undertrial or a prisoner, in spite of the law laid down by this Court, is a serious matter.

(5.) According to the report of the Superintendent of Police the respondents had resorted to hand-cuffing Shri Kelwa. Their action may invite an action under the Contempt of Courts Act against them but we refrain from passing any order under the Contempt of Courts Act in view of the fact that respondents have been charge-sheeted and charges under Section 220, Indian Penal Code have already been framed against them by the learned Chief Judicial Magistrate. The learned Chief Judicial Magistrate shall expeditiously try the case and pass appropriate orders keeping in view the law laid down by this Court on the subject.

(6.) Since the trial has commenced before the learned Chief Judicial Magistrate, we do not propose to proceed further with this application. The petition is therefore disposed of and the rule discharged.

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Cross Citation :2006 ALL MR (Cri) 1241

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

(PANAJI BENCH)

Hon'ble Judge(s) : R. M. S. KHANDEPARKAR & N. A. BRITTO, JJ.

Mrs. Karishma Kamlesh Naik & Ors…Vs...Government of Goa & Ors.

Criminal Writ Petition No. 19 of 2003 **6th March,** 2006.

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Violation of human rights - Petition against handcuffing and parading the accused in public by Police - Petition registered as Public Interest Litigation - It would be improper after a lapse of almost three years to shut the doors of the Court and direct that the petitioners should seek reliefs elsewhere or approach the Human Rights Commission – Compensation of Rs. 15,000/- is granted to each accused. (Para 15)

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Mr. S,. G. DESAI, Senior Advocate with Mr.
SHIVAN DESSAI, Advocate for the Petitioners.
Mfs. A- A- AGNI, Amicus Curiae.
Mf. S- K. KAKQDI£AR, senior Advocate with
Mr- S. N- SARDESAI, Public Prosecutor forRespondent NQS.l to 3-
Mr. S. Q. LQTLIKAR, Senior Advocate with MS,K. SAMBARI, Advocate for the RespondentNos.4 to 6.

JUDGEMENT

N. A. BRITTO, J.:- Petitioners' Petition dated 02-07-2003, was ordered to be registered as P.I.L. as it involved serious issue of violation of human rights and on 04-08-2003 rule was issued.

2. It is necessary to state some facts which are relevant for the disposal of this petition.

3. On or about 16-06-2003, Crime No.96/03 came to b,e registered at Panaji Police Station upon a complaint of Antonio Paulo D'Cfuz, under Sections 307, 506(ii) read with Section 34, IPC and Sections 3 and 25 of the Arms Act against Kamlesh Naik, Nilesh Mangueshkar and Sanjeev Mangueshkar alias Gabba Mangueshkar, all residents of Taleigao, Panaji. The Petitioner Karishma Kamlesh Naik, is the wife of the said Kamlesh Naik while Petitioners no.2 and 3 Mrs. Richa Rajkumar Naik and Poonam Ravindra Naik respectively, are the sisters in law of the said Nilesh Mangueshkar and Sanjeev alias Gabba Mangueshkar and all of them reside in the same house at Taleigao but in different portions. Respondent Salim Shaik, was the Police Inspector at the relevant time in-charge of Panjim Police Station, while respondent C. L. patil, was the Officer investigating the said case. Respondent Rajan Nigalye, it appears, was not even connected with Panjim Town Police Station and was posted elesewhere at the relevant time.

4. The petitioners alleged that on 17-06-2003, about seven to eight Policemen came to their house in search of the said accused and caused damaged. However, we are not concerned in this Petition, about the said allegation and the petitioners would certainly be at liberty to seek appropriate remedy as regards to the same. On 24-0^-2003, the said accused Kamlesh Naik and Nilesh Naik, surrendered before the J.M.F.C., Panaji, and the learned J.M.F.C., was initially pleased to remand the said two accused to judicial custody but after an application for remand was filed, was pleased to remand the said two accused to Police custody for two days and again for another two days, which police custody

remand was to expire on 29-06-2003. This Petition pertains to the incident which took place on 28-06-2003. The petitioners have alleged that they had gone "to lodge a complaint as regards the incident of 17-06-2003, but the Panjim Police Station had refused to entertain their complaint and had been continuously refusing to entertain the same as they were acting on instructions of their local M.L.A., who was also a Minister and that they had tried to approach the Minister but were not granted audience and were told that they having helped his opponent during the last Assembly elections, they should go to him for help. The petitioners alleged that on 28-06-2003 the Panjim Police apparently acting at the behest of the said Minister, stripped Kamlesh Naik and Nilesh Mangueshkar off their shirts and pants, tied their hands at their back and paraded them in their underwear in Taleigao area with the said Minister overseeing the same from some private car from a distance and, therefore, it was apparent that the said Minister was personally seeing to it that his instructions were followed by the police. The petitioners alleged that because of the said inhuman treatment meted out to the said Kamlesh Naik and Nilesh Mangueshkar on 28-06-2003, they approached the S.D.P.O., Shri. Waman Tari and D.I.G., Shri. Karnal Singh, who pleaded helplessness and, therefore, on 29-06-2003, they went for a meeting organised by a private institution, which was attended by the then Chief Minister of Goa, and at the said meeting, at the behest of a city lawyer, Shri, Satish Sonak, the petitioner no.l narrated the incident as regards to the damage to their house whereupon the said Advocate Satish Sonak pleaded with the said Chief Minister to order a judicial inquiry but the Chief Minister is stated to have said that a judicial inquiry would not serve any purpose, etc. The petitioners contending that the illegalities committed by.the police were being refused to be looked into and the Chief Minister having said what he allegedly did, they had no other option but to approach this Court with this Petition.

5. It does appear that the petitioners' complaint to the D.I.G., Shri. Karnal Singh, was entertained. This was reported on the daily newspaper 'Gomantak Times-Weekender' on 29-06-2003 and what transpired at the said meeting was reported by daily 'Herald' on 30-06-2003 and, it also appears that, D.I.G. Shri. Karnal Singh, directed Dy. S. P. Shri. W[aman] Tari to conduct an inquiry, who submitted a report dated 14-07-2003. After perusal of the said report, this Court was not satisfied with the said report dated 14-07-2003, and for the reasons disclosed in the Order dated 04-08-2003. Therefore, this Court directed the District and Sessions Judge, Panaji, to conduct an inquiry into the allegations made by the petitioners, at the time of issuing rule on 04-08-2003. Subsequently, the said Order was modified and the District and Sessions Judge, Panaji, was directed to issue notice to all parties and to record their statements and submit them to this Court for further directions in the matter.

6. As stated on behalf of respondent Director General of Police, it appears that the inquiry report dated 14-07-2003, did reveal certain lapses on the part of the police and, therefore, it was decided to transfer all the six police officers including P.I. Shri. Salim Shaik, P.S.I. Shri. Rajan Nigalye and P.S.I. Shri. C. L. Patil and it was ordered to initiate disciplinary proceedings against the said investigating officer P.S.I. Shri. Rajan Nigalye and P.I. Shri. Salim Shaik, in charge of the Police Station. The petitioner no.l, in her affidavit dated 09-08-2005, has made an allegation that no disciplinary proceedings were initiated against P.I. Salim Shaik and P.S.I. Rajan Nigalye as ordered and, in fact, P.S.I. Rajan Nigalye, was promoted to Inspector of Police, though he was reverted subsequently and, P.S.I. C. L. Patil, was promoted as Inspector of Police.

7. The learned Sessions Judge, by his report submitted on 03-11-2003, submitted along with it five statements recorded of the petitioners as well as both the said accused namely Kamlesh Naik and Nilesh Mangueshkar, eleven affidavits of police officials including that of the P.I. Salim Shaik and as many as 39 affidavits of the members of the public.

8. As far as the incident of parading is concerned, there is no dispute that both the s^id accused Kamlesh Naik and Nilesh Mangueshkar were taken out of the Police lockup and in handcuffs and, according to Police Inspector Salim Shaik, they were taken out because they volunteered to disclose the places of their hideouts after commission of the offence and they were so taken in order to conduct the panchanama. The handcuffing of the said accused is sought to be justified on the ground that at the time of elections, Teleigao was declared as hypersensitive area; the accused were hailing from the said area and were actively involved in criminal activities and, therefore, they were handcuffed as a matter of precaution anticipating high risk of untoward incident; that the chances of the accused slipping out from their custody and abduction was also anticipated and, considering that the police custody was to expire on the next day and that it was dark and late in the day, they decided to take the accused immediately to Taleigao. The handcuffing is also sought to be justified on the ground that it was a 4th Saturday and was a Court holiday and it was too late to call on the Magistrate to seek the requisite permission for handcuffing and due to paucity of time, they immediately decided to visit the places which the accused had offered to show. It has also been stated by respondent Police Inspector Shri. Shaik that the said accused then showed to them in the presence of Panchas, places of their hideouts, etc. The affidavit of Police Inspector Shri. Salim Shaik clearly shows that he, as an Officer-in-charge of the Police Station, was fully aware that permission of a J.M.F.C. was required to be taken before handcuffing an accused. Indeed, the Supreme Court in the case of Prem **Shankar Shukla Vs. Delhi Administration (AIR 1980** S.C. 1535) had, inter alia, ordered that:

"Handcuffing is prima facie inhuman, and, therefore, unreasonable, is over-harsh and at the first flush, arbitrary".

"that an accused is involved in over a score of cases is no ground for handcuffing the prisoner. Unless there be reasonable exception of violence or attempted to be rescued, the prisoner should not be handcuffed".

"there are other measures whereby an escort can keep a safe custody of a detenu without the indignity and cruelty implicit in handcuffs or other iron contraptions. Indeed, binding together either the hands or the feet or both has not merely a preventive impact, but also a punitive hurtful ness".

"since there are other ways of ensuring security, it can be laid down as a rule that handcuffs or other fetters shall not be forced on the person of an undertrial prisoner ordinarily".

"It is brutalising to handcuff a person in public and so is unreasonable to do so. Of course, the police escort will find it comfortable to fetter their charges and be at ease but that is not a relevant consideration".

"If a few more guards will suffice, then no handcuffs. If a close watch by armed policemen will do, then no handcuffs. If alternative measures may be provided, then no iron bondage. This is the legal norm".

"The nature of the accusation is not the criterion. The clear and present danger of escape breaking out of the police control is the determinant, and for this there must be a clear material, not glib assumptions".

"The conclusion flowing from these considerations is that there must first be well grounded basis for drawing a strong inference that the prisoner is likely to jump jail or break out of custody or play the vanishing trick. The belief in this behalf must be based on antecedents which must be recorded and proneness to violence must be authentic. Vague surmises or general averments that the undertrial is a crook or desperado, rowdy or maniac, cannot suffice. In short, save in rare cases of concrete proof readily available of the dangerousness of the prisoner in transit - the onus of proof of which is on him who puts the person under irons - the police escort will be committing personal assault or mayhem if he handcuffs or fetters his charge. It is disgusting to see the mechanical way in which callous policemen, cavalier fashion, handcuff prisoners in their charge, indifferently keeping them company assured by the thought that the detainee is under iron restraint."

9. The Apex Court in the case of Citizens for Democracy (1995(3) S.C.C. 743), had issued certain directions and some of them are as follows:-

".....The handcuffs or other fetters shall not be forced on a prisoner - convicted or undertrial - while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to Court and back. The police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport from one jail to another or from jail to Court and back".

"Where the police or jail authorities have well-grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being so dangerous/desperate and the finding that no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner".

"In all the cases where a person arrested by police is produced before the Magistrate and remand - Judicial or non-judicial is given by the Magistrate, the person concerned shall not be handcuffed unless special orders in that respect are obtained from the Magistral at the time of the grant of tjie remandp-"All ranks pf pQlice an$ th,g pr^Qfl authorities, to meticulously obey the attpyg mentioned directions, and in Yio|a|ionby any rank of police in the country or rnemtjer of t.he jail establishment shall be summarily punished under the Contempt of Courts Act apart from other penal consequences under the law".

10. A reference to the case of **Sunil Gupta & Ors.** Vs. **State of M. P. & Ors. ((1990)3 S.C.C. 119),** will also not be out of context. In this case, the Apex Court has stated that when a person is remanded by a judicial order by a competent Court, that person comes within the judicial custody of the Court and taking of that person from a

prison to the Court or back from the Court to the prison by the escort party is only under the judicial orders of the Court and even if extreme circumstances necessitate the escort party to bind the prisoners in fetters, the escort party should record the reasons for doing so in writing and intimate the Court so that the Court considering the circumstances either approves or disapproves the action of the escort party and issues necessary direction, (emphasis supplied).

11. In the above background, we have heard the learned Senior Counsels on behalf of the parties at length as well as Mrs. Agni, the learned Amicus Curiae. Shri. Dessai, the learned Senior Counsel appearing on behalf of the petitioners, has submitted, that the material on record is more than sufficient to conclude that there has been violation of Article 21 of the Constitution of the said two accused and for suitable action to be taken by this Court for the said violation. Shri. Dessai, has further submitted that the fact that the said police officials were transferred on account of their involvement in the said incident of parade, is sufficient proof that the said accused were paraded as alleged by the petitioners. Shri. Dessai further submits that the affidavits recorded by the learned Sessions Judge, of about forty persons, clearly disclose that the said accused were paraded and against the said forty persons, none have stated to the contrary. As per Shri. Dessai, the said affidavits are sufficient pleadings to dispose of the present petition.

12. hri. Lotlikar, the learned Senior Counsel on behalf of respondent Nos.4 to 6, has submitted that the said affidavits recorded by the learned Sessions Judge, cannot be looked into because no opportunity was given to th said respondents to cross-examine ani controvert the facts stated by them. Shri Lotlikar, the learned Senior Counsel ha submitted that the petition filed by tlv petitioners, when compared to the affidavit subsequently filed by them before the learne< Sessions Judge, shows that the petitioners havi indulged in embellishment and exaggeratioi and, in such a situation, it would be unsafe t< rely upon the affidavits filed by them before the learned Sessions Judge. Shri. Lotlikar ha: submitted that though the respondents hav< admitted about the handcuffing, the explanatioi given by them, per se, could not be rejectee outright. It is the submission of Shri. Lotlika that it would be hazardous for this Court to arrive at any conclusion based on the affidavits of the petitioners and the said accused given before the learned Sessions Judge, who are in the habii of exaggerating their versions.

13. Shri. Kakodkar, the learned Senioi Counsel appearing on behalf of respondent Nos.l to 3 has submitted that the grievances oi the petitioners could be best looked into by the Human Rights Court constituted under Section 30 of the Human Rights Act, 1993, or by the National Human Rights Commission, in the event there is no State Commission constituted under the said Act. Shri. Kakodkar, submits that the limitation provided to approach the National Human Rights Commission, will not come in the way of the petitioners in the event this petition is forwarded by this Court to the said National Human Rights Commission. Shri, Kakodkar has submitted that after the enactment of the Protection of Human Rights Act, 1993, this Court, ought not to entertain individual grievances of violation of human rights and the parties should be left to seek their remedies before the Human Rights Court or the National Human Rights Commission. As per Shri. Kakodkar, the petitioners approached this Court only with a view to put pressure upon the police so that obtaining of bail was facilitated. It is the submission of Shri. Kakodkar that in this petition, there is no public interest involved. Shri. Kakodkar has also submitted that, prima facie, evidence produced by or on behalf of the petitioners, may at the most, be sufficient only to order further inquiry into the matter. Shri. Kakodkar, has

submitted that the Investigating Officer, was the best Judge to assess the situation and order the handcuffing of the said two accused and, in any event, it was a bonafide exercise of power, though wrongly exercised.

14. We have considered the submissions made. We are unable to accept the submissions of learned Senior Counsels Shri. Lotlikar and Shri. Kakodkar.

15. We have already elaborately set out herein above, how this petition came to be registered as a P.I.L., and as then stated by the Division Bench of this Court, it was registered with a view to address to the issues arising out of gross violation of human rights by the police as well as inaction on the part of the higher police authorities including the highest executive authority of this State and this Court having entertained the petition in public interest and issued rule, it would be improper after a lapse of almost three years to shut the doors of this Court and direct that the petitioners should seek reliefs elsewhere or approach either the Human Rights Court or for that matter, the National Human Rights Commission. In our view, the petition can be decided and adequate reliefs granted on the basis of the material available on record in view of the admission that the said two accused were handcuffed and the explanation for the handcuffing, as we shall show little later, being wholly untenable and nothing but a glib talk, if we may use that expression, to cover up the said handcuffing. In other words, once handcuffing is admitted, parading can be inferred. We need not go to the statements recorded by the learned Sessions Judge except those affidavits submitted by the respondents themselves, particularly the affidavit of Police Inspector, Salim Shaik.

16. First of all, we must refer to the affidavit filed on behalf of respondent Nos.l to 3, in which, the Deputy Inspector General of Police has clearly admitted that the report submitted by the Sub-Divisional Police Officer, dated 14-07-2003, did reveal certain lapses on the part of the police and, therefore, they were transferred. Although disciplinary proceedings against P.S.I. Rajan Nigalye, the Investigating Officer and P.I. Salim Shaik, the Police Inspector in-charge of Panjim Police Station, were ordered to be initiated, there is no whisper from Senior Counsel Shri. Kakodkar, as to what happened to the said disciplinary proceedings and, we can only conclude that the respondent Nos. 1 to 3 are really not interested in taking any action against the said P.S.I. Nigalye and P.I. Salim Shaik and are only dragging their feet. If certain lapses were revealed then it was appropriate that the respondent State took disciplinary action against the guilty Police Officers, which has not been done till date. In our view, transfer of the said Police Officers was not the remedy. Remedy lay is taking disciplinary action, if found guilty. As already stated, handcuffing of the said two accused is admitted and from the facts disclosed, it can be certainly established that the said two accused were paraded and not necessarily in connection with investigations but for extraneous reasons. No doubt, the said two accused had a rather colourful past in that accused Nilesh V. Mangueshkar had four offences registered against him apart from a Chapter case but they pertained to the years 1998 and the year 1999, respectively. Likewise, against accused Kamlesh Naik, there were four offences registered but the last was of the year 1993 and two Chapter cases of the year 1994-95. However, it is an admitted position that both the said accused had voluntarily surrendered before the Court on 24-06-2003 and, thereafter, were taken by the police to conduct a recovery panchanama on 25-06-2003, when it is alleged that at the instance of accused Kamlesh, a danda was recovered and at the instance of accused Nilesh, a knife/sword was recovered. There has been no explanation why the so-called hideout panchanama for which the accused were allegedly taken on 28-06-2003, was not

conducted at the same time or on the same day when said panchanama of recovery under section 27 of the Evidence Act was conducted on 25-06-2003. The accused were also taken on 26-06-2003 for a remand and it is not the case of respondent Nos.4 to 6, that on the aforesaid two occasions, the said two accused had misbehaved or attempted to free from custody and were required to be handcuffed. We are also unable to understand as to why the P.S.I, had to drive the jeep himself. The petitioners have alleged that the said accused were paraded in underwear. We see from the arrest panchanama that both the accused were wearing jeans pants and it has been now stated on behalf of respondent Nos.4 to 6, that at the time of the said hideout panchanama, they were wearing shorts without explaining as to when the said accused were provided with the shorts. There is no contemporary record produced to show that both the said accused were provided shorts after they had changed their jeans pants. The affidavit of Police Inspector, Salim Shaik, clearly discloses that the Police Officers were fully aware of the directions issued by the Hon'ble Supreme Court in the case of **Citizens of Democracy** (supra), and yet, chose to violate the same in letter and spirit. That the weather was gloomy or that it was getting dark, as sought to be projected by Police Inspector Salim Shaik, had nothing to do with the handcuffing of the accused. There is also no explanation as to why towards the end of the day on 24-06-2003, that suddenly a decision was taken to carry out the said hideout panchanama. The hideout panchanama is something, which is unheard of in investigation of criminal cases in as much as even if an accused points out to a place as a place where he was hiding, it can have no relevance in a criminal trial. If -a hideout panchanama was so necessary, there is no explanation as to why it was not carried out at Calangute where the said accused were also stated to have hidden themselves. The fact that Taleigao was declared as a hypersensitive area for the purpose of the elections held in June,

2002, is also not convincing because the heat which is sometimes generated during the time of elections, is not expected to stay for a whole year and, in any event, it must be observed that the said two accused were earlier taken to Taleigao and presumably without putting any handcuffs. If at all it was a Saturday and a Court holiday, the said two accused could have been taken at any time to the residence of the Magistrate apart from the fact that the Magistrates are also known to do roster duty in the morning session on holidays. It is also not the case of the respondents that they had intimated the J.M.F.C. on 29-06-2002, when they were produced, about the said handcuffing, as contemplated in the case of **Sunil Gupta** (supra). The explanations for handcuffing given are nothing but a sham and are only excuses put forward on behalf of respondent Nos.4 to 6 in order to justify the handcuffing of the said two accused inspite of knowing fully well the directions issued by the Hon'ble Supreme Court in the case of **Citizens for Democracy** (supra). They are not at all convincing and, therefore, have got to be rejected and after the same are rejected, what remains is the fact that the accused were paraded with handcuffs by respondent Nos.4 to 6 without any apparent reason and which means that it was done with a view only to humiliate them. There is no contemporaneous record produced by the respondents, which reflects the so-called reasons justifying their action of handcuffing, apart from the fact that neither prior or post Magisterial permission was not taken. We would not be concerned in this petition, at whose instance the said parading was done.

17. The Apex Court in the case of **Bandhua** Mukti **Morcha Vs. Union of India & Ors.** ((1984)3 **SCC 161),** has stated that it is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this Court in **Francis Mullin's** case ((1981)1 SCC 608), to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 of the Constitution derives its life

breath from the Directive Principles of State Policy and particularly clauses (e) and (0 of Article 39 and Articles 41 and 42. The Supreme Court has further stated that where a person or class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the Court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bonafide can move the Court for relief under Article 32 and a fortiorari, also under Article 226, so that the fundamental rights may become meaningful not only for the rich and the well-to-do who have the means to approach the Court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources, unable to seek judicial redress. We have already indicated the circumstances under which, this petition came to be admitted by this Court and rule issued.

18. The case of **State of Maharashtra & Ors.** Vs. **Ravikant S. Patil ((1991)2 SCC** 373), was a case where the accused was arrested with the allegations of murder and was handcuffed and both his arms were tied by a rope and he was taken through the streets and a Division Bench of this Court has held that the Police Inspector had subjected the under trial to unwarranted humiliation and indignity and directed him to pay compensation and he was also censured. In Appeal, the Apex Court did not interfere with the direction of payment of compensation but directed that the same be paid by the State and directed the concerned authorities, if they thought necessary, to hold an inquiry and decide whether any further action had to be taken against the said Inspector of Police Shri. Prakash Chavan.

19. In the case of **Fattuji Vs. The Superintendent of Police, Akola** & **Ors.** (2002 **ALL MR** (Cri) 107), a Division Bench of this Court dealt with the death of an accused in custody and directed the State to compensate the children of the deceased in the sum of Rs. 1,75,0007- and further directed the State not only to take disciplinary proceedings against the Police Officers, who were found responsible for the death of the said accused Suresh Fattuji Gedam, while in police lock-up but also to prosecute them for having committed offence to which they may be found guilty in the course of investigation by handing over the investigation of the case to an Officer of the rank of D.I.G. Police or above. The Court also directed action to be initiated against all those Police Officers, who were on duty at the Police Station during the time when the deceased was arrested and till his death. In the case **of Shobha Anil Londase Vs. State of Maharashtra &** Ors. (2003 **ALL MR** (Cri) **1491),** another Division Bench of this Court, to which one of us were parties (R.M.S. Khandeparkar, J.) also dealt with custodial death and ordered compensation to be paid in the sum of Rs.3,00,000/- to the petitioner being the husband of the said accused within a period of six weeks and to file compliance report. The Court also directed to hold necessary inquiry to fix up responsibility to contribute the said compensation and ordered to take necessary steps in accordance to the provisions of law to recover the same from those persons and further directed compliance report to be filed within a time prescribed. This Court also directed to initiate necessary proceedings against all the persons responsible for the custodial death of the husband of the petitioner namely Anil Londase and to take legal action against those persons and directed that compliance report be filed within the stipulated time.

20. In the last two cases, referred to herein above, this Court followed the principle laid down by the Apex Court **inNilabati Behera Vs. State of Orissa** (1993(2) SCC 746), that enforcement of constitutional right and grant of redress embraces award of

compensation as part of legal consequences of its contravention and award of compensation is a remedy available in public law, based on strict liability for contravention of fundamental rights.

21. In the case at hand, although respondent Nos. 1 and 3 came to the conclusion, on an inquiry report submitted by the Sub-Divisional Police Officer, that there were certain lapses on the part of the police and, accordingly, transferred all the six Police Officers/Officials, nothing happened as far as the disciplinary proceedings ordered to be initiated against P.S.I. Rajan Nigalye and P.I. Salim Shaik and it has been alleged by the petitioners that inspite of the said Order to initiate disciplinary proceedings, at one stage, P.S.I. Rajan Nigalye was promoted and then again reverted. The handcuffing of the said two accused has been admitted. The reasons assigned for the said handcuffing cannot at all be accepted and they are only a ruse to justify the actions of respondent Nos.4 to 6 and the parading of the said two accused in handcuffs, which was done only to humiliate them. We, therefore, direct the respondent State to compensate each of the said two accused for violation of their human rights and consequent humiliation meted out to them by parading them in handcuffs, in the sum of Rs. 15,0007- each. We further direct respondent No.3 to file a compliance report within a period of six weeks from today, as regards payment of compensation. We direct the respondent State to hold and complete the disciplinary proceedings against respondent Nos.4 to 6, Police Officers, within a period of six months from today and file compliance report within two weeks thereafter. Respondent-State will be at liberty to recover the said compensation from respondent Nos.4 to 6 as deem fit and in accordance with law. We make it clear that no observations made herein will come in the way of prosecution of the said accused in Crime No.96/03.

In view of the above, Rule is made absolute in terms of above directions with costs ofRs.5,000/-. **Petition allowed**

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Cross Citation :2001 CRI. L. J. 4092

MADRAS HIGH COURT

Coram : M. KARPAGAVINAYAGAM, J.

"K. V. Rajendran .. v.. Inspector of Police"

Cri. O.P. No. 19352 of 1998 and Cri. M.P. No. 9037 of 1998, D/- 1 -3 -2001.

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A] Protection of Human Rights – Abuse of power by Govt. officers and Police - Illegal Confinement and brutal torture by Revenue officer – Victim lodge report to police – Police conducted biased enquiry – The

accused R.D.O. was allowed to continue to work as RDO in the very same jurisdiction during the enquiry period is highly illegal – Tahsildar/Trainee Magistrate and Police constable and sub-Inspector of Police helped the accused by exceeding their limit – When the statutory authority, namely Police failed to perform their duty under section 154 of Cri. P.C., it is the bounden duty of the High Court to invoke the power u.s. 482 of Cr. P.c. to give suitable direction to register FIR and investigate – The judiciary which is the sentinel of the great liberty of citizens would certainly intervene in the cases where the human dignity is wounded in order to uphold human values and to protect the rights guaranteed under the constitution – Dy. S.P. , C.I.D. was directed to register FIR and take suitable action against the concerned officials.

B] No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment is a part of Universal Declaration of Human Rights.

C] The victim was beaten brutally by the RDO and Policemen. He was produced before trainee Magistrate and remand order was obtained even without recording his complaint of torture – the primary report called from the CID support the allegations of petitioner.

D] Human Rights commission - Dropping of enquiry by Human Rights Commission is a no obstacle for the proposed registration of FIR against guilty officers – The petitioner sent a petition to the Commission which was referred to the collector – Collector sent a report to the commission to drop the action as allegations were not proved so commission closed the case and directed the victim that if aggrieved he can approach to any other courts for vindication of his rights – dropping of enquiry by Human Rights Commission is a no obstacle for the proposed registration of FIR against guilty officers – The judiciary cannot keep quiet by shutting its eyes to the illegalities commited by govt. officials.

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Cases Referred : Chronological Paras

D. K. Basu v. State of W.B., 1997 Cri LJ 743 : (1997) 1 SCC 416 : AIR 1997 SC 616 : 1997 AIR SCW 233 56

All M. S. Employees Union v. Union of India, 1997 SCC (Cri) 303 : (1996) 4 Crimes 180 37, 38

Bodhisattwa Gautam v. Miss. Subhra Chakraborty, AIR 1996 SC 922 : (1996) 1 SCC 490 : 1996 AIR SCW 325 56

State of Haryana v. Bhajan Lal, 1992 Cri LJ 527 : AIR 1992 SC 604 : 1992 AIR SCW 237 51

V. Suresh, for Petitioner; R. Shanmugasundaram, Public Prosecutor (for Nos. 1 to 4), A. Packiaraj, Spl. Public Prosecutor (for No. 5), K. Asokan Sr. Advocate for M/s. Geetha Asokan (for No. 6), for Respondents.

Judgement

ORDER :- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" is a part of the Universal Declaration of Human Rights. The content of Article 21 of our Constitution, read in the light of Article 19, is similarly elevating. But romance about human rights and rhetoric about constitutional mandates lose credibility if, in practice, the protectors of law and minions of the State become engines of terror and panic people into fear. We are constrained to make these observations as our conscience is in consternation when we read the facts of the case which have given rise to the order challenged before us in this petition.

2. I am reminded of the above observation made by Justice Krishna Iyer, while I go through the facts of this case which are so shocking.

3. K. V. Rajendran, a Senior Lecturer in Physics Department in the Presidency College, Chennai has filed this petition under Section 482, Cr.P.C. seeking for a direction to the respondents police to register an F.I.R. based on the complaint dated 2-9-1998 against Mr. Karunakaran Revenue Divisional Officer, Mayiladuthurai, the sixth respondent herein and other officials for having brutally tortured him and committed other illegal acts between 26-8-1998 and 28-8-1998 and for transfer of the investigation from the State Police to the Central Bureau of Investigation, the fifth respondent herein and also to order payment of compensation.

4. The case of the petitioner as found in his affidavit filed along with the petition is summarised as follows :

"(a) The petitioner hails from the village Tharangampadi in Nagapattinam District. His parents and brothers live in Perumalpet, hamlet of Tarangampadi village. The petitioner has been working as a Lecturer after finishing his M.Sc. and M.Phil. in Madras University for the past ten years in different Government Colleges in Ponneri, Villupuram, Krishnagiri and Tindivanam. For the last two years, he has been working as a Senior Lecturer in the Presidency College, Chennai.

(b) On 26-8-1998, Vinayaka Chathurthi day, he left Madras and reached his village in the evening. After dinner, his younger brother Kannan and himself went to the separate room situate near to his house and slept there. At about 11.00 p.m. 10 people headed by the sixth respondent the Revenue Divisional Officer woke them up by shouting and forcibly took the petitioner and put him in the Government jeep which was parked at a distance. Though the petitioner came to know from them that they were all Government officials, they refused to explain why they were arresting and where they were taking him to. Even while the jeep was going, the R.D.O. the sixth respondent began to beat him and asked him as to whether he had given false information to him through telephone regarding smuggling of teakwood from the area. He replied that he was not the person who phoned up.

(c) Then, the jeep reached the Tharangampadi Taluk Office, he was taken inside the room. The R.D.O. in the presence of other officials who were all Tahsildar and Police Constable in the mufti, asked him whether he had made telephone complaint regarding the inaction of the officials over the smuggling of teakwood in the area. Once again, he replied in the negative. The R.D.O. getting infuriated started slapping him on his face several times and gave severe blows with his hands. He also instigated the Head Constable who was one among the gathered people to beat him. After continuous beating by the R.D.O. and the Head Constable for about 15 minutes, the petitioner was quetioned about the private life, profession, family members, etc. He gave all the details. Even then, the R.D.O. did not

stop beating. He stood in front of him, held both his shoulders tightly and raised his knee and focibly smashed his testicles. He cried out with unbearable pain and fell down on the floor. Then, the R.D.O. began to threaten him asking to give in writing that he was the person who had telephonically called him asking him to take action against smuggling of teakwood. Even after brutal and violent treatment, he refused to heed to the dictates of the R.D.O. Then, the R.D.O. ordered that he be made to stand with his hands placed on two tables. When he was so standing, he took his metal torch light and dealt two blows on his left hand causing serious injuries on the fingures. Thereafter, with the same torch, the RDO gave two blows on the back portion of his head near the lower skull region. Unable to cope up with the pain, he finally caved in and said that he would sign in any papers. Immediately thereafter, the RDO. Ordered white sheets of papers to be brought and obtained his signature on the blank sheets. The R.D.O. thereafter dictated a statement purporting to be his confession which one of the officials wrote on the blank sheets bearing his signature.

(d) When this occurrence had taken place, he was surrounded by the Tahsildar, revenue officials and mufti police. When he was kept in the Taluk Office in the night of 26/27-8-98, one of the policemen forced him to part with a "Navaratne" ring, which he was wearing. During that time, his brother Kannan along with another co-villager Ravi reached the Taluk Office and personally witnessed the beating inflicted on him. Seeing the inhuman treatment and fearing for his life, they rushed to the local M.L.A. and informed him. But, despite the phone call from local M.L.A. the petitioner was tortured and his signature was obtained in the blank papers. Then, the R.D.O. handed over the petitioner along with signed papers to the Sub-Inspector of Police. Even then, the R.D.O. asked the Sub-Inspector of Police to give him proper treatment in the lock up.

(e) On the basis of the said instruction, the Sub-Inspector of Police took the petitioner to the adjoining Police Station and instructed the policemen present there to chain the ankles to the table of the Writer of the Police Station. Accordingly, it was done. Although the petitioner was crying in great pain and his hands, head and other parts of the body were swollen, the Sub-Inspector of Police did not offer any help.

(f) Next day, i.e. on 27-8-1998 morning, his brother Kannan along with one Marimuthu came to the Police Station and saw him still chained. At about 10.30 a.m. the petitioner was taken in a car to Mayiladuthurai along with some other accused who were brought with him were produced before the concerned Magistrate. But, the petitioner alone was kept aside. Only at 2.00 p.m. he was taken to another room where he was produced before some other Magistrate. Before entering the room, the escorting policemen warned him not to complain about the torture inflicted on him. However, when he was produced before the said Magistrate, he began to narrate the incident by which he was attacked by the R.D.O. and sought for urgent medical treatment. But, the said Magistrate did not arrange for the same, but merely remanded him.

(g) Thereafter, he was taken to Sub Jail, Poraiyar. There, he informed the Jailor about the injuries and requested for the treatment. The Jailor told him that duty doctor would come only next day, i.e. on 28-8-1998. He spent that night in extreme pain without any first aid or medicines in the jail. Next day at 12.00 noon, the duty doctor visited the Sub Jail and examined him and made entries in the register regarding his injuries. On seeing the injuries on head, left hand, testicles and other parts of the body, he was given O.P. chit. In the evening, as per the orders of the Judicial Magistrate No. 2, Mayiladuthurai, he was released for taking appropriate treatment.

(h) Since he had acute pain in private parts, he came to Chennai and got treatment from one Dr. Neelmogam, a Senior Doctor. At the request of the petitioner, on that date itself, office-bearers of the Teachers' Association sent a complaint detailing the brutal attacks

made on the petitioner by Karunakaran, the R.D.O., Mayiladuthurai, to the Chief Minister, D.G.P. and other officials. As a result of several petitions given by the petitioner to various authorities, the D.R.O., Nagapattianam was asked to conduct an enquiry. He appeared before him and gave all the relevant materials. However, the D.R.O. persuaded him to compromise the matter and not to proceed against the R.D.O., Karunakaran. When he found that the enquiry was only an 'eye-wash' and police did not take any action, he again sent reminders to the higher officials.

(i) In the meantime, he also came to know that the Deputy Superintendent of Police, S.B. CID, Nagapattinam was entrusted with the task of enquiring into the allegations and after enquiry, the report has been forwarded to the senior police officials. Though D.R.O. enquiry has not been conducted properly, it is reliably understood that the Deputy Superintendent of Police, S.B. CID, Nagapattinam has collected materials and sent the report stating that the allegations in the complaint given by the petitioner are true. Despite that, no action has been taken by the police by registering the F.I.R. and conducting the investigation against the said R.D.O. and other officials. Hence, he has filed this application for the above directions."

5. Originally, the petition was filed only against five respondents. On finding that there are serious allegations against the R.D.O. who is Government official, the permission was sought from this Court by filing separate application in Crl. M.P. No. 9123 of 2000 to implead the said Karunakaran, R.D.O. as one of the respondents. This Court ordered the said petition and allowed to implead him as sixth respondent.

6. Though totally there are six respondents, the counter-affidavits have been filed only by the second respondent, viz., Superintendent of Police, Nagapattinam, District and Karunakaran, R.D.O., Mayiladuthurai, the sixth respondent herein.

7. The statement of the sixth respondent as found in the counter is briefly stated as follows :-

"Karunakaran, the sixth respondent was originally working as Assistant Professor in the Colleges. In 1996, he was selected in the Group I services and appointed as Deputy Collector in the year 1997. He took up his training between 24-4-1997 and 17-8-1998. He joined at Mayiladuthurai as the Revenue Divisional Officer only on 17-8-1998. On 26-8-1998 at about 4.30 p.m. he received a telephone call at his office and the caller informed that one Rajendran, son of Perumal of Vellakoil had secreted teak and sandalwood in the house and asked him to go and seize the same. The caller further informed that when the customs officials were infomed of the same, they visited the place and after receiving bribe they had gone away and that if he also does not initiate action, the same would be published in the daily "The Indian Express". The caller claimed to be one Prasad, a Reporter in Indian Express. Thereafter, he went along with his P.A. and other assistants proceeded in jeep and reached Vellakoil at about 7.00 p.m. and inspected the residence of Rajendran of Vellakoil and no teak or sandalwood was found secreted. Thereafter, he enquired from the said villagers in order to ascertain as to who could have given a false information over the telephone. On enquiry from the villagers, he came to know that the petitioner was the only person who was educated in the village and fluent in speaking English. Therefore, Karunakaran went and questioned the petitioner. Thereafter, he was brought to Taluk Office and there, he was enquired about the telephone conversation. During interrogation, the petitioner gave a statement voluntarily stating that he only gave the false information through telephone. After recording his statement, he handed over his written statement along with him to the police for further enquiry. But, the petitioner gave a complaint to the State Human Rights Commission alleging torture. The District Revenue Officer, on the direction of the Commission, conducted enquiry on his complaint. After finishing the same, the D.R.O. sent a report to the Collector stating that the allegations are

false. As such, the averments in the complaint and the affidavit filed by the petitioner are not true. The sixth respondent was also working as an Assistant Professor in College and his parents were also Teachers and as such, he could not indulge in such sort of inhuman activities."

8. The main crux of the counter filed by the second respondent-the Superintendent of Police, Nagapattinam, is this :

"He had also received a complaint from the petitioner relating to the torture by Karunakaran, R.D.O. and on receipt of the same, he directed the Deputy Superintendent of Police, Sirkazhi for enquiring into the matter in reference No. G2/28010/98. In the meantime, it came to be known that the State Human Rights Commission was already enquiring into the matter and therefore, it was decided that no parallel enquiry need be conducted at that time. Ultimately, the State Human Rights Commission also passed an order on 8-10-1998 closing the enquiry. The Deputy Superintendent of Police, Sirkazhi sent a report closing the enquiry on the basis of the Human Rights Commission on the basis of the recommendation of the District Collector in the light of the report of the District Revenue Officer."

9. Pending the main Crl. O.P. No. 19352 of 1998 before this Court, the petitioner also filed Crl. M.P. No. 5358 of 1999 requesting this Court to direct the third respondent-Deputy Superintendent of Police, SB CID and the fourth respondent-Chief Secretary to Government to produce the report of the third respondent sent to the Superintendent of Police, Special Branch, CID, Chennai. In that application, the direction was given to the third respondent to produce his report in a sealed cover before this Court by the order dated 7-12-2000. Accordingly, the same was produced before this Court.

10. On going through the said report, it is seen that one of the complaints which had been sent by the petitioner was received by the Superintendent of Police, SB CID, Chennai also and he directed the Deputy Superintendent of Police, SB CID, Nagapattinam to conduct a confidential enquiry with regard to the allegations contained in the complaint given by the petitioner regarding the acts of torture committed by Karunakaran and other officials and on that direction, Mr. Sethunathan, D.S.P., SB CID conducted the enquiry and examined several persons and sent a report dated 27-9-1998 stating that the confidential enquiry revealed that most of the allegations made by the petitioner are true.

11. In the light of the above pleadings of the respective parties and the materials placed before this Court, it would be appropriate to deal with the question whether the petitioner would be entitled to reliefs sought for in this petition.

12. According to the petitioner, Karunakaran, R.D.O., Mayiladuthurai, the sixth respondent, suspecting that the petitioner who is an educated person had telephonically asked the R.D.O. to search the premises of one Rajendran of Vellakoil in order to seize the teak and sandalwood secreted, thereby giving false information, took him forcibly when he was sleeping inside his room in Tharangampadi village on 26-8-1998 at about 11.00 p.m. He was taken to Tharangampadi Taluk Office and beaten brutally by torch light and hands on the head and hands causing serious injuries and by knee smashing his testicles and also asked the other police personnel who were in mufti to beat him severely and he was made to put signatures in the blank sheets by compelling him to admit that he was the person who gave the wrong information telephonically. Under the instruction of the R.D.O., the Sub-Inspector of Police also took him to the Police Station where he was chained to a table and he was not given medical aid nor was he allowed to report the matter to the Magistrate before whom he was produced. He got the first aid treatment in the Jail and after came out on bail, he was treated by a senior doctor at Chennai and obtained the certificate that he has sustained grievous injuries on the hands and other injuries on the private parts and head.

13. On the other hand, it is the contention of the sixth respondent Karunakaran, R.D.O. that he did not beat the petitioner. He had a telephonic message from a person who was posing himself as a Reporter in Indian Express that one Rajendran of Vellakoil had concealed the teak and sandalwood in his house and if he does not take action against him, the matter will be published in the Indian Express and on hearing the message, he went and inspected the house of the said Rajendran and he found nothing of that sort and when he enquired the villagers, he came to know that the only person who was conversant with English was the petitioner and therefore, he took him to the Taluk Office and interrogated him and thereafter, he recorded his confession and handed over the confession statement and the petitioner to the Sub-Inspector of Police.

14. Admittedly, both the petitioner and the sixth respondent were not known to each other. It cannot be disputed that the petitioner is a permanent resident of Chennai working as a Senior Lecturer in the Presidency College and he came to the village on 26-8-1998 being the Vinayagar Sathurthi Day. It is also not disputed by the sixth respondent that on suspicion, he was taken to Taluk Office where he was interrogated and after obtaining his statement, he was handed over to the police, who, in turn, registered the case against the petitioner.

15. It is the specific case of the petitioner that he was woken up, taken in a jeep forcibly, beaten in the jeep itself and thereafter, he was brutally beaten with torch light on the hands and head by the R.D.O. at Taluk Office, After he was released on bail, he came to Chennai and got treatment from the Doctor. Thereafter, he sent petition after petition to the higher officials not only by himself but also through the Teachers' Association in which he was one of the members. He also approached the State Human Rights Commission by giving a petition and sent a complaint to the Chief Minister and also gave a complaint to the Superintendent of Police, Magapattinam in whose jurisdiction the occurrence had taken place. In such a situation, the enquiry was initiated by the officials concerned.

16. As stated above, on receipt of the complaint from the petitioner, the State Human Rights Commission directed the District Collector to conduct enquiry and the District Collector also, in turn, directed the District Revenue Officer, Nagapattinam to conduct enquiry. Similarly, the Superintendent of Police, Nagapattinam also directed the Deputy Superintendent of Police, Sirkazhi to conduct enquiry. Besides this, the Superintendent of Police, SB CID, Chennai also directed the Deputy Superintendent of Police, SB CID, Nagapattinam to conduct a confidential enquiry and sent a report.

17. Now, it is seen from the affidavits filed by the parties that the District Revenue Officer conducted enquiry by examining witnesses and sent the report to the District Collector stating that the allegations are not proved. Accordingly, the District Collector accepted the report and sent the intimation to the State Human Rights Commission. On the basis of the said report, the Human Rights Commission closed the enquiry. However, the Human Rights Commission specifically gave liberty to the petitioner that if he is still aggrieved, he can approach the concerned Human Rights Court or other Court for vindication of his right in accordance with law.

18. As indicated above, the Superintendent of Police, Nagapattinam did not pursue the enquiry, since parallel enquiry was conducted by the District Revenue Officer on the orders of the Human Rights Commission. but, separate confidential enquiry was conducted by the Deputy Superintendent of Police, SB CID, Nagapattinam on the direction of the Superintendent of Police and a report was sent on 27-9-1999 stating that the allegations of illegal detention, torture and assault on the petitioner by Karunakaran, R.D.O., Mayiladuthurai, are true.

19. In the meantime, this appliction seeking for the direction to register the F.I.R. and to hand over the investigation to C.B.I. has been filed on 28-10-1998 and the same has been entertained by this Court on 3-11-1998.

20. Under these circumstances, the finding given by the District Revenue Officer or the order accepting the said report by the District Collector and consequential order passed by the State Human Rights Commission would not disentitle the petitioner to approach this Court seeking for the suitable direction from this Court by invoking inherent powers, especially when the SB CID through confidential enquiry had come to the conclusion that the allegations are true.

21. In this context, this Court is constrained to refer to the following important aspects in order to decide whether the grievance expressed by the petitioner has to be redressed by this Court or not.

22. The petitioner while he was sleeping in his room at the village at about 11.00 p.m. Mr. Karunakaran, R.D.O. the sixth respondent took him, put him in the jeep and brought him to the Taluk Office. The reason for such action given by the sixth respondent in his counter that on the telephonic information given by one Prasad claiming to be a Reporter, India Express regarding the stock of teak and sandalwood in the house of one Rajendran, he went and inspected the said place, but no teak or sandalwood was found secreted and therefore, on suspicion, as he was informed that the petitioner alone was the English speaking person in the village, he took him to the Taluk Office and enquired from him about the telephonic conversation. In the light of this admission, the statement given by the petitioner that he was forcibly taken to the Taluk Office and he was beaten and injuries were inflicted on his testicles by smashing it with knees and the injuries were inflicted on the head and hand by means of torch light by Karunakaran assumes significance. As stated above, the petitioner who is stranger to the sixth respondent had no reason to file the complaint against the R.D.O. by constantly pursuing his request to the officials to take action against him by tapping at the doors of several forums not only by himself but also through Teachers' Association.

23. If the R.D.O. had a genuine suspicion about the petitioner, he had no business to take the petitioner forcibly to the Taluka Office under the garb of enquiry. He would also admit in the counter-affidavit that "since I did not want to embarrass the petitioner in the presence of the villagers, I had brought him to the Taluk Office and enquired him about the telephonic conversation". This sentence would clearly indicate that the sixth respondent wanted that the petitioner shall be suitably dealt with, which cannot be done in the presence of the villagers and therefore, the petitioner was compelled to come with R.D.O. to Taluk Office where the "so-called interrogation" was done.

24. It shall be stated in this context, the law does not authorise the R.D.O. to take a person from his house when he was sleeping in order to enquire about a particular matter at his office. If actually he had any suspicion, that must have been enquired into through proper channel. This act of taking the petitioner forcibly to the Taluk Office is nothing but high-handedness. It is also seen from his counter-affidavit that he is aged about 37 years and he just finished his training on 17-8-1998 and joined at Mayiladuthurai as Revenue Divisional Officer, on the same date i.e. on 17-8-1998. Within nine days, this occurrence had taken place.

25. According to the petitioner, unable to bear the pain over the torture inflicted by the sixth respondent and the police and other officials, he put the signatures in the blank papers. The papers were filled up by one of the officials on the dictation of the R.D.O. According to the R.D.O. it was a voluntary. Had it been a voluntary one, there is no reason as to why the petitioner himself had not written the said statement in his own handwriting. It is also noted that after finishing the writing, the petitioner was asked to read the said

written statement and the same was tape recorded. It is found in the enquiry report that R.D.O. admitted having tape recorded. The very fact that the statement of the petitioner at the compulsion of the R.D.O. was read out by the petitioner and the same was tape recorded would itself show that the said statement would not be a voluntary one.

26. Thereafter, the statement was counter-signed by the sixth respondent and the same was handed over to the Sub-Inspector of Police who was present then in the Taluk Office. The Sub-Inspector of Police also was asked to give "proper treatment" to the petitioner in the lock-up. Accordingly, the petitioner was taken to the police station, where he was chained to the table of the Writer and he was not allowed even to pass urine. Both the occurrences relating to the beating by the RDO and other officials and chaining to the table in the police station were seen by the brother of the petitioner and two other local villagers. These facts have not been specifically denied by the Sub-Inspector of Police by filing his counter. On the other hand, the Superintendent of Police, Nagapattinam, the second respondent has filed a counter-affidavit stating that on 26/27-8-1998 at 01.00 hrs. Karunakaran, Revenue Divisional Officer, Mayiladuthurai appeared in person and gave a complaint to him and the same was registered. The relevant portion of the counter is as follows :-

"On 26/27-8-98 at 01.00 hrs. Tr. Karunakaran, Revenue Divisional Officer, Mayiladuthurai appeared in person with a person. He preferred a complaint to me against one Tr. V. Rajendran, S/o Varadarajan (35/98) of Meenayar St., Perumal Pettai who was brought by him. A statement had been recorded by him from the said Rajendran. Tr. Rajendran had admitted in that statement that he had given a phone call to the Revenue Divisional Officer, Mayiladuthurai impersonating as a Reporter of "Indian Express" stating that huge quantity of sandalwood and teak wood logs were being hidden in the house of one Tr. Rajendran S/o Perumal in a house under construction.

On verification by the Revenue Divisional Officer, Mayiladuthurai, it was found as a false one and on enquiry from 7.00 p.m. to 11.30 p.m. the Revenue Diivisional Officer has detected the person who has given the anonymous call as Tr. Rajendran S/o Varadarajan. The said Rajendran had admitted that he is responsible for giving wrong direction to officials in discharging their duty.

The said Rajendran was indentified as a Lecturer in Government Presidency College, Madras in the department of Micro Physics. On the basis of the personal complaint by Revenue Divisional Officer, Mayiladuthurai, a case was registered in Poraiyar Police Station Cr. No. 542/98 under Sections 177, 186 and 506 (ii), IPC in Sl. No. 146 of FIR at 01.00 hrs. on 26/27-8-98 and the accused was arrested after observing all usual formalities. On 27-8-98, he was produced before the learned Judicial Magistrate No. II, Mayiladuthurai and he was remanded to judicial custody as per the orders of the learned Magistrate and on the next day he was bailed out."

27. The statement made by the Superintendent of Police, the second respondent herein, in the counter would show as if the complaint was made to the Superintendent of Police by the Revenue Divisional Officer. This is not factually correct. The reading of the F.I.R. registered in Crime No. 542/98 under Sections 177, 186 and 506(ii), I.P.C. would reveal that the statement of the petitioner was handed over along with him to the Sub-Inspector of Police for necessary action. This statement itself shows that the arrest was shown at 01.00 hrs. on 26/27-8-1998. Therefore, between 11.30 p.m. and 1.00 midnight, the petitioner was in the illegal custody of the R.D.O. at Taluk Office where so-called confession was obtained from the petitioner.

28. Furthermore, it is not known as to how the statement alleging that he gave a false information would attract the offences under Sections 177, 186 and 506(ii), I.P.C. The very fact that the complaint was registered immediately for these offences even

without verification whether these would attract any cognizable offence would show that the F.I.R. could not have been registered without the specific instruction to do so by the R.D.O. Even in the counter filed by Karunakaran, R.D.O., he mentioned in para 21, "I humbly submit that I had in fact requested the police not to object to the petitioner being enlarged on bail". When he instructed the Sub-Inspector of Police not to object to the bail petition, it goes without saying that he thinks that he has got power to give a suitable instruction to Sub-Inspector of Police either to register a case or to say no objection in the bail petition. This is nothing but ignorance of law.

29. At this stage, it is relevant to note that in the counter filed by the Superintendent of Police, the second respondent, at the end of para 3, it is mentioned that "the investigation in Cr. No. 542/98 was completed and was referred as mistake of law on 23-12-98". This would clearly show that there is not material that he was the person who gave the false information to the R.D.O. and the R.D.O. only on suspicion, took the law into his own hands and tortured the petitioner by making brutal attacks by causing injuries on the various parts of the body including private parts by smashing the same with knees.

30. Yet another disturbing feature at this stage is to be noticed. According to the petitioner, he was taken to the Court along with the other accused who were involved in the other cases and though all the other accused were produced before the jurisdiction Judicial Magistrate, he was not produced before the said Magistrate and he was kept aside and at 2.00 p.m. he was produced before some other Magistrate who was called to be a Special Magistrate who happened to be the Tahsildar working under the R.D.O., Karunakaran, the sixth respondent herein. It is stated by the petitioner when he entered into the room of the Special Tahsildar, he was warned by escorting police officials that he should not complain about the torture. However, when he was produced before the Special Magistrate, he complained and showed the injuries, but the said Magistrate did not take note of it, but simply remanded him.

31. The fact that he was not produced before the regular Magistrate and he was produced before the Trainee Magistrate who happened to be a Tahsildar has not been denied. There is also no explanation as to why such a discrimination was shown to the petitioner alone. This shows that the Special Magistrate/Tahsildar, who ought to have recorded the statement of the petitioner about the torture against the R.D.O. had not recorded while he was remanded, probably for helping the R.D.O. from future problem.

32. Moreover, it is admitted by the Superintendent of Police, the second respondent in his counter that along with the R.D.O., on receipt of telephonic information, Police Constable accompanied the R.D.O. to Vellakoil village and searched the house of the said Rajendran and thereafter, went to the house of the petitioner. Thus, it is clear that the Constables and Head Constable were there throughout along with the R.D.O., both when the petitioner was taken forcibly to the Taluk Office and he was beaten brutally by the R.D.O. and other policemen. That was the reason why he was not produced before the regular Magistrate, but belatedly he was produced before the Trainee Magistrate/Tahsildar and remand order was obtained even without recording his complaint of torture.

33. The above factors would reveal that from the beginning, the police personnel as well as the Tahsildar/Special Magistrate have either helped the R.D.O., the sixth respondent in exercise of their duty by exceeding their limit or they have acted illegally at the specific instruction of the said R.D.O. under whom they were working under different capacities.

34. At this juncture, the report submitted by the Deputy Superintendent of Police, SB CID as directed by this Court on the basis of the confidential enquiry conducted by him on the direction of the Superintendent of Police, SB, CID, Ngapattinam District assumes great importance. On going through the report, it is clear that the observation made in the

earlier paragraphs by me would find support. On perusal of the said report, it is obvious that the Deputy Superintendent of Police, SB, CID conducted confidential enquiry by examining the relevant and important witnesses at various quarters and found that the most of the allegations contained in the complaint given by the petitioner as against Karunakaran, R.D.O., Mayiladuthurai are correct.

35. The gist of the conclusions arrived at by the Deputy Superintendent of Police, SB CID after such confidential enquiry could be summarised as below :-

(1) On 26-8-1998 at about 4.30 p.m. Mr. Karunakaran, R.D.O., Mayiduthurai received a phone call to his office phone number at Mayiladuthurai that sandalwood and teak wood were stocked in the house of one Rajendran of Vallakoil. The caller introducing himself as Prasad, the Editor of Indian Express, told him that if no action is taken immediately, he would publish about this in Indian Express. Therefore, the R.D.O. called Muthuvel, Headquarters Deputy Tahsildar along with jeep of the latter to his office. He requested the Deputy Superintendent of Police, Mayiladuthurai to provide two Constables for his operation. Accordingly, they were sent to the R.D.O.'s office. Then, the R.D.O. proceeded along with the Tahsildar, officials of the R.D.O. and the Police Constables. He went to the house of Rajendran of Vellakoil and searched his house for sandalwood and teak wood but nothing was found. During this search, the R.D.O. told him that the informant through phone asking him to search his premises used English words also and enquired as to who could have done this. Then, Vellakoil Rajendran and others told R.D.O. that the petitioner K. V. Rajendran must have informed through the telephone or must be the person who informed R.D.O. as he is the only person ill-disposed towards Vellakoil Rajedran and well-versed in English. On this information, the R.D.O. went along with the other officials to the house of the petitioner Rajendran around 11.00 a.m. and took him in the jeep to Taluk Office, Tharangampadi.

(2) Kannan, the younger brother of the petitioner was not allowed to accompany the petitioner in the jeep. Thereafter, Kannan went along with one Ravi to Taluk Office. He stated in the enquiry that he witnessed the beating by the R.D.O. The petitioner stated that he reported to Dr. K. Durairaj, Poraiyar during his routine check-up of prisoners on 27-8-1998 showing injuries on his body. The doctor has prescribed medicines Sptron, Brufen and Parastomol. The doctor has has mentioned in page 86 in the "Prisoners' Treatment Register" that he found a contusion on the scalp of the petitioner. But Arjunan, I Grade Warder of Sub Jail, Poraiyar has not made any mention of any injury on the petitioner in the Prisoners' Admission Register, as he did not find any injury at the time of admission of the petitioner. But, the entry made by the Jail Doctor about the injuries on the scalp falsifies this entry.

(3) The allegation of beating by R.D.O. with a torch on his hand would probabilise the fact that the petitioner's left index finger is slightly out of normal shape, arching in the middle. This as well as the middle finger have small humps on their bone, which can be caused by hit on the fingers with a blunt object. The petitioner after his release on 28-9-1998 went and took treatment from Dr. Neelamagam of Malar Hospital and produced the certificate issued by the doctor. The certificate would indicate that the Doctor found hairline fracture of left index finger, bleeding injuries on the head and treatment of testicles etc. If the petitioner had shown his contusion to the doctor at the Sub-Jail, it is natural that he would have shown the injuries on his fingers also. But, the Doctor did not prefer to mention about all the injuries in the register except the contusion on the scalp because the allegation was against the local R.D.O.

(4) Vijayaraghavan, Typist working in the R.D.O. Office admitted during the enquiry that he only wrote the statement of the petitioner, as dictated by the R.D.O. It is also accepted by him that the R.D.O. was having a torch light in his hand. But, none could explain for the

injuries on the fingers and the contusion on the head of the petitioner. So, the allegation that the petitioner sustained injuries at the hands of R.D.O. while he was in the custody of the R.D.O. appeared to be true.

(5) The petitioner was asked to read about the statement written by Vijayaraghavan, Typist as dictated by the R.D.O. and while he read out, it was tape recorded at the Taluk Office. Normally the tape recording of a statement will be done during a question and answer session. The tape recorder "Philips" Indian make, belongs to Gr. I.P.C. 525 S. Selvaraj of Poraiyar P.S. The enquiry revealed that after dictation was over, the Sub-Inspector of Police was called to the Taluk Office at 1.00 a.m. on 27-8-1998 and instructed by the R.D.O. to keep the petitioner in his custody by handing over the confession statement endorsed by the R.D.O. and the same was later registered in Poraiyar P.S. Crime No. 542/98 under Sections 177, 186 and 506(ii), I.P.C. There are no ingredients in the alleged statement of the petitioner to attract these sections. The contention of the petitioner that Section 506(ii), I.P.C. was added vindictively to arrest him cannot be brushed aside as the case assumed an importance because it was initiated by the local R.D.O.

(6) Next day morning, the petitioner was escorted by Grade I Constable Rajagopal and Rajendran of Poraiyar Police Station to the Court of J.M. II, Mayiladuthurai in a Tourist Taxi, along with the five other under trial prisoners from the Sub Jail, who are facing trial under Tamil Nadu Prohibition Act. On that date, J.M. I of Mayiladuthurai was holding additional charge of J.M. II, J.M. I was sitting up to 1.00 p.m. and thereafter, he went to Sirkazhi. The petitioner was not produced before the said Magistrate, but at 2.30 p.m. he was produced before the Balasubramanian, Special Judicial Magistrate, Mayiludutharai. He is a Tahsildar undergoing judicial training. He recorded in his remand order "Accused produced. No complaints. Remanded to custody till 10-9-1998". The said Special Judicial Magistrate is a Trainee Magistrate and Revenue Official subordinate to the R.D.O. Therefore, the contention of the petitioner that he was wantonly produced before the Tahsildar after the Judicial Magistrate left at 1.O' Clock in order to avoid the recording of his complaint of torture cannot be said to be wrong.

(7) The injury found on the fingers and the contusion found on the head of the petitioner bear a proximate cause to the allegations of the petitioner. Further, the R.D.O. seems to have acted in haste in fixing the petitioner as the psuedonimous phone caller. As such, the enquiry revealed that there is a prima facie case against the R.D.O. and his staff who accompanied him.

36. From the above factors which are referred to in the earlier paragraphs and from the conclusions arrived at by the Deputy Superintendent of Police, SB CID, it is manifest that there are found important aspects which could be undisputedly noticed:

(i) The R.D.O. along with Revenue Officials and Police Constables went to the house of the petitioner at 11.00 p.m. and compelled him to come along with them to Taluk Office where he was tortured by the R.D.O. and others for obtaining a statement from him. The statement was written by the Typist working under R.D.O. as dictated by the R.D.O. The petitioner was asked to read out the statement and the same was tape recorded.

(ii) The Sub-Inspector of Police came to the Taluk Office and received the statement copy alleged to have been made by the petitioner with an endorsement by R.D.O. On the basis of that statement, case was registered under Sections 177, 186 and 506(ii), I.P.C. Only thereafter, arrest was shown. He was in the police lock-up on that entire night. Admittedly, the investigation in this case has been referred as a 'mistake of law'. This shows that the petitioner was admittedly in the custody of the R.D.O. at the Taluk Office from 11.00 p.m. to 1.00 a.m. and thereafter, he was in custody of the police lock-up from 1.00 a.m. till he was taken to the Magistrate for remand. There are no details in the counter filed by the

Superintendent of Police, Nagapattinam District as to why the said case was dropped as a 'mistake of law'. However, the fact remains that the further action was dropped. The investigation disclosed in that crime number that the details of the confession given by the petitioner are not true. Furthermore, as concluded by the Deputy Superintendent of Police, SB CID, the statement also would not attract any of the offences mentioned in the said statement. Thus, it is clear that the petitioner was in illegal custody from 11.00 p.m. till he was produced before the Magistrate concerned in the case which was subsequently found to be mistake of law. In this situation, the custody both under R.D.O. and the Sub-Inspector of Police cannot be said to be legal.

(iii) Next day, the petitioner was taken to the Court for remand along with the other accused who were facing trial under Tamil Nadu Prohibition Act. J.M. I was incharge of J.M. II at Myladuthurai. Even though the others were produced before the J.M. I, Mayiladuthurai, the petitioner was not produced before him. On the other hand, after the Judicial Magistrate left at 1.00 p.m., he was produced before some other Magistrate at 2.30 p.m. who happened to be the Revenue official subordinate to R.D.O. who was a Trainee Magistrate. This fact is not disputed. There is also no reason as to why he alone was produced before the Trainee Magistrate, who was working under the R.D.O. In this context, the statement made by the petitioner that his complaint of torture against R.D.O. was not recorded by the Special Magistrate cannot be said to be untrue. Furthermore, the Jail Doctor found contusion on the scalp of the petitioner and the Doctor's certificate produced by the petitioner obtained from Malar Hospital, Chennai would show that he had sustained injury not only on the scalp but also hairline fracture on left index finger and bleeding injuries on the other parts of the body.

(iv) The petitioner sent a petition to the Human Rights Commission. The said Commission referred it to the Collector. The Collector, in turn, asked the D.R.O. who is another Revenue Official to conduct inquiry. The R.D.O. after conducting enquiry recommend to the Collector to drop the action since the allegations were not proved. On that basis, the Collector sent a report to the Human Rights Commission. Accordingly, the Commission felt that no further enquiry need be conducted at the level of Commission and if the petitioner is aggrieved, he can approach the concerned Human Rights Court or other Courts for vindication of his rights in accordance with law. In the meantime, the Deputy Superintendent of Police under second respondent began to conduct enquiry. But, when the second respondent came to know that the enquiry is being conducted by the D.R.O., he thought it fit to drop the said enquiry. However, the Superintendent of Police, SB CID directed the third respondent-Deputy Superintendent of Police, SB CID to conduct confidential enquiry. In obedience to the said direction, he conducted the enquiry, examined the witnesses, collected the medical certificates and sent a report to the Superintendent of Police, SB CID, Chennai s tating that there is a prima facie case made out, since there are sufficient materials available to conclude that the allegations about the torture at the hands of the R.D.O. are true.

37. Mr. Asokan, the learned Senior Counsel appearing for the sixth respondent has produced the report sent by the District Revenue Officer after enquiry to the District Collector, who, in turn, recommended for dropping further action and the order dated 8-10-1998 passed by the State Human Rights Commission holding that no further enquiry need be conducted at the level of Commission. On the strength of these records, the learned Senior Counsel would submit that no further investigation is needed by the police. It is also submitted that it is open to the petitioner to file a private complaint as against the official concerned for the allegations contained in his complaint. He would cite the decision in AIIMS Employees' Union v. Union of India, 1997 SCC (Cri) 303.

38. The above submission, in my view, lacks substance. The decision in 1997 SCC (Cri) 303 (supra) would not apply to the present facts of the case. In the case dealt with by the Supreme Court, the petitioner without adopting the procedure provided under the Criminal Procedure Code, straightway came to the High Court under Article 226 of the Constitution seeking for a mandamus. While dealing with the procedure contemplated under Sections 154 to 173 of Cr. P.C., the Apex Court in that case would absorve that when an information constituting the cognizable offence is received and is reduced to writing, the Officer incharge of the Police Station shall register the case and investigate into these cognizable cases under Section 156, Cr. P.C. and after conducting the investigation prescribed in the manner envisaged in Chapter XII, the charge-sheet shall be submitted to the Court having jurisdiction to take cognizance of the offence under Section 173, Cr. P.C.

39. In the case on hand, the petitioner has tapped the doors of every forum including the police. Curiously, D.R.O. was asked to conduct enquiry by the District Collector, who is the Revenue official, against the R.D.O. who was allowed to continue to work as R.D.O. in the very same jurisdiction during the relevant period.

40. The petitioner in his affidavit filed before this Court has categorically stated in para 25 of the affidavit that Mr. Hariharan, D.R.O., Nagapattinam who conducted enquiry was all the time trying to persuade the petitioner to compromise the matter and not to proceed ahead with his demand to prosecute the R.D.O. Karunakaran. It is further stated in the affidavit that an impression was created in his mind that the said D.R.O. was trying to somehow extricate the R.D.O. from the case.

41. The said statement made in para 25 regarding the biased enquiry by the D.R.O. has not been specifically refuted in any of the counter-affidavits. Moreover, the above statement cannot be ignored lightly in the light of the fact that from the beginning both Tahsildar/Trainee Magistrate and the Police Constables and Sub-Inspector of Police of Poraiyar Police Station had been helping the R.D.O. throughout.

42. Under these circumstances, when the statutory authority, namely police failed to perform the duty under Section 154, Cr. P.C., it is the bounden duty of this Court to invoke the powers under Section 482, Cr. P.C. to give suitable directions to register F.I.R. and investigate, particularly when the contents of the complaint would make out cognizable offences like wrongful confinement, torture, extortion and causing injuries on the vital parts of the body, etc.

43. Furthermore, the Human Rights Commission itself in its order gave liberty to the petitioner that he can approach the concerned Human Rights Court or other Courts for vindication of his rights. Under these circumstances, he has approached this Court by way of vindication of his rights seeking for this direction.

44. In the light of the above pathetic and pitiable factual situation, the judiciary cannot keep quiet by shutting its eyes.

45. The judiciary which is the sentinel of the great liberty of citizens would certainly intervene in the cases where the human dignity is bound in order to uphold human values and to protect the rights guaranteed under the Constitution.

46. The Goverenment officials required to be sensitised to the values of human dignity and to the restraint in power. When they allow an inhuman conduct on the part of the officials, it exhibits both the indifference and insensitiveness to human dignity and the constitutional rights of the citizens.

47. As Joeph Addison said :

"Better to die ten thousand deaths than wound my honour."

If dignity or honour vanishes what remains of life !

48. The protection of the individual from oppression and abuse by the law enforcing officers is a major interest in a free society. Denying a person of his liberty is a serious matter.

49. If human rights are to triumph, executives must be sensitised, legislators ethicalised and Judges conscientised.

50. The Universal Declaration in Article 3 proclaims that everyone has the right to life, liberty and security of person. But between rhetoric and reality there is a gaping gap.

51. In this connection, it is worthwhile to refer to the decision of the Supreme Court in State of Haryana v. Bhajan Lal, 1992 Cri LJ 527 : (AIR 1992 SC 604), wherein it has been held thus :-

"But if a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provisions causing serious prejudice to the personal liberty and also property of a citizen, then the Court on being approached by the person aggrieved for the redress of any grievance has to consider the nature and extent of the breach and pass appropriate orders as may be called for without leaving the citizens to the mercy of police echelons since human dignity is a dear value of our Constitution. Needs no emphasis that no one can demand absolute immunity even if he is wrong and claim unquestionable right and unlimited powers exercisable up to unfathamable cosmos. Any recognition of such power will be tantamount to recognition of 'Divine Power' which no authority on search can enjoy."

52. In then light of the materials available and the conclusion arrived at in the confidential enquiry, it is clear that the R.D.O. has transgressed his limit and illegally exercised his powers causing serious prejudice to the personal liberty of the petitioner. In such an event, this Court on being approached by the person aggrieved for the redress of the grievance has to pass appropriate orders to render justice to the person aggrieved.

53. In this petition, the petitioner has prayed to direct the respondents to register an F.I.R. based on the complaint made by the petitioner dated 2-9-1998 against Mr. Karunakaran, R.D.O., Mayiladuthurai and other officials for torturing him and for commission of other illegal acts and consequently, transfer further investigation to the C.B.I., fifth respondent and order payment of compensation.

54. As noted above, the third respondent has already conducted confidential enquiry and submitted that report to the Superintendent of Police, SB CID stating that there are enough prima facie materials to take action on the complaint given by the petitioner against the sixth respondent and others.

55. Under these circumstances, it would be appropriate to direct the third respondent to register F.I.R. for the various offences mentioned in the complaint given by the petitioner dated 2-9-1998 against Karunakaran, R.D.O., sixth respondent and other officials and conduct investigation. Since the confidential report show that the preliminary confidential enquiry has been conducted in a proper way by the third respondent, it is unnecessary to hand over the investigation to C.B.I. Accordingly, the Deputy Superintendent of Police, SB CID, Nagapattinam District, the third respondent is directed to register F.I.R., as noted above, and take suitable action against the persons concerned in accordance with the procedure contemplated under law, continue the investigation and file the final report.

56. Regarding the claim of interim compensation, the learned Counsel for the petitioner cited judgments in Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490 : (AIR 1996 SC 922) and D. K. Basu v. State of W.B., (1997) 1 SCC 416 : (1997 Cri LJ 743).

57. In my view, the question of compensation can be considered at the later stage. The more important is that the R.D.O., sixth respondent who has taken law into his own

hands and caused serious prejudice to the personal liberty of the petitioner has to be booked and investigation has to be conducted after registration of the F.I.R. Therefore, the question regarding the entitlement of compensation and quantum of the same can be considered by the appropriate forum and at appropriate stage.

58. With these observations, the petition is allowed. Consequently, no separate order is necessary in Crl. M.P. No. 9037 of 1998.

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Petition allowed.

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Cross Citation :1997 (1) SCC 416, 1997 CRI.L.J. 743

SUPREME COURT OF INDIA

CORAM : KULDIP SINGH AND A.S. ANAND, JJ.

SHRI D.K. BASU v State of West Bengal

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[A] Constitution of India Art. 21 & 22 custodial violence Guidelines regarding Arrest – Violation of – Failure to Comply with requirements of guidelines laid down by Supreme court shall apart from rendering the concerned official liable for departmental action also render him liable to be punished for contempt of Court and the proceedings for it may be instituted in any High court of India having territorial jurisdiction.

[B] PROOF OF CUSTODIAL TORTURE – Held – It is impossible to have direct evidence of custodial torture by the police – It is difficult to secure evidence against the policemen responsible for resorting to third degree method since they are in charge of police station records which they can manipulate – The witnesses are either police men or co-prisoners who are highly reluctant as prosecution witnesses due to fear of retaliation by the superior officers of the Police – The Courts are required to change their outlook and attitude particularly in cases involving custodial crimes - They should adopt a realistic approach rather than a narrow technical approach so that the guilty should not escape – The victim of the crime should have satisfaction that ultimately the Majesty of law has prevailed.

"One of us (namely, Anand, J.) speaking for the court went on to observe: The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a could not careless' attitude in appreciating the evidence on the record and thereby condoning the barbarous their degree methods which are still being used, at some police stations, despite being illegal. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the case

situations and the peculiar circumstances of given case as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate implicate them with the torture. The Courts, must not loose sight of the fact that death in police custody is perhaps one of the worst kind of crime in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society." This Court then suggested:

The Courts are also required to have change in their outlook and attitude particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the case of custodial crime so that as far as possible with their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the Majesty of Law has prevailed."

[C] STATE TERRORISM - Use of third degree method not permitted to police – Experience shows that worst violations of Human Rights takes place during the course of investigation where police uses torturing method and adops techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation - The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the Rule of Law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice become louder.

- If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would

have the tendency to become law unto himself thereby leading to anarchism – No civilized national can permit that to happen – The precious rights guaranteed by Article 21 of the constitution cannot be denied to convicts, under trials deteneus and other prisoners in custody except according to the procedure established by law by placing such reasonable restrictions as are permitted by law – It must be remembered that law does not permit use of third degree methods or torture of accused during interrogation and investigation with a view to solve crime – End cannot justify the means no society can permit that the police would be accomplishing behind the closed doors what legal order forbid.

- State Terrorism is no answer to combat terrorism – To provide legitimacy to terrorism will be bad for the state – The terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in the manner permitted by law – Need therefore is to develop scientific methods of investigation and train the investigators properly to investigate to meet the challenge.

[D] HOW TO CHECK ABUSE OF POLICE POWER (para 30):- Presence of Counsel for assestee be permitted during investigation – How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time dying the interrogation may deter the police from using third degree methods during interrogation.

[E] GUIDELINES REGARDING ARREST (para 36)

We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measurers:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The

particulars of all such police personnel who handle interrogation of the arrestee insist be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by atleast one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/herbed, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illegal Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should bc displayed on conspicuous notice board.

[F] PUNITIVE MEASURES :- (PARA 41 AND 42)

UBI JUS IBI REMEDIUM - There is no wrong without a remedy. The law wills that in every case where a man is wronged and undamaged he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done.

Some punitive provisions are contained in the India Panel Code which seeks to punish violation of right to life. Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive Sections 330 and 331 provide for punishment of those who inflict injury grievous hurt on a person to extort confession or information in regard to commission of all

offence. Illustrations (a) and (b) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out place where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. These statutory provisions are, however, inadequate to repair the wrong done to the citizen. PROSECUTION OF THE OFFENDER IS AN OBLIGATION OF STATE IN CASE OF EVERY CRIME BUT THE VICTIM OF CRIME NEEDS TO BE COMPENSATED MONETARILY ALSO. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the Sate of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is compulsion of judicial consequence.

[G] COMPENSATORY RELIEF – has to be granted despite of availability of alternate remedies.

The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the court too much as protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspiration. The purpose of public law is not only to cigilized public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights .

[H] CONSTITUTIONAL SAFEGUARDS : (para 17)

Fundamental rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus, it would also include within itself a guarantee, against torture and assault by the State or its functionaries. Article 22 guarantees Protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the rights to consult

and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the persons arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours such arrest, excluding the time necessary for the journey form the place of arrest to the court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguards provided to a person with a view a protect his personal liberty against any unjustified assault by the State. In tune with constitutional guarantee a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights of the citizens. Chapter V of Criminal Procedure Code, 1973 deals with the powers of arrest of a person and the safeguards which are. required to be followed by the police to protect the interest of the arrested person. Section 41, Cr. P.C. confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 provides the method and manner of arrest. Under this Section no formality is necessary while arresting a person. Under Section 49, the police is not permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and lie may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes Clause (2) of Articles 22 of the Constitution of India. There are some other provisions also like Section 53, 54, and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold an enquiry into the cause of death.

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Referred. Joginder Kumar vs State, 1994 (4) SCC 260; Neelabati Bahera vs State of Orissa, 1993 (2) SCC 746; State of Madhya Pradesh vs Shyamsunder Trivedi & Ors, 1995 (3) SCALE 343; Re Death of Sawinder Singh Grover, 195 Supp (4) SCC 450; Miranda vs Arizona, 384 US 436; Rudal Shah vs State of Bihar, 1983 (4) SCC 141; Sebastian M. Hongrey vs Union of India, 1984. (3) SCC 339 and 1984 (3) SCC 82; Bhim Singh vs State of J&K, 1984 (Supp) SCC 504 and 1985(4) SCC 677; Sahell vs Commissioner of Police, Delhi, 1990(1) SCC 422; Kasturi Lal Ralia Ram Jain vs State of U.P., 1965. (1) SCR 375;

Quinn vs Ryan, 1965 IR 70 (122); Byrne vs Ireland, 1972 IR 241; Maharaj vs Attorney General of Trinidad and Tobago, (1978) 2 All E.R.670; Simpson vs Attorney General, 1994 NZLR 667;

Dr. Anand, J. - The Executive Chairman, Legal Aid Services, West Bengal, a non-political organisation registered under the Societies Registration Act, on 26th August, 1986 addressed a letter to the Chief Justice of India drawing his attention to certain news items published in the Telegraph dated 20, 21 and 22 of July, 1986 and in tile Statesman and Indian Express dated 17th August, 1986 regarding deaths in police lock-ups and custody. The Executive Chairman after reproducing the news items submitted that it was imperative to examine the issue in depth and to develop "custody jurisprudence" and formulate modalities for awarding compensation to the victim and/or family members of the victim for atrocities and death caused in police custody and to provide for accountability of the officers concerned. It also stated in the letter that efforts are often made to hush up the matter of lock-up deaths and thus the crime goes unpunished and "flourishes". It was requested that the letter alongwith the news items be treated as a writ petition under "public interest litigation" category.

2. Considering, the importance of the issue raised in the letter and being concerned by frequent complaints regarding custodial violence and deaths in police lock up, the letter was treated as a writ petition and notice was issued on 9.2.1987 to the respondents.

3. In response to the notice, the State of West Bengal filed a counter. It was maintained that the police was not hushing up any matter of lock-up death and that wherever police personnel were found to be responsible for such death, action was being initiated against them. The respondents characterised the writ petition as misconceived misleading and untenable in law.

4. While the Writ petition was under consideration, a letter addressed by Shri Ashok Kumar Johri on 29.7.87 to the Hon'ble Chief Justice of India drawing the attention of this Court to the death of one Mahesh Bihari of Pilkhana, Aligarh in police custody was received. That letter was also treated as a writ petition and was directed to be listed alongwith the writ petition filed by Shri D.K. Basu. On 14.8.1987 this Court made following order:

"In almost every states there were allegations and these allegations are now increasing in frequency of deaths in custody described generally by newspapers as lock-up deaths. At present there doesn't appear to be any machinery to effectively deal with such allegations. Since this is an all India question concerning all States, it is desirable to issue notices to all the Sates Governments to find out whether they are desire to say anything in the matter. Let notices issue to all the State Governments. Let notice also issue to the Law Commission of India with a request that suitable suggestions may be made in the matter. Notice be made returnable in two months from today."

5. In response to the notice, affidavits have been filed on behalf of the States of West Bengal, Orissa, Assam, Himachal Pradesh, Madhya Pradesh, Haryana, Tamil Nadu, Meghalaya, Maharashtra and Manipur. Affidavits have also been filed on behalf of Union Territory of Chandigarh and the Law Commission of India.

6. During the course of hearing of the Writ petitions, the court felt necessity of having assistance from the Bar and Dr. A.M. Singhivi senior advocate was requested to assist the Court as amicus curiae.

7. Learned counsel appearing for different States and Dr. Singhivi, as friend of the Court, present the case ably and though the effort on the part of the States initially was to show that "everything was well" within their respective States, learned counsel for the parties, as was expected of them in view of the importance of the issue involved, rose above their respective briefs and rendered useful assistance to this Court in examining

various facts of the issue and made certain suggestions for formulation of guidelines by this Court to minimise, if not prevent, custodial violence and for award of compensation to the victims of custodial violence and kith and kin of those who die in custody on account of torture.

8. The Law Commission of India also in response to the notice issued by this Court forwarded a copy of the 113th Report regarding "Injuries in police custody and suggested incorporation of Section 114-B in the India Evidence Act."

9. The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty, of the Court, as custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by person who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.

10. "Torture" has riot been defined in the Constitution or in other penal laws. "Torture" of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'week' by suffering. The word torture today has become synonymous with the darker side of human cilivlisation.

"Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it.

Torture is anguish squeezing in you, chest, cold as ice and heavy, as a stone paralyzing as steep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."

- Adriana P. Bartow.

11. No violation of any of the human rights has been the subject of so many Conventions and Declarations as 'torture' - all aiming at total banning of it in all forms but inspite of the commitments made to eliminate torture, the fact remains that torture is more widespread now than ever before. "Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual dignity and whenever human - dignity is wounded, civilisation takes a step backward - flag of humanity must on each such occasion fly half-mast.

12. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law.

13. "Custodial violence" and abuse of police power is not only peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948, which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degarding treatment or punishment." Despite the pious declaration, the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication.

14. In England, torture was once regarded a normal practice to get information regarding the crime, the accomplices and the case property or to extract confessions, but with the development of common law and more radical ideas imbibing human thought and approach, such inhuman practices were initially discouraged and eventually almost done away with, certain aberrations here and there notwithstanding. The police powers of arrest, detention and interrogation in England were examined in depth by Sir Cyril Philips Committee – 'Report of a Royal Commission on Criminal Procedure' (command – Papers 8092 of 1981). The report of the Royal Commission is, instructive. In regard to the power of arrest, the Report recommended that the power to arrest without a warrant must be related to and limited by the object to be Carved by the arrest, namely, to prevent the suspect form destroying evidence or interfering with witnesses or warning , accomplices who have not yet been arrested or where there is a good reason to suspect the repetition of the offence and not to every case irrespective of the object sought to be achieved.

15. The Royal Commission suggested certain restrictions on the power of arrest on the basis of the 'necessity principle The Royal Commission Said:

"..... we recommend that detention upon arrest for an offence should continue only on one or more of the following criteria:

(a) the person's unwillingness to identify himself so that a summons may be served upon him;

(b) the need to prevent the continuation or repetition of that offence;

(c) the need to protect the arrested person himself or other persons or property;

(d) the need to secure or preserve evidence of or relation to that offence or to obtain such evidence from the suspect by questioning him; and

(e) the likelihood of the person failing to appear at court to answer any charge made against him."

The Royal Commission also suggested: "To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be finger printed or to participate in an identification parade. It could also be extended to attendance for interview at a time convent both to the suspect and to the pole office investigating the case....."

16. The power of arrest, interrogation and detention has now been streamlined in England on the basis of the suggestions made by the Royal Commission and incorporated in Police and Criminal Evidence Act, 1984 and the incidence of custodial violence has been minimized there to a very great extent.

17. Fundamental rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus, it would also include within itself a guarantee, against torture and assault by the State or its functionaries. Article 22 guarantees Protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the rights to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the persons arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours such arrest, excluding the time necessary for the journey form the place of arrest to the court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the

constitutional safeguards provided to a person with a view a protect his personal liberty against any unjustified assault by the State. In tune with constitutional guarantee a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights of the citizens. Chapter V of Criminal Procedure Code, 1973 deals with the powers of arrest of a person and the safeguards which are. required to be followed by the police to protect the interest of the arrested person. Section 41, Cr. P.C. confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 provides the method and manner of arrest. Under this Section no formality is necessary while arresting a person. Under Section 49, the police is not permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and lie may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes Clause (2) of Articles 22 of the Constitution of India. There are some other provisions also like Section 53, 54, and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold an enquiry into the cause of death.

18. However, inspite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody had been a disturbing factor. Experience shows that worst violations of human rights takes place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost every day carrying reports of dehumanizing torture, assault, rape and death in custody of police, or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the creditability of the Rule of Law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

19. The Third Report of the National Police Commission in India expressed its deep concern with custodial violence and lock-up deaths. It appreciated the demoralizing effect which custodial torture was creating on the society as a whole. It made some very useful suggestions. It suggested:

"..... An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstance:-

(i) The case involves a gave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody his is likely to commit similar offences again. It would be desirable to insist through officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines....."

The recommendations of Police Commission (supra) reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. These recommendations, however, have not acquired any statutory status so far.

20. This Court in Joginder Kumar Vs. State [1994 (4) SCC 260] () to which one of us, namely Anand, J. was a party) considered the dynamics of' misuse of police power of arrest and opined:

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justification for the exercise of it is quite another.... No arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness ad bonafides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person his liberty is serious matter."

21. Joginder Kumar's case (supra) involved arrest of a practicing lawyer who had been called to the police station in connection with a case under inquiry on 7.1.94. On not receiving any satisfactory account of his whereabouts, the family members of the detained lawyer preferred a petition in the nature of habeas corpus before this Court on 11.1.94 and in compliance with the notice, the lawyer was produced on 14.1.94 before this Court. The police version was that during 7.1.94 and 14.1.94 the lawyer was not in detention at all but was only assisting the police to detect some cases. The detenue asserted otherwise. This Court was not satisfied with the police version. It was noticed that though as on that day the relief in habeas corpus petition could not be granted but the questions whether there had been any need to detain the lawyer for 5 days and if at all he was not in detention then why was this Court not informed, were important questions which required an answer. Besides, if there was detention for 5 days, for what reason was he detained. The Court, therefore, directed the District Judge, Ghaziabad to make a detailed enquiry and submit his report within 4 weeks. The Court voiced its concern regarding complaints of violations of human rights during and after arrest. It said:

"The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two? A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the on one had, and individual duties, obligations and responsibilities on the other, of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which come first – the criminal or society, the law violator or the abider....."

This Court then set down certain procedural "requirements" in cases of arrest.

22. Custodial death is perhaps one of tile worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilised national can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials, detenues and other prisoners in

custody except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

23. In Neelabati Bahera Vs State of Orissa [1993 (2) SCC,746], (to which Anand, J. was a party) this Court pointed out that prisoners and declines are not denuded of their fundamental rights under Article 21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of the fundamental rights of the arrestees and detenues. It was observed:

"It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and permitted by law, which can be imposed on the enjoyment of fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure tatha the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the Sate is strict and admits of no exceptions. The wrongdoer is accountable and the Sate responsible if the accountable in Sate is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

24. Instances have come to our notice where the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest and the arrested person has been subjected to torture to extract information form him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of arrestee has sometimes resulted into his death. Death in custody is not generally shown in the records of the lock-ups and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any compliant against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officer turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting into death as the police lock-up where general torture or injury is caused is away from the public gaze and the witnesses are either police men or co-prisoners who are highly reluctant to appear as prosecution witnesses due to fear of retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody,

it is difficult to secure evidence against the policemen responsible for resorting to third degree methods since they are incharge of' police station records which they do not find difficult to manipulate. Consequently, prosecution against the delignuent officers generally results in acquittal. State of Madhya Pradesh Vs. Shyamsunder Trivedi & Ors. [1995 (3) Scale, 343 =] is an apt case illustrative of the observations made by us. In that case, Nathu Banjara was tortured at police station, Rampura during the interrogation. As a result of extensive injuries caused to him he died in police custody at the police station. The defence set up by the respondent police officials at the trial was that Nathu had been released from police custody at about 10.30 p.m. after interrogation on 13.10.1986 itself vide entry Ex. P/22A in the Roznamacha and that at about 7.00 a.m. on 14.10.1981, a death report Ex. P/9 was recorded at the police station, Rampura, at the instance of Ramesh respondent No. 6, to the effect that he had found "one unknown person" near a

tree by the side of the tank riggling with plain in his chest and that as soon as respondent No. 6 reached near him, the said person died. The further case set up by SI Trivedi, respondent No. 1, incharge of the police station was that after making a Roznamacha entry at 7.00 a.m. about his departure from the police station (respondent No. 1 - Shyamsunder Trivedi) and Constable RajRam respondent proceeded to the spot where the dead body was stated to be lying for conducting investigation under Section 174 Cr. P.C. He summoned Ramesh Chandra and Goverdhan respondents to the spot and in their presence prepared a Panchanama Ex. P/27 of the dead body recording the opinion therein to the effect that no definite cause of death was known.

25. The First Additional Sessions Judge acquitted all the respondents of all the charges holding that there was no direct evidence to connect the respondents with the crime. The State of Madhya Pradesh went up in appeal against the order of acquittal and the High Court maintained the acquittal of respondents 2 to 7 but set aside he acquittal of respondent No. 1, Shyamsunder Trivedi for offences under Section 218, 201 and 342 IPC. His acquittal for the offence under Section 302/149 and 147 IPC was, however, maintained. The State filed an appeal in this Court by special leave. This Court found that the following circumstances had been established by the prosecution beyond every reasonable doubt and coupled with the direct evidence of PWs 1,3,4,8 and 18 those circumstances were consistent only with hypothesis of the guilt of the respondents and were inconsistent with their innocence:

(a) That the deceased had been brought alive to the police station and was last seen alive there on 13.10.81;

(b) that the dead body of the deceased was taken out of the police station on 81 at about 2 p.m. for being removed to the hospital;

(c) that SI Trivedi respondent No. 1, Ram Naresh Shukla, Respondent No. 3, Rajaram, respondent No. 4 and Ganiuddin respondent No. 5 were present at the police station and had all joined hand to dispose of the dead body of Nathu- Banjara;

(d) that SI Trivedi respondent No. 1 created false evidence and fabricated false clues in the shape of documentary evidence with a view to screen the offence and for that matter, the offender;

(e) SI Trivedi respondent in connivance with some of his subordinates, respondents herein had taken steps to cremate the dead body in host haste describing the deceased as a 'lavaris' though the identity of the deceased, when they had interrogated for a sufficient long time was well known to them and opined that:

"The observations of the High Court that the presence and participation of these respondents in the crime is doubtful are not borne out from the evidence on the record and appear to be an unrealistic over simplification of the tell tale circumstances established by the prosecution."

26. One of us (namely, Anand, J.) speaking for the court went on to observe: The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a could not careless' attitude in appreciating the evidence on the record and thereby condoning the barbarous their degree methods which are still being used, at some police stations, despite being illegal. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the case situations and the peculiar circumstances of given case as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd harm would come to them,

if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate implicate them with the torture. The Courts, must not loose sight of the fact that death in police custody is perhaps one of the worst kind of crime in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society." This Court then suggested:

The Courts are also required to have change in their outlook and attitude particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the case of custodial crime so that as far as possible with their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the Majesty of Law has prevailed.

27. The State appeal was allowed and the acquittal of respondents 1,3,4 and 5 was set aside. The respondents were convicted for various Offences including the offence under Section 304 Part II/34 IPC and sentenced to various terms of imprisonment and fines ranging from Rs. 20,000/- to Rs. 50,000/-. The fine was directed to be paid to the heirs of Nathu Banjara by way of compensation. It was further directed:

"The trial Court shall ensure, in case the fine is deposited by the accused respondents, that the payment of the same is made to the heirs of deceased Nathu Banjara, and the Court shall take all sort precautions as are necessary to see the money is not allowed to fall into wrong, hand and its utilised for benefit of the members of the family of the decreased Nathu Banjara, and if found practical by deposit in Nationalised Bank or post office on such terms as the Trial Court may in consultation with heirs for the deceased consider fit and proper."

28. It needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers. The victim of crime or his kith and kin become frustrated and contempt for law develops. It was considering these aspects that the Law Commission in its 113th Report recommended the insertion of Section 113B in the Indian Evidence Act. The Law Commission recommended in its 113th Report that in prosecution of police officer for an alleged offence of having caused bodily injury to a person, if there was evidence that the injury was caused during the period when the person was in the custody of the police, the court may presume the injury was caused by the police officer having the custody of that person during that period. The Commission further recommended that the court, while considering the question of presumption, should have regard to all relevant circumstance including the period of custody, statement made by victim, medical evidence and evidence which the Magistrate may have recorded. Change of burden of proof was, thus, advocated. In Shyam Sunder Trivedi's case (supra) this Court also expressed the hope that the Government and the legislature would give serious thought to the recommendation of the Law Commission. Unfortunately the suggested amendment, has no been incorporated in the statute so far. The need of amendment requires no emphasis - sharp rise in custodial violence, torture and death in custody, justifies the urgency for the amendment and we invite Parliament's attention to it.

29. Police is no doubt, under a legal duty and his legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigated with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person an using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

30. How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon.

Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time dying the interrogation may deter the police from using third degree methods during interrogation.

31. Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Boarder Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, R.A.W., Central Bureau of investigation (CBI), CID, Traffic Police, Mounted Police and ITBP, which have the power to detain a person and to interrogate him in connection with the investigation of economic offences under the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well. In Re Death of Sawinder Singh Grover [1995 Supp (4) SCC, 450], (to which Kuldip Singh, J. was a party) this Court took suo moto notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the Additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge a FIR and initiate criminal proceedings against all persons named in the report of the Additional District Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay a sum of Rs. 2 lacs to widow of the deceased by way of ex gratia payment at the interim stage. Amendment of the relevant provisions of law to protect the interest of arrested persons in such case too is genuine need.

32. There is one other aspect also which needs our consideration. We are conscious of the fact that police in India have to perform a difficult ad delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, the increasing number of underworld and armed gangs and criminals. Many hard core criminals like extremists, the terrorists, drug peddlers smugglers who have organized gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalization and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balance approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worse than the disease itself.

33. The response of American Supreme Court to such an issue in Mirranda Vs. Arizona 384 US 436 is instructive. The Court said:

"A recurrent argument, made in these case is that society's need for interrogation out-weights the privilege. This argument is not unfamiliar to this Court. See e.g., Chambers V. Florida 309 US 227 240-41, 84L ed 716, 724, 60 S CT 472 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the

individual when confronted with the power of Government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged." (Emphasis ours)

34. There can be no gain saying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the Courts. The right to in the detenues, culprits or arrestee in the interest of the nation, must take precedence over an individual's right to personal liberty. The latin maxim salus populi est suprema lex (the safety of the people is the supreme law) and salus populi est suprema lex (safety of the State is the supreme law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that community. The action of the Sate, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated - indeed subjected to sustained and scientific interrogation - determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or drive knowledge about his accomplice, weapons etc. His constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal Challenge of terrorism be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism. That would be bad for the State, the community and above all for the Rule of law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

35. In addition to statutory and constitutional requirements to which we have made a reference, we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest at the time of arrest in the presence of atleast one witness who may be a member of the family of the arrestee or a respectable person of locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be counter signed by the arrestee.

36. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measurers:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee insist be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by atleast one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or

relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/herbed, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should bc displayed on conspicuous notice board.

37. Failure to comply with the requirements herein above mentioned shall apart form rendering the concerned official liable for departmental action also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the Country, having territorial jurisdiction over the matter.

38. The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to Which a reference has been made earlier,

39. These requirements are in addition 1, the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding the rights and dignity of arrestee.

40. The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of very State Union Territory and it shall be their obligation to circulate the same to every police station, under their charge and get the same notified at ever police station at a conspicuous place. It would also be useful and serve large interest to broadcast the requirements on the All India Radio besides being shown on the National network of Doordarshan and publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about tile rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would been to curb, if not totally

eliminate the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.

PUNITIVE MEASURES

41. UBI JUS IBI REMEDIUM - There is no wrong without a remedy. The law wills that in every case where a man is wronged and undamaged he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done.

42. Some punitive provisions are contained in the India Panel Code which seeks to punish violation of right to life. Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive Sections 330 and 331 provide for punishment of those who inflict injury grievous hurt on a person to extort confession or information in regard to commission of all offence. Illustrations (a) and (b) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out place where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. These statutory provisions are, however, inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the Sate of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is compulsion of judicial consequence.

43. Article 9(5) of the International Convenient on Civil and Political Rights, 1996 (ICCRP) provides that "anyone who has been the victim of unlawful arrest or of courts, the Government of India at time of its ratification (of ICCRP) in 1979 had made a specific reservation to the effect the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention and thus become a party to covenant. That reservation, however, has now lost its relevance in view of law laid down by this Court in a number of case awarding compensation this Court in number of cases awarding compensation for the infringement of the fundamental right to life of a citizen. {See with advantage Rudal Shah Vs. State of Bihar [1983 (4) SCC, 141]: Sebastian M. Hongrey Vs. Union of India [184 (3) SCC, 339] and 1984 (3) SCC, 82]; Bhim Singh Vs. State of J & K [1984 (Supp) SCC, 504 and 1985 (4) SCC, 677] Saheli Vs. Commissioner of Police, Delhi [1990 (1) SCC, 422]} There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, this Court has judicially evolved a right to compensation in cases of established unconstitutional depravation of personal liberty or life, [See: Neelabati Bahera Vs. State (Supra)].

44. Till about two decades ago the liability of the Government for tortious act of its public servants was generally limited and the person affected could enforce his right in tort by filing a civil suit and there again the defence of sovereign immunity was allowed to have it play. For the violation of the fundamental right to life or basic-human rights, however, this Court has taken the view that the defence of sovereign immunity is not available to the State for the tortious acts of the public servants and for the established violation of the rights guaranteed by Article 21 of the Constitution of India. In Neelabati Bahera Vs. State [supra] the decision of this Court in Kasturi Lal Raila Ram Jain Vs. State of U.P. [1996 (1) SCR, 375] wherein the plea of sovereign immunity had been upheld in a

case of vicarious liability of the State for the tort committed by its employees was explained thus:

"In this context it is sufficient to say that the decision of this Court in Kasturilal unpholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liablity in tort, which is distinct form the State's liablity for contravention of fundamental rights to which the application in the constitutional scheme and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of fundamental rights, when the only practicable mode of enforcement of the fundamental rights call be the award of compensation. The decisions of this Court in Rudal Sah and others in that contravention of fundamental rights, in the constitutional remedy under Articles 32 and 226 of the Constitution. On the other hand, Kasturilal related to the value of goods seized and not returned to the owner due to fault of damages for the tort of conversation under the ordinary process, and not a claim for compensation for violation of fundamental rights. Kasturilal is, therefore, inapplicable in this context and distinguishable."

45. The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortious acts of the public servants. Public Law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 32 or 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the Courts under the public law jurisdiction for penalising the wrong doer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen.

46. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much, as the protector and custodian of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim - civil action for damages is a long drawn and cumbersome judicial process. Monetary compensation for redressal by the Court finding the infringement of the indefeasible right to life of the citizen is, therefore, a useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread winner of the family.

47. In Nilabati Bahera's case (supra), it was held :

"Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve 'new tools' to give relief in

public law by molding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the title "Freedom under the Law" Lord Denying in his own style warned:-

"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do thing which they ought not to do : and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to date machinery, by declarations, injunctions and actions for negligence... This is not the tasks of Parliament.... the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state; but abused they lead to a totalitarian state. None such must even be allowed in this country".

48. A similar approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental rights of the citizen has been adopted by the courts of Ireland, which has a written constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy for the infringement of those rights. That has, however, not prevented the Courts in Ireland from developing remedies, including the award of damages, not only against individuals guilty of infringement, but against the State itself.

49. The informative and educative observations of O' Dalaigh CJ in The State (at the Prosecution of Quinn) v. Ryn [1965] IR 70 (122) deserve special notice. The Learned Chief Justice said:

"It was not the intention of. the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at bought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of those rights. As a necessary corollary, it follows that no one can with impunity set these rights at bought or circumvent them, and that the Court's powers in this regard are as ample as the defence of the Constitution requires." (Emphasis supplied)

50. In Byrne v. Ireland [1972] IR 241, Walsh J opined at p 264:

"In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed".

(Emphasis supplied)

51. In Maharaj Vs. Attorney General of Trinidad Tobago [(1978) 2 All. E.R. 670], the Privy Council while interpreting Section 6 of the Constitution of Trinidad and Tobago held that though not expressly provided therein, it permitted an order for monetary compensation, by way of 'redress' for contravention of the basic human rights and fundamental freedoms. Lord Diplock speaking for the majority said:

"It was argued on behalf of the Attorney General that Section 6(2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in jaundoo v. Attorney General of Guyana. Reliance was placed on the reference in the subsection to enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections' as the purpose for which orders etc. could be made. An order for

payment of compensation, it was submitted, did not amount to the enforcement of the rights that had been contravened. In their Lordships' view an order for payment of compensation when a right protected under Section I 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under Section 6(1) and may well be the only practicable form of redress, is by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by para (a) of Section 6(2), viz. jurisdiction to hear and determine any application made by any person in pursuance of sub-section (1) of this section. The very wide powers to make orders, issue writs and give directions are ancillary to this."

52. Lord Diplock then went on to observe (at page 680):

"Finally, their Lordships would say something about the measure of monetary compensation recoverable under Section 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law far damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone."

53. In Simpson vs. Attorney General [Baigent's case] (1994 NZLR, 677) the Court of Appeal in New Zealand dealt with the issue in a very elaborate manner by reference to a catena of authorities from different jurisdictions. It considered the applicability of the doctrine of vicarious liability for torts like unlawful search, committed by the police officials which violate the New Zealand Bill of Rights Act, 1990. While dealing with the enforcement of rights and freedoms as guaranteed by the Bill of Rights for which no specific remedy was provided. Hardie Boys J. observed:

"The New Zealand Bill of Rights Act unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise its function powers duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights are the entitlement of every citizen and their protection the obligation of every ciglized state. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared. The reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred (and they are but a sample) is in my own opinion equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning." (Emphasis supplied)

54. The Court of Appeal relied upon the judgments of the Irish Courts, the Privy Council and referred to the law laid down in Nilabati Behera Vs. State (supra) thus :

"Another valuable authority comes from India, where the constitution empowers the Supreme Court to enforce rights guaranteed under it. In Nilabati Behera v. State of Orissa (1993) Crl. LJ 2899, the Supreme Court awarded damages against the State to the mother of a young man beaten to death in police custody. The Court held that its power of enforcement imposed a duty to "force new tools", of which compensation was an appropriate one where that was the only mode of redress available. This was not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity does not apply. These observations of Anand J it p 2912 may be noted.

The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too too much as protector and guarantor of the indefeasible

rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspiration. The purpose of public law is not only to cigilized public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights."

55. Each of the five members of the Court of Appeal in Simpson's case (supra) delivered a separate judgment but there was unanimity of opinion regarding the grant of pecuniary compensation to the victim, for the contravention of his rights guaranteed under the Bill

of Rights Act, notwithstanding the absence of an express provision in that behalf in the Bill of Rights Act.

56. Thus, to sum up, it is now a well accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometime perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is victoriously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be fell to the criminal courts in which the offender is prosecuted, which the State, in. law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damage which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait, jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.

57. Before parting with this judgment we wish to place on record our appreciation for the learned counsel appearing for the States in general and Dr. A.M. Singhvi, learned senior counsel who assisted the Court amicus curiae in particular for the valuable assistance rendered by them.

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Eq. Citation :2009 SCCOnLine Gau 107, 2010 CRI. L. J. 56

IN THE GAUHATI HIGH COURT

(SHILLONG BENCH)

W.P. (C) No. 147(SH) of 2008, D/- 22 -7 -2009.

M/s. Pusma Investment Pvt. Ltd. and Ors.

Vs.

State of Meghalaya and Ors.

CORAM: T. VAIPHEI, J. (Single Bench)

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CASE NOTE :

Criminal P.C. (2 of 1974), S.160, S.91 - SUMMONS - PERSONAL APPEARANCE and Attendance of witnesses - Enforcement of - Petitioners were residents of Delhi and said to be acquainted with facts of case - Were summoned for their personal attendance by police officer at Shillong - Since police officer making investigation can enforce attendance of persons u/S.160 only if witness resides within limits of his or adjoining police station - Hence, notices issued seeking personal attendance were liable to be quashed. (Para 5)

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V.K. Jindal, Sr. Advocate and S. Jindal, for Petitioner; S.P. Mahanta, Addi. Advocate General, Meghalaya with N.D. Chullai, Sr. G.A., for Respondents.

Judgement

ORDER :- The legality of the notices issued by the Deputy Superintendent of Police, C. I. D. Headquarters, Meghalaya, Shillong under Section 160/91 of the Code of Criminal Procedure, 1973 requiring the petitioners, who are residing in New Delhi, to appear before him at Shillong for recording their statements in connection with Laban P. S. Case No. 63(11)04 under S. 408/415/418/420/423/424/464/468/471/120-B, I. P. C. and for production of some documents, are under challenge in this writ petition.

2. Though the facts pleaded by the petitioners in the writ petition are many, it is not necessary to refer to them in detail as the controversy can be resolved on a narrow compass. The notices are dated 1-11-2007, and dated 28-5-2008 addressed to each of the petitioners, two of which, being illustrative of the other notices, run along the following lines :

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"Office of the Addl. Director General of
Police CID (Hqr),
Meghalaya, Shillong,
NOTICE under S. 160, Cr. P. C.

To
Shri Sunil Bhansali
Director, Pusma Investment Pvt. Ltd.
71, Daryaganj, New Delhi-110002.

Ref : Laban P. S. Case No. 63(11)04 U/s. 408/415/418/420/423/424/464/468/471/120-B, I.P.C.

You are hereby directed to appear before the undersigned on the 10 day of Dec. 2007 at the office of the Addl. Director General of Police CID (Hqr) Meghalaya, Shillong at 10 a.m. positively for recording your statement in connection the above noted case.

Further, you are to bring all the relevant documents pertaining to your company with complete books of account, investment registers, return and documents filed with ROC, income tax returns, balance sheet, minute books and bank statements from 1997 till date.

You are also to bring your personal income tax returns and bank statements from 1997 till date.

Herein fail not.

Sd/-
(C. Syrti MPS)
Dated Shillong, Investigating Officer,
The 1st Nov., 2007. Deputy Superintendent
of Police,
CID HQ, Meghalaya, Shillong"

"Office of the Addl. Director General of
Police. CID (HQR)
Meghalaya, Shillong.
NOTICE u/S 160/91, Cr. P. C.

To
Shri Sunil Bhansali
Director, Pushpa Investment Pvt. Ltd.
71, Daryaganj, New Delhi-110002.
Ref : Laban P. S. Case No. 63(11)04 U/s. 408/415/418/420/423/424/464/468/471/120-B, I. P. C.
You are expected to appear at the Office of the Additional Director General of Police, CID (HQR) Meghalaya, Shillong on the 10th Dec., 2007 for recording your statement and examining your Company's documents in connection with the above noted case, but you failed to act in accordance with for the same.
Hence, yet again I'm giving you this notice to appear before the undersigned on 23rd June, 2008 at the office mentioned hereinabove @ 11.00 a.m. absolutely. Detail for the case will be explained to you on your present before the investigating officer as date time mentioned above.
List of company's documents need to be produced w.e.f. 1998-2
1. Bank statement
2. Book of account
3. Investment Register
4. Income-tax Return
5. Balance Sheet
6. Return and documents filed with ROC
Herein fail not.
Sd/-
(C. Syrti MPS)
Dy. Superintendent of Police, CID (Hqr),
Meghalaya, Shillong"

3. There is no dispute at the bar that the petitioners No. 1, 2, 4, 5 and 6 are residents of Daryaganj, New Delhi while the petitioner No. 3 is a resident of Faridabad, Haryana : they are then obviously not within the limits of Shillong Police Station or within the adjoining police station. The notices reproduced hereinabove indicate that the petitioners have been required to appear before the respondent No. 6 at the C. I. D. Headquarters at Shillong. Before proceeding further, it may be useful to refer to the provisions of Sections 91 and 160, Cr. P. C. hereunder :

"91. Summons to produce document or other thing.- (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer by a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to product it at, at the time and place stated in the summons or order.

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(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.
(3) Nothing in this section shall be deemed-
(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Banker's Book Evidence Act, 1891 (13 of 1891), or
(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority"
"160. Police Officer's power to require attendance of witnesses.- (1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining police station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required :
Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.
(2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence."
4. Insofar as Section 91 is concerned, there is no difficulty. If a Court or a police officer considers the production of a document or a thing for the purposes of investigation, inquiry, trial or other proceeding under the Code, it can require the person in whose possession or power such document or thing is believed to be, to attend and produce it at the time and place stated in the summons or order. However, the personal attendance of the person, in whose possession or power the document or thing is believed to be, cannot be insisted upon for production of such document or thing : the mere production of such document or thing will obviate his personal attendance. It is, however, with respect to Section 160 that the controversy has cropped up. Because the personal attendance of the petitioners are considered by the respondent No. 6 to be necessary as they appear to be acquainted with the facts and circumstances of the criminal case registered at Laban Police Station, Shillong. Mr. V. K. Jindal, the learned senior counsel for the petitioners, vehemently submits that when the petitioners are admittedly residents of Delhi, the summons for their personal appearance issued by the respondent No. 6 at Shillong is contrary to the provisions of Section 160 inasmuch as this provision speak of the persons being summoned to be necessarily within the limits of the police station of the police officer making the investigation or the adjoining police station. According to the learned senior counsel, the language of Section 160 is clear and unambiguous and does not leave any room for two views, namely, the persons, even if they are acquainted with the facts and circumstances, to be summoned must be residing within the local limits of the jurisdiction of the police officer making the investigation or the adjoining police station, and any other interpretation will be doing violence to the plain language of the section. Per contra, Mr. S. P. Mahanta, the learned Additional Advocate General, submits with equal vehemence that for requisitioning the attendance of a person, who is well acquainted with the facts and circumstances of the case, it is not necessary that he should be residing within the limits of the police station of the investigating officer or any adjoining police station. He heavily relies on the decision of the Bombay High Court in Anirudha S. Bhagat v. Ramnivas Meena, 2005 Cri LJ 3346 (DB) in support of his contention. He contends that the petitioners have no case for resisting the summons and are only interested in stalling the investigation of the case to avoid criminal prosecution of heinous crimes. He, therefore, urges this Court to dismiss the writ petition with heavy costs.

5. Section 160, Cr. P. C. authorizes a police officer making an investigation, by order in writing, (i) to require the attendance
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before himself, (ii) of any person, who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case, and (iii) who is residing within the limits of his own police station or any adjoining police station. The expression "who being within the limits of his own" read with the words following it, namely, "or any adjoining station" can only mean the person, who is to be summoned, must reside within the limits of the police station of the police officer making the investigation. So read, it becomes clear that such police officer making the investigation can enforce the attendance of a person acquainted with the facts and circumstances only if the latter resides within the limits of his own police station or adjoining station. If the person being summoned does not reside within the limits of the police station of the police officer making the investigation or, at any rate, within the limits of the adjoining police station, it appears that such police officer cannot enforce his attendance even though he may be acquainted with the facts and circumstances of the case being investigated by him. The proviso to sub-section (1) of Section 160 says that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides. Then, sub-section (2) of Section 160 further provides that the State Government may, by rules made in this behalf, provide for the payment by the officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence. Conjoint reading of both the sub-sections and the proviso to sub-section (1) of Section 160 plainly indicate, firstly, that the person to be summoned by the officer making the investigation must reside within the local limits of his own police station or within the adjoining area, secondly, that in the case of a male person under the age of fifteen years or woman, their attendance cannot be enforced at any place other than their residence even if they reside within the limits of the police station of the police officer making the investigation or within the limits of the adjoining police station and, thirdly, that reasonable expenses of every person other than a male person under the age of fifteen years or woman attending such requisition at any place within the limits of the police station shall have to be paid by the concerned police officer as per rules framed by the State Government in this behalf. If the contention of the learned Additional Advocate General that under Section 160, the police officer making the investigation is not disabled from requiring the attendance of a witness residing beyond the local limits of his police station or adjoining station, is accepted, that will amount to ignoring the words "being within the limits of his own or any adjoining station". In my opinion, such interpretation is against all canons of interpretation. It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute (see Ashwini Kumar Ghosh v. Arabinda Bose, AIR 1952 SC 369). "In the interpretation of statutes", observed Das Gupta, J. in J. K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of U. P., AIR 1961 SC 1170 (at page 1174), "the Courts presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect." The Legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the Legislature will not be accepted except for compelling reasons. When the language of Section 160 is plain and unambiguous, this Court cannot plunge headlong into a discussion of the reason which motivated the Legislature into enacting this provision and took into consideration the hardship and inconvenience being caused to the investigating agency if they are not allowed to enforce the attendance of witnesses residing beyond their police station or

adjoining police station. The rule of purposive construction cannot also be invoked in this provision. The correct principle, according to the learned author, G. P. Singh, J., is that after the words have been construed in the context and it is found that the language is capable of bearing only one construction, the rule in Heydon's case ceases to be controlling and gives way to the plain meaning rule. But the rule cannot be used to "the length of applying unnatural meanings to familiar words or of so stretching the language that its former

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shape is transformed into something which is not only significantly different but has a name of its own especially when "the language has no evident ambiguity or uncertainty about it. (see Principles of Statutory, Interpretation, 9th Edn. pp. 119-120). In the view that I have taken, the impugned notices are ultra vires the provisions of Section 160 of the Code of Criminal Procedure, 1973, and cannot be sustained in law. I have carefully gone through the case Anirudha S. Bhagat (2005 Cri LJ 3346) (supra) cited by the learned Additional Advocate General, but, with respect, I find myself unable to agree with view taken by the Division Bench of the Bombay High Court for the reasons already stated in the foregoing.

6. Consequently, this writ petition succeeds. The impugned notices issued by the respondent No. 6 to the petitioners under Section 160, Cr. P. C. are hereby quashed. No further notice under S. 160, Cr. P. C. shall be issued by him upon the petitioners hereafter to enforce their attendance from Delhi as witnesses in connection with Laban P. S. Case No. 63(11)04. Insofar as the notice under Section 91, Cr. P. C. is concerned, it is hereby declared that the personal attendance of the petitioners before the respondent No. 6 is not necessary merely for production of the documents required by him in connection with that case. However, there shall be no costs.

Petition allowed.

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Cross Citation :2011 CRI. L. J. 2908

SUPREME COURT OF INDIA

(From : Delhi)

Coram : 2 HARJIT SINGH BEDI AND CHANDRAMAULI Kr. PRASAD, JJ. (Division Bench)

Criminal Appeal No. 2231 of 2009 with Criminal Appeal Nos. 2476, 2477-2483 and 2484 of 2009, D/- 2 -5 -2011.

Satyavir Singh Rathi v. State thr. C.B.I.

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(A) Delhi Police Act (1978), S.140 - Offence by Police Officer - Bar to prosecution lodged after three months - Shelter of period of three months can be taken only if act done by police officer is under colour of duty - Case of murder by police officials - Will not fall within expression 'colour of duty' occurring in S. 140. (Paras 35, 36, 42)

(B) Penal Code (45 of 1860), S.300, Exception 3 - MURDER - POLICE OFFICERS - Death by police officials - Benefit of exception 3 to S.300 - Obligation to prove an exception is on preponderance of probabilities but it nevertheless lies on defence - Accused police party had fired without provocation at car killing two innocent persons and injuring one - Incident occurred on account of mistaken identity of deceased as wanted criminal by police party - Defence of police party that deceased had first resorted to firing - Found unacceptable as it was proved, that 7.65 mm pistol had been surreptitiously placed in car to create defence - Though police party was acquitted to plant pistol in car on grounds that it was not possible to pinpoint culprit who had done so - This can, by no stretch of imagination, be taken to mean that pistol had been planted in car has been disbelieved by High Court - Accused police party not entitled to benefit of exception 3 to S. 300. (Para 14)

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JUDGEMENT

HARJIT SINGH BEDI, J. :- This judgment will dispose of Criminal Appeal Nos.2231 of 2009, 2476 of 2009 and 2477-2484 of 2009. The facts have been taken from Criminal Appeal No. 2231 of 2009 (Satyavir Singh Rathi v. State thr. C.B.I.).

2. On the 31st March 1997 Jagjit Singh and Tarunpreet Singh PW-11 both hailing from Kurukshetra in the State of Haryana came to Delhi to meet Pradeep Goyal in his office situated near the Mother Dairy Booth in Patparganj, Delhi. They reached the office premises between 12.00 noon and 1.00 p.m. but found that Pradeep Goyal was not present and the office was locked. Jagjit Singh thereupon contacted Pradeep Goyal on his Mobile Phone and was told by the latter that he would be reaching the office within a short time. Jagjit Singh and Tarunpreet Singh, in the meanwhile, decided to have their lunch and

after buying some ice-cream from the Mother Dairy Booth, waited for Pradeep Goyal's arrival. Pradeep Goyal reached his office at about 1.30 p.m. but told Jagjit Singh and Tarunpreet Singh that as he had some work at the Branch of the Dena Bank in Connaught Place, they should accompany him to that place. The three accordingly left for the Bank in the blue Maruti Esteem Car bearing No. UP-14F-1580 belonging to Pradeep Goyal. Mohd. Yaseen, a hardcore criminal, and wanted by the Delhi Police and the police of other States as well, in several serious criminal cases, was being tracked by the Inter-State Cell of the Crime Branch of the Delhi Police and in the process of gathering information of his movements, his telephone calls were being monitored and traced by PW-15 Inspector Ram Mehar. The appellant Satyavir Singh Rathi, Assistant Commissioner of Police and the In-Charge of the Inter-State Cell, received information that Mohd. Yaseen would be visiting a place near the Mother Dairy, Patparganj, Delhi at about 1.30 p.m. on the 31st March 1997. Inspector Anil Kumar (appellant in Criminal Appeal No.2484 of 2009) of the Crime Branch was accordingly detailed by ACP Rathi to keep a watch near the Mother Dairy Booth in Patparganj and he was actually present at that

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place when Tarunpreet Singh and Jagjit Singh met Pradeep Goyal in his office. Jagjit Singh who was a cut haired Sikh (without a turban though he sported a beard) was mistaken for Mohd. Yaseen by Inspector Anil Kumar. As the Inspector was, at that stage, accompanied only by two police officials, Head Constable Shiv Kumar and Constable Sumer Singh, he called for reinforcements from ACP Rathi who was at that time present in his office in Chanakayapuri. On receiving the call, ACP Rathi briefed the staff in his office and told them that two young persons had been spotted near the Mother Dairy Booth in Patparganj and that one of them, a bearded young man, resembled Mohd. Yaseen, the wanted criminal. The ACP, along with a police party consisting in all of 12 persons, left the Inter-State Cell office at 1.32 p.m. to assist the police team led by Inspector Anil Kumar. As per the record, barring Head Constable Srikrishna and Constable Om Niwas, all the officials, including ACP Satyavir Singh Rathi were armed with service weapons. The police officials and the weapons they were carrying are given hereunder:

(i) ACP Satyavir Singh Rathi 9 MM Pistol No.0592
(ii) Insp. Anil Kumar .38 Revolver No.1147
(iii) SI Ashok Rana .38 Revolver No.1139
(iv) SI A Abbas .38 Revolver No.1114
(v) ASI Shamsuddin .38 Revolver No.1112
(vi) HC ShivKumar .38 Revolver No.1148
(vii) HC Mahavir Singh .38 Revolver No. 0518
(viii) HC Tej Pal .38 Revolver No.1137
(ix) Ct.Sunil Kumar SAF carbine
(x) Ct. Subhash Chand .38 Revolver No.1891
(xi) Ct. Kothari Ram AK-47 No.5418
(xii) Ct. Bahadur Singh AK-47 No. 2299
(xiii) Ct. Sumer Singh .38 Revolver No.1906

3. In the meanwhile, the Maruti Esteem car, which had been followed by Inspector Anil Kumar and the other two officials with him, stopped at the Dena Bank at 2.00 p.m. Pradeep Goyal then got down from the car, leaving Jagjit Singh and Tarunpreet Singh behind. Jagjit Singh, however, on the request of Pradeep Goyal, occupied the driver's seat so that the car was not towed away by the police. Pradeep Goyal then went on to the Dena Bank where two of his employees Vikram and Rajiv were waiting for him outside the

Bank. The three then went inside the Bank whereafter Vikram returned to the car to pick up a briefcase belonging to Pradeep Goyal. Tarunpreet Singh also accompanied Vikram to the Bank while Jagjit Singh continued to sit alone in the driver's seat. Pradeep Goyal came out from the Bank at about 2.30 p.m. and after giving instructions to his employees, sat in the Esteem car on the front left seat whereas Tarunpreet Singh got into the rear seat. The car driven by Jagjit Singh thereafter moved on towards Barakhamba Road. As the car halted at the red light on Barakhamba Road, the two police parties, one headed by ACP Satyavir Singh Rathi and other by Inspector Anil Kumar, joined forces. The car was immediately surrounded by the police officials who fired from almost all sides killing Pradeep Goyal and Jagjit Singh instantaneously and causing grievous injuries to Tarunpreet Singh. The three occupants were removed to the RML Hospital in a Police Control Room Gypsy, but Pradeep Goyal and Jagjit Singh were declared dead on arrival. On receiving information with regard to the shootout, Inspector Niranjan Singh- PW 42, the SHO of Police Station, Connaught Place, New Delhi, rushed to the place of incident followed by senior police officials, including the DCP. On an inspection of the car, Inspector Niranjan Singh PW recovered a 7.65 mm pistol loaded with 7 live cartridges in the magazine, a misfired cartridge in the breech and two spent cartridge cases of 7.65 mm bore from inside the car. These items were taken into possession. Inspector Anil Kumar also handed over a written complaint with regard to the incident to Inspector Niranjan Singh, who in turn sent the same to the Police Station with his endorsement, and an FIR No. 448/97 dated 31st March 1997 under Sections 186/353/307 of the IPC and Section 25 of the Arms Act was registered against the occupants of the car. In the complaint, Inspector Anil Kumar recorded that after the car had stopped at the red light, it had been surrounded by the police and that he had thereafter knocked at the driver's window asking the occupants to come out but instead of doing so, Jagjit Singh had started firing at the police party from

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inside the car resulting in gun shot injuries to Constables Sunil Kumar and Subhash Chand and that it was thereafter that the police personnel had opened fire at the car in self defence with a view to immobilizing the occupants and to prevent their escape. The incident, however, sparked a huge public outcry. The very next day Dinesh Chand Gupta, father-in-law of Pradeep Goyal, made a complaint to the Lt. Governor, Delhi on which another FIR No. 453/97 was registered at Police Station Connaught Place, New Delhi against the police personnel involved in the shootout for an offence punishable under Section 302/34 of the IPC. In the complaint, it was alleged that the police officials had surrounded the car and had fired indiscriminately and without cause, at the occupants killing the two and causing grievous injuries to the third. The initial investigation with regard to the incident was carried out by Inspector Niranjan Singh but pursuant to the orders of the Government of India made on the 1st April of 1997 the investigation was handed over to the Central Bureau of Investigation (hereinafter called the CBI) and the two FIRs were amalgamated for the purpose of investigation. The CBI, on investigation, came to the conclusion that the police party headed by ACP Satyavir Singh Rathi and Inspector Anil Kumar had fired on the Maruti Esteem car without provocation and that FIR No. 448/97 dated 31st March 1997, registered on the complaint of Inspector Anil Kumar, was intended to act as a cover-up for the incident and to justify the police action. The CBI accordingly found that no shot had been fired from inside the car by Jagjit Singh, as alleged, and that the claim in this FIR that two police officials, who were a part of the police party, had sustained gun shot injuries as a result of firing from the car, was false. The investigation also found that the 7.65 MM pistol and cartridges allegedly recovered from inside the car had actually been planted therein by members of the police party with

a view to creating a defence and screening themselves from prosecution. As a result of the investigation made in both the FIRs, a charge sheet was filed before the Chief Metropolitan Magistrate on the 13th June 1997. The said Magistrate took cognizance for the offences punishable under Section 302/307/201/120-B/34 by his order dated 10th July 1997 against 10 members of the police party and in addition, under Section 193 of the IPC against Inspector Anil Kumar for having lodged a false report with regard to the incident. The matter was then committed for trial. The trial court recorded the evidence of 74 witnesses and also took in evidence a large number of documents, including the reports of the Forensic Science Laboratory. In the course of a very comprehensive judgment dated 10th July, 1997 the trial court recorded the conviction and sentence as under:

4. All the substantive sentences were directed to run concurrently. The matter was thereafter taken in appeal to the Delhi High Court which re-examined the entire evidence and concluded that the conviction of the appellants under Section 302/120B of the IPC could not be sustained and they were entitled to acquittal of that charge, but their conviction and sentence under Sections 302 and 307 of the IPC was liable to be maintained with the aid of Section 34 of the IPC instead of Section 120B of the IPC. It was also directed that the conviction and sentence of ACP Rathi and Inspector Anil Kumar under Sections 193, 201/34 and 203/34 of the IPC was liable to be maintained. The appeals were accordingly allowed to this very limited extent. It is in this background that the matter is before us after the grant of Special leave on the 23rd November 2009.

5. We have heard the learned counsel for the parties in extenso in arguments spread over several days. Mr. Amrendra Sharan, the learned senior counsel appearing in the lead case i.e. the appeal of ACP Satyavir Singh Rathi, has raised several arguments in the course of the hearing. He has first pointed out that the prosecution story and the findings of the trial court as well as of the High Court with regard to the manner of the incident and how it happened were erroneous and the defence version that the appellants had fired at the car in self-defence after Jagjit Singh had first fired a shot through the window injuring two policemen was, in fact, the correct one in the light of the prosecution evidence itself that a 7.65 mm bore pistol, and two fired cartridge cases had been found and recovered from the car itself as deposed to by PW13, PW15, PW35, PW41 and PW57 and as these witnesses had not been declared hostile the prosecution was bound by their statements. In this connection, the learned counsel has placed reliance on Javed Masood and Anr. v. State of Rajasthan 2010 (3) SCC 538 : (AIR 2010 SC 979 : 2010 AIR SCW 1656). It has also been pleaded that the fact that a single shot had been followed by a volley had been deposed to by PW-26 Avtar Singh who was an injured witness and also by ASI Om Bir-PW who was in a police control room Gypsy stationed closed by. It has further been pointed out that from the evidence of the aforesaid witnesses it was clear that all the window panes of the car had been broken which indicated that a shot had indeed been fired from inside the car. In addition, it has been urged by Mr. Sharan that

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the investigation made by the CBI was completely partisan and though a large number of independent witnesses had been examined at site, none had been cited as witnesses, and that even Dr. V.Tandon, who had extracted the bullet from the person of Constable Sunil Kumar, had not been produced as a witness. It has been highlighted that no investigation had been made as to the ownership of the 7.65 mm pistol or as to how and who had planted it in the car, as alleged. It has further been submitted that there was no common intention on the part of ACP Rathi along with his co-accused to commit the murders as he was sitting in his Gypsy far away from the place of the shoot out and there was no evidence whatsoever to suggest that he had either encouraged or directed the other police officials to shoot at the car and as such his conviction with the aid of Section 34 of the IPC,

could not be sustained. He has, in this connection, cited Ram Nath Madhoprasad and Ors. v. State of M.P. AIR 1953 SC 420. As a corollary to this argument, the learned counsel has also emphasized that as the trial court had framed a charge under Section 302/120B and in the alternative under Section 302/34 of the IPC but had chosen to record a conviction under the former provision only and had not rendered any opinion on the alternative charge, it amounted to a deemed acquittal of the alternative charge and as the State had not challenged the matter in appeal, the High Court was not justified in an appeal filed by the accused in altering the conviction from one under Section 302/120B of the IPC to one under Section 302/34 of the IPC. In this connection, the learned counsel has placed primary reliance on Sangaraboina Sreenu v. State of A.P. 1997 (5) SCC 348 : (AIR 1997 SC 3233 : 1997 AIR SCW 3290) and Lokendra Singh v. State of M.P. 1999 SCC (Crl) 371 and Bimla Devi and Anr. v. State of J and K 2009 (6) SCC 629 : (AIR 2009 SC 2387 : 2009 AIR SCW 3216) and in addition on Kishan Singh v. Emperor AIR 1928 P.C. 254, The State of Andhra Pradesh v. Thadi Narayana 1962 (2) SCR 904 : (AIR 1962 SC 240) and Lakhan Mahto v. State of Bihar 1966 (3) SCR 643 : (AIR 1966 SC 1742). The learned counsel has also urged that it was settled beyond doubt that the provisions of Section 313 of the Code of Criminal Procedure had to be scrupulously observed and it was obligatory on the trial court to put all the incriminating circumstances in the prosecution story to an accused so as to enable him to effectively meet the prosecution case and if some material circumstance was not put to an accused, it could not be taken into account against him and had to be ruled out of consideration in the light of the judgments reported as Hate Singh Bhagat Singh v. State of Madhya Bharat AIR 1953 SC 468, Vikramjit Singh v. State of Punjab 2006 (12) SCC 306) : (2006 AIR SCW 6197) and Ranvir Yadav v. State of Bihar 2009 (6) SCC 595 : (AIR 2009 SC (Supp) 1439 : 2009 AIR SCW 3475). The learned counsel has also furnished a list of 15 circumstances which had not been put to the accused, particularly to ACP Rathi, at the time when his statement had been recorded. It has, in addition, been pleaded that the prosecution was barred as the cognizance in this case had been taken beyond the period of 3 months as envisaged in Section 140 of the Delhi Police Act, 1978 and on the factual aspect has referred us to various dates relevant in the matter. In this connection, the learned counsel has placed reliance on Jamuna Singh and Ors. v. Bhadai Shah AIR 1964 SC 1541 and Prof. Sumer Chand v. Union of India and Ors. 1994 (1) SCC 64 : (AIR 1993 SC 2579 : 1993 AIR SCW 3240). It has finally been submitted by Mr. Sharan that the sanction under Section 197 of the Code of Criminal Procedure too had been given without application of mind and as the entire record was not before the Lt. Governor, all relevant material had not been considered and for this additional reason also, the prosecution was not justified. In this connection the learned counsel has placed reliance on State of Karnataka v. Ameerjan 2008 (1) SCC (Crl) 130 : (AIR 2008 SC 108 : 2007 AIR SCW 6217). Mr. Uday U.Lalit, the learned senior counsel appearing for Head Constable Mahavir Singh, the appellant in Criminal Appeal No. 2476/2009, has pointed out that there were 15 persons in all in the police party and of them only 10 persons had been sent for trial and of the 5 left out, three

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had not used the firearms which they had been carrying and Head Constable Mahavir Singh (as per the evidence on record) had not fired into the car, his case fell in the category of those who had not been sent up for trial and, as such, he too was entitled to acquittal. It has also been pointed out that after the dead body of Jagjit Singh had been cremated, a bullet had been recovered from his ashes allegedly fired from the weapon of Head Constable Mahavir Singh but as the High Court had disbelieved the evidence of this recovery, there was no evidence against him. He has, in addition, supported Mr. Sharan's arguments on Section 313 of the Cr.P.C. and has contended that the scope and rigour of

Section 313 remained unchanged despite the introduction of Section 315 of the Cr.P.C. which now made an accused a competent witness in his defence.

6. Mr. Balasubramaniam, the learned senior counsel for Inspector Anil Kumar in Criminal Appeal No. 2484 of 2009, has also supported the arguments raised by the other counsel with regard to the common intention of the appellant more particularly as he had not fired at the car though armed. He has also pleaded that even accepting the prosecution story as it was, the only inference that could be drawn was that the police party had fired at the car in self-defence and that such an inference could be drawn from prosecution story had been accepted by this Court in Mohan Singh and Anr. v. State of Punjab AIR 1963 SC 174.

7. Mr. Vineet Dhanda, the learned counsel for the appellants in Criminal Appeal Nos. 2477-2483 of 2009, has pointed out that although the appellants in these matters had admitted that they had fired into the car yet the fact that Mohd. Yaseen was a dreaded criminal with 21 criminal cases against him including 18 of murder, the police party had to be careful and they had fired back only after the first shot by Jagjit Singh. The learned counsel, however, has confined his primary argument to the fact that the appellants were acting on the orders of ACP Rathi, who was their superior officer, and as they had taken an oath at the time of induction to office to follow the orders of superior officers, they were liable for exoneration of any kind of misconduct as per Section 79 of the IPC. He has also pointed out that the appellants had, in their statements recorded under Section 313 of the Cr.P.C., unanimously stated that the orders for the firing had been given by ACP Rathi.

8. Mr. Harin Rawal, the Additional Solicitor General representing the CBI has, however, controverted the submissions made by the counsel for the appellants. It has been pointed out that the investigation had revealed that the incident had happened as the police party was under the impression that Jagjit Singh was in fact Mohd. Yaseen and in their anxiety to get at him, had decided to eliminate him pursuant to their common intention. It has been highlighted that the defence that Jagjit Singh had first resorted to firing from inside the car had been found to be unacceptable by both the courts below and a positive finding had been recorded that the 7.65 mm bore pistol had been surreptitiously placed in the car to create a defence. He has further pointed out that the prosecution story with regard to the incident had been proved by independent evidence and as the investigation was being handled by the Delhi Police at the initial stage, some attempt had apparently been made to help the appellants in order to create a cover-up story. The argument that the CBI had conducted a partisan investigation has also been controverted. It has been highlighted that all relevant evidence had been produced before the Court and nothing had been withheld and that in any case allegations of a partisan investigation could be made against an individual officer but could not be generalized against an organization as vast as the CBI and no argument had been addressed identifying any officer(s) of the CBI of any misconduct. It has also been submitted that from the evidence of the prosecution witnesses and the conduct of the appellants pre and post-facto the incident indicated that the murders had been committed pursuant to their common intention and this was also supported by the fact that a false story had been put up in defence. It has also been pointed out that deemed acquittal theory projected by

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Mr. Sharan could not be applied in the present case as the judgment reported in Lokendra Singh's case cited by him had been doubted in Lakhjit Singh and Anr. v. State of Punjab 1994 Suppl. (1) SCC 173 : (1993 AIR SCW 2938) and the matter had thereafter been referred to a larger Bench which in the judgment reported in Dalbir Singh v. State of U.P. 2004 (5) SCC 334 : (AIR 2004 SC 1990 : 2004 AIR SCW 2119) had over-ruled the judgment in Lokendra Singh's case (supra) and that the judgment in Dalbir Singh's case had subsequently been followed in Dinesh Seth v. State of NCT of Delhi 2008 (14) SCC 94

: (AIR 2008 SC (Supp) 400 : 2008 AIR SCW 5639). It has been highlighted that the judgment in Bimla Devi's case (AIR 2009 SC 2387 : 2009 AIR SCW 3216) (supra) relied upon by Mr. Sharan had not taken note of the last two cited cases. It has, further been contended by Mr. Rawal that though it was a matter of great importance that all incriminating circumstances must be put to an accused, but if some material had been left out it would not ipso-facto mean that it had to be ruled out of consideration as it was for an accused to show that prejudice had been suffered by him on that account. It has been pointed out that the issue of prejudice ought to have been raised by the appellants at the very initial stage before the trial court and as this had not happened, the prosecution was fully justified in arguing that no prejudice had been caused. The learned ASG has placed reliance on Shobhit Chamar and Anr. v. State of Bihar 1998 (3) SCC 455 : (AIR 1998 SC 1693 : 1998 AIR SCW 1469) and Santosh Kumar Singh v. State thr. CBI 2010 (9) SCC 747 for this submission. The arguments raised by Mr. Sharan with regard to Section 140 of the Delhi Police Act and Section 197 of the Cr.P.C. have also been controverted. It has been submitted that Section 140 of the Delhi Police Act would apply only to offences committed under that Act and not to other offences and that in any case in order to claim the protection under Section 140, the act done by a police officer had to be "under the colour of duty" and as "murder" would not come in that category, no protection thereunder was available. In this connection, the learned ASG has placed reliance on The State of Andhra Pradesh v. N.Venugopal and Ors. AIR 1964 SC 33, State of Maharashtra v. Narhar Rao AIR 1966 SC 1783, State of Maharashtra v. Atma Ram AIR 1966 SC 1786 Bhanuprasad Hariprasad Dave and Anr. v. The State of Gujarat AIR 1968 SC 1323, and Prof. Sumer Chand's case (AIR 1993 SC 2579 : 1993 AIR SCW 3240) (supra) as well. In so far as the sanction under Section 197 of the Cr.P.C. is concerned, it has been pleaded that the Lt. Governor had all relevant material before him when the order granting sanction had been made and that the material was adequate for him to take a decision and merely because some of the evidence had been received by the CBI after the grant of sanction, would not invalidate the sanction. In this connection, the learned ASG has placed reliance on S.B.Saha and Ors. v. M.S.Kochar AIR 1979 SC 1841.

9. The learned ASG has also controverted Mr. Lalit's arguments with regard to the culpability of appellant Head Constable Mahavir Singh. It has been pointed out that the bullet recovered from the ashes of Jagjit Singh had been found to have been fired from the weapon of Head Constable Mahavir Singh but the High Court had declined to accept this part of the prosecution story as Didar Singh PW who had produced the bullet before the Haryana Police after picking it up from the funeral ashes, had not deposed in his evidence that he had handed over the bullet to the Police. It has, however, been submitted that Head Constable Mahavir Singh had indeed fired his weapon had been admitted by him and the story that he had fired in the air to disperse a huge and turbulent crowd that had collected, was not borne out by the evidence. Mr. Balasubramaniam's argument with regard to the involvement of Inspector Anil Kumar has also been challenged by the ASG by urging that though he admittedly had not fired his weapon but his case did not fall in the category of those police officials who had not been sent for trial. It has been submitted that the appellant had in fact been the prime mover in the entire story. Dealing with the arguments addressed by Mr. Vineet Dhanda, the learned ASG has

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highlighted that there was no evidence to suggest that it was on the orders of ACP Rathi that the firing had been resorted to, except for the self-serving statements made by the appellants under Section 313. It has, accordingly, been pointed out that this set of appellants could not claim the benefit of Section 79 of the Indian Penal Code.

10. On hearing the learned counsel for the parties, several facts appear to be admitted on record but are compounded by a tragedy of errors. These relate to the place and time of incident, the presence of the appellants duly armed with most of them having fired into the car with their service weapons, that Mohd. Yaseen was admittedly a notorious criminal and that Jagjit Singh (deceased) had been mistaken by Inspector Anil Kumar for Mohd. Yaseen, and that Pradeep Goyal owned a blue Esteem car with a Uttar Pradesh number plate, and had his office in Patparganj near the Mother Dairy Booth. It is in this background that the prosecution and the defence versions have to be examined. The prosecution story has already been narrated above and does not require any recapitulation in detail. Suffice it to say that Inspector Anil Kumar and his two associates had followed the car driven by Pradeep Goyal to the Dena Bank Branch at Connaught Place and it was after Pradeep Goyal and the others had left the Dena Bank premises and were near the Barakhamba Road crossing that the two police parties, one headed by Inspector Anil Kumar, and other by ACP Rathi, had joined forces and surrounded the car as it stopped at a red light, and had fired into it killing two persons and injuring one. It is at this stage that the prosecution and the defence deviate as it is the case of the defence that after the car had been surrounded, Inspector Anil Kumar had knocked at the driver's window asking the occupants to come out but instead of doing so Jagjit Singh had fired two shots at the police which had led to a fusillade in self defence. It is true that Avtar Singh PW, who was an injured witness and ASI Ombir Singh, PW-13 did say that the multiple firing had been preceded by one solitary shot which apparently is in consonance with the defence version. Likewise, PW-13 ASI Ombir Singh, PW15 Inspector Ram Mehar, PW-35 Inspector Rishi Dev, PW41 Constable Samrat Lal, and PW-57 S.I. Sunil Kumar testified that a 7.65 mm bore pistol along with two fired cartridges and 7 live cartridges in the magazine and one misfired cartridge in the breech, had been recovered from the car. This story too appears to support the case of the defence. It is equally true that it is not always necessary for the accused to plead self- defence and if the prosecution story itself spells it out, it would be open to the court to examine this matter as well, as held by this Court in Mohan Singh's case (AIR 1963 SC 174) (Supra) and in James Martin vs. State of Kerala 2004 (2) SCC 203. Likewise, it is now well settled in the light of the judgment in Javed Masood's case (AIR 2010 SC 979 : 2010 AIR SCW 1656) (supra) that if a prosecution witness is not declared hostile by the prosecution, the evidence of such a witness has to be accepted by the prosecution. It must also be observed that though the prosecution is bound to prove its case beyond reasonable doubt, the obligation on an accused under Section 105 of the Indian Evidence Act, 1872 is to prove it by a preponderance of probabilities. We have, accordingly, examined the evidence under the above broad principles.

11. As already indicated above, PW's Avtar Singh and Ombir Singh did state that a single shot had been followed by multiple shots thereafter. Avtar Singh, however, apparently did not receive a bullet injury as the simple abrasion on him had been apparently caused by a flying splinter from the tarmac but we have extremely independent evidence on this score as well. PW-1 Geeta Ram Sharma, the Chief Photographer of the Statesman Newspaper, which has its office adjacent to the red light on Barakhamba Road, deposed that on the 31st March 1997 at about 2 - 2.30 p.m. while he was sitting in his room along with his colleagues PWs Sayeed Ahmed and Shah Nawaz, they had heard the sound of firing from the Barakhamba Road side and that he along with the other PWs had come out to the crossing along with their camera equipment and had seen a blue Esteem car standing there with two bodies

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lying alongside and one injured person sitting on the road with a large number of police men, including some in mufti, present. He stated that on his directions Shah Nawaz and

Sayeed Ahmed had taken a large number of photographs of the site and 14 of them were also produced as Exs. P-1 to P-14. He further stated that Vijay Thakur, one of the Reporters of the Statesman had also been present. Sayeed Ahmed and Shah Nawaz aforementioned appeared as PW-2 and PW-67 and supported the story given by PW-1 Geeta Ram Sharma. He also proved the photograph marked Ex. 'X' which shows that the driver's window was intact. We have perused the photograph ourselves and find that the driver's window was definitely intact. The photograph is in black and white and has been taken through the driver's window and the man wearing white with a dark tie seen in the photograph has two shades of white, the portion through the window having a dull hue and the portion above, far brighter. It has come in the evidence of PW-Tarunpreet that the car A.C. was on when the firing took place and the windows had been drawn up. We can also take notice that in this background, the windows and windshield would be of tinted glass. Likewise, we are also of the opinion that had the shots been fired through the driver's window or the windshield some powder residues would have been left around the bullet holes as the shots would have been fired from almost a touching distance. PW-37 Roop Singh from the Central Forensic Science Laboratory, who had examined the car very minutely detected no such residue and also testified that the appreciable powder distance of a 7.65 mm pistol could be one to two feet but would depend on the sitting posture of the person firing. He also stated that in all at least 29 bullet holes had been detected on the car of 9 mm, 7.62 mm and .380 calibre weapons and that most of the seven exit holes in the car could have been caused by bullets fired from the rear and left side into the car and exiting thereafter, although the possibility of an exit hole being caused by a bullet fired from inside the car could also not be ruled out. He further pointed out that as the bullet fired at Constable Subhash Chand remained embedded in his body and had not been taken out for medical reasons, it was not possible to give an opinion whether it was a bullet of 7.65 mm calibre. The defence story that Constables Sunil and Subhash had suffered injuries on account of the firing of two shots from inside the car, is further belied by the medical evidence. PW-16-Dr. Harmeet Kapur carried out the medico legal examination of Constable Subhash Chand Ex.PW16/B. He found three bullet injuries on his person, which indicated blackening. These injuries could not have been caused by firing from inside the car as the blackening from a pistol would be, at the most, from a foot or two. Likewise, PW-17 Dr. Neeraj Saxena who had examined Constable Subhash Chand, also found three separate gun shot injuries on his person. He also produced in evidence his treatment record Ex.PW17/B. This doctor was not even cross-examined by the prosecution. It needs to be emphasized that all the weapons used in the incident fired single projectiles (i.e. bullets), whereas the distance between the gun shot injuries on the two injured policemen show at least 3 different wounds of entry on each of them. On the contrary, it appears that the injuries suffered by them were caused by the firing amongst the policemen as they had surrounded and fired into the car indiscriminately and without caution ignoring that they could be a danger to themselves on cross-fire on uncontrolled firing. It has, in fact, been pointed out by Mr. Sharan that ACP Rathi had written to his superiors pointing to the ineptitude of his team of officers but he had been told that no other staff was available. The present case illustrates and proves the adage that a weapon in the hands of an ill- trained individual is often more of a danger to himself than a means of defence. In this background, the evidence of PW's Geeta Ram Sharma, Sayeed Ahmad and Shah Nawaz, PW-50 Constable K.K.Rajan and PW-51 Constable Rajinderan Pilley becomes extremely relevant. PW-13 ASI Ombir Singh who was the Officer In-Charge of the PCR Gypsy parked near the Fire Station Building adjoining Barakhamba Road, had undoubtedly supported the

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defence version that a single shot had been followed by a volley. Constable Rajan and Constable Pilley, who were present along with ASI Ombir Singh, categorically stated that they had not heard any single fire and it was only the continuous firing that had brought them rushing to the site and having reached there, they had taken the three victims to the R.M.L. Hospital. Their story is corroborated by the evidence of the three newspaper employees. Tarunpreet Singh PW was also categoric that no shot had been fired from inside the car. The story therefore that Jagjit Singh had fired at the police party when accosted is, therefore, on the face of it, unacceptable. In this overall scenario even if it is assumed that the driver's window had been found broken as contended by the defence, it would still have no effect on the prosecution story.

12. We now come to the question as to the recovery of the 7.65 mm bore pistol allegedly used by Jagjit Singh as this fact is intimately connected with the defence version. First and foremost, it appears that even prior to the arrival of PW-42 SHO Niranjan Singh, the Car had already been searched and the site violated as a cell phone belonging to one of the victims had been picked up by appellant ASI Ashok Rana and handed over to the SHO. The fact that undue interest had been taken by the offending police officials is also clear from Ex. P/10 a photograph showing the ASI looking into the car. More significantly, however, PW-12 Sant Lal, the official Photographer of the Delhi Police, took two photographs Ex. PW12/28 and PW12/29 of the driver's seat from very close range but they show no pistol or empty shells. Even more significantly ACP Rathi submitted a detailed written report Ex.D.16/8 on the 1st of April, 1997 to his superior officer in which he talks about the firing by Jagjit Singh but makes no mention as to the recovery of a pistol from the car although as per the defence story the weapon had been picked up by the SHO soon after the incident. Likewise, in the report Ex. PW-42/C lodged by Inspector Anil Kumar appellant with the Connaught Place Police immediately after the incident, there is no reference whatsoever to the presence of a 7.65 mm pistol in the car. It is also relevant that the pistol had been sent to the Central Forensic Science Laboratory but PW-46 S.K.Chadha who examined the weapon, could find no identifiable finger prints thereon.

13. The cumulative effect of the above evidence reveals the starkly patent fact that the defence story projected was a palpably false one and the police officials involved having realized almost immediately after the incident (perhaps on questioning Tarunpreet Singh-PW) that they had made a horrific mistake, immediately set about creating a false defence. The trial court and the High Court have accordingly opined on the basis of the overall assessment that the defence version was a concoction and that the prosecution story that it was the unprovoked firing by the appellants which had led to the death of Jagjit Singh and Pradeep Goyal and grievous gun shot injuries to Tarunpreet Singh, had been proved on record.

14. This finding also completely dislodges Mr. Subramaniam's argument that in case the defence, as laid, was not entirely acceptable, the accused were nevertheless entitled to claim the benefit of Exception 3 to Section 300 of the Indian Penal Code. This Exception pre-supposes that a public servant who causes death, must do so in good faith and in due discharge of his duty as a public servant and without ill-will towards the person whose death is caused. In the light of the fact that the positive case set up the defence has been rejected by the trial court, the High Court as well as by us, the question of any good faith does not arise. On the contrary, we are of the opinion that the appellants had fired without provocation at the Esteem Car killing two innocent persons and injuring one. As already mentioned above, the obligation to prove an exception is on the preponderance of probabilities but it nevertheless lies on the defence. Even on this touchstone the defence cannot succeed. It is true that the High Court has acquitted the appellants of planting the

7.65 mm bore pistol in the car. However, this acquittal has been rendered only on the ground that it was not possible to pinpoint the culprit who had done so. This can, by no
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stretch of imagination, be taken to mean that the story that the pistol had been planted in the car has been disbelieved by the High Court. The reliance of the defence on Mohan Singh's case and James Martin's Case (AIR 1963 SC 174) (supra) is, therefore, irrelevant on the facts of this case. It is true that the Prosecution is bound by the evidence of its witnesses as held in Javed Masood's case. In the present matter, however, we see that the recovery of the 7.65 mm weapon appears to be an admitted fact, but with the rider that it had been planted to help the defence.

15. The argument that the CBI had conducted a partisan and motivated investigation, is based largely on three premises; firstly, that all the independent witnesses whose statements had been recorded under Section 161 of the Cr.P.C. at the site, had not been brought in evidence, secondly, that Constables Sunil Kumar and Subhash Chand had suffered gun shot injuries but the CBI had tried to create evidence that these injuries were as a consequence of firing by their co-appellants in that an effort had been made to show that the bullet recovered from the ashes of Jagjit Singh after his cremation had been fired from the weapon carried by Head Constable Mahavir Singh, thirdly, that Dr. V. Tandon who had extracted the bullet from the hand of Constable Sunil Kumar, had not been even cited as a witness.

16. As against this, the learned ASG has pointed out that it was not necessary to produce every person whose statement had been recorded under Section 161 and as the incident was admitted by the defence, though a counter version had been pleaded, the Court was called upon to decide which of the two versions was correct, and in this background all witnesses who were material had been examined. It has further been pointed out that the bullet which had allegedly been recovered from the ashes of Jagjit Singh, had been handed over to Sub- Inspector Ram Dutt of the Haryana Police who in turn had handed it over to the investigating officer of the CBI and as such, the CBI had nothing to do with that recovery.

17. It is true that all witnesses have not been examined but we find that in the circumstances this was not necessary. It will also be seen that as per the prosecution story, appellants Sunil Kumar and Subhash Chand, had been caused injuries by shots fired from the weapons of Head Constable Tej Pal Singh and Constable Kothari Ram appellants. As per the report of the CFSL Ex.P/37F, the bullet recovered from the person of Constable Sunil Kumar had been fired from the .380 revolver of Head Constable Tej Pal Singh and as per the evidence of PW-37 Roop Singh, the possibility that the metallic bullet which was embedded on the person of Constable Subhash Chand appellant could be the steel core portion of a shattered 7.62 mm bullet of the weapon of Constable Kothari Ram. Much argument has, however, been made by the learned defence counsel on the evidence of PW-37 Roop Singh wherein some doubt has been expressed as to the identity of the bullet allegedly recovered from the hand of Constable Sunil Kumar. He stated in his examination-in-chief that he had received parcel No.12 along with a covering letter dated 7th April, 1997 referring to the bullet recovered from Sunil Kumar's hand. He further stated that he had opened the parcel and had found one .380 calibre bullet and no other object therein and that he had re-sealed the bullet in the parcel. It appears from the evidence of PW-37 that parcel No.12 was again opened in Court and at that stage it was found to contain not only a .380 calibre bullet but also one fired 7.65 mm bullet. The witness, however, stated that when the parcel had been received by him in the Ballistics Department from the Biology Department of the Laboratory, the 7.65 mm bullet had not been in it. A pointed

question was thereafter put to him as to how he could explain the presence of the 7.65 mm bullet in parcel No.12. In answer to this question, he stated as under:
"When this parcel was opened on the earlier hearing and at that time after .380 bullet was exhibited the other bullet i.e. 7.65 mm (Ex.PW37/24) was found lying on the table, and so in these circumstances the said 7.65 mm bullet was exhibited."
18. Taken aback by this unforeseen development, the prosecution filed an application dated 4th December, 1999 for clarification.
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A reply thereto was filed by the defence on the 4th of January, 2000. On re-examination, the witness suggested that the 7.65 mm bullet had been mixed up with the .380 bullet by some Advocate when the parcel had been opened in Court on an earlier date during court proceedings. In the light of the fact that the trial court and the High Court have already held (and also held by us) that no shot had been fired from inside the car from the 7.65 mm pistol, the possibility of a 7.65 mm bullet being in the parcel becomes suspect and it appears that some mischief was being played out. We must also notice that we are dealing with appellants who are all police officials and the trial court has clearly hinted that there appeared to be some connivance between the appellants and the investigation. In any case, the creation of some confusion vis- a-vis the bullets, is a matter which would undoubtedly help the defence and a presumption can thus be raised that this had been stage managed by the defence. This aspect too cannot be ignored. The argument raised by the learned counsel for the appellants, therefore, that the application filed for clarification had been withdrawn as the prosecution was shying away from the truth is not sustainable as this had happened in the light of the clarification given by PW-37 Roop Singh. Nothing ominous or sinister can be read into this.
19. The learned counsel has also challenged the recovery of the bullet from the ashes of Jagjit Singh. This submission is based on the evidence of PW-8 Didar Singh, the elder brother of Jagjit Singh and PW-49 ASI Ram Dutt to whom the bullet had been handed over by Didar Singh and the statements of Dr. G.K.Sharma and PW-24 Yashoda Rani who had X-rayed the dead body and found no image of a bullet therein. It has accordingly been argued that this too was the brainchild of the CBI and a crude attempt to inculpate Constable Mahavir Singh. The trial court had accepted the prosecution story that this spent bullet had been recovered from the ashes of Jagjit Singh. This part of the prosecution story has, however, been rejected by the High Court by observing that the trial court had ignored the evidence on this score as Didar Singh PW-8 had nowhere stated that he had picked up of a bullet from the ashes and handed it over to Sub-Inspector Ram Dutt and more particularly as the two doctors who had X-rayed the dead body had found no trace of a bullet. We endorse this finding of the High Court in the light of the uncertain evidence on this score but to allege that the CBI officials had a hand in planting the bullet, is unwarranted. It will be seen from the evidence of PW-49 Ram Dutt that Jagjit Singh had been cremated on the 2nd of April, 1999 and the bullet had been recovered the next day when the ashes were being collected and had been handed over to him the same day and that it had thereafter been sealed and deposited in the Malkhana. The CBI, at this stage, had nothing to do with the recovery of the bullet as PW-72 Inspector Sumit Kumar of the CBI had taken it into possession duly sealed vide Memo Ex. PW49/A dated 11th April, 1999. It is also relevant that the weapon bearing Butt No.518 carried by Head Constable Mahavir Singh had been seized by the Delhi Police on the 1st April, 1997 itself and the CBI did not have access to it which could have enabled it to create any false evidence on this score. We must also recall that the police party comprised 15 personnel. Only 10 who played an active role had been prosecuted. This background points to a fair investigation.

We are, therefore, of the opinion that no fault whatsoever can be found in the investigation made by the CBI.

20. The primary argument, however, of the appellants that even assuming the prosecution story to be the correct, there was no common intention on the part of the appellants to commit murder, must now be examined. Highlighting the role attributed to the two appellants ACP Rathi and Inspector Anil Kumar, it has been submitted that ACP Rathi had not fired at the car and was in fact sitting 20 meters away from the firing site. Mr. Lalit, appearing for Inspector Anil Kumar, has also supported this argument and submitted that Inspector Anil Kumar too had not fired at the car and the only role attributed to him was a knock at Jagjit Singh's window calling upon him to step out but instead of doing

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so he had fired back leading to a nasty shoot out. It has, accordingly, been submitted by the learned counsel that the finding of the High Court that all the appellants were guilty under Section 302/34 etc. was wrong.

21. The learned ASG has, however, submitted that the question as to whether Section 34 of the IPC would apply would depend upon the facts of the case and for this reason, the sequence of events preceding the incident, the actual incident itself, and post facto the incident, would have to be taken into account.

22. We have considered the arguments of the learned counsel very carefully. It bears reiteration that the trial court had convicted all the appellants on the primary charge under Section 302 read with section 120-B of the IPC, but the High Court has acquitted them under that provision and convicted them under Section 302/34 etc. of the IPC instead. This aspect would have to be examined in the background of the defence story that had been projected and as the entire police operation had been conducted in a secret manner as no outsider had any access to what is going on in the matter relating to Mohd. Yaseen. Admittedly, the target was Mohd. Yaseen, concededly a notorious criminal with a bounty on his head, as he had been involved in a large number of very serious criminal matters. The incident happened on account of a mistake as to the identity of Jagjit Singh who could pass off as a Muslim and it is nobody's case that the police party had intended to eliminate Jagjit Singh and his friends. The courts below have been very clear on this score and have observed that keeping in mind the background in which the incident happened, that it was not the outcome of an act in self defence but was pursuant to the common intention to kill Mohd. Yaseen. The possibility of a hefty cash reward and accelerated promotion acted as a catalyst and spurred the police party to rash and hasty action. As to the role of ACP Rathi and Inspector Anil Kumar, the High Court has found that it was Rathi who was the leader of the police party in his capacity as the ACP and therefore, it was not necessary for him to be in the forefront of the attack on the Esteem car and Inspector Anil Kumar who had admittedly knocked at the window could be treated likewise as being the next officer in the hierarchy. We have seen the site plan and notice that ACP Rathi was sitting in his Gypsy about 15 meters away from the car when the incident happened. It has come in evidence that when Inspector Anil Kumar had conveyed the fact of Jagjit Singh's and Tarunpreet Singh's presence at the Mother Dairy Booth at Patparganj, the ACP had got together a police party of heavily armed officers, briefed them, and they had thereafter moved on to Connaught Place. It has been found as a matter of fact that when Inspector Anil Kumar had followed the Car to the Dena Bank, Jagjit Singh had been left behind in the car alone for quite some time but Inspector Anil Kumar and his two associates had made absolutely no attempt to apprehend him at that stage or to counter check his identify as the Inspector had Mohd. Yaseen's photograph with him. Even more significantly the Inspector made no attempt to identity Pradeep Goyal or Tarunpreet Singh whatsoever, although admittedly he was in close wireless contact with ACP Rathi. This is the pre-incident conduct

which is relevant. The facts as brought reveal a startling state of affairs during the incident. It is the case of the defence that the car had been surrounded to immobilize the inmates and to prevent them from escaping and that it was with this intention that Inspector Anil Kumar had knocked on the driver's window asking the inmates to get out but he had been answered by firing from inside the car. This plea cannot be accepted for the reason that the defence has already been rejected by us. Moreover PW-37 testified that there were no bullet marks on the tyres and they remained intact even after the incident, despite 34 shots being fired at the car, and 29 bullet holes, most of them of entry, thereon. On the other hand, the appellants presupposed that one of the inmates was Mohd. Yaseen, the wanted criminal and that the firing was so insensitive and indiscriminate that some of the shots had hit Constables Subhash Chand and Sunil Kumar. The post-facto conduct of the appellants is again relevant.

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Inspector Anil Kumar gave a report on the 1st April 1997 immediately after the incident, which was followed by a report by ACP Rathi the next day giving the counter version. This has been found by us to be completely untenable. The High Court was, therefore, justified in holding that in the light of the above facts, it was not necessary to assign a specific role to each individual appellant as the firing at the car was undoubtedly with a clear intent to annihilate those in it and was resorted to in furtherance of the common intention of all the appellants. In Abdul Sayeed v. State of M.P. 2010 (10) SCC 259 : (2010 AIR SCW 5701), it has been held as under :

"49. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit the offence. The phrase "common intention" implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the "same intention" or "similar intention" or "common object". The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (See Mohan Singh v. State of Punjab : (AIR 1963 SC 174).)

50. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention. (Vide Krishnan v. State of Kerala (AIR 1997 SC 383 : 1996 AIR SCW 3754) and Harbans Kaur v. State of Haryana" (AIR 2005 SC 2989 : 2005 AIR SCW 274).)

23. In conclusion, we must hold that the appellants were liable to conviction under Sections 302/34 etc. of the IPC.

24. We now come to Mr. Sharan's connected argument with regard to the deemed acquittal theory of the appellants for the offence under Sections 302, 307 read with Section 34 of the IPC by the trial court. At this stage, we may recall that the trial court had framed a charge under Section 302/307 read with Section 120-B of the IPC and an alternative charge under Section 302/307 read with Section 34 of the IPC but without opining on the alternative charge, had convicted the appellants for the offence under Section 302/307 read with Section 120- B of the IPC. It has accordingly been contended that as the appellants had been deemed to have been acquitted of the charge of having the common intention of committing the murders and there was no appeal by the State

against the deemed acquittal against under that charge, it was not open to the High Court to alter or modify the conviction. The learned ASG has, however, pointed out that a contrary view had been expressed earlier in Lakhjit Singh's case (1993 AIR SCW 2938) (supra) and as a consequence of this apparent discordance, the matter had been referred to a Bench of three Judges in Dalbir Singh's case (AIR 2004 SC 1990 : 2004 AIR SCW 2119) (supra) which had overruled the judgment in Sangaraboina Sreenu's case (AIR 1997 SC 3233 : 1997 AIR SCW 3290) (supra) and by implication overruled Lokendra Singh's case (supra) as well. He has further highlighted that the judgment in Dalbir Singh's case (supra) had been followed in Dinesh Seth's case (AIR 2008 SC (Supp) 400 : 2008 AIR SCW 5639) (supra) but both these cases had not even been alluded to in Bimla Devi's case (AIR 2009 SC 2387 : 2009 AIR SCW 3216) (supra). He has accordingly pointed out that the very basis of Mr. Sharan's argument on the theory of deemed acquittal was lacking.

25. We have considered the arguments of the learned counsel very carefully. We must, at the outset, emphasize that the judgments referred to above and cited by Mr. Sharan

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are largely on the basis that a charge for the offence of which the appellants had ultimately been acquitted, had not been framed and therefore, it was not possible to convict an accused in the absence of a charge. For example, in Sangaraboina Sreenu's case (supra) a judgment rendered in two paragraphs, this Court held that only a charge under Section 302 had been framed against the accused, therefore, he could not be convicted under Section 306 of the IPC although the Court noticed that the offence under Section 306 was a comparatively minor offence, within the meaning of Section 220 of the Cr.P.C. It was also noticed that the basic constituent of an offence under Section 302 was homicide whereas the offence under Section 306 was suicidal death and abetment thereof. This judgment was followed in Lokendra Singh's case (supra) wherein a similar situation existed. It appears, however, that both these judgments had over looked the judgment in Lakhjit Singh's case (supra) as in this case a Division Bench of this Court had held that a conviction under Section 306 of the IPC could be recorded though a charge under Section 302 had been framed. In arriving at this conclusion, the Bench observed that the accused were on notice as to the allegations which would attract Section 306 of the IPC and as this section was a comparatively minor offence, conviction thereunder could be recorded. On account of this apparent discordance of opinion over the issue involved, the matter was referred to a Bench of three Judges in Dalbir Singh's case (AIR 2004 SC 1990 : 2004 AIR SCW 2119) (supra). By this judgment, the opinion rendered in Sangarabonia Sreenu's case (supra) was overruled, as not being correctly decided. Ipso facto, we must assume that the decision in Lokender Singh's case (supra) must also be read as not correctly decided. The judgment in Dalbir Singh's (supra) has subsequently been followed in Dinesh Seth's case (supra). We must, therefore, record that the judgment rendered in Bimla Devi's case (supra) which does not take into account the last two cited cases, must be held to be per incuriam. Kishan Singh's and Lakhan Mahto's cases (AIR 1928 PC 254 and AIR 1966 SC 1742) (supra) were cases where no charge had been framed for the offences under which the accused could be convicted whereas Thadi Narayana's case (AIR 1962 SC 240) was on its own peculiar facts.

26. We find the situation herein to be quite different. We must notice that the charges had indeed been framed in the alternative and for cognate offences having similar ingredients as to the main allegation of murder. Section 386 of the Cr.P.C. refers to the power of the appellate court and the provision insofar relevant for our purpose is sub-clause (b) (ii) which empowers the appellate court to alter the finding while maintaining the sentence. It is significant that Section 120-B of the IPC is an offence and positive evidence on this score has to be produced for a successful prosecution whereas Section 34 does not

constitute an offence and is only a rule of evidence and inferences on the evidence can be drawn, as held by this Court in Lachhman Singh and Ors. v. The State AIR 1952 SC 167. We are, therefore, of the opinion that the question of deemed acquittal in such a case where the substantive charge remains the same and a charge under Section 302/120B and an alternative charge under section 302/34 of the IPC had been framed, there was nothing remiss in the High Court in modifying the conviction to one under Section 302/307/34 of the IPC. It is also self evident that the accused were aware of all the circumstances against them. We must, therefore, reject Mr. Sharan's argument with regard to the deemed acquittal in the circumstances of the case.

27. The learned counsel for the appellants have also argued on the failure of the court in putting all relevant questions to them when their statements under Section 313 of the Cr.P.C. had been recorded. Mr. Sharan has also given us a list of 15 questions which ought to have been put to the ACP as they represented the crux of the prosecution story. It has been submitted that on account of this neglect on the part of the court the appellants had suffered deep prejudice in formulating their defence. Reliance has been placed on Hate Singh Bhagat Singh (AIR 1953 SC 648), Vikramjit Singh (2006 AIR SCW 6197)

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and Ranvir Yadav's cases (AIR 2009 SC (Supp) 1439 : 2009 AIR SCW 3475) (supra). It has however been pointed out by the learned ASG that the 15 questions referred to were largely inferences drawn by the courts and relatable to the evidence on record, and the inferences were not required to be put to an accused. He has further submitted even assuming that there had been some omission that by itself would not a fortiori result in the exclusion of evidence from consideration but it had to be shown further by the defence that prejudice had been suffered by the accused on that account inasmuch that they could claim that they did not have notice of the allegations against them. In this connection, the learned ASG has placed reliance on Shivaji Sahebrao Bobde v. State of Maharashtra, AIR 1973 SC 2622 and Santosh Kumar Singh and Shobit Chamar's cases (AIR 1998 SC 1693 : 1998 AIR SCW 1469) (supra).

28. Undoubtedly, the importance of a statement under Section 313 of the Cr.P.C. insofar as the accused is concerned, can hardly be minimized. This statutory provision is based on the rules of natural justice for an accused must be made aware of the circumstances being put against him so that he can give a proper explanation and to meet that case. In Hate Singh's case (AIR 1953 SC 648) (supra) it was observed that:

"the statements of an accused person recorded under Ss.208,209 and 342 are among the most important matters to be considered at a trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the trial.

This means that they must be treated like any other piece of evidence coming from the mouth of a witness and matters in favour of the accused must be viewed with as much deference and given as much weight as matters which tell against him. Nay more. Because of the presumption of innocence in his favour even when he is not in a position to prove the truth of his story, his version should be accepted if it is reasonable and accords with probabilities unless the prosecution can prove beyond reasonable doubt that it is false. We feel that this fundamental approach has been ignored in this case."

29. It must be highlighted that the judgment in this case was rendered in the background that in the absence of any provision in law to enable an accused to give his part of the story in court, the statement under Section 342 (now 313) was of the utmost importance. The aforesaid observations have now been somewhat whittled down in the light of the fact that Section 315 of the Cr.P.C. now makes an accused a competent witness in his defence. In Vikramjit Singh's case (2006 AIR SCW 6197) (supra), this Court again dwelt on the importance of the 313 statement but we see from the judgment that it was primarily based on an overall appreciation of the evidence and the acquittal was not confined only to the fact that the statement of the accused had been defectively recorded. In Ranvir Yadav's case (AIR 2009 SC (Supp) 1439 : 2009 AIR SCW 3475) (supra) this Court has undoubtedly observed that even after the incorporation of Section 315 in the Cr.P.C., the position remains the same, (in so far as the statements under Section 313 are concerned) but we find that the judgment was one of acquittal by the Trial Court and a reversal by the High Court and this was a factor which had weighed with this Court while rendering its judgment. In any case the latest position in law appears to be that prejudice must be shown by an accused before it can be held that he was entitled to acquittal over a defective and perfunctory statement under Section 313. In Shivaji's case (AIR 1973 SC 2622) (supra), a judgment rendered by three Hon'ble Judges, it has been observed in paragraph 16 as under :

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"It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of an evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction. In such a case, the court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Cr.P.C., the omission has not been shown to have caused prejudice to the accused."

30. The judgment in Santosh Kumar Singh's case (supra) is to the same effect and is based on a large number of judgments of this court.

31. It is clear from the record herein that the appellants, all police officers, had been represented by a battery of extremely competent counsel and in the course of the evidence, the entire prosecution story with regard to the circumstances including those of conspiracy and common intention had been brought out and the witnesses had been subjected to gruelling and detailed cross-examinations. It also bears reiteration that the incident has been admitted, although the defence has sought to say that it happened in different circumstances. It is also signally important that all the accused had filed their detailed written statements in the matter. All these facts become even more significant in the background that no objection had been raised with regard to the defective 313 statements in the trial court. In Shobhit Chamar's case (AIR 1998 SC 1693 : 1998 AIR SCW 1469) (supra) this Court observed:

"We have perused all these reported decisions relied upon by the learned advocates for the parties and we see no hesitation in concluding that the challenge to the conviction based on non-compliance of Section 313 Cr.P.C. first time in this appeal cannot be entertained unless the appellants demonstrate that the prejudice has been caused to them. In the present case, as indicated earlier, the prosecution strongly relied upon the ocular evidence of the eye witnesses and relevant questions with reference to this evidence were put to the appellants. If the evidence of these witnesses is found acceptable, the conviction can be sustained unless it is shown by the appellants that a prejudice has been caused to them. No such prejudice was demonstrated before us and, therefore, we are unable to accept the contention raised on behalf of the appellants."

These observations proceed on the principle that if an objection as to the 313 statement is taken at the earliest stage, the court can make good the defect and record an additional statement as that would be in the interest of all but if the matter is allowed to linger on and the objections are taken belatedly it would be a difficult situation for the prosecution as well as the accused. In the case before us, as already indicated, the objection as to the defective 313 statements had not been raised in the trial court. We must assume therefore that no prejudice had been felt by the appellants even assuming that some incriminating circumstances in the prosecution story had been left out. We also accept that most of the 15 questions that have been put before us by Mr. Sharan, are inferences drawn by the trial court on the evidence. The challenge on this aspect made by the learned counsel for the appellants, is also repelled.

32. Mr. Sharan has also referred us to Section 140

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of the Delhi Police Act, 1978 to contend that as the cognizance in the present matter had been taken more than three months from the date of the incident, the prosecution itself was barred. Elaborating on this aspect, the learned counsel has submitted that the incident had happened on the 31st March 1997 and an incomplete charge-sheet had been filed within three months i.e. on the 13th June 1997 but cognizance in the matter had admittedly been taken beyond three months i.e. on the 10th July 1997. The learned counsel has, in support of this plea, relied on the judgment in Jamuna Singh (AIR 1964 SC 1541) and Prof. Sumer Chand's case (AIR 1993 SC 2579 : 1993 AIR SCW 3240) (supra) to argue that the provisions of Section 140 of the Delhi Police Act had to be strictly applied, more particularly where the act complained of had been done in the discharge of official duty. The learned ASG has, however, submitted that the provisions of Section 140 of Delhi Police Act would be applicable only to offences referred to in the Act itself and found largely in Section 80 onwards and not to cases where the offence was linked to any other penal provision and that in any case the police official involved had to show that the action taken by him had been taken under colour of duty. The learned counsel has in this connection relied on N. Venugopal (AIR 1964 SC 33), Narhar Rao (AIR 1966 SC 1783), Atma Ram (AIR 1966 SC 1786), Bhanuprasad Hariprasad Dave (AIR 1968 SC 1323) and on Professor Sumer Chand's cases (supra).

33. Before we examine the merits of this submission, we need to see what the High Court has held on this aspect. The High Court has observed that an incomplete charge-sheet had been filed within time inasmuch that the statements of the witnesses recorded under Section 161 of the Cr.P.C. had not been appended therewith and we quote :

"and the prosecuting agency had, therefore, taken adequate care in filing the charge-sheet well within time and could not, thus, have anticipated that the Court of the learned Chief Metropolitan Magistrate would have its own problems in taking immediate cognizance of the offences on the charge-sheet within three months from the date of commission of the crimes, it could not have applied for a sanction for prosecution under Section 140 of the

Act as it was not at all required in that situation. If the Court of learned Chief Metropolitan Magistrate had difficulty in taking cognizance of the offences for absence of the copies of statements under Section 161 Cr.P.C., it could have very well posted the case for a shorter date before expiry of three months and could have required the CBI to make available the copies of required material for taking cognizance of the offences. We are unable to find from the proceedings recorded by the learned Chief Metropolitan Magistrate the reason as to why instead of requiring the CBI to produce the copies of required material within a day or two, such a longer date was fixed for according consideration for taking cognizance of the offences. Whatever be the reason for delay in taking cognizance of the offences in the facts and circumstances of the case, we are unable to accept the plea that any sanction under Section 140 of the Delhi Police Act was required to sustain the prosecution against the appellants, particularly when the charge-sheet had been filed in the Court well before the expiry of three months' period."

34. We are, however, not called upon to go into the correctness or otherwise of the observations of the High Court, as we intend giving our own opinion on this score.

Sub-section (1) of Section 140 is reproduced below:

"Bar to suits and prosecutions.- (1) In any case of alleged offence by a police officer or other person, or of a wrong alleged to have been done by such police officer or other person, by any act done under colour of duty or authority or in excess of any such duty or authority, or wherein it shall appear to the court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained and if entertained shall be dismissed if it is instituted, more than three months after the date of the act complained of.

Provided that any such prosecution against a police officer or other person may be

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entertained by the court, if instituted with the previous sanction of the Administrator, within one year from the date of the offence.

(2).....

(3)....."

35. This Section postulates that in order to take the shelter of the period of three months referred to therein the act done, or the wrong alleged to have been done by the police officer should be done under the colour of duty or authority or in excess of such duty or authority or was of the character aforesaid, and in no other case. It must, therefore, be seen as to whether the act of the appellants could be said to be under the colour of duty and therefore, covered by Section 140 ibidem.

36. At the very outset, it must be made clear from the judgment of this Court in Jamuna Singh's case (AIR 1964 SC 1541) (supra) that the date of cognizance taken by a Magistrate would be the date for the institution of the criminal proceedings in a matter. The facts given above show that the cognizance had been taken by the Magistrate beyond three months from the date of incident. The larger question, however, still arises as to whether the shelter of Section 140 of the Delhi Police Act could be claimed, in the facts of this case. We must, at the outset, reject the learned ASG's argument that Section 140 would be available to police officials only with respect to offences under the Delhi Police Act and not to other penal provisions, in the light of the judgment in Professor Sumer Chand's case (AIR 1993 SC 2579 : 1993 AIR SCW 3240) (supra) which has been rendered after comparing the provisions of the Police Act, 1861 and Section 140 of the Delhi Police Act, 1978 and it has been held that the benefit of the latter provision would be available qua all penal statutes.

37. The expression `colour of duty' must now be examined in the facts of this case. In Venugopal's case (AIR 1964 SC 33) (supra), this Court held as under:

"It is easy to see that if the act complained of is wholly justified by law, it would not amount to an offence at all in view of the provisions of S.79 of the Indian Penal Code. Many cases may however arise wherein acting under the provisions of the Police Act or other law conferring powers on the police the police officer or some other person may go beyond what is strictly justified in law. Though Sec.79 of the Indian Penal Code will have no application to such cases, Sec.53 of the Police Act will apply. But Sec.53 applies to only a limited class of persons. So, it becomes the task of the Court, whenever any question whether this section applies or not arises to bestow particular care on its decision. In doing this it has to ascertain first what act is complained of and then to examine if there is any provision of the Police Act or other law conferring powers on the police under which it may be said to have been done or intended to be done. The Court has to remember in this connection that an act is not "under" a provision of law merely because the point of time at which it is done coincides with the point of time when some act is done in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be able to say that an act is done "under" a provision of law, one must discover the existence of a reasonable relationship between the provisions and the act. In the absence of such a relation the act cannot be said to be done "under" the particular provision of law."

38. This judgment was followed in Narhar Rao's case (AIR 1966 SC 1786) (supra) . This Court, while dealing with the question as to whether the acceptance of a bribe by a police official with the object of weakening the prosecution case could be said to be under `colour of duty' or in excess of his duty, observed as under:

"But unless there is a reasonable connection between the act complained of and the powers and duties of the office, it cannot be said that the act was done by the accused officer under the colour of his office. Applying this test to the present case, we are of the opinion that the alleged acceptance of bribe by the respondent was not an act which could be said to have been done under the colour of his office or done in excess of his duty or authority within the meaning of S.161(1) of

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the Bombay Police Act. It follows, therefore, that the High Court was in error in holding that the prosecution of the respondent was barred because of the period of limitation prescribed under Sec.161(1) of the Bombay Police Act. The view that we have expressed is borne out by the decision of this Court in State of Andhra Pradesh vs. N.Venugopal, AIR 1964 SC 33, in which the Court had construed the language of a similar provision of S.53 of the Madras District Police Act (Act 24 of 1859). It was pointed out in that case that the effect of S.53 of that Act was that all prosecutions whether against a police officer or a person other than a police officer (i.e. a member of the Madras Fire Service, above the rank of a fireman acting under S.42 of the Act) must be commenced within three months after the act complained of, if the act is one which has been done or intended to be done under any of the provisions of the Police Act. In that case, the accused police officers were charged under Ss.348 and 331 of the Indian Penal Code for wrongly confining a suspect Arige Ramanua in the course of investigation and causing him injuries. The accused were convicted by the Sessions Judge under Ss.348 and 331 of the Indian Penal Code but in appeal the Andhra Pradesh High Court held that the bar under S.53 of the Police Act applied and the accused were entitled to an acquittal. It was, however, held by this Court that the prosecution was not barred under S.53 of the Police Act, for it cannot be said that the acts of beating a person suspected of a crime or confining him or sending him away in an injured condition by the police at a time when they were engaged in investigation are acts done or intended to be done under the provisions of the Madras District Police Act or Criminal Procedure Code or any other law conferring powers on the police. The appeal was accordingly allowed by this Court and the acquittal of the respondent set aside."

39. Both these judgments were followed in Atma Ram's case (AIR 1966 SC 1786) (supra) where the question was as to whether the action of a Police Officer in beating and confining a person suspected of having stolen goods in his possession could be said to be under colour of duty. It was held as under :

"The provisions of Ss.161 and 163 of the Criminal Procedure Code emphasize the fact that a police officer is prohibited from beating or confining persons with a view to induce them to make statements. In view of the statutory prohibition it cannot, possibly, be said that the acts, complained of, in this case, are acts done by the respondents under the colour of their duty or authority. In our opinion, there is no connection, in this case between the acts complained of and the office of the respondents and the duties and obligations imposed on them by law. On the other hand, the alleged acts fall completely outside the scope of the duties of the respondents and they are not entitled, therefore, to the mantle of protection conferred by S. 161 (1) of the Bombay Police Act."

40. Similar views have been expressed in Bhanuprasad Hariprasad Dave's case (AIR 1968 SC 1323) (supra) wherein the allegations against the police officer was of taking advantage of his position and attempting to coerce a person to give him a bribe. The plea of colour of duty was negatived by this Court and it was observed as under:

"All that can be said in the present case is that the first appellant a police officer, taking advantage of his position as a police officer and availing himself of the opportunity afforded by the letter Madhukanta handed over to him, coerced Ramanlal to pay illegal gratification to him. This cannot be said to have been done under colour of duty. The charge against the second appellant is that he aided the first appellant in his illegal activity."

41. These judgments have been considered by this Court in Professor Sumer Chand's case (AIR 1993 SC 2579 : 1993 AIR SCW 3240) (supra) which has been relied upon by both sides. In this case, Professor Sumer Chand and several others were brought to trial initiated on a first information report but were acquitted by the trial court. Professor Sumer Chand thereupon filed a suit against the Investigating officer and other police officials for malicious prosecution claiming Rs.3 Lacs as damages. This

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Court held that the prosecution had been initiated on the basis of a First Information Report and it was the duty of a Police Officer to investigate the matter and to file a charge-sheet, if necessary, and that there was a discernible connection between the act complained of by the appellant and the powers and duties of the Police Officer. This Court endorsed the opinion of the High Court that the act of the Police Officer complained of fell within the description of `colour of duty'.

42. In the light of the facts that have been found by us above, it cannot, by any stretch of imagination, be claimed by anybody that a case of murder would fall within the expression `colour of duty'. We find absolutely no connection between the act of the appellants and the allegations against them. Section 140 of the Delhi Police Act would, therefore, have absolutely no relevance in this case and Mr. Sharan's argument based thereon must, therefore, be repelled.

43. The learned Counsel has also raised an argument that the sanction under Section 197 of the Cr.P.C. had been mechanically given and did not indicate any application of mind on the part of the Lt. Governor. It has accordingly been prayed that the entire prosecution was vitiated on this score. Reliance has been placed by Mr. Sharan for this argument on Ameerjan's case (AIR 2008 SC 108 : 2007 AIR SCW 6217) (supra). This argument has been controverted by the learned ASG who has pointed out that a bare reading of the sanction order as well as the evidence of PW-48 C.B. Verma, the concerned Deputy Secretary in the Delhi Government who had forwarded the file to the Lt. Governor,

revealed that all material relevant for according the sanction had been given to the Lt. Governor. The learned ASG has placed reliance on S.B.Saha's case (AIR 1979 SC 1841) (supra) as well as on Ameerjan's case above- referred.

44. We have considered this argument very carefully in the light of the evidence on record. We first go to the evidence of PW-48 C.B. Verma. He deposed that a request had been received from the CBI for according sanction for the prosecution of the appellants along with the investigation report and a draft of the sanction order. He further stated that on receipt of the aforesaid documents the matter had been referred first to the Law Department of the Delhi Administration and then forwarded to the Home Department and then to the Chief Secretary and finally, the entire file had been put up before the Lt. Governor who had granted the sanction for the prosecution of the ten officials. It is true that certain other material which was not yet available with the CBI at that stage could not obviously have been forwarded to the Lt. Governor, but we see from the various documents on record that even on the documents, as laid, adequate material for the sanction was available to the Lt. Governor. We have perused the sanction order dated 10th of October 2001 and we find it to be extremely comprehensive as all the facts and circumstances of the case had been spelt out in the 16 pages that the sanction order runs into. In Ameerjan's case (AIR 2008 SC 108 : 2007 AIR SCW 6217) (supra) which was a prosecution under the Prevention of Corruption Act (and sanction under Section 19 thereof was called for), this Court observed that though the sanction order could not be construed in a pedantic manner but the purpose for which such an order was required had to be borne in mind and ordinarily the sanctioning authority was the best person to judge as to whether the public servant should receive the protection of Section 19 or not and for that purpose the entire record containing the materials collected against an accused should be placed before the sanctioning authority and in the event that the order of sanction did not indicate a proper application of mind as to the materials placed before the sanctioning authority, the same could be produced even before the Court. Admittedly, in the present case only the investigation report and the draft sanction order had been put before the Lt. Governor but we find from a reading of the former that it refers to the entire evidence collected in the matter, leaving the Lt. Governor with no option but to grant sanction. In S.B. Saha's case (AIR 1979 SC 1841) (supra), this Court was dealing primarily with the question as to whether sanction under Section 197 of the Cr.P.C. was required where

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a Customs Officer had misappropriated the goods that he had seized and put them to his own use. While dealing with this submission, it was also observed as under:

"Thus, the material brought on the record up to the stage when the question of want of sanction was raised by the appellants, contained a clear allegation against the appellants about the commission of an offence under Section 409, Indian Penal Code. To elaborate, it was substantially alleged that the appellants had seized the goods and were holding them in trust in the discharge of their official duty, for being dealt with or disposed of in accordance with law, but in dishonest breach of that trust, they criminally misappropriated or converted those goods. Whether this allegation or charge is true or false, is not to be gone into at this stage. In considering the question whether sanction for prosecution was or was not necessary, these criminal acts attributed to the accused are to be taken as alleged."

45. As already indicated above, the Lt. Governor had enough relevant material before him when he had accorded sanction on the 10th October 2001.

46. We now come to the other appeals in which some additional arguments have been raised. In Criminal Appeal No. 2476/2009 of Head Constable Mahavir Singh, Mr. Lalit has argued that 15 persons in all had constituted the police party and 10 persons had been

sent up for trial including ACP Rathi and Inspector Anil Kumar and five others, three of them armed who had not fired any shot, and two other who had not been armed, had not been prosecuted and as Head Constable Mahavir Singh had also not fired at the car, his case fell amongst the five and he was, therefore, entitled to be treated in a like manner. In addition, it has been submitted that Head Constable Mahavir Singh did not share the common intention with the other nine accused. Mr. Lalit has also referred us to question No.53 put to the Head Constable by which the circumstances pertaining to the actual incident had been put to him and he had answered as under:

"I was behind the entire team. Then the team was left with no option but to return fire in self defence and to save members of the public as a large crowd had started gathering suddenly on hearing the faring from inside the car. Some members of our team returned fire. As I was behind and a little away from the car, I held back my fire. But on seeing a crowd gathering and to prevent the members of general public from coming close to the car, I fired one shot in the air. In the meanwhile I heard Constable Subhash Chand scream that he had been hurt. Then the firing was ordered to be stopped. Within moments a PCR Gypsy also arrived. Then the efforts were made to take the injured out and send them to hospital. In the meanwhile press photographers, police of the PS C.P. and Sr. officers also arrived."

47. He has found support for his arguments from the Panchnama Ex. B-67/2 prepared by P.Kailasham, Executive Engineer, CBI on the 11th April, 1997 on the observations of three Shri Ohri, DSP and Sri Sree Deep. It has accordingly been argued by Mr. Lalit that the defence taken by Head Constable Mahavir Singh that he had fired to keep the crowd away was clear from the record and as the incident had happened in a very busy locality i.e. the outer circle of Connaught Place, a crowd had undoubtedly collected. He has further pointed out that the story that a bullet fired by Head Constable Mahavir Singh from his 7.62 mm AK-47 rifle at Jagjit Singh had been disbelieved by the High Court and the falsity of the prosecution story was, thus, clearly spelt out.

48. We have considered the arguments advanced by the learned counsel. Admittedly, as per his own showing, Head Constable Mahavir Singh had used his service weapon and fired one shot therefrom. The prosecution story is that he had fired at the car whereas the defence is that he had fired the shot in the air to keep the crowd away. This argument is based on a clear misconception and does not take into account the normal tendency of a person at a crime scene, (more particularly where indiscriminate gun fire had been resorted to) would be to run far and away. It appears that the crowd had collected only after the shooting had ceased. There is no evidence whatsoever to show that any

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crowd had collected while the firing was going on or that a single shot had been fired after the volley of 34 shots. We have also perused the large number of photographs of the site and see that the crowd that had gathered after the shooting, was perfectly disciplined and keeping a reasonable distance away from the Esteem car and the dead bodies lying around it. Admittedly also, there is absolutely no evidence with regard to the defence taken by Constable Mahavir Singh. An effort could have been made by the defence to elicit some information about the behaviour of the crowd from the policemen and the Statesman employees who had appeared as prosecution witnesses. Not a single question was, however, put to them on this aspect. We are therefore of the opinion that the story projected by him in his 313 statement is not supported by any evidence whatsoever. His case, therefore, cannot be distinguished from the other seven accused who had admittedly fired at the car.

49. We have already dealt with Mr. Balasubramaniam's arguments in the case of Inspector Anil Kumar who has filed Criminal Appeal No.2484/2009 while dealing with the question of

common intention and the self-defence claimed by the appellant. No further discussion is, therefore, required in this appeal.

50. We finally take up Criminal Appeal Nos. 2477-2483 of 2009 in which the arguments have been made by Mr. Vineet Dhanda, Advocate. It is significant that these seven police officers had admitted firing into the vehicle but it is their case in their statements under Section 313 of the Cr.P.C. as also their written statements that they had done so only on the direction of ACP Rathi, a superior officer. They have accordingly sought the benefit of Section 79 of the IPC which provided:

"Act done by a person justified, or by mistake of fact believing himself justified, by law.- Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it."

51. In the written submissions filed by Mr. Vineet Dhanda long after the judgment had been reserved and beyond the time fixed by us for the filing of the written submissions (which have nevertheless been taken on record) the stand taken is completely different and in accordance with that of Mr. Sharan and Mr. Lalit with regard to the defence claimed by the appellants. Mr. Dhanda has also filed a large number of judgments on this aspect. These judgments had not been cited by the learned counsel at the time of hearing. We have however gone through the judgments and find nothing different therein from the judgments cited by the other learned counsel. We, therefore, deem it unnecessary to advert to them at this stage.

52. We have nevertheless examined the submissions with regard to Sections 76 to 79 of the IPC. We see absolutely no evidence that the firing had been resorted to by the seven appellants on the order of ACP Rathi as we have found that it was pursuant to the common intention of all the accused that the incident had happened. It is also relevant that the statements made by these seven appellants are not admissible in evidence against ACP Rathi, being a co-accused, in the light of the judgment of this Court reported in Vijendrajit Ayodhya Prasad Goel vs. State of Bombay AIR 1953 SC 247 and S.P.Bhatnagar and Anr. vs. The State of Maharashtra AIR 1979 SC 826. This Court in the former case has observed that a statement under Section 342 of the Cr.P.C. (now Section 313) cannot be regarded as evidence. The observations in the latter case are equally pertinent wherein it has been held that a defence taken by one accused cannot, in law, be treated as evidence against his co-accused. As already observed, Section 315 of the Cr.P.C. now makes an accused a competent witness in his defence. Had the appellants in this set of appeals chosen to come into the witness box to support their plea based on the orders of ACP Rathi, a superior officer, and claimed the benefit of Section 79 of the IPC, something could be said in their behalf but in the face of no evidence the story projected by them cannot be believed.

53. On an overall view of the evidence in

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the case and in the light of the arguments raised by the learned counsel for the parties, we find no fault with the judgments of the trial court as well as the High Court. We, accordingly, dismiss all these appeals.

Appeals dismissed.

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-: CHAPTER = 6 :-

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PROSECUTION AGAINST PRINT AND

ELECTRONIC MEDIA

(NEWS PAPER AND T.V. CHANNELS)

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Cross Citation :2006 CRI. L. J. 3643

RAJASTHAN HIGH COURT

Hon'ble Judge(s) : K. S. RATHORE, J.

"Bhim Sen Garg ….Vs….State of Rajasthan"

Civil Writ Petn. No. 1027 of 2006, D/- 13 -6 -2006.

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A] Cr. P.C. Sec. 154 – F.I.R. registered against a Newspaper's Editor – The Newspaper published some news items regarding involvement of a person in an incident about prosecution by women – On the basis of newspaper reporting an enquiry was launched by Police – During enquiry the news item was found to be flase against the person – On the basis of enquiry report F.I.R. registered against Editor of news Paper under Sections 465, 467, 471 and 120-B of I.P.C. as the C.D. on basis of which news was published was also found to be interpolated – Editor challenged the F.I.R. by filing petition – Held that – the F.I.R. and proceedings are legal and proper and cannot be qushed.

B] Necessary Party – Allegation of malafides in petition against a person who is not respondent can not be accepted.

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Bhim Sen Garg v. State of Rajasthan and Ors.

Cases Referred :	Chronological Paras
2006 Cri LJ 964 : AIR 2006 SC 915	34, 55
2005 Cri LJ 92 : AIR 2005 SC 9	34
2005 Cri LJ 3200 : AIR 2005 SC 4135	26
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2004 Cri LJ 822 : AIR 2004 SC 555	34
2004 Cri LJ 1819 : AIR 2004 SC 2684	34
2004 Cri LJ 3834 : AIR 2004 SC 4608	34
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2003 Cri LJ 4987 : AIR 2003 SC 4259	34
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1995 Cri LJ 2665 : AIR 1995 SC 1219 26
1993 Cri LJ 3684 : AIR 1993 SC 2644 26
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S. R. Bajwa, Sr. Counsel with V. P. Bishnoi, for Petitioner; Mohd. Aslam, for Respondents.

Judgement

ORDER :-

By way of this writ petition the petitioner prayed for a writ of mandamus for quashment of FIR No. 21/06, dated 27-1-06 registered at Police Station Transport Nagar, Jaipur for the offences punishable under Sections 465, 469, 471, 120-B, I.P.C. and Section 65 of the Information Technology Act, 2000.

2. During the course of investigation, the Investigating Officer has deleted the offence under Section 65 of the I.T. Act, 2000 from the purview of investigation and has proceeded to undertake further investigation only in regard to the offences under Sections 465, 469, 471, 120-B, IPC.

3. In the First Information Report, it has been alleged that some news items were published in the Newspaper which were containing aspersions against Cabinet Minister in Govt. of Rajasthan Shri Rajendra Singh Rathore, founded on some statement of one Ved Prakash Saini. In the report it has also been stated that on the basis of the newspaper reporting an enquiry was launched by the I.G.P. (Special and Economic Offences), C.I.D., Jaipur.

4. The reporting in newspaper related to allegations on Cabinet Minister Shri Rajendra Singh Rathore pertaining to his involvement in an incident about prostitution by one Vanita wife of Ved Prakash Saini.

5. During the course of enquiry launched by the I.G.P. (Special and Economic Offences), C.I.D., Jaipur, statements of victim Vanita, petitioner Bhim Sen Garg, Police Officers Arun Macha and Pyara Singh etc. were recorded.

6. Vanita, in her statement recorded during the course of enquiry stated that she was in custody at Police Station Shyam Nagar, Jaipur on 10-6-2005 in connection with F.I.R. No. 168/05, she had reported to a News Reporter that she had never gone with any Minister or his P. A.

7. On the conclusion of the enquiry it was found that Vanita had been sent for prostitution by her husband on 10-6-2005 to some other three persons. As such, Mahaka Bharat had published scandalous news on the basis of which the Minister's name was being dragged in the controversy.

8. In the aforesaid backdrop, on the basis of inquiry report, an F.I.R. No. 217/05 was registered under Sections 5 and 6 of PITA Act at Police Station Jamwa Ramgarh, Jaipur. The investigation of the same was given to the Additional Superintendent of Police and it was found that no Minister or his P.A. was found to be involved in the incident.

9. During the course of investigation of F.I.R. No. 217/05, a notice was given to the petitioner-Editor of Mahaka Bharat for providing the original C.D. on the basis of which

newspaper reporting was done. In response to the notice, it is alleged that petitioner showed inability in providing the original C.D. However, a copy of C.D. was provided to the Additional Superintendent of Police by one employee of Mahaka Bharat, namely; Shri K. M. Sharma, Accounts Officer. And on receipt of copy of C.D. it was sent to FSL Jaipur for examination and a report was also given. In the report it was found that C.D. was found interpolated and it was also alleged that in the original interview by Electronic Media as also in the statement recorded under Section 164, Cr.P.C. before Magistrate, Vanita had categorically stated that she had not gone with any Minister, but Bhim Sen Garg had removed the said portions from the C.D. and by way of interpolation, committed forgery and on the basis of the interpolated C.D., a scandalous news item was published in Mahaka Bharat with an object to stigmatize the image of a particular Minister in State Government.

10. For the offence committed by the petitioner FIR No. 21/06 was registered at Police Station, Transport Nagar on 27-1-06 for the offences punishable under Sections 465, 467, 471 and 120-B, IPC and Section 65 of Information Technology Act, 2000 and later on during investigation, the offence under Section 65 of the IT Act, 2000 has been deleted from the purview of investigation.

11. The FIR No. 21/06 registered at P. S. Transport Nagar is challenged by the petitioner on the ground that the impugned FIR which as been lodged against the petitioner is outcome of blatant and flagrant malicious action on the part of State Police at behest of Cabinet Minister Shri Rajendra Singh Rathore. It is also submitted that the alleged FIR has been lodged by Shri Pradeep Mohar, Additional Superintendent of Police (Special and Economic Offences) C.I.D. (C.B.), Jaipur. And after alleging allegation, learned counsel for the petitioner submitted that the FIR has been lodged against the petitioner with ulterior motive and to wreak vengeance on the petitioner with a view to spite him due to private and personal grudge.

12. It is also contended that the impugned FIR has been lodged in utter disregard of the provisions contained in Code of Criminal Procedure as also the Evidence Act. And from reading the FIR in question it is clearly borne out that no cognizable offence is said to have been committed by the petitioner. When the contents/allegations, even if controverted, do not disclose commission of any cognizable offence, then the Police loses its power to investigate under Section 156 (1), Cr.P.C. without prior order of a Magistrate in consonance with the provisions contained in Section 155 (2), Cr.P.C. Under such circumstances, the Investigating Agency would not have the requisite power to investigate as per Section 156, Cr.P.C. Thus, the alleged FIR completely defies the entire scheme relating to powers of investigation contained in the Code of Criminal Procedure.

13. Learned Sr. Counsel Mr. Bajwa submitted briefs on account of which the impugned FIR has been lodged :-

(I) An earlier F.I.R. No. 217/2005 of Police Station Jamwa Ramgarh was registered for offence punishable under Sections 5 and 6 of PITA Act, in the wake of entire controversy arising in Print and Electronic Media, against number of persons.

(II) That in the said F.I.R. investigation was carried out by the Additional Superintendent of Police (Special and Economic Offences) C.I.D. (C.B.) - the complainant in the impugned FIR. The subject-matter of his investigation was the incident, which took place on 10-3-2005 wherein victim Vanita was forced for prostitution by her husband, at the hands of number of persons.

(III) Additional Superintendent of Police (Special and Economic Offences) C.I.D. (C.B.) conducted investigation in F.I.R. No. 217/05 and during the course of his investigation he came to the conclusion that Ram Pratap Gupta, Vijay Singh Meena, Sardar Singh, Ved Prakash Saini, Bajrang and Badri Narain were involved in the said offence. But, however,

he from his investigation, did not find Cabinet Minister Shri Rajendra Singh Rathore to be involved in the incident and to be prima facie guilty of the said offence.

(IV) Subsequent to the conclusions of Additional Superintendent of Police (Special and Economic Offences) C.I.D. (C.B.) in his investigation in FIR No. 217/05 P.S. Jamwa Ramgarh he ventured to lodge the impugned FIR as a complainant for the alleged false evidence created by Bhim Sen Garg-Editor, Mahaka Bharat, through newspaper reporting and the C.D. Footage.

(V) The impugned FIR is squarely related to the false evidence about involvement of Cabinet Minister Shri Rajendra Singh Rathore, founded on the basis of tampered C.D. recording.

14. After formulation of aforesaid points Mr. Bajwa submitted that whenever an Investigating Officer is of the opinion that some false evidence was given to implicate a particular accused, then as per the scheme of Cr.P.C., the Investigating Officer is supposed to give his conclusions qua the subject-matter of investigation as also complicity of the accused, in the form of a negative report/final report qua the accused and at the same time has to recommend action against the person giving false information against that accused under Section 182 or 211, I.P.C.

15. The impugned FIR is also challenged on the ground that the FIR has been lodged for the offences in question on the basis of the so-called interpolated C.D. The impugned FIR is also challenged on the ground that it is nowhere borne out that the disputed C.D. in question was ever in the conscious, exclusive custody/control/dominion of the petitioner as the alleged C.D. was handed over to the Police by one Shi K. M. Sharma, employee of the petitioner. Thus, the contents of the entire FIR even if taken on their face value, do not disclose that the petitioner, in any manner, was himself involved in the process of alleged tampering of the C.D. in question. In the absence of the identification of the accused, who were actually involved in preparing the C.D., the petitioner cannot be hauled up for the said offence.

16. Learned Senior Counsel Shri Bajwa also mentioned the dates and events of the incident and submitted that on 10-3-2005, the alleged involvement of Cabinet Minister Shri Rajendra Singh Rathore in sex orgy which had allegedly taken place in R.T.D.C. Hotel - "Jheel Pryatak" in Village Jamwa Ramgarh.

17. On 16-6-2005, in FIR No. 168/05 Police Station Shyam Nagar, Jaipur, Vineeta had been arrested underr P.I.T.A. and was interviewed by Print/Electronic Media. During interviews involvement of concerned Minister in the sex orgy relating to 10-3-2005 was revealed. On 21-9-2005, the news regarding involvement of the Minister has been published in the Hindi Daily Newspaper "Mahaka Bharat". On 21-9-2005, Inspector General of Police Shri Liyakat Ali was deputed to conduct inquiry about the allegations of involvement of the Minister and Shri Liyakat Ali submitted interim report on 26-9-2005 wherein the Minister was absolved. And on 26-9-2005 Shri Liyakat Ali in the capacity of informant filed FIR under PITA Act at Police Station Jamwa Ramgarh regarding the sex orgy involving the Minister and FIR No. 217/05 under PITA was registered. The statement of Vineeta under Section 164, Cr.P.C. was recorded in FIR No. 217/05 on 28-9-2005 and in the aforesaid FIR challan has been filed against six persons for the offences under PITA on 23-11-05. After filing of challan Shri Pradeep Mohan Sharma, Additional Superintendent of Police C.I.D. filed impugned FIR No. 21/06 at Police Station Transport Nagar on 27-1-2006 against the petitioner Bhim Sen Garg for the offences under Sections 465, 469, 471, 120-B, I.P.C.

18. In the impugned FIR, it is alleged against the petitioner that the petitioner is found guilty of tampering of C.D. in respect of words as well as pictures; forgery was committed

by the petitioner to defame the Cabinet Minister and C.D. was misused and on its basis false news was published in the daily Hindi Newspaper "Mahaka Bharat".

19. Mr. Bajwa further submitted that the purpose of cheating (sic). Section 471, IPC contemplates use of forged document. Thus, it is only when ingredients of Section 465, IPC are clearly spelt out in FIR, then the other two offences can be pressed into service.

Mr. Bajwa further submitted that the FIR in the eye of law does not sustain as the original C.D. is not on record. On the basis of some copy no report regarding altering of C.D. can be given. The copy of C.D. was not recovered from the personal custody of petitioner. Offence under Section 469, IPC regarding forgery of C.D. for the purpose of harming reputation is also not made out for the simple reason that FIR completely fails to spell out allegations of forgery itself. And regarding offence under Section 471, IPC there is no allegation in the FIR that the petitioner used the C.D.

20. It is also contended that the alleged impugned FIR is second FIR and referred the case of T.T. Antony wherein Hon'ble the Supreme Court has held that no second FIR in respect of an offence which was subject-matter of investigation in an earlier FIR can be registered. Therefore, second FIR giving it a colour of independent offences under Sections 465, 468, 469 and 471, IPC has been registered with a calculated design to harass the petitioner.

21. Learned counsel for the petitionerr also alleged malice and mala fide allegation against the sitting Cabinet Minister and submitted that the influence of sitting Cabinet Minister for lodging second FIR has been used and Press was gagged and right to information was crushed. Selective targeting of "Mahaka Bharat" while other newspapers and news channels were conveniently left out.

22. And after alleging the mala fide allegation against the Minister concerned, learned counsel Mr. Bajwa referred legal bar in registering impugned FIR as no separate FIR can be registered against the alleged fabrication of false evidence by a witness in the earlier FIR. No second FIR for the same subject-matter can be registered and the impugned FIR is hit by Section 162, Cr.P.C.

23. It is also contended that the impugned criminal proceedings initiated against the petitioner are pre-mature as the concerned Minister has not been exonerated finally as yet and the Trial Magistrate may invoke offence under Sections 366/376, IPC and may commit the same to Court of Session and Sessions Court after recording statement of prosecutrix Smt. Vineeta may proceed against the concerned Minister under Sections 319, Cr.P.C.

24. Further stated that the original C.D. might be produced during the trial and the allegations against the Minister might be fully endorsed and the trial Court may believe the contents of C.D. as true and may rely on the statement of petitioner in that trial as a turthful witness. So after conclusion of trial only it will be clear as to whether the concerned Minister has been rightly indicted and as to whether the contents of C.D. are genuine. If the trial Court concludes otherwise, only then the stage to proceed against the petitioner in respect of fabrication/forgery will arise. Till then any exercise to initiate proceedings against the petitioner is per se premature.

25. It is also contended that the alleged FIR is false at its face value in accordance with the test laid down by Hon'ble the Supreme Court in the case of Bhajan Lal as the allegation do not constitute impugned offence and allegations are prompted by malice and legal bar engrafted in Code stand attracted, should be made applicable to the present petition.

26. Learned counsel for the petitioner has placed reliance on the judgments reported in 2004 (12) SCC 195 : 2005 Cri LJ 3200; 2004 (7) SCC 768 : 2004 Cri LJ 4623; 2004 (7) SCC 775 : AIR 2005 SC 1452; AIR 1997 SC 3433; AIR 1993 SC 2644 : 1993 Cri LJ 3684;

AIR 1993 SC 2466 (sic), 1995 (4) SCC 392 : 1995 Cri LJ 2665; 2001 (6) SCC 181 : 2001 Cri LJ 3329, TT Antony v. State of Kerala and case of Bhajan Lal, 1992 Cri LJ 527.

27. Per contra, learned counsel appearing for the State emphatically denied the submissions made on behalf of the petitioner that the State Police has taken any action at the behest of the Cabinet Minister Shri Rajendra Singh Rathore as alleged by the petitioner. It is also denied that the contents of the FIR speaks volumes about the mala fide and ulterior motives and denied that the FIR has been lodged to wreak vengeance on the petitioner allegedly with a view to spite him due to private and personal grudge. And there is no question of violation of any provision contained in the Code of Criminal Procedure and Evidence Act as the FIR in question clearly discloses commission of cognizable offence and the investigation of FIR No. 217/05 lodged with Police Station Jamwa Ramgarh for offence under Sections 5 and 6 of PITA Act is concerned, the same was an altogether different incident. It was only when the petitioner in his newspaper prominently reported about the alleged involvement of a Cabinet Minister of the State Shri Rajendra Singh Rathore and alleged cover up thereof by the Police that he was required to produce the Compact Disk on the basis of which the aforesaid news item was published. When C.D. was provided by the Accounts Manager of the petitioner Shri K. M. Sharma to the Investigating Officer, this C.D. was sent to State Forensic Science Laboratory for examination. The report of the State Forensice Science Laboratory indicated as under

"Thirty three clip-discontinuities have been detected in the video footage of the file AVSEQ01.DAT. All these clips joined together make a 9 minutes 46 seconds video footage, whic indicate post-production editing.

Audio examination reveal that the audio recording in the video footage is also cut and broken at some places which correspond with video clip joints."

28. And the conclusion of Forensic Science Laboratory clearly proved that the electronic record contained on the Compact Disk by way of audio and video was tampered with and another Compact Disk was prepared by fabrication. This C.D. was made basis of newspaper reports published in daily newspaper Mahaka Bharat wherein allegations were made not only against the Minister but also against the State Police that it had tried to cover up the incident. It is, therefore, denied that the allegations contained in the FIR do not disclose any cognizable offence. In fact, the result of the examination by the State Forensic Science Laboratory categorically stated that total play time of the AVSEQ01.DAT file contained in the MPEGAV folder is 9 minutes 46 seconds. In the whole of the duration of this time, the report detected 33 clip discontinuities in the video footage of the said file. All these clips when joined together make a 9 minutes 46 seconds video footage which clearly indicate post-production editing. Audio examination further revealed that the audio recording in the video footage was also cut and broken at some places which correspond with video clip joints. The Investigating Officer of the FIR No. 217/05 further requested the State F.S.L. to get an explanation note on the technical terminologies used in the report of their examination. It was thereafter that the office of the Director, Police FSL Rajasthan, Jaipur vide letter dated 25-1-2006 supplemented the aforesaid report by clarifying certain technical terminologies.

29. It is further submitted that the Investigating Officer of FIR No. 217/05 was concerned with the investigation of the offences under Sections 5 and 6 of the PITA Act and in the course of investigation when it was transpired that electronic report contained on the C.D. was tampered with and another C.D. was prepared by way of fabircation which was substantiated from the report of the State F.S.L., this constituted another and independent offence punishable under Sections 465, 469, 471, 120-B, IPC and Section 65 of Information Tecnology Act, 2000. He, therefore, lodged this FIR with the Police Station, Transport Nagar within whose jurisdiction the registered office of Mahaka Bharat is located

and C.D. was received by the Investigating Officer. It is, therefore, denied that any scheme contained in the Code of Criminal Procedure was violated. It is denied that any novel method was adopted for lodgment of the FIR. It is also denied that the FIR is intended to harass, humiliate and malign the petitioner. It is denied that FIR has been lodged at the behest of Shri Rajendra Singh Rathore. It is denied that the allegations in the impugned FIR would have constituted an offence under Section 182/211, IPC for giving false information. As already submitted, the fabrication of the C.D. was an independent and separate offence punishable under Sections 465, 469, 471, 120-B, IPC and Section 65 of Information Technology Act, 2000. It is denied that the FIR has been lodged with a view to tiding over the alleged predicament under Section 155 (2), Cr.P.C.

30. It is denied that the State F.S.L. do not give report on the basis of examination of a copy of the C.D. which is interpolated. This precisely is the allegation against the petitioner that he prepared an interpolated C.D. giving completely a new version to it and fabricating its contents. Such a C.D., therefore, cannot be considered as a secondary evidence as for the purpose of offences alleged to have been committed by the petitioner, this C.D. would constitute primary evidence.

31. The C.D. was handed over by Shri K.M. Sharma, Accounts Manager of the petitioner on his behalf in response to the notice given by the Investigating Officer. When the Investigating Officer handed over the notice to the person present in the registered office of the Mahaka Bharat, Shri K.M. Sharma upon receiving telephone instructions from the petitioner handed over the subject C.D. to the Investigating Officer. In so far as the identification of the accused is concerned, the same would be the subject- matter of investigation and petitioner cannot invite this Hon'ble Court into prejudging the issue which are essentially in the domain of the Investigating Officer. Learned counsel for the State with regard to argument that second FIR is barred being hit by provisions of Section 157 and 162, Cr.P.C. submitted that the case of T.T. antony v. State of Kerala and others, reported in 2001 (6) SCC 181 : 2001 Cri LJ 3329, has not been correctly appreciated and understood by the petitioner as Hon'ble the Supreme Court has observed as under (Para 20) :-

"20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 170 and 173, Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154, Cr.P.C. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer-in-charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173, Cr.P.C."

32. And the respondent-State by referring the observation made by Hon'ble the Supreme in the case T.T. Antony tried to distinguish the present case and submitted that the second FIR according to the Supreme Court judgment is barred only in relation to the same cognizable offence or the same occurrence or the same incident giving rise to one or more cognizable offences. Such restriction cannot be applied in the facts of the present case where the FIR has been lodged against the petitioner on the basis of an altogether (sic) occurrence and for a different offence and being FIR against another set of accused and not against the same set of accused who have been offenders in the FIR No. 217/05. In the present FIR No. 21/06 the allegation against the accused is with regard to terming

with and fabrication of electronic record contained on the Compact Disk (CD) which found basis of the newspaper report dated 21-9-2005. This offence has been prima facie established by report of the Forensic Science Laboratory.

33. In view of this fact, it would be clearly evident that the FIR in question is not only pertains to different set of offence but also relates to a different occurrence which has taken place in a different transaction and against different set of accused. There would be, therefore, no prohibition for lodgment of a new FIR even though the discovery of the fact with regard to the fabrication of the electronic record contained on the CD may have come to surface during the course of investigation of another FIR No. 217/05.

34. Learned counsel for the State in support of his submissions, has relied upon the following judgments :-

1. AIR 2004 SC 4320 : (2004 Cri LJ 4219), Upkar Singh v. Ved Prakash and others,
2. 2002 (1) SCC 714 : (2002 Cri LJ 923), Kari Choudhary v. Mst. Sita Vedi and Ors.
3. 2006 (1) SCC 732 : (2006 Cri LJ 964).
4. 2004 (7) SCC 768 : (2004 Cri LJ 4623), Gangadhar Janardhan Mhatre v. State of Maharashtra and others;
5. 2003 (12) SCC 241 : (2003 Cri LJ 4987), Hemraj and another v. State of Punjab.
6. 1999 (3) SCC 259 : (1999 Cri LJ 1833), Rajesh Bajaj v. State of Delhi.
7. 2003 (4) SCC 579 : (AIR 2003 SC 1843), Indian Railway Construction Co. Ltd. v. Ajay Kumar;
8. 2002 (4) SCC 160 : (AIR 2002 SC 1314), First Land Acquisition Collector and others v. Nirodhi Prakash Ganguly;
9. 2004 (5) SCC 223 : (2004 Cri LJ 1819), State v. Jayapaul
10. 2005 (5) SCC 230 : (2004 Cri LJ 3834), S. Jeevanatham v. State;
11. 2005 (1) SCC 122 : (2005 Cri LJ 92), Zandu Pharmaceuticals Works Ltd. and Ors. v. Mohd. Sharaful Haque and another;
12. 2003 (11) SCC 251 : (2004 Cri LJ 822), M. Narayandas v. State of Karnataka and Ors.
13. 2002 (3) SCC 89 : (2002 Cri LJ 998,) State of Karnataka v. M. Devendrappa and another.
14. 1996 (2) SCC 37 : (1996 Cri LJ 1354), State of H.P. v. Pirthi Chand and another.
15. 2000 (8) SCC 115 : (2000 Cri LJ 4665), Mahavir Prasad Gupta and another v. State of National Capital Territory of Delhi and Anr.
16. 2005 (2) WLC 612 : (2005 Cri LJ 256), Ravi Shankar Srivastava v. State of Rajasthan and others.

35. Having heard rival submissions of the respective parties and upon careful perusal of the relevant provisions of Cr.P.C. and IPC and after carefully reading of the judgments referred by the respective parties to decide this question whether the FIR No. 21/06, dated 27-1-06 registered at Police Station, Transport Nagar, Jaipur for the offence punishable under Sections 465, 469, 471 and 120-B, IPC at its face value is false and deserves to be quashed and set aside or not.

36. As the learned counsel for the petitioner raised several legal questions regarding maintainability of the disputed impugned FIR in question and the petitioner referred Section 156, Cr.P.C. and more particularly Section 156 (1) and (2). The provisions of Section 156, Cr.P.C. is reproduced hereunder :-

156. Police Officer's to investigate cognizable cases.-

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.

37. Thus, Section 156 deals with the power of the police officer to investigate cognizable cases and as per sub-section (1) any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII. And in sub-section (2), no proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
38. By referring Section 156, learned counsel for the petitioner tried to make out the case that the contents of the FIR itself borne out that no cognizable offence can be said to have been committed. Since no cognizable offence is made out, therefore, the investigating agency has power to investigate into the matter.

39. Whereas the contents of FIR clearly indicates that the clips disc continuities out-broken A V footage, post-production editing whereas Vineeta in her statement deposed before the Magistrate under Section 164, Cr. P.C. categorically has not mentioned the involvement of the Minister and his P.A. and this statement has been erased. And since the petitioner himself has shown the inability to produce original C.D., the copy of the same was obtained and sent to the FSL for examination and the offence is made out under Sections 465, 469, 471 and 120-B, IPC which is cognizable. Thus, the police officer is empowered to investigate into the matter under Section 156, Cr. P.C.

40. I have also perused Section 465 of IPC. As referred by the learned counsel for the petitioner Section 465 deals with the punishment for forgery "whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. And after referring Section 465 of IPC, learned counsel for the petitioner tried to make out the case that the petitioner cannot be liable for forgery until and unless clear allegation against the petitioner is made out that the petitioner himself has fabricated/tampered with the electronic record. As evident by the reply submitted on behalf of the respondent and as not disputed by the respondent and the petitioner that the copy of the C.D. was handed over by the petitioner's Accountant Shri K. M. Sharma in the office of Mahaka Bharat for which the petitioner has instructed him on telephone and the allegation can only be established after conducting the investigation.

41. Upon perusal of Section 468, IPC as referred by the petitioner which contains whoever commits forgery, intending that the (document or electronic record forged) shall

be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. And Section 471 contains whoever fraudulently or dishonestly uses as genuine any (document or electronic record) which he knows or has reason to believe to be a forged (document or electronic record), shall be punished in the same manner as if he had forged such (document or electronic record).

42. As stated hereinabove, in my considered view, the conclusion can only be drawn after investigation whether any offence is made out or not and in the instant writ petition since the petitioner has challenged the legality of the FIR and prayed for quashment of the FIR in question, therefore, this Court is only confined to determine the question whether the impugned FIR at its face value is false or not.

43. As the petitioner relied upon the case of T.T. Antony, 2001 Cri LJ 3329, wherein Hon'ble the Supreme Court has held as under :-

"After registering the FIR and commencing investigation, registering of second FIR or successive FIRs in respect of the same incident and crime and making of fresh investigations pursuant thereto would be irregular which call for interference by High Court under Articles 226 and 227 or Cr.P.C. and interference by Supreme Court under Article 136 with the fresh investigation to prevent abuse of statutory power of investigation or otherwise to secure ends of justice."

44. Learned counsel appearing on behalf of the respondents also placed reliance on the judgment of T.T. Antony, 2001 Cri LJ 3329 and relied on para 20 which reads as under :-

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173, Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirement of Section 154, Cr.P.C. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offence. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 Cr.P.C."

45. Applying the ratio decided by Hon'ble the Supreme Court in the case of T.T. Antony, 2001 Cri LJ 3329, in the instant case, second FIR is of course barred only in relation to same cognizable offence or same occurrence or the same incident giving rise to one or more cognizable offence wherein the present FIR has been lodged against the petitioner on the basis of altogether different occurrence and for a different offence and being FIR against another set of accused and not against the same set of accused who have been offenders in the FIR No. 217/05. In the FIR in question, the allegation against the accused is with regard to tampering with and fabrication of electronic record on the Compact Disk (CD) and which is established by Forensic Science Laboratory Report given by the FSL on 21-9-2005.

46. Thus, even in view of the Hon'ble Supreme Court as held in the case of T.T. Antony wherein Hon'ble Supreme Court has said that the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173, Cr. P.C.

47. The petitioner strongly pleaded that the impugned FIR has been lodged against the petitioner under the influence of the sitting Cabinet Minister and alleged several mala fides against the Cabinet Minister. Not only mere assertion of the allegation but it was categorically stated that the selective targetting of "Mahaka Bharat" while other newspapers and news channels were conveniently left out as the sitting Cabinet Minister having private and personal grudge.

48. The allegations of mala fide against the Cabinet Minister Shri Rajendra Singh Rathore are liable to be rejected at the outset because the petitioner has not impleaded him as party respondent to the writ petition and without he being a party to the writ petition, no such allegations against him can be accepted as allegations of mala fide and mere assertion of mala fide allegation does not survive.

49. I am also not convinced with the submission made on behalf of the petitioner that the FIR in question is hit by Section 162, Cr. P.C. and the criminal proceedings initiated against the petitioner cannot be said to be premature as stated by the learned counsel for the petitioner.

50. As both the learned counsel for the parties have placed heavy reliance on the judgment of Hon'ble Supreme Court in the case of State of Haryana and others v. Bhajan Lal and others reported in AIR 1992 SC 604 : (1992 Cri LJ 527) wherein Hon'ble the Supreme Court has laid down certain tests/guidelines where the High Court may in exercise of powers under Art. 226 or u/S. 482 of Cr. P.C. may interfere in proceedings relating to cognizable offences to prevent abuse of the process of any Court or otherwise to secure the ends of justice. However, power should be exercised sparingly and that too in the rarest of rare cases.

51. The points of determination which are laid down by Hon'ble the Supreme Court (sic) as under :-

1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2) Where the allegation in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under S. 156 (1) of the Code except under an order of a Magistrate within the purview of S. 155 (2) of the Code.

3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under S. 155 (2) of the Code.

5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6) Where there is an express legal bar engrafted in any of he provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.
Where allegations in the complaint did constitute a cognizable offence justifying registration of a case and investigation thereon and did not fall in any of the categories of cases enumerated above, calling for exercise of extraordinary powers or inherent powers, quashing of FIR was not justified.

52. Now as per the test laid down by Hon'ble the Supreme Court it is to be seen that the FIR in question constitute any cognizable offence against the petitioner or not. Bare perusal of the contents of the FIR and the factual aspect that the news which was published in the Daily Newspaper of the alleged involvement of Cabinet Minster Shri Rajendra Singh Rathore in sex orgy on 21-9-05 and during enquiry and after obtaining a copy of C.D. and the report submitted by the F.S.L. itself borne out that the C.D. is found tampered with and fabricated and thus on the basis of the report of FSL the FIR No. 21/06 registered by the Police against the petitioner and in view of the test laid down by Hon'ble Supreme Court in the case of Bhajan Lal, the first information report at its face value cannot be said to be false and prima facie constitute offence and make out the case against the accused.
53. Learned counsel for the respondents referred the case of Upkar Singh v. Ved Prakash and others of Hon'ble Supreme Court, reported in AIR 2004 SC 4320 : (2004 Cri LJ 4219) wherein the Supreme Court has distinguished the case of T.T. Antony, 2001 Cri LJ 3329 and held that there can be no bar for lodgment of two FIRs even in respect of the same incident because different version may come by the rival parties who lodge counter cases against each other.
54. And also referred the case of Hon'ble Supreme Court in the case Kari Choudhary v. Mst. Sita Devi and others, reported in 2002 (1) SCC 714 : (2002 Cri LJ 923) wherein Hon'ble the Supreme Court has held that although there cannot be two FIRs against the same accused in respect of the same case but when there are rival version in respect of the same episode, they would take the shape of two different FIRs and investigation can be carried on under both of them.
55. Hon'ble the Supreme Court further explaining the case of T.T. Antony, (2001 Cri LJ 3329) in the case reported in 2006 (1) SCC 732 : (2006 Cri LJ 964) held that a separate FIR can be lodged in respect of an independent and distinct offences and that the second

FIR could not be prohibited on the ground that some other FIR had been filed against the accused in respect of certain other allegations. It was further made clear that in the case of T.T. Antony, the second FIR in relation to same cognizable offence or same occurrence or incident and against same accused is barred not with regard to different offence and against different accused.

56. With regard to mala fide allegation against the Minister concerned, the respondent placed reliance on the judgment in the case Indian Railway Construction Co. Ltd. v. Ajay Kumar, reported in 2003 (4) SCC 579 : (AIR 2003 SC 1843) wherein Hon'ble the Supreme Court has observed as under :-

"22. Neither learned single Judge nor the Division Bench has examined the question as to practicability or otherwise of holding the enquiry in the correct perspective. They have proceeded on the footing as if the order was mala fide; even when there was no specific allegation of mala fides and without any specific person against whom mala fides were alleged being impleaded in the proceedings. Except making a bald statement regarding alleged victimization and mala fides, no specific details were given.

23. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or prsonal ill-will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fides in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deducted as a reasonable and inescapable inference from proved facts. It cannot be overlooked that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in E.P. Royappa v. State of T.N., (AIR 1974 SC 555) Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when he imputations are grave and they are made against the holder of an offence which has a high responsibility in the administration."

57. And I am not convinced with the submission made on behalf of the petitioner and the allegation alleged against the police as well as against the Cabinet Minister that the police was acting under the influence of Cabinet Minister Shri Rajendra Singh Rathore and were trying to save him in order to get a pat on their back from the said Minister.

58. I am also not convinced with the submission made on behalf of the petitioner that the alleged FIR is outcome of gross mala fides on the part of the concerned Minister. and in view of the settled proposition of law, the allegation of mala fide against the Minister concerned without impleading him as party are not sustained as held by Hon'ble the Supreme Court in the case of Indian Railway Construction, (AIR 2003 SC 1843) (supra).

59. It is the burden on the petitioner to establish mala fide alleged against the police officials and the Minister concerned. Mere assertion of mala fide allegation would not enough and in support of such allegation specific material should be placed before the Court as held by Hon'ble the Supreme Court in the case "First Land Acquisition Collector and others v. Nirodhi Prakash Ganguly, reported in 2002 (4) SCC 160 : (AIR 2002 SC 1314).

60. Thus in view of the test laid down by Hon'ble the Supreme Court in the case Bhajan Lal, (1992 Cri LJ 527) and as observed hereinabove, the impugned FIR No. 21/06 cannot be said to be false at its face value and the petitioner also not able to prove the malice against the Minister concerned and police officials.

61. In view of the observations made hereinabove, the present petition is not the rarest of rares case which requires any interference while exercising extraordinary power under Article 226 of Constitution of India.

62. Thus, no interference whatsoever is required in the impugned FIR No. 21/06, dated 27-1-06 and the petitioner has utterly failed to make out any case that the FIR in question is false at its face value.

63. consequently, the writ petition fails and is hereby dismissed with no orders as to cost.

Petition dismissed.

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Cross Citation :-MHLJ-4-705 , 2004-BCR(Cri)-1-450

BOMBAY HIGH COURT

Hon'ble Judge(s) : J.G.Chitre ,J

with Criminal Application 35 of 2000

Mar 20,2003

ANIL THAKERANEY.... V/s.... M.DARIUS KAPADIA

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PUBLICATION OF NEWS WITH ATTRACTIVE HEADING AMOUNTS TO DEFAMATION ,- In view of that, the imputation published in "the BRIEF" has to be viewed,- The petitioner has published that imputation as alleged by the complainant. The matter starts with heading in very big letters "the Director behind barsl" It is sure to invite anybody's attention by its nature itself. In that case the person looking to it would be gathering the impression that the aged director has gone behind the bars. Prima facie it would create a stigma to him. The petitioner has not published the remaining portion of the item in the same size of the letters. The remaining portion of the matter is in small letters.

The remaining portion of the matter is in small letters. Even that also starts with some sentences which are prima facie damaging the reputation of the aged director who has been reported to be behind bars. The said heading has been decorated with exclamation mark. That has given more strength to the impact which is likely to be created by it. The reporting of the talk ensued between the Brief spokesperson and Shri kapadia (original complainant) has been mentioned in the said news item at last but one paragraph. Before reading that paragraph one has to read paragraph 1 and paragraph 2.

WHILE considering a complaint of defamation, the Court has to consider the imputation as a whole and the prima facie impact which is likely to be created by it also. In the present case, the impact would create a prima facie case in favour of respondent Kapadia. Therefore, this Court does not find that the Trial Court has committed any error in issuing the process against the petitioner Mr. Anil Thakeraney, because the defence which the present petitioner may take, will have to undergo the process of judicial consideration. He would be obliged to make out a case that he published the said matter with due care and caution.

IT is to be noted that whoever publishes the account of a judicial proceeding, is under an obligation to publish it correctly and in a sober way. There has to be no addition to create "mirch masala" to it at the cost of the person against whom such matter has been published. But tendency of printing Court proceedings by giving pungent heading is at increasing trend. The prestige lost once cannot be restored later on and, therefore, the legislature has put alarms of caution by providing explanations, exceptions and illustrations to section 499 of the I. P. C.

Everybody has an important right to live in the society with dignity and remark slinging has been decided to be curbed out by Legislature and, therefore, section 499 has come with its faces as it is. Whoever endeavours in publishing anything against anybody has to be careful enough to see that he commits no offence and he remains well within four corners of the exceptions satisfactorily.

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(1.) BOTH these applications have been mentioned in the Board as fixed for final hearing. Shri Saste is appearing for the State of Maharashtra and has been saddled with the burden of protecting the interest of the prosecution. Therefore, this Court does not wait for Shri Kapadia, the original complainant and hears these applications which are pretty old and which have obstructed the hearing of the criminal prosecutions in the Trial Court.

(2.) SHRI H. N. Vakil appearing for Shri Anil Thakeraney (original accused no. 6 mentioned in the complaint in context with Case No. 1817/s/1998)submitted that the petitioner published the true account of a criminal proceeding in his magazine "the BRIEF" and, therefore, keeping in view the exception provided to section 499 of the I. P. C. , he has not committed the offence of defamation. He submitted that the Trial Court should not have taken the cognizance of the complaint filed by respondent Kapadia and should not have issued the process against him in context with section 500 of the I. P. C. Shri Gangal submitted that his client Shri Kamath has absolutely played no role as per the allegations made in the complaint. Therefore, no cognizance should be taken against him by the Magistrate and the process should not have been Issued against him. Shri Gangal further submitted that this Court has wide powers and, therefore, when it is a case of no case at all, this Court be pleased to quash the order of issuing process against his client Shri Kamath.

(3.) 4th exception under section 499 of the I. P. C. provided that it is not defamation to publish a substantially true report of the proceedings of a court of Justice, or of the result of any such proceedings. If at all anybody has to be within four corners of the exception, he has to act reasonably and in good faith. His action must be with due caution and care. In view of that, the imputation published in "the BRIEF" has to be viewed, The petitioner has published that imputation as alleged by the complainant. The matter starts with heading in very big letters "the Director behind barsl" It is sure to invite anybody's attention by its nature itself. In that case the person looking to it would be gathering the impression that the aged director has gone behind the bars. Prima facie it would create a stigma to him. The petitioner has not published the remaining portion of the item in the same size of the letters. The remaining portion of the matter is in small letters. Even that also starts with some sentences which are prima facie damaging the reputation of the aged director who has been reported to be behind bars. The said heading has been decorated with exclamation mark. That has given more strength to the impact which is likely to be created by it. The reporting of the talk ensued between the Brief spokesperson and Shri kapadia (original complainant) has been mentioned in the said news item at last but one paragraph. Before reading that paragraph one has to read paragraph 1 and paragraph 2.

(4.) WHILE considering a complaint of defamation, the Court has to consider the imputation as a whole and the prima facie impact which is likely to be created by it also. In

the present case, the impact would create a prima facie case in favour of respondent Kapadia. Therefore, this Court does not find that the Trial Court has committed any error in issuing the process against the petitioner Mr. Anil Thakeraney, because the defence which the present petitioner may take, will have to undergo the process of judicial consideration. He would be obliged to make out a case that he published the said matter with due care and caution.

(5.) IT is to be noted that whoever publishes the account of a judicial proceeding, is under an obligation to publish it correctly and in a sober way. There has to be no addition to create "mirch masala" to it at the cost of the person against whom such matter has been published. But tendency of printing Court proceedings by giving pungent heading is at increasing trend. The prestige lost once cannot be restored later on and, therefore, the legislature has put alarms of caution by providing explanations, exceptions and illustrations to section 499 of the I. P. C. Everybody has an important right to live in the society with dignity and remark slinging has been decided to be curbed out by Legislature and, therefore, section 499 has come with its faces as it is. Whoever endeavours in publishing anything against anybody has to be careful enough to see that he commits no offence and he remains well within four corners of the exceptions satisfactorily. Criminal Application No. 2510 of 1999 stands dismissed.

(6.) AFTER dismissal of Criminal Application No. 2510 of 1999, this Court turns to Criminal Application No. 35 of 2000. After perusal of the complaint, as it is, no case has been made out against the said petitioner shri Kamath. The complainant is obliged to make out a case making out prima facie offence alleged to have been committed by such an accused. When a complaint is filed in the Court, the Magistrate is obliged to give judicial consideration to it before coming to the conclusion whether he should take cognizance of it and whether he should issue the process. In this case, he has failed to do so and, therefore, has landed in gross error of issuing the process against the petitioner Shri Kamath. What is illegal cannot be permitted to survive for a single moment. Therefore, process issued against the said petitioner stands quashed. He stands exonerated. He need not appear in the said Court. Mr. Anil Thakeraney to appear before the Trial Court on 17. 4. 2003 during working hours of that Court. Observations made in this judgment should not weigh at the time of trial. The stay stands vacated. Rule stands discharged.

(7.) PARTIES to act on an ordinary copy of this judgment duly authenticated by the Private Secretary of this Court.

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-:CHAPTER = 8:-

Sec. 340 of Cr.P.C.

How to use provisions of section 340 of cr.p.c. to prosecute the person who files false and misleading say / documents in court and also false complaint before court and police.

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Cross Citation :2002 CRI. L. J. 548 (AIR 2002 SC 236 = 2001 AIR SCW 4910)

SUPREME COURT OF INDIA

(From : 2001 Cri LJ 1594 (Bombay)

Coram : K. T. THOMAS, S. N. PHUKAN AND Y. K. SABHARWAL, JJ.

(Full Bench)

Pritish, Appellant ..Vs...State of Maharashtra and others, Respondents.

Criminal Appeal No. 1188 of 2001 (arising out of SLP (Cri.) No. 1856 of 2001),

D/- 21 -11 -2001.

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Criminal P.C., Sec. 340 – Forged documents filed during Civil Proceedings – Preliminary enquiry before filing complaint – There is no obligation on Court to afford on opportunity of hearing to claimants/ land owners who sought big amount of compensation by producing forged sale deeds – Order for initiation of prosecution proceeding before Magistrate can be passed directly – Opportunity of hearing would be accused is not required to be given.

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Judgement

THOMAS, J. :- Leave granted.

2. Appellant who scored substantially in a land acquisition proceeding is now facing rough weather as he is arraigned in a criminal proceeding on account of certain documents he produced as evidence. The court which granted a quantum leap in awarding compensation to the land owners later foundthat they had used forged documents for inveigling such a bumper gain as compensation and hence the court ordered some of the claimants to face prosecution proceedings in a criminal court. The only point now canvassed by the appellant is that the court should have heard the appellant before ordering such prosecution. The said plea raised by the appellant before the High Court was repelled as per the impugned judgement. Hence this appeal by special leave.

3. An area of 3.9 acres of land was acquired by the State Government for construction of a canal under Arunwati Project in 1985. The land acquisition officer awarded a total of Rs. 24,000/- as compensation for the entire land. As the owners were not satisfied with the said award they moved for a reference under Section 18 of the Land Acquisition Act. The reference court (which is a civil court) on the basis of evidence adduced by the parties made a big leap by enhancing the compensation amount from Rupees twenty four thousand to Rupees ten lakhs thirty thousand, besides the other benefits such as solatium, additional compensation and interest as provided in Section 23 of the Land Acquisition Act. The reference court passed the award granting the said enhancement on 23-4-1993. Appellant was one of the beneficiaries of the said award and the enhancement was made on the basis of the evidence adduced by the parties including the appellant. Though the claimants expressed dissatisfaction even with such enhancement and moved the High Court for further enhancement the High Court dismissed the appeal filed by them in 1993.

4. In 1995, some person of the locality brought to the notice of the reference court that the claimants had wangled a whopping enhancement after playing chicanery on the Court by producing forged copies of sale deeds for supporting their claim for enhancement. The documents marked by the reference court as Exts. 31, 32 and 35 were fabricated copies of sale deeds in which the extent of the lands sold had been shown as far less than the real area transferred as per the instruments of sale, according to those persons.

5. The reference court conducted an inquiry on being told by the aforesaid applicants that the above mentioned documents are forged. The court got down the relevant records

from the Sub-Registry for the purpose of examining the correctness of the aforesaid three documents and found that they were fabricated copies of the original and found that they were fabricated copies of the original sale deeds. The said court further found that appellant and one Rajkumar Anandrao Gulhane have committed offence affecting the administration of justice by using forged documents. The court then passed the following order :-

"Therefore, it is expedient in the ends of justice on my part to file the complaint in writing against them before Judicial Magistrate of First Class having jurisdiction to take appropriate and proper criminal action against them, as it appears that they have not only cheated the public at large and government but have misguided or tried to misguide my learned procedure by preparing and producing false documentary evidence as well as by giving false oral evidence just to have a wrongful gain."

6. The persons who moved the court for taking action under Section 340 of the Code Criminal Procedure (for short 'the Code') by bringing the above facts to the notice of the reference court were not satisfied as they felt that the other persons who also secured the advantage of such enhancement were also to be proceeded against. So they filed an appeal before the District Court. On 12-8-1996 the District Judge concerned ordered that the complaint shall be filed against five more persons besides the appellant and Rajkumar Ananarao Gulhane. We are told that those five persons moved the High Court and got themselves extricated from prosecution proceedings. Appellant then filed an appeal before the High Court purportedly under Section 341 of the Code in challenge of the order of the reference court which directed the filing of a criminal complaint against him. The main contention he raised before the High Court was that the reference court has overlooked the basic principles of natural justice and proceeded to make an inquiry without giving an opportunity to him to be heard in the matter and hence great prejudice had been caused to him as he had been deprived of the opportunity to be heard. Learned single judge of the High Court while repelling the above contention observed thus :-

"The procedure does not contemplate that before initiating preliminary enquiry the court ought to give notice to the person against whom it may make a complaint on completion of the preliminary enquiry and, obviously so because what is contemplated is only a preliminary enquiry, and if the court chooses to take action against the said person, it does not mean that he will not have full and adequate opportunity under Section 340(1)(b) of the Criminal Procedure Code. Therefore, the contention of the learned counsel for the appellants, that the court, before initiating any enquiry into the matter, ought to have given notice to the appellants and that the appellants have a right to be heard, cannot be accepted."

7. Shri V.A. Mohta, learned senior counsel for the appellant contended that the basic principle of natural justice is violated when the reference court ordered prosecution against the appellant without affording him an opportunity of being heard. In elaborating the said point learned senior counsel submitted that the scheme of Sections 340 to 344 of the Code contains an in-built safety for the persons sought to be proceeded against, by obliging the court to afford an opportunity of being heard to them.

8. Chapter XXVI of the Code contains provisions "as to offences affecting the administration of justice". Among the 12 sections subsumed therein we need consider only three. Section 340 consists of four sub-sections of which only the first sub-section is relevant for the purpose of this case. Hence the said sub-section is extracted below:

"When upon an application made to it in this behalf or otherwise, any court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in

respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-
(a) record a finding to that effect;
(b) make a complaint thereof in writing;
(c) send it to a Magistrate of the first class having jurisdiction;
(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and
(e) bind over any person to appear and give evidence before such Magistrate."

9. Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion the court is empowered to hold a preliminary inquiry. It is not peremptory that such preliminary inquiry should be held. Even without such preliminary inquiry the court can form such an opinion when it appears to the court that an offence has been committed in relation to a proceeding in that court. It is important to notice that even when the court forms such an opinion it is not mandatory that the court should make a complaint. This sub-section has conferred a power on the court to do so. It does not mean that the court should, as a matter of course, make a complaint. But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interest of justice that the offence should further be probed into. If the court finds it necessary to conduct a preliminary inquiry to reach such a finding it is always open to the court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by the court regarding its opinion. It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or not. Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed.

10. "Inquiry" is defined in Section 2(g) of the Code as "every inquiry, other than a trial, conducted under this Code by a magistrate or court." It refers to the pre trial inquiry, and in the present context it means the inquiry to be conducted by the magistrate. Once the court which forms an opinion, whether it is after conducting the preliminary inquiry or not, that it is expedient in the interest of justice that an inquiry should be made into any offence the said court has to make a complaint in writing to the magistrate of first class concerned. As the offences involved are all falling within the purview of "warrant case" [as defined in Sec. 2 (x)] of the Code the magistrate concerned has to follow the procedure prescribed in Chapter XIX of the Code. In this context we may point out that Section 343 of the Code specifies that the magistrate to whom the complaint is made under Section 340 shall proceed to deal with the case as if it were instituted on a police report, That being the position, the magistrate on receiving the complaint shall proceed under Section 238 to Section 243 of the Code.

11. Section 238 of the Code says that the magistrate shall at the outset satisfy that copies of all the relevant documents have been supplied to the accused. Section 239 enjoins on the magistrate to consider the complaint and the documents sent with it. He may also make such examination of the accused, as he thinks necessary. Then the magistrate has to hear both the prosecution and the accused to consider whether the allegations against the accused are groundless. If he finds the allegations to be groundless he has to discharge the accused at that stage by recording his reasons thereof. Section 240 of the Code says that if the magistrate is of opinion, in the aforesaid inquiry, that

there is ground for presuming that the accused has committed the offence he has to frame a charge in writing against the accused. Such charge shall then be read and explained to the accused and he shall be asked whether he pleads guilty of the offence charged or not. If he pleads not guilty then the magistrate has to proceed to conduct the trial. Until then the inquiry continues before the magistrate.

12. Thus, the person against whom the complaint is made has a legal right to be heard whether he should be tried for the offence or not, but such a legal right is envisaged only when the magistrate calls the accused to appear before him. The person concerned has then the right to participate in the pre-trial inquiry envisaged in Section 239 of the Code. It is open to him to satisfy the magistrate that the allegations against him are groundless and that he is entitled to be discharged.

13. The scheme delineated above would clearly show that there is no statutory requirement to afford an opportunity of hearing to the persons against whom that court might file a complaint before the magistrate for initiating prosecution proceedings. Learned counsel for the appellant contended that even if there is no specific statutory provision for affording such an opportunity during the preliminary inquiry stage, the fact that an appeal is provided in Section 341 of the Code, to any person aggrieved by the order, is indicative of his right to participate in such preliminary inquiry.

14. Section 341 of the Code confers a power on the party on whose application the court has decided or not decided to make a complaint, as well as the party against whom it is decided to make such complaint, to file an appeal to the court to which the former court is subordinate. But the mere fact that such an appeal is provided, it is not a premise for concluding that the court is under a legal obligation to afford an opportunity (to the persons against whom the complaint would be made) to be heard prior to making the complaint. There are other provisions in the Code for reaching conclusions whether a person should be arrayed as accused in criminal proceedings or not, but in most of those proceedings there is no legal obligation cast on the court or the authorities concerned, to afford an opportunity of hearing to the would be accused. In any event appellant has already availed of the opportunity of the provisions of section 341 of the Code by filing the appeal before the High Court as stated earlier.

15. Once the prosecution proceedings commence the person against whom the accusation is made has a legal right to be heard. Such a legal protection is incorporated in the scheme of the Code. Principles of natural justice would not be hampered by not hearing the person concerned at the stage of deciding whether such person should be proceeded against or not.

16. Be it noted that the court at the stage envisaged in Section 340 of the Code is not deciding the guilt or innocence of the party against whom proceedings are to be taken before the magistrate. At that stage the court only considers whether it is expedient in the interest of justice that an inquiry should be @page-CriLJ553 made into any offence affecting administration of justice. In M.S. Sheriff and anr. v. State of Madras and ors. (AIR 1954 SC 397) a Constitution Bench of this Court cautioned that no expression on the guilt or innocence of the persons should be made by the court while passing an order under Section 340 of the Code. An exercise of the court at that stage is not for finding whether any offence was committed or who committed the same. The scope is confined to see whether the court could then decide on the materials available that the matter requires inquiry by a criminal court and that it is expedient in the interest of justice to have it inquired into. 1954 CriLJ 1019

17. Learned senior counsel cited the decision of a single Judge of the High Court of Andhra Pradesh in Nimmakayala Audi Narrayanamma v. State of Andhra Pradesh (AIR 1970 AP 119) in which learned Judge observed that it is just and proper that the court

issues a show cause notice to the would be accused as to why they should not be prosecuted. This was said while interpreting the scope of Section 476 of the old Code of Criminal Procedure (which corresponds with Section 340 of the present Code). The following is the main reasoning of the learned single Judge :-

"The proceedings under Section 476 Criminal P.C. being judicial and criminal in nature, the interpretation that should be placed in construing the section should be just, fair, proper and equitable and must be in accordance with the principles of natural justice. By adopting such interpretation and procedure, the aggrieved party would be afforded with an adequate opportunity to show and satisfy the court that it was not in the interests of justice, to launch the prosecution and thereby avoid further proceeding. That apart, the appellate court also would be in a position to appreciate the reasons assigned in each case and would have the advantage of coming to its own conclusion without any difficulty about the justification or otherwise of launching the prosecution in a particular case. When once the prosecution had been launched, the accused will not be having an opportunity thereafter to raise the question of expediency in the interests of justice to launch the very prosecution itself. The case thereafter will have to be gone into on the merits."

18. We are unable to agree with the said view of the learned single Judge as the same was taken under the impression that a decision to order inquiry into the offence itself would prima facie amount to holding him, if not guilty, very near to a finding of this guilt. We have pointed out earlier that the purpose of conducting preliminary inquiry is not for that purpose at all. The would be accused is not necessary for the court to decide the question of expediency in the interest of justice that an inquiry should be held. We have come across decisions of some other High Courts which held the view that the persons against whom proceedings were instituted have no such right to participate in the preliminary inquiry. (vide M. Muthuswamy v. Special Police Establishment (AIR 1985 Criminal Law Journal 420)).

19. We therefore agree with the impugned judgment that appellant cannot complain that he was not heard during the preliminary inquiry conducted by the reference court under Section 340 of the Code. In the result we dismiss this appeal.

Appeal dismissed.

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Cross Citation :2010-SCC(Cr)-3-586

SUPREME COURT OF INDIA

Coram : S.N.VARIAVA, B.N.AGRAWAL,JJ.

Interim Application 18 Of 1983, Civil Appeal 5502 Of 1983, Mar 07,2003
UTTAR PRADESH Resi.Emp.Co-op.House B.Society Vs New Okhla Indus. Deve. Authority

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(A) Contempt of Courts Act, 1971 — S. 2(c) — Criminal contempt — Filing of false affidavit intentionally — Held, amounts to contempt of court — On facts held, Contemnor by making a false statement on affidavit with the intention of inducing the Supreme Court not to pass any adverse order against NOIDA Authorities had committed contempt of court(Para 7)

(B) Contempt of Courts Act, 1971 — S. 12 — Filing false affidavit intentionally — He submitting that apology tendered should be accepted and/or in any event fine would suffice — Held, on facts, apology tendered was worthless since it was not genuine and bona fide and was tendered only after it was found that false statement had been made on oath — he did not on his own point it out —it was only an attempt to get out of consequences of having been caught — Hence, sentence of simple imprisonment for one week imposed – Mr S.C. Pabreja sentenced to simple imprisonment for a period of one week under section 12 of the contempt of courts Act, 1971-He shall immediately be taken into custody and remanded to Tihar Jail for Undergoing sentence.

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Order

1.Mr. S.C Pabreja has been issued a show cause notice as to why action in contempt should not be taken against him for having filed an affidavit in this court, containing a statement which is false to his knowledge, with a view to see that the court does not pass an order against the stand taken by NOIDA Authorities before this court.

2.The Facts are as follows: the dispute is regarding allotment of accommodation to 242 members of the appellant Society. Order Passed on 4-4-1991 recorded a statement on behalf of NOIDA Authorities that they would allot in either Sectors 40, 41 or 42. Due to passage of time no plots were available in Sectors 40 and 41. The question was whether plots were available in Sector 42. Whereas the appellant Society claimed that plots were still available in Sector 42, Noida Authorities 1 claimed that no plots were available in Sector 42. Noida Authorities were, therefore, directed to file an affidavit setting out whether plots were available in Sector 42. In the affidavit filed it was claimed by NOIDA Authorities that they had already allotted plots in Sector 42 to one Kendriya Karamchari Society and therefore no plots were available. This position was seriously disputed by the appellant Society. It was orally stated to the Court that the allotment in favour of that

Society stood cancelled. b Therefore, NOIDA Authorities were directed to file another affidavit setting out whether or not plots were available after checking up relevant records.

3. In pursuance of this direction, Mr S.C. Pabreja filed an affidavit on 3-2-2003 wherein it is stated as follows;

"The aforesaid matter came up for hearing on 17-1-2003, in which a submissionwas made on behalf of the applicant and the respondent Society, that despite the fact that the land is still available for the construction of 242 LIG flats in Sector 42 itself, Noida Authority has filed an affidavit, saying that no land is available in the said sector.

In this view of the matter the Hon'ble Court was pleased to adjourn this case for 24-1-2003. On the said date an affidavit was submitted on behalf of Noida, saying that, the entire land of Sector 42 has already been allotted for residential and other purposes and no land is available in Sector 42.

After hearing the parties, the Hon'ble Court was of the view, that NoiDA must file a detailed affidavit, giving the names and the area allotted to each member of 'Kendriya Karamchari Society1, who have been allotted plots in Sector 42. In these circumstances the list of the said members who have been allotted plots in Sector 42 is being annexed herewith and marked as Annexure A71"

4.A list of names was also annexed to this affidavit giving an impression that plots had already been allotted in Sector 42 to so many persons.

5.Thereafter, the appellants point out, on affidavit, that the allotment in favour of this Society has already been cancelled. NOIDA Authorities were directed to state on affidavit whether that was so. Now one Mr Ashok Kumar Verma files an affidavit admitting that that allotment had been cancelled. This affidavit states that the "money has been refunded". Today it is stated that all the monies have not been refunded but in only two cases monies have been refunded.

6.It is, thus, clear that Mr S.C. Pabreja has filed an affidavit containing a false statement with a view to give a false picture to this Court i.e. no plots were available in Sector 42. This has been done with a view to see that Noida Authorities were not directed to provide a plot in Sector 42. This in spite of the fact that the affidavit was to be filed after checking up the records and ascertaining whether or not plots were in available in Sector 42. It would not be denied that Mr S.C. Pabreja had checked up the records and knew, when he filed the affidavit, that plots were available in Sector 42.

7. It has been held in Hiralal Chawla v. State of UP.1 that filing of a false affidavit amounts to contempt of court. Mr S.C. Pabreja by making a false statement on affidavit with the intention of inducing this Court not to pass any adverse orderagainst NOIDA Authorities has committed contempt of court.

8.On behalf of Mr S.C. Pabreja it was submitted that he had joined this Department only two months prior and that he was under the impression that since a writ petition was pending in the Allahabad High Court no fresh allotment could be made in favour of the appellant Society. To be noted that in Mr S.C. Pabreja's affidavit there is no mention of any

pending writ petition. Mr S.C. Pabreja does not even point out that the allotment in favour of that Society already stood cancelled. On the contrary the impression sought to be given to the Court is that allotment in favour of the persons whose names are mentioned in the list annexed to that affidavit still stands. Mr Pabreja has clearly stated that no plots were available. This is a false statement to his knowledge. We are not satisfied with the explanation. We, therefore, hold that Mr Pabreja has committed contempt of this Court's order.

9. It is submitted that apology has already been tendered and apology should be accepted. It is submitted that in any event a fine would be sufficient. In our view, the apology tendered in this case is worthless. It is tendered after it was found that false statement was made on oath. On his own Mr S.C. Pabreja did not point out to this Court that a wrong statement had been made in that affidavit. The affidavit which was to be filed was to state the correct position after checking up whether plots were available in Sector 42. It was admitted that Mr Pabreja had checked up and was aware that plots were not available in Sector 42. Yet he chose to make a false statement in order to support NoiDA Authorities' stand that no plots were available in Sector 42. Under these circumstances the apology now tendered is only an attempt to get out of consequences of having been caught.

10. Reliance is placed on Radha Mohan Lai v. Rajasthan High Court (Jaipur Bench)2 wherein in para 6 it is held as follows: (SCC p. 430)

"6. Having regard to the aforesaid facts, it appears that although the apology has been tendered after the appellant had been found guilty of contempt of court and after the High Court had inflicted the imprisonment on him but still the apology seems to be sincere and not to ward off the punishment. We accept the contention of Mr Dhankhar that the apology here is evidence of real contrition as also of his consciousness of wrong done by him. In M. Y. Shareefv. Hon 'ble Judges of Nagpur High Court31 a Constitution Bench of this Court accepted the apology that was tendered before thisCourt for the first time.

11.In that case the court accepted that the apology was sincere and that it was not tendered to ward off punishment . The court accepted the apology as evidence of real contrite as also of his consciousness of the wrong done by him.We are no satisfied that the apology tendered in this case is genuine or bona fide. We do not see any reason for accepting such an apology. We, therefore, sentence Mr S.C. Pabreja 10 simple imprisonment for a period of one week under section 12 of the contempt of courts Act, 1971.He shall immediately be taken into custody and remanded to Tihar Jail for Undergoing sentence.

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Cross Citation :1999 CRI. L. J. 4743

DELHI HIGH COURT

Coram : M. S. A. SIDDIQUI, J.

M/s. A-One Industries ….Vs…D.P. Garg,
Cri. A. No. 119 of 1996 and Cri Ms. Nos. 3188-89 of 1996, D/- 30 -7 -1999.

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A] Criminal P.C. (2 of 1974), S. 340 – IPC, 193 – Filling of false affidavit in judicial proceedings – Order directing prosecution of accused for offence under S. 193 of I.P.C. – Accused coming with defence of bonafide mistake – Held – Court cannot examine defence of accused – Order passed by Addl. District Judge does not require any interference

B] Filing of false affidavit – Effect of – It needs to be highlighted that filing a false affidavit or giving a false evidence in a Judicial proceeding is a serious matter – Supreme Court in AIR 1995 SC 795 observed that,

> *"..... Filing of false affidavits or making false statement on oath in Court aims at striking a blow at the Rule of Law and no Court can ignore such conduct which has the tendency to shake public confidence in the judicial institution because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone reporting to filing of false affidavits or giving of false statements and fabricating false evidence in a Court of law. The stream of justice has to be kept clear and pure and anyone soiling its purity must be dealt with sternly so that no one can be permitted to undermine the dignity of the Court and interfere with due course of judicial proceedings or the administration of justice."*

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Cases Referred : Chronological Paras

Judgement

ORDER :- This appeal under Section 341, Cr.P.C. is directed against the order dated 11-4-1996 passed by the Additional District Judge, Delhi under Section 340, C.P.C. directing prosecution of the appellant for the offence under Section 193, Cr.P.C.

2. Briefly stated, facts giving rise to this appeal are that on 24-10-1986 the appellant filed a false affidavit in the case RCS No. 158/90 (M/s. A-One India Industries v. D.P. Garg and Co.), pending on the file of the Additional District Judge, Delhi stating therein that by the orders dated 22-10-1986 passed by this Court in RFA No. 199/86, operation of the order dated 29-9-1986 passed by the Additional District Judge had been stayed. On 25-10-

1986, on inspection of the record of case RFA No. 199/86 by the respondent D.P. Garg, it was discovered that no such stay order as mentioned in the said affidavit was granted by this Court. Respondent, therefore, filed an application under Section 340, Cr.P.C. before the Additional District Judge for initiating appropriate proceedings against the appellant. By the impugned order, the Additional District Judge directed prosecution of the appellant for the offence punishable under Section 193, I.P.C. Hence this appeal.

3. It is an admitted position that on 24-10-1986, the appellant had filed his affidavit before the Additional District Judge, Delhi containing the following statement.

"That the Hon'ble High Court of Delhi has been pleased to stay the operation of order dated 29-9-1986 passed by the Hon'ble Court in R.F.A. No. 199/86 dated 22-10-1986. The said order has been passed by Hon'ble Mr. Justice C.L. Choudhary. The said case in the High Court is now fixed for 12-11-1986."

4. It is also undisputed that no such stay order as mentioned in the said affidavit was granted by this Court in RFA No. 199/86. Thus it becomes clear that on 24-10-1986, the appellant had filed a false affidavit in a judicial proceedings pending before the Additional District Judge, Delhi. It is contended on behalf of the appellant that the said affidavit was filed under a bona fide mistake. It needs to be highlighted that filing a false affidavit or giving false evidence in a judicial proceeding is a serious matter. In this connection I may usefully excerpt the following observations of their Lordships of the Supreme Court in Dhananjay Sharma v. State of Haryana (1995) 4 JT (SC) 483 : (AIR 1995 SC 795) :-

"..... Filing of false affidavits or making false statement on oath in Court aims at striking a blow at the Rule of Law and no Court can ignore such conduct which has the tendency to shake public confidence in the judicial institution because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone reporting to filing of false affidavits or giving of false statements and fabricating false evidence in a Court of law. The stream of justice has to be kept clear and pure and anyone soiling its purity must be dealt with sternly so that no one can be permitted to undermine the dignity of the Court and interfere with due course of judicial proceedings or the administration of justice."

5. Whether action in such matters should be taken under Section 95, Cr.P.C. is a matter primarily for the Court which hears the application, and its discretion is not to be lightly interfered with an appeal. In the instant case, the material on record clearly makes out a case under Section 193, IPC against the appellant. The order dated 18-11-1996 passed by the learned Metropolitan Magistrate shows that a charge under Section 193, IPC has already been framed against the appellant. At this stage the Court cannot examine the defence of the appellant and record a finding thereon. In my opinion, the impugned order of the learned Additional District Judge does not suffer from any legal infirmity.

6. In the result, the appeal is dismissed.

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Cross Citation :2002 CRI. L. J. 4485

PUNJAB & HARYANA HIGH COURT

Coram : R. C. KATHURIA, J.

Devinder Mohan Zakhmi ...Vs… Amritsar Improvement Trust, Amritsar and another

Criminal Misc. No. 14943 of 2002, D/- 9 -5 -2002.

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Cri. P.c. S. 340 – 195- Petitioner filed Civil suit – In reply to the suit the respondent officer of Amritsar Improvement Trust filed a false and misleading reply in Court to frustrate claim of petitioner – Thereafter petitioner filed application under section 340 of Cri. P.C. – Respondent officer filed application of adducing defence evidence which is allowed by Civil Judge – Held- During course of enquiry under sec. 340 of cr. P.c. the Court cannot grant permission to accused to produce defence evidence the order is illegal, hence set aside.

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Judgement

ORDER :- Petitioner, Devinder Mohan -akhmi, seeks quashing of order dated 2-4-2002 (Annexure P-4) passed by Civil Judge (Junior Division), Amritsar, on an application filed by him under Section 340 of the Code of Criminal Procedure (hereinafter referred to as the Code).

2. The facts have to be noticed briefly in order to focus the controversy raised in the present petition.

3. Petitioner had filed suit for mandatory injunction seeking directions against the Amritsar Improvement Trust, Amritsar, through its Chairman (respondent No. 1) and others to allot alternative plot in lieu of plot No. 2564 which was earlier allotted to the petitioner on 16-9-1997 in pursuance to the order passed by this Court as the plot so allotted, was located in a low lying area and it was not possible for the petitioner to carry out any construction on the same. It was also alleged by the petitioner in the suit that a number of other vacant plots were available with the respondent - Improvement Trust at Ranjit Avenue, Amritsar but in the reply filed by respondent No. 1, controverting the stand of the petitioner, the availability of plots was denied.

4. During the pendency of the suit, an application under Order XXXIX, rules 1 and 2 of the Code of Civil Procedure was filed by the petitioner on which the trial Court had directed respondent No. 1 to file an affidavit of the competent Authority to specify that no vacant plot measuring 150 sq. yards was available in Block "B and E" of Ranjit Avenue, Amritsar, Parkash Singh, respondent No. 2, who is posted as Senior Assistant in the office of respondent - Trust filed affidavit dated 23-12-1998 before the trial Court stating therein that no plot measuring 150 sq. yards was available in Blocks B and E in Ranjit Avenue, Amritsar. Thereafter, the petitioner filed an application under Order XI,

Rule 15 of the Code of Civil Procedure so as to seek direction to respondent No. 1 to produce the allotment Register relating to Block B and E in Ranjit Avenue, Amritsar, which was allowed by the Court. During inspection of the register, the petitioner detected that

bogus and fictitious allotments were shown by respondent No. 1 in order to deny the claim of the petitioner. His enquiry disclosed that some vacant plots were available as on 16-7-1999 which was in contradiction to averments made in affidavit dated 23-12-1998. With this back-ground, on 30-7-1999 the petitioner filed an application under Section 340 of the Code for taking action against respondent No. 2 for having committed offence referred to in clause (b) of sub-section (1) of Section 195 of the Code. Upon this, a preliminary enquiry was conducted by the trial Court in terms of requirement of Section 340 of the Code. Petitioner himself appeared as a witness and thereafter closed his evidence on 29-10-2001 whereafter the trial Court adjourned the application for consideration for 22-11-2001 which was again adjourned to 14-12-2001. Thereafter, written arguments were filed by the petitioner and the matter was adjourned to 4-1-2002. On 4-1-2002, respondents filed an application under Section 195 of the Code for permission to adduce evidence which was allowed by the Civil Judge (Junior Division), Amritsar, as per order dated 2-4-2002. It is this order which has been assailed in the present petition.

5. Notice of the petition was given to the respondents. No one has put in appearance on their behalf.

6. I have heard learned counsel for the petitioner at length.

7. Learned counsel for the petitioner has vehemently contended before me that during the course of preliminary enquiry proceedings in terms of Section 340 of the Code, respondents have no right to participate and adduce evidence and the prayer made by the respondents in this regard allowed by the Civil Judge (Junior Division), Amritsar, as per order dated 2-4-2002 is wholly unjustified and not tenable in law. He placed reliance on the observations made in case Madan Lal Sharma v. Punjab and Haryana High Court through its Registrar, 2000 (1) Rec Cri R 592 : (2000 Cri LJ 1512) wherein it was laid down that no hearing is required to be given to the accused before filing of the complaint because the accused can raise all defences before the Magistrate when the complaint is filed. Further reference was made to observations of the Apex Court in Pritish v. State of Maharashtra, 2002 (1) Rec Cri R 92 : (2002 Cri LJ 548) wherein it was observed in paras 9 and 10 as under :-

"9. Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the Court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion the Court is empowered to hold a preliminary inquiry. It is not peremptory that such preliminary inquiry should be held. Even without such preliminary inquiry the Court can form such an opinion when it appears to the Court that an offence has been committed in relation to a proceeding in that Court. It is important to notice that even when the court forms such an opinion it is not mandatory that the Court should make a complaint. This sub-section has conferred a power on the Court to do so. It does not mean that the Court should, as a matter of course, make a complaint. But once the Court decides to do so, then the Court should make a finding to the effect that on the fact situation it is expedient in the interest of justice that the offence should further be probed into. If the Court finds it necessary to conduct a preliminary inquiry to reach such a finding it is always open to the Court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by the Court regarding its opinion. It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is

guilty or not. Far from that, the purpose of preliminary inquiry, even if the Court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed.

10. "Inquiry" is defined in Section 2(g) of the Code as "every inquiry, other than a trial, conducted under this Code by a magistrate or Court." It refers to the pre-trial inquiry, and in the present context it means the inquiry to be conducted by the Magistrate. Once the court which forms an opinion, whether it is after conducting the preliminary inquiry or not, that it is expedient in the interest of justice that an inquiry should be made into any offence the said Court has to make a complaint in writing to the Magistrate of first class concerned. As the offences involved are all falling within the purview of "warrant case" (as defined in Section 2(x)) of the Code the Magistrate concerned has to follow the procedure prescribed in Chapter XIX of the Code. In this context we may point out that Section 343 of the Code specifies that the Magistrate to whom the complaint is made under Section 340 shall proceed to deal with the case as if it were instituted on a police report, that being the position, the Magistrate on receiving the complaint shall proceed under Section 238 to Section 243 of the Code."

The entertainment of the application of respondents by the trial Court in order to enable them to produce evidence in defence, as such was against the mandate of law. The findings of the trial Court that the provisions of Section 340 of the Code do not propose to shut down all gates for the respondents to place their case before the Court and these provisions are only directive in nature, as such cannot be accepted in the face of the dictum of law laid down in the above-mentioned cases. Manifestly, the trial Judge has committed a patent error in passing order dated 2-4-2002 and for that reason, the same cannot be sustained.

For the foregoing reasons, the petition is allowed and order dated 2-4-2002 set aside.

Petition allowed.

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Cross Citation :2007-ALLMR(CRI)-0-2281 , 2007-MHLJ(Cri)-2-860

HIGH COURT OF BOMBAY

Coram : C.L.PANGARKAR,J.

Maud Late John Desa Vs. Gopal Leeladhar Narang

Criminal Application 1115 of 2007 Of Jul 11,2007

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Criminal P.C. Sec. 340, 341 – Filing of false affidavit in civil suit – Proceeding under Sec. 340 of Cri. P.C. – The main civil suit was at the end stage and fixed for final arguments held Merely because civil suit was pending that did not prevent the civil Judge from entering in to an enquiry - The Civil Judge should register such application as Miscellaneous Judicial case and then proceed to decide the application according to the provisions of Sec. 340 of Cr. P.C. – Civil suit and application under section 340 of Cr. P.C. has to be decided independently.

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(1.) RULE. Heard Finally with consent of parties.

(2.) THIS petition under Section 482 of the Code of Criminal procedure seeks to quash the order passed by Civil Judge (Jr. Dn.) and the Sessions Judge on an application under Section 340 of Code of criminal Procedure and appeal thereon under Section 341 of Code of criminal Procedure.

(3.) A few facts may be stated thus -The petitioner had filed Civil Suit against the non-applicant for injunction and other reliefs. In the said civil suit, it is alleged that the respondent had filed an affidavit in which the petitioner claims that the respondent has made patently false statement. The petitioner, therefore, filed an application purporting to be an application under Section 340 of Code of Criminal Procedure. As said earlier, it is the contention of the petitioner that respondent had made a false statement on oath in the affidavit as regards the height of the compound wall constructed by the respondent. It appears that the petitioner's contention is that respondent while answering to the allegations in para no. 6 of the plaint had undertaken not to increase the height of wall beyond 7 feet even though sanction was given by the Municipal Corporation for construction of a wall of having height of 2 meters equivalent to 6 ft. 6 inches. The petitioner's grievance is that how could defendant/respondent on oath say that he will not increase the height above 7 feet when Corporation has granted sanction for 6. 6 ft. and this amounts to making false statement on oath.

(4.) THE learned Civil Judge rejected the application saying that the evidence of both sids is closed and matter is fixed for arguments and in such circumstances it would not be appropriate to hold separate enquiry and give a finding which may even cause prejudice to both the parties. Holding so, he rejected the application.

(5.) THE learned Sessions Judge concurred with the Civil Judge and dismissed the appeal.

(6.) I have heard the petitioner-in-person and the learned counsel for the non-applicant.

(7.) WHENEVER an application under Section 340 of Code of criminal Procedure is filed, the Civil Manual Chapter XIX para 337 requires that it should be registered as Miscellaneous Judicial Case i. e. a case where a Judicial Enquiry is contemplated. The learned Civil judge should have, therefore, directed the application to be registered as Miscellaneous Judicial Case. Section 340 of Code of Criminal procedure reads thus -340. Procedure in cases mentioned in Section 195

(1) When upon an application made to it in this behalf or otherwise any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, -

(a) record a finding to that effect ; (b) make a complaint thereof in writing; (c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance for the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do send the accused in custody to such Magistrate ; and

(e) bind over any person to appear and give evidence before such Magistrate. (2) The power conferred on a Court by subsection (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the court to which such former Court is subordinate within the meaning of sub-section (4) of Section 195.

(3) A complaint made under this section shall be signed,- (a) Where the Court making the complaint is a High court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the court or by such officer of the Court as the Court may authorize in writing in this behalf.

(4) In this section, ?court? has the same meaning as in Section 195.

(8.) THE section thus says that the court should be of opinion that an enquiry should be held. Even for forming an opinion, there should be some evidence and not mere surmises. If there is a prima facie evidence, the court must enter into an enquiry and record a finding as to whether an offence referred to in Section 195 of Code of criminal Procedure is committed. It was, therefore, not proper on part of Judges of the lower courts to have rejected the application. The learned Civil Judge should have, in fact, upon consideration of the application, decided whether it was necessary to hold the enquiry and if found necessary should have held an enquiry. Merely because civil suit was pending, that did not prevent and could not prevent the civil Judge from entering into an enquiry. I would, therefore, set aside both the orders and direct the civil judge to register Exh. 52 as miscellaneous Judicial Case and then proceed to decide the application according to the provisions contained in Section 340 of code of Criminal Procedure. Pendency of this application shall not be and cannot be a constraint on the Civil Judge in deciding the Civil suit on merits. The civil judge may proceed to decide the suit and may also proceed to

decide the application under Section 340 of Code of criminal Procedure separately. The application under Section 482 of code of Criminal procedure is thus disposed of in the above terms.

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Cross Citation :2007-ALLMR(CRI)-0-3401 , 2007-MHLJ(Cri)-2-701

HIGH COURT OF BOMBAY

CORAM: B.H. MARLAPALLE,J.

Wallace Joseph Hayden ---Vs--- State of Maharashtra

Criminal Writ Petition 1346 of 2000 Of Jul 20,2007

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Cri. P.C. Section 340, 195 – F.I.R. and investigation in the matter documents related to proceedings before Court is barred – F.I.r. and all proceeding are abuse of process of Court – Hence quashed – The proper procedure is to approach before the concerned Court.

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JUDGEMENT

(1.) THIS petition filed under Article 227 of the constitution read with Section 482 of Cr. P. C. prays for quashing the proceedings in Criminal Case No. 15/i and R. /1998 presently pending before the Additional chief Metropolitan Magistrate, 9th Court, Bandra, bombay and to quash and set aside the order dated 7/9/2000 made on the Remand Application No. 184/ra/2000 and the order dated 23/9/1999 passed by the learned additional Chief Metropolitan Magistrate.

(2.) THE facts leading to this case and which are not in dispute are that, one Mrs. Serah Henriques was the owner of the property situated at 171, St. Martin?s Road, Bandra, Bombay 400 050, where she was residing with her six sons and one daughter and in addition there were four tenants, one of whom was one mrs. May Rodrigues much before 1950 and she was residing with her nephew Mr. Wallace Hayden, the present petitioner no. 1. The daughter of Mrs. Serah henriques, the present petitioner no. 2, married the petitioner no. 1 in 1961 and petitioner nos. 3,4 and 5 are the sons from the said marriage. The petitioners continued to stay in the tenanted premises occupied by mrs. May Rodrigues. On getting to know the news that the landlady was negotiating with the builder to develop the property Mrs. May Rodrigues sent a legal notice to the landlady in June 1972 and filed RAD Suit no. 5129 of 1972 in the Small Causes Court at Bombay sometimes in August 1972 and joined all the sons of the landlady, including the present respondent no. 3 and the partners of the construction firm by name M/s. Nanavati Construction. Ex parte decree came to be passed in favour of the tenant on 19/10/1973 declaring her to be a tenant and in addition permanent injunction from demolishing the tenanted premises

against the builder and the landlady was also granted. The tenant expired in 1981 and the landlady accepted the present petitioner no. 1 as the tenant and issued rent receipts from 1981 to 1985. The partners of M/s. Nanavati Construction filed suit bearing No. 1403 of 1975 for specific performance of agreement to sell against the landlady and her sons and the said suit was decreed and on 9/8/1995 Minutes before the prothonotary of this court in HC - Suit No. 1403 of 1975 were signed. Sometimes in April 1990 the petitioner no. 1 filed RAD Suit No. 2693 of 1990 in the small Causes Court seeking permanent injunction from demolition of the tenanted premises, even though the earlier order of permanent injunction in RAD Suit no. 5129/1972 at the instance of the original tenant was already in operation. On 10/8/1993 order of injunction was passed in RAD Suit No. 2693 of 1990 and the challenge to the same in Appeal No. 150 of 1994 was unsuccessful. Writ Petition No. 663 of 1995 was filed by the Nanavati Builders on 20/3/1995 and prior to this on 10/8/1993 the present respondent no. 3 who was defendant no. 3 in RAD Suit No. 2693 of 1990 made an application to the Small Causes Court for sending the original rent receipts to handwriting expert as according to him those rent receipts were forged. The said application was rejected holding that the documents could be sent to handwriting expert after defendants filed their Written Statement and the issue can be decided during the trial of the suit. An application came to be filed before this court seeking directions to produce the original rent receipts and the said application was rejected. On 17/4/1998 private complaint No. 15/ir/98 came to be filed by the present respondent no. 3 against the Bandra Police for investigation of alleged forgery of rent receipts produced in the Small Causes Court. Investigation was carried out by the Inspector of Bandra Police Station and he submitted his report under Section 156 (3) of cr. P. C. The complainant made an application in the small Causes Court on 14/2/2000 praying to allow the police to take inspection by Expert of the disputed rent receipts and while all these proceedings were pending, the petitioner no. 1 came to be arrested by the Bandra Police Station on 9/7/2000 and was subsequently released on conditional bail on the same day.

(3.) IN his order dated 10/8/1993 the learned Judge of the Small Causes Court stated that admittedly the plaintiff-tenant had produced rent receipts on record in Injunction No. No. 122 of 1990 which were purported to be issued by the landlady and photostat copies of those receipts were supplied to the defendants. As per the provisions of the C. P. C. the court can direct the plaintiff to supply copies of the documents on which he has placed reliance to the other side and that was already done by the plaintiff. In case the defendants had any doubts about the veracity of these receipts, they could raise that point in their Written statement and could very well agitate the same at the time of hearing of the suit. The learned Judge further observed that the defendants were at liberty to convince the court that the signatures on the rent receipts were forged.

(4.) WHEN the veracity of the rent receipts was doubtful, as per the defendants, they were not prevented from making an application to the Small causes Court during the course of the trial of the suit to forward the rent receipts to the handwriting expert so as to obtain his opinion and on submission of the opinion either way, both the parties were at liberty to examine the handwriting expert. Thus the issue regarding the signature of the landlady on the subject rent receipts and its genuineness could have been decided by the Small Causes Court during the trial of the suit in which these receipts were brought on record. It was most unwarranted for the present respondent no. 3 to approach the larned Metropolitan magistrate with a criminal complaint for the offences punishable under Sections 467 to 469, 471 and 420 read with Section 34 of IPC when the issue of the authenticity of the rent receipts was also subjudice before the Small Causes Court. The

respondent no. 3 abused the process of law by filing a private complaint before the learned Metropolitan Magistrate, 9th Court, Bandra, Bombay for the very same purpose and even otherwise the issue, whether the rent receipts were signed by the landlady or not has to be proved by the handwriting expert and not by the police. The criminal complaint was aimed at harassing the petitioners-tenants and to make them rush from pillar to post. By way of interim relief granted by this court on 29/9/2000 the trial of the complaint has been stayed and the trial of the complaint, if allowed, is bound to result in duplication of the same action which the Small Causes Court is competent to take for verification of the signatures of the landlady on the rent receipts.

(5.) HENCE, the petition succeeds and the same is hereby allowed partly. Rule is made absolute in terms of prayer clause (b), (c) and (cc). Writ to go forthwith.

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Cross Citation : AIR 1959 ANDHRA PRADESH 204

ANDHRA PRADESH HIGH COURT

(Division Bench)

Coram : 2 K. SUBBA RAO, C. J. AND SRINIVASACHARI, JJ.

Koppala Venkataswami, v. Satrasala Lakshminarayana Chetti and another, Respondents.

Appeal No. 352 of 1952; A.A.O. No. 270 of 1952 and Civil Misc. Petns. Nos. 1677 and 1678 of 1955, D/- 20 -12 -1956.

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Criminal P.C. (5 of 1898), S.476 - FORGERY - Suit on forged contract - Party found to have committed forgery - Where it was found as a fact that in the suit on a contract the party, had committed acts of deliberate forgery in concocting a false contract in support of his claim, such a person is obviously a danger to society and this is a typical case where the Court should file a complaint under S. 476 Cr. P.C. (Para 16)

Section 476, Cr. P.C. is conceived in the interests of the public and unless complaints are made against parties or witnesses who are proved to be forgers or perjurers in time, the growing evil of the impunity with which documents are got up and false evidence secured to support false and frivolous claims or to defeat genuine ones, cannot be controlled or eradicated. This cannot be done if the appellate Court suspends the operation of the order of a subordinate Court directing the filing of a complaint as a matter of course when an appeal is filed by a party against that order. It is necessary that the appellate Court should scrutinise the facts of the case with care and give stay only if it is convinced that there is an arguable case for the appellant. (Para 17)

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A. Ramakrishna Rao for the Petitioner; Govt. Pleader (Sri M. Seshachalapathi), Public Prosecutor (Sri D. Munikannaiah), B. Venkataramaiah and V.V. Nagaramaiah, for Respondents.

Judgement

K. SUBBA RAO, C. J. :- This is a plaintiff's appeal against the decree and judgment of the Court of the District Judge, Anantapur, in O.S. No. 6 of 1951, a suit filed by the appellant to recover a sum of Rs. 29,264-9-3 from the defendants.

2. The defendants are the partners of a firm carrying on business under the name and style of "S. Lakshminarayana Chetti, V. Hanumantbayya Chetti, Thimmaneherla." The plaintiff is a businessman residing at the same place. The plaintiff's case is that the 1st defendant, on behalf of the firm, entered into an agreement with the plaintiff on 19-7-1947 to buy 2000 bags of coriander seeds, each bag containing 40 seers at Rs. 28-10-0

per bag and to take delivery of the same on or before 30-10-1947. Alleging that the defendants denied that they

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entered into any such contract with the plaintiff, the plaintiff filed the aforesaid suit for recovery of damages being the difference between the contract rate and the market rate.

3. The defendants denied that they entered into any agreement with the plaintiff either on 19-7-1947 or on any subsequent date to buy 2000 bags or any quantity whatsoever of coriander seeds or any other goods.

4. The learned District Judge, on a consideration of the entire evidence placed before him, came to the conclusion that the defendants did not enter into the alleged contract with the plaintiff. On that finding, the suit was dismissed. Hence, the appeal.

5. The only question in this appeal is whether the defendants entered into a contract with the plaintiff on 19-7-1947 to buy 2000 bags of coriander seeds. Ex. A-1 is the alleged contract. It purports to be a contract form of the defendants firm duly filled up embodying the terms of the suit contract. Appended to the document are the signatures of the 1st defendant as a buyer and the plaintiff, as a seller.

It is dated 19-7-1947, P.W. 1, the plaintiff, says that the document was written by some clerk of the defendants' firm and was signed by the 1st defendant. The 1st defendant as D.W. 2 denies that he executed Ex. A-1 and states that the handwriting is not that of his clerk. The clerk, who is alleged to have written this document, has not been examined.

The evidence of the plaintiff and that of the 1st defendant discloses that they were on bad terms during the crucial period and that there was also litigation between them which was taken up to the High Court. The evidence of P.W. 1, who is obviously an interested witness, cannot, therefore, be accepted unless ft is corroborated by other evidence or supported by convincing and probabilising circumstances.

6. Ex. B-2 is one of the admitted forms of contracts maintained by the defendants. A comparison of the ink and print found in Exs. A-1 and B-2 indicates that Ex. A-1 is not one of the forms printed by the defendants for their use. There is obvious difference in the ink used and print in both the forms. While Ex. B-2 shows a clear perforation at the top indicating that it was removed from the contract form book, Ex. A-1 does not disclose a clear perforation but only a clumsy attempt to make it appear that there is such perforation.

7. A comparison of the signature of the 1st defendant in Ex. A-1 with those found in Exs. B-4 to B-10 brings out the clear differences between the two. While the admitted signatures are in a free and flowing hand, the disputed one appears to be a laboured and constrained one. D.W. 2 says that in his signature ordinarily there will be spacing between the first two letters and the third letter and that the final two letters are written one over the other.

In the admitted signature, the first two letters are written over one another and there is spacing between the 2nd letter and the 3rd letter whereas it is not so in the case of the disputed signature. In this case, we have not had the advantage of a Handwriting Expert scrutinising the signatures and giving his opinion on the genuineness or otherwise of the disputed signature. This is certainly one of those cases where Expert evidence would have been of great use.

But, for one reason or other that was not done in the Court below. The learned Counsel for the appellant suggests that the document may now be sent to an Expert but we think the request is rather too late for the suit is of the year 1950 and six years have passed by. The appellant also filed an application for admission of other documents containing 1st defendant's signatures for comparison. It is alleged in the affidavit filed in support of the petition that the said documents were sent to the High Court in Appeal No. 812 of 1948,

and, after the appeal was disposed of, they had been returned to the District Court, Anantapur and they were still there.

But that appeal was disposed of in February 1951, whereas the suit, out of which this appeal arises, was dismissed on 25-2-1952 and the plaintiff had every opportunity to file the documents in the District Court if he had intended to use them for the purpose of comparison. There are no grounds for admitting the fresh documents sought to be filed in this case.

No doubt, a comparison of the signatures without the help of an Expert may not afford a conclusive test in the case of expert forgers. But, in this case, the disputed signature appears to belong to a class different from the group of admitted signatures. It is not as if the admitted signatures were scribbled on some unimportant papers but they were all affixed to promissory notes wherein the 1st defendant was undertaking a liability.

Therefore, the easy flow of the admitted signatures cannot be explained away by stating that in Ex. A-1 the 1st defendant was putting his signature to a solemn document whereas in the other documents he was scribbling away an unimportant document. A comparative study of the signatures in this case certainly supports the case of the def endants.

8. Learned counsel strongly relies upon Ex. A-4, a letter dated 25-10-1947 alleged to have been written By the 1st defendant to the plaintiff in reply to a demand made by him in Ex. A-2 dated 24-10-1947 wherein the 1st defendant intimated to him that, as soon as Sarabhayya came to the village, he would come and take delivery of the goods. This letter, it is said, was received by the plaintiff in an envelope Ex. A-5 with the seal of Thimmancherla dated 26-10-1947.

If this letter was genuine, it would establish the plaintiff's case for it contains a clear admission of the existence of the contract. D.W. 2 denies that he had written any such letter. Ex. A-4 is written on a bill form used by the defendants' firm. D.W. 2 has produced a book containing duplicate copies of the bills of his firm. Ex. A-4, as the learned District Judge points out, fits in with this book. It admittedly contains the initials of the 1st defendant.

A scrutiny of Ex. A-4 discloses that some writing originally written was effaced and the contents of Ex. A-4 were engrossed thereon above the signature. The first question that occurs to one's mind is whether a reply to a demand under Ex. A-2 would have been written on a bill form when the defendants must have had letter headings of their own and that too not signed but initialled by the 1st defendant. The defendants on 27-10-1947 gave a reply Ex. A-2 through their advocate Sri G. Nagi Reddi, Goory.

In that notice, the defendants denied in specific terms that they entered into any contract with the plaintiff for the purchase of coriander. They also alleged that, for the reason that they had obtained a decree against the plaintiff in the District Court, Anantapur, the plaintiff had concocted matters and written a letter in the manner he did.

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If really on 25-10-1947 the 1st defendant had admitted the existence of the suit contract, is it likely that, two days thereafter, he would have issued a reply notice denying the existence of such a contract and attributing forgery to the plaintiff for such a belated denial after the clear admission in Ex. A-4 would not have served the defendants' purpose. That apart, the plaintiff sent two telegrams to the defendants dated 29-10-1947 and 30-10-1947 and also a notice Ex. A-10 dated 17-12-1947 through his advocate Sri D.L. Chetti.

If really the defendants admitted the contract in Ex. A-4 and denied it in Ex. A-6, is it likely that the plaintiff would not have mentioned in the telegrams or, at any rate, in the letter dated 17-12-1947 the fact that at the earliest moment he admitted the contract. Even in the plaint no mention was made of Ex. A-4. It is inconceivable that, if there was a document like Ex. A-4 admitting the contract and if that fact was mentioned to the

plaintiff's advocate, he would not have prominently stated in the plaint that the defendant was denying the contract notwithstanding the fact that he admitted it as early as 25-10-1947.

The only explanation for this omission the plaintiff can offer in his evidence is that he did not show Ex. A-4 to his advocate at the time he issued the notice Ex. A-10. This is one of those hackneyed explanations witnesses offer when driven to a corner. The explanation is too thin for acceptance. The fact that Ex. A-5, a postal cover addressed to the plaintiff dated 26-10-1947 was produced is not of much consequence.

Both the persons belong to the village of Thimmancherla and the plaintiff, who forged Ex. A-4 could have easily put that letter in Ex. A-5 addressed it to himself and posted it We have no doubt that the plaintiff secured some used bill issued by the defendants and, after erasing the contents, engrossed the reply notice over the initials of the 1st defendant.

9. There are also many circumstances in this case which improbabiblise the existence of any such contract between the parties. The defendants filed O.S. No. 48 of 1946 against the plaintiff for recovering damages to the extent of Rs. 6,000/- in connection with some other contract. The plaintiff, in his turn, filed another suit against the defendants for a sum of Rs. 19,000/- on the basis of some alleged oral contract entered into by the defendants with him.

The District Court decreed the suit filed by the defendants in part and dismissed the suit filed by the plaintiff. The defendants filed an appeal to the High Court against the decree of the Sub Court, in so far as it disallowed their claim, while the plaintiff preferred cross-objections. Pending the appeal, when the defendants sought to execute the decree, the plaintiff filed an application in July 1947 praying for six months time. The defendants were given notice that the said application would be heard on 26-7-1947.

While the plaintiff says that a friendly order was made in that application granting time, the 1st defendant says that notwithstanding the fact that he opposed the application, the Court gave time as the plaintiff deposited a sum of Rs. 1,000/-. In view of the fact that the appeal was pending and the parties were keenly contesting the same, it is not likely that the defendants would have agreed for giving additional time to the plaintiff.

It is more likely that the Court, in view of the part payment made by the plaintiff, granted time. The suit contract was alleged to have been entered into between the parties on 19-7-1947 just a week before the application praying for time came up for hearing and when the appeal was pending in the High Court. It is very improbable that the defendants would have entered into a contract with the plaintiff during the period when they were seriously fighting in respect of other contracts alleged to have been entered into between them.

10. Secondly, there is clear evidence in this case that, during the period the defendants are alleged to have entered into a contract with the plaintiff, there was a downward trend in the market for coriander. Ex. B-11, the account book kept by the firm of Vallamkonda Adeppa and produced by D.W. 1 shows that the market rates for coriander was ranging between Rs. 21/- and Rs. 22/- during the period commencing from 27-2-1947 and ending with 2-11-1947.

On the side of the plaintiff P.W. 2 was examined to establish that on 18-7-1947 the price of coriander had risen upto Rs. 30/- Exs. A-15 and A-1S dated 18-7-1947 are the entries in the account book produced by P.W. 2. The book purports to relate to the firm of Golla Narayanappa in Thimmancherla. The entries do not give any particulars of the persons from whom the coriander was purchased or to whom it was sold.

They do not contain the seals of the Income-tax Officer or the Sales Tax Officer. The said items are also not in the hand-writing of P.W. 2. The items, therefore, are not proved and the evidence of P.W. 2 in the circumstances cannot be accepted, particularly when Ex. B-11, the account book of another firm, shows that, during a period of nine months, the

price of coriander did not exceed the rate of Rs. 24/- per bag. It is, therefore clear to our mind that the defendants who are businessmen would not have entered into a contract with the plaintiff at such a high rate when there-was a downward trend in the market for coriander.

11. Further, there is also the evidence of D.W. 2 to the effect that the defendant' firm ceased to do any active business and that they did not wind up the business only because of the pendency of the aforesaid suits. There is no reason to disbelieve the evidence of D.W. 2. We, therefore, hold, on a consideration of the oral and documentary evidence and the probabilities in the case, that thy plaintiff has failed to establish that the defendants entered into the suit contract with him.

12. It is then contended that the learned Judge went wrong in awarding maximum compensatory costs the defendant, namely, Rs. 1000/-. We think, having regard to the glaring forgery committed by the plaintiff in this case presumably to wreck his vengeance upon the defendants, the learned Judge was certainly justified in exercising his power under Section 35A(1)(2), C.P.C. and awarding maximum costs to the defendants. This is a typical example of false and vexatious claims, for which compensatory costs are provided under Section 35 A.C.P.C.

13. In the result, we dismiss the appeal with costs. In our view, the respondents should also be given compensatory costs. Notwithstanding the clear findings of the District Judge, the appellant persisted in his false claim for four long years and put the respondents to unnecessary trouble and expense. We fix the compensatory costs at Rs. 1000/-.

14. C.M.P. No. 1677 of 1955 : There are no grounds for admitting fresh evidence at this very late stage. The appellant could, with some diligence, have filed all the documents now sought to be admitted here in the first court itself. The application is dismissed.

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15. C.M.P. No. 1678 of 1955 : Dismissed.

16. C.M.A. No. 270 of 1952 : This is an appeal against the order of the District Judge, Anantapur, directing a complaint to be filed against the plaintiff under Ss. 209, 467 and 471, I.P.C. We have found, agreeing with the learned District Judge, that the appellant had committed acts of deliberate forgery by concocting Exs. A-1 and A-4 in support of his claim. The plaintiff forged the said documents to support his claim for a large amount of Rs. 29,264-9-3.

Such a person is obviously a danger to society and this is a typical case where the Court should file a complaint under S. 476, Cr. P.C. The learned District Judge has rightly exercised his discretion and made the complaint. But, unfortunately, the above appeal was filed against that order and the High Court stayed the operation of the order with the result that four years have passed by from the date of the order of the learned Judge and 9 years from the date the forgery was committed.

The question is whether it is expedient in the interests of justice that an enquiry should be made into the offence within the meaning of S. 476(1), Cr. P.C. We think, that in view of the inordinate delay, no useful purpose will be served by prosecuting the appellant for an act of forgery committed in the year 1947. Though this is a case of the type for which S. 476, Cr. P.C. is really intended, with great reluctance we have come to the conclusion that no further proceedings need be taken against the appellant.

17. Section 476, Cr. P.C. is conceived in the interests of the public and unless complaints are made against parties or witnesses who are proved to be forgers or perjurers in time, the growing evil of the impunity with which documents are got up and false evidence secured to support false and frivolous claims or to defeat genuine ones, cannot be controlled or eradicated.

This cannot be done if the appellate Court suspends the operation of the order of a subordinate Court directing the filing of a complaint as a matter of course when an appeal is filed by a party against that order. It is necessary that the appellate Court should scrutinise the facts of the case with care and give stay only if it is convinced that there is an arguable case for the appellant.

The appellate Courts also-whether it is the High Court or the first appellate Court should try to dispose of such appeals as early as possible so that the purpose of S. 476, Cr. P.C. is not defeated. Learned Counsel appearing for the Government Pleader suggested that, even if the appellate Court suspends the order of a subordinate Court directing the filing of a complaint, the Magistrate before whom such a complaint was filed would have to stay the trial on the ground that an appeal was pending. Section 476(3), Cr. P.C. reads :

"Where it is brought to the notice of such Magistrate or of any other Magistrate to whom the case may have been transferred that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter had arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided."

This sub-section does not enjoin on a Magistrate the obligation to adjourn every such trial, whenever an appeal is filed. It is in his discretion to do so having regard to the facts of each case. This rule, cannot, therefore, be interpreted as to compel a Magistrate to automatically adjourn a case on the ground that an appeal was pending against the decision arrived at in the judicial proceeding out of which the matter has arisen.

He should exercise his discretion with care and if he is of the opinion that the appeal is frivolous he should not adjourn the trial unless the party concerned gets a stay order from the appellate Court. We hope and trust that, in the interests of the administration of justice in the State, the aforesaid procedure would, as far as possible, be followed.

18. The appeal is allowed but, in the circumstances, the appellant is directed to pay the costs of the respondent.

Order accordingly.

2009 ALL SCR (O.C.C) 193=AIR 1986 SC 872

SUPREME COURT OF INDIA
(FULL BENCH)

Express Newspaper Pvt.Ltd-Vs-Union of India

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Constitution of India , Arts. 32,226-Malafides- Pleadings- If allegations of malafides remain unrebutted and unanswered court is bound constrained to accept them.

Per A.P. Sen ,J:- Where malafides are alleged , it is necessary that the person against whom such allegations are made should come forward with an answer refuting or denying such allegations.For otherwise such allegations remain unrebutted and the court would in such a case be constrained to accept the allegations so remaining unrebutted and unanswered on the test of probability .It is not for the parties to say what is relevant or not. The matter is one for the court to decide.

(para 115)

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1996 CRI. L. J. 3983 = AIR 1996 SC 2687 = 1996 AIR SCW 3356

SUPREME COURT

(From : Bombay)*

Coram : 2 Dr. A. S. ANAND AND K. T. THOMAS, JJ. (Division Bench)

Criminal Misc. Petn. No. 3830 of 1996 in Criminal Appeals Nos. 276-277 of 1993, D/- 13 -8 -1996.

Dr. Buddhi Kota Subbarao, Applicant v. K. Parasaran and others, Respondents.

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Criminal P.C. (2 of 1974), S.191, S.192, S.193 - The course adopted by the applicant is impermissible and his application is based on mis-conception of law and facts. No. litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived or frivolous petitions- We have referred to the history of the case only to show how the applicant has, thanks to the permissiveness of the judicial system, filed one petition after another to question the validity-.(para 6&11)

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AIR 1994 SUPREME COURT 853 = 1994 AIR SCW 243

SUPREME COURT OF INDIA

Coram : 2 KULDIP SINGH AND P. B. SAWANT, JJ.

Civil Appeal No. 994 of 1972, D/- 27 -10 -1993.

S. P. Chengalvaraya Naidu (dead) by L.Rs., Appellants v. Jagannath (dead) by L.Rs. and others, Respondents.

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(A) Evidence Act (1 of 1872), S.44 - EVIDENCE - JUDGMENT - FRAUD - Proceeding in court - Fraud on Court by litigant - Withholding of vital document relevant to litigation - It is fraud on Court - Guilty party is liable to be thrown out at any stage – The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. It can be said without hesitation that a person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

> "Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment / decree -- by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

(B) Civil P.C. (5 of 1908), S.2(2)-Evidence Act (1 of 1872), S.44 - EVIDENCE - JUDGMENT - FRAUD - Litigant obtaining preliminary decree for partition of property BY suppressing material fact - Not mentioning at trial as to his having executed before filing of suit release deed the non-production and non-mentioning of the release deed at the trial tantamounted to playing fraud on the court vitiating the decree - Decree is vitiated by fraud.

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JUDGEMENT

KULDIP SINGH, J.:- "Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment / decree -- by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

2. Predecessor-in-interest of the respondents-plaintiffs filed application for final decree for partition and separate possession of the plaint properties and for mesne profits. The appellants defendants contested the application on the ground that the preliminary decree, which was sought to be made final, was obtained by fraud and, as such, the application was liable to be dismissed. The trial Judge accepted the contention and dismissed the application for grant of final decree. The respondents-plaintiffs went in appeal before the High Court. A Division Bench of the High Court went through plethora of case law and finally allowed the appeal and set aside the order of the trial Court. This appeal is by way of certificate granted by the High Court.

3. One Jagannath was the predecessor-in interest of the respondents. He was working as a clerk with one Chunilal Sowcar. Jagannath purchased at court auction the properties in dispute which belonged to the appellants. Chunilal Sowcar had obtained a decree and the court sale was made in execution of the said decree. Jagannath had purchased the property in the court auction on behalf of Chunilal Sowcar, the decree-holder. By a registered deed dated November 25, 1945, Jagannat relinquished all his rights in the property in favour of Chunilal Sowcar. Meanwhile, the appellants who were the judgment-debtors had paid the total decretal amount to Chunilal Sowcar. Thereafter, Chunilal Sowcar, having received the decretal amount, was no longer entitled to the

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property which he had purchased through Jagannath. Without disclosing that he had executed a release deed in favour of Chunilal Sowcar Jagannath filed a suit for partition of the property and obtained a preliminary decree. During the pendency of' the suit, the appellants did not know that Jagannath had no locus standi to file the suit because he had already executed a registered release deed, relinquishing all his rights in respect of the property in dispute, in favour of Chunilal Sowcar. It was only at the hearing of the application for final decree that the appellants came to know about the release deed and, as such, they challenged the application on the ground that non-disclosure on the part of Jagannath that he was left with no right in the property in dispute, vitiated the proceedings and, as such, the preliminary decree obtained by Jagannath by playing fraud on the court was a nullity. The appellants produced the release deed (Ex. B- 15) before the trial Court. The relevant part of the release deed is as under:-

"Out of your accretions and out of trust vested on me, purchased the schedule mentioned properties benami in my name through court auction and had the said sale confirmed, The said properties are in your possession and enjoyment the said properties should henceforth be held and enjoyed with all rights by you as had been done;

"So far. If any civil or criminal proceedings have to be conducted in respect of the said properties or instituted by others in respect of the said properties you shall conduct the said proceedings without reference to me and shall be held liable for the profits or losses

you incur thereby. All the records pertaining the aforesaid properties are already remaining with you."

4. The High Court reversed the findings of the trial Court on the following reasonings :-

"Let us assume for the purpose of argument that this document, Exhibit B-15, was of the latter category and the plaintiff, the benamidar, had completely divested himself of all rights of every description. Even so, it cannot be held that his failure to disclose the execution of Exhibit B-15 would amount to collateral or extrinsic fraud. The utmost that can be said in favour of the defendants is that a plaintiff who had no title (at the time when the suit was filed) to the properties has falsely asserted title and one of the questions that would arise either expressly or by necessary implication is whether the plaintiff had a subsisting title to the properties. It was up to the defendants, to plead and establish by gathering all the necessary materials, oral and documentary, that the plaintiff had no title to the suit properties. It is their duty to obtain an encumbrance certificate and find out whether the plaintiff had still a subsisting title at the time of the suit. The plaintiff did not prevent the defendants, did not use any contrivance, nor any trick nor any deceit by which the defendants were prevented from raising proper pleas and adducing the necessary evidence. The parties were fighting at arm's length and it is the duty of each to traverse or question the allegations made by the other and to adduce all available evidence regarding the basis of the plaintiff's claim or the defence of the defendants and the truth or falsehood concerning the same. A party litigant cannot be indifferent, and negligent in his duty to place the materials in support of his contention and afterwards seek to show that the case of his opponent was false. The position would be entirely different if a party litigant could establish that in a prior litigation his opponent prevented him by an independent, collateral wrongful act such as keeping his witnesses in wrongful or secret confinement, stealing his documents to prevent him from adducing any evidence, conducting his case by tricks and misrepresentation resulting in his misleading of the Court. Here, nothing of the kind had happened and the contesting defendants could have easily produced a certified registration copy of Exhibit B- 15 and non-suited the plaintiff; and, it is absurd for them to take advantage of or make a point of their own acts of omission or negligence or carelessness in the conduct of their own defence."

5. The High Court further held as under :-

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"From this decision it follows that except proceedings for probate and other proceedings where a duty is cast upon a party litigant to disclose all the facts, in all other cases, there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. It would cut at the root of the fundamental principle of law of finality of litigation enunciated in the maxim 'interest republicaent sit finis litium ' if it should be held that a judgment obtained by a plaintiff in a false case, false to his knowledge, could be set aside on the ground of fraud, in a subsequent litigation. "

6. Finally, the High Court held a under:-

"The principle of his decision governs the instant case. At the worst the plaintiff is guilty of fraud in having falsely alleged, at the time when he filed the suit for partition, he had subsisting interest in the property though he had already executed Exhibit B-15. Even so that would not amount to extrinsic fraud because that is a matter which could well have

been traversed and established to be false by the appellant by adducing the necessary evidence. The preliminary decree in the partition suit necesarily involves an adjudication though impliedly that the plaintiff has a subsisting Interest in the property."

7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the, illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.

8. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the Court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to got an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Nonproduction and even non-mentioning of the release deed at the trial tantamounts to paying fraud on the Court. We do not agree with the observations of the High Court that the appellants-defend ants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of playing fraud on the Court as well as on the opposite party.

9. We, therefore, allow the appeal, set aside the impugned judgment of the High Court and restore that of the trial Court. The appellants shall be entitled to their costs which we quantify as Rs. 11,000 / -.

Appeal allowed.

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(1979) 2 Supreme Court Cases 491

SUPREME COURT OF INDIA

(BEFORE P.N. SHINGHAL AND O. CHINNAPPA REDDY, *JJ.)*

SMT S.R, VENKATARAMAN . . Appellant;

Versus

UNION OF INDIA AND ANOTHER .. Respondents.

Civil Appeal No. 2764 of 1977+=, decided on November *2,* 1978

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Malice in law— Natural justice— Mala fide— Malice in fact and malice in law— Difference between the two concepts— But question of malice immaterial where discretionary power is used for unauthorised purpose— Malice in law is different from malice in fact and may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause - Held, gross abuse of legal power to use a rule to a purpose and in a manner unwarranted by it - Order infected with an abuse of power as is based on nonexisting facts (Para 5)

Shearers. Shields, (1914) AC 808, 813, relied on But in the present cose it is not necessary to examine the question of malice in law for if a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. It will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. It is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence.It will be gross abuse of legal power to punish a person or destroy her service carrer in a manner not warranted by law by using a rule meant to be exercised in the. public interest to a purpose wholly unwarranted by it and thereby to arrive at quite a

contradictory result. An administrative order based on reasons of fact that do not exist must be held to be infected with an abuse of power and must be set aside. (Paras 6 to 10)

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Eq. citation: **(2010) 2 Supreme Court Cases 114**

SUPREME COURT OF INDIA

(BEFORE G.S. SINGHVI AND AX GANGULY, JJ.)

Dalip Singh .. Versus

State Of Uttar Pradesh And Others.

Civil Appeal No. 5239 of 2002,

Decided on December 3, 2009

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A) Practice and Procedure— Abuse of process— New creed of dishonest litigants, misleading court and suppressing facts noticed and strongly deprecated— No relief should be granted to such persons- A litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final .

A party which has misled the Court in passing an order in its favour is not entitled to be heard on the merits of the case. A person who invokes the Court's jurisdiction is duty-bound to place all the facts before the Court without any reservation. If there is suppression of material facts or twisted facts have been placed before the High Court then

it will be fully justified in refusing to entertain a petition filed under Article 226 of the Constitution. (Paras 4 and 7)

It is imperative that the petitioner approaching the writ court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim.

The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. It is now well established that a iltigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. { Para 1 and 2)

Tenancy and land Laws—Determination on merits—Entitlement to— Matter delayed by tenure-holder and his heirs by misleading court and suppressing facts.

B) Inconsistent and alternativee plea— amounts to suppression of facts— Party prima facie suppressing facts and misleading court is Abuse of process- Party approaching court suppressing facts and misleading court— Party suppressing facts, held, is not entitled to be heard on merits.

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A V. Papayya Sastry v. Govt, of A. P., (2007) 4 SCC 221; Sunil Poddar v. Union Bank of India, { 2008) 2 SCC 326, relied on Hari Narain v. Badri Das, AIR 1963 SC 1558; Weicom Hotel v. State of A. P., (1983) 4 SCC 575: 1983 SCC { Cri) 872; G. Narayanaswamy Reddy Govt, of Karnataka, (1991) 3 SCC 261; 5. P. Chengaivaraya NaidusL Jagannath, (1994) 1 SCC 1; Prestige Lights Ltd. v. SBI, (2007) 8 SCC 449; ft v. Kensington Income Tax Commissioners, (1917) 1 KB 486 (CA), relied on K.D. Sharmav Sail(2008) 12 SCC 481 G Jayashree M.Bhagwandas S.Patel (2009) 3SCC 141, SS-D/44363/C

Advocates who appeared in this case:

Shambu Prasad Singh, Prashante Jha and Ms Manjula Gupta, Advocates, for the Appellant; Pramod Swarup, Senior Advocate (LK. Pandey, S.K. Dwivedi, Amtt Singh, Ms Sushma Verma, Chandra Prakash Pandey, Dr. Krishan Singh Chauhan, K.C. Lamba, Chand Kiran and Kartar Singh, Advocates) for the Respondents.

ORDER

For many centuries Indian society cherished two basic values of life i.e. „ satya, (truth) and. ahimsa. (non-violence) . Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice- delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression offsets in the court proceedings.

2) In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now wefl established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

3) In Hart Narain v. Badri Dasl this Court adverted to the aforesaid rule and revoked the leave granted to the appellant by making the following observations: (AIR p. 1558)

It is of utmost importance that in making material statements and forth grounds in applications for special leave made under Article 136 of the Constitution, care must De taKen not iu y statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterises as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in such a case special leave granted to the appellant ought to be revoked..

4) In Welcom Hotels/. State ofA.P.[2] the Court held that a party which has misled the Court in passing an order in its favour is not entitled to be heard on the merits of the case.

5) In G. NarayanaswamyReddyv. Govt, of Karnataka* the Court denied relief to the appellant who had concealed the fact that the award was not made by the Land Acquisition Officer within the time specified in Section 11-A of the Land Acquisition Act because of the stay order passed by the High Court. While dismissing the special leave petition, the Court observed:

(SCC p. 263, para 2)

. 2. \ Curiously enough, there is no reference in the special leave petitions to any of the stay orders and we came to know about these orders only when the respondents appeared in response to the notice and filed their counter-affidavit. !n our view, the said interim orders have a direct bearing on the question raised and the non-disclosure of the same certainly amounts to suppression of material facts. On this ground alone, the special leave petitions are liable to be rejected. It is well settled in law that the relief under Article 136 of the Constitution is discretionary and a petitioner who approaches this Court for such relief

must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed. We accordingly dismiss the special leave petitions.

6) In S.P. Chenga/varaya Naiduv. JagannattA the Court held that where a preliminary decree was obtained by withholding an important document from the court, the party concerned deserves to be thrown out at any stage of the litigation.

7) In Prestige Lights Ltd. v. $815 it was held that in exercising power under Article 226 of the Constitution of India the High Court is not just a court of law, but is also a court of equity and a person who invokes the High Court's jurisdiction under Article 226 of the Constitution is duty- bound to place all the facts before the Court without any reservation. If there is suppression of material facts or twisted facts have been placed before the High Court then it will be fully justified in refusing to entertain a petition filed under Article 226 of the Constitution. This Court referred to the judgment of Scrutton, LJ. in R v. Kensington Income Tax Commissioner*, and observed:

> (Prestige Lights Ltd cas&>, SCC p. 462, para 35)
> In exercising jurisdiction under Article lib TO the UJnsTituuon, me nigh toun win always Keep in menu the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the court, then the Court may dismiss the action without adjudicating the matter on merits. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible.

8) In A V. Papayya Sastryv. Govt. of A.P 7 the Court held that Article 136 does not confer a right of appeal on any party. It confers discretion on this Court to grant leave to appeal in appropriate cases. In other words, the Constitution has not made the Supreme Court a regular court of appeal or a court of error. This Court only intervenes where justice, equity and good conscience require such intervention.

9) In Sunil Poddarv. Union Bonk of IndiaS the Court held that while exercising discretionary and equitable jurisdiction under Article 136 of the Constitution, the facts and circumstances of the case should be seen in their entirety to find out if there is miscarriage of justice. If the appellant has not come forward with clean hands, has not candidly disclosed all the facts that he is aware of and he intends to

delay the proceedings, then the Court will non-suit him on the ground of contumacious conduct.

10) In K.D. Sharmav. SAILS the Court held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the writ court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be ismissed at the threshold without considering the merits of the claim. The same rule was reiterated in G. Jayashreev. Bhagwandas S. PatellO.

11) This appeal, which is directed against the order dated 21-5-2001 passed by the Allahabad High Court is illustrative of how unscrupulous litigants can mislead the authorities entrusted with the task of implementing the provisions of the U.P. imposition of Ceiling on Land Holdings Act, 1960 (for short a the Act.) and the courts for retaining possession of the surplus land. The tenure-holder, Praveen Singh did not file statement in terms of Section 9 |2-A) of the Act in respect of his holding as on 24-1-1971. After about four years, the prescribed authority issued notice dated 29-11-1975 under Section 10(2) of the Act and called upon Shri Praveen Singh to show cause as to why the statement prepared under Section dingly. A copy of the statement was sent to Shri Praveen Singh along with the notice in CLH Form 4. For the sake of convenient reference, the notice is reproduced beiow:

, CLH FORM 4 (See Rule 8) [Form of notice under Section 10(2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960]

To, name of tenure-Holder Shri Praveen Singh,

With parentage Address s/o Shri Raghubir Singh, andr/o Village Tisotara, PO Khas, Pargana Kirat Pur, Tehsil Najibabad, District Bijnor.

Whereas you have failed to submit a statement/have furnished incomplete/incorrect statement in respect of all your holdings in the State of Uttar Pradesh including holdings of your family members with all the required particulars within the time mentioned in the notice in CLH Form 1, published under Section 9;

And whereas the statement of all holdings held by you in the State on 8-6-1973, statement showing proposed ceiling area applicable to you and the proposed surplus land have been prepared under subsection (1) of Section 10, they are sent to you herewith and you are hereby called upon to show cause within a period of 15 days from the date of service of this notice, why the said statement be not taken as correct.

On your failure to dispute the correctness of the statements in any court, within the time allowed, the aforesaid statement shall be treated as final and ceiling area applicable to you and the surplus land shall be determined accordingly.

Given under my hand and seal of the Court this day of 29-11-1975.

sd ./-
Signature of the prescribed authority of the Sub-
Division Tehsil Najibabad..

12} The notice was delivered to Shri Praveen Singh on 3-12-1975, but he neither filed any objection to the proposed determination of his surplus land nor sought extension of time for the said purpose. After service of notice, the prescribed authority adjourned the case on 10-12-1975 and again on 19-12-1975 apparently with the hope that the tenure-holder may file objection to the statement prepared under Section 10(1). This is evident from the proceeding sheets of the two dates, which are reproduced below:

„ Proceedings dated 10-12-1975 File received after service of notice on the tenure-holder on 3-12-1975. It is ordered that the file be put up on 19-12-1975 after receipt of objections.
sd/-
Prescribed Authority Proceedings dated 19-12-1975 File put up. The ensure-holder has not filed any objection despite service. It is ordered that the file be put up for ex parte orders on 27-12-1975.

sd/-

Prescribed Authority,

13) On 27-12-1975, the prescribed authority noted that Shri Praveen Singh has not filed any objection and eclared that 18.22 acres of irrigated land was surplus in the hands of the tenure- holder. After six months and twelve days, Shri Praveen Singh submitted an application dated 8-7- 1976 along with what was termed as an ffidavit efore the prescribed authority and prayed that ex parte order dated 27-12-1975 may be set aside and he may be given opportunity to file objections and tender evidence. The prescribed authority rejected the application on the same day i.e. 8-7-1976 by observing that no valid ground has been made out for reconsidering the matter after six months.

14) The appeal preferred by Shri Praveen Singh against the order of the prescribed authority was dismissed by the Additional Commissioner (Judicial), Allahabad (Appellate Authority) in default because no one appeared on the date of hearing. The restoration application filed by Shri Praveen Singh wasdismissed on 27-8-1980. He then challenged the orders of the prescribed authority and the appellate authority in Writ Petition No. 8342 of 1980, which was allowed by the High Court and the matter was remitted to the appellate authority with a direction to decide the application of Shri Praveen Singh afresh in accordance with law.

15) In compliance with the direction given by the High Court, the appellate authority reconsidered the appeal of Shri Praveen Singh but dismissed the same on the ground that the tenure-holder had not filed an application under Section 5 of the Limitation Act for

condonation of the delay and even in the application filed for setting aside the ex parte order, no cause was shown for the delay. The appellate authority also observed that the tenure-holder had not denied receipt of notice dated 29-11 -1975 issued under Section 10(2) of the Act, but did not file any objection till the passing of ex parte order on 27-12-1975 and that his assertion of having come to know of the ex parte order from Lekhpal Halqa on 7-7-1976 is not believable. It appears that after remand of the matter by the High Court, Shri Praveen Singh died and, therefore, his legal representatives (including the appellant herein) were substituted in his place.

16) The legal representatives of Shri Praveen Singh jointly filed Civil Miscellaneous Writ Petition No. 22790 of 1990 and prayed for quashing of orders dated 27-12-1975, 8-7-1976, 7-8-1990 passed by the prescribed authority and the appellate authority respectively. They also prayed for issue of a direction to the appellate authority to remand the case to the prescribed authority for entertaining their objections. In Para 3 of the writ petition, the following statement was made:

. That the petitioner's late father, against whom the proceedings had been initiated under Section 10(2) of the Ceiling Act, filed application on 8-7-1976 supported by an affidavit stating therein clearly that he was seriously ill for about ten months as such he was not in a position to file objection, and as a matter of fact he did not have any knowledge of the date of the proceedings that were being conducted before the prescribed authority. True copy of the application dated 8-7-1976 of the petitioner's late father is annexed herewith as Annexure 2. True copy of the affidavit filed in support of the application dated 8-7-1976 of the petitioner's father is annexed herewith as Annexure 3..

(emphasis added)

17) By an order dated 7-9-1990, the learned Single Judge of the Ailahabad High Court stayed the operation of the orders passed by the prescribed authority and the appellate authority. The interim and during the interregnum the appeflant continued to enjoy the property. In the special leave petition filed against the order of the High Court, notice was issued on 12-10-2001, but the appellant's prayer for stay was declined. Thereafter, the surplus land of the tenure-holder was distributed among the landless persons who were joined as parties pursuant to order dated 7-3-2006 passed in IA No. 9 of 2004.

18) After service of notice. Respondents 1 to 3 filed counter in the form of an affidavit of Shri Pradip Kumar Singh, Additional Tahsildar, District Bijnor, U.P. In his affidavit, Shri Pradip Kumar gave details of the steps taken by the prescribed authority in terms of Sections 10(1) and 10 (2) of the Act and made a categorical assertion that notice issued on 29-11-1975 was duly served upon Shri Praveen Singh on 3-12-1975. This is evident from Paras 4 (/V) and ($ of the counter-affidavit which read as under:

. (i\) That the averments of facts made in the list of dates against date 7-7-1976 are not admitted being incorrect. The notice in CLH Form 4 having been served on the tenure-holder on 3-12-1975, it was for him to have filed his objection. It was for the tenure-holder

to have managed his affairs. It is not for a court or an authority to communicate to the tenure- holder each and every order passed by it once service of the notice is complete, the Act does not require that each and every date of proceedings and the copy or information about the final order ex parte or otherwise be served on him. The tenure-holder avoided to file his objections since he had none. The statement of surplus land is prepared by the Revenue Authorities in accordance with the provisions of the Act which is prepared on the basis of revenue records of land held by a tenure-hoider in his name and there is. presumption of correctness of the revenue record..

(i} That the averments of fact in the list of date against date 8-7-1976 are not admitted as stated. It is submitted that an application dated 8-7-1976 filed by the tenure-holder did not dispute service of notice in CLH Form 4 dated 29-11-1975. The application was of a general nature. If a tenure-holder having been asked to file objections within 15 days of the date of service of him. chooses not to do so. , would proceed to a presumption that he has nothing to say. Section 11 of the Act provides that where a tenure-holder chooses not to dispute and not to file any objection to the statement prepared by the prescribed authority under Section 10 of the Act within the stipulated period, the prescribed authority. shall, accordingly determine the surplus land of the tenure-holder. Sub-section (2) of Section 11 of the Act further provides that where an application is made by a tenure-holder within thirty days of the date of an order under sub-section (11) of the Act that being a statutory duty cast on the prescribed authority. In the present case the prescribed authority after passing order dated 27-12-1975 fixed the next date as 27-1-1976 i.e. after 30 days and it is only on 27-1-1976 that the prescribed authority sent a notification regarding publication of surplus land in the Official Gazette which was so published on 5-6-1976..

Shri Sunil Kumar Singh, son of the appellant Dalip Singh and grandson of late Shri Praveen Singh filed rejoinder-affidavit dated 18-2-2002, In Para 3 of the rejoinder-affidavit Shri Sunil Kumar Singh made the following statement:

That it is denied categorically that the father of the petitioner had ever received the notice dated 29-11-1975 along with the statement of surplus land, prepared under Section 10 (1) of the Act. It is humbly stated that the father of the petitioner could not file any show cause without going through the abovereferred statement prepared under Section 10(1) of the Act.

20) We have heard the learned counsel for the parties and scrutinised the record. In our opinion, the appeal is liable to be dismissed only on the ground that the tenure-holder Shri Praveen Singh did not state correct facts in the application filed by him on 8-7-1976 before the prescribed authority for setting aside the ex parte order and the appellant did not approach the High Court with clean hands inasmuch as, by making a misleading statement in Para 3 of the writ petition, an impression was created that the tenure-holder did not know of the proceedings initiated by the prescribed authority. By making the saidstatement, the appellant succeeded in persuading the High Court to pass an interim order which made by the authority concerned to distribute the surplus land among landless ersons. Even before this Court, a patently false statement has been made

in the rejoinder- affidavit on the issue of receipt of notice dated 29-11-1975 by Shri Praveen Singh.

21) A perusal of the application dated 8-7-1976 submitted by Shri Praveen Singh for setting aside the ex parte order dated 27-12-1975 passed by the prescribed authority makes it clear that he had pleaded his continuous illness for ten months as the cause for his inability to file objection, in Para 2 of the application, Shri Praveen Singh made a suggestive assertion that he had no knowledge of the proceedings initiated by the prescribed authority and he came to know about the case having been decided ex parte only on 7-7-1976 when he went to Lekhpal to procure memo. There was not even a whisper in the application that notice dated 29-11-1975 issued by the prescribed authority under Section 10(2) of the Act had not been served upon him and on that account he could not file objections within 15 days.

22) The application fiied by Shri Praveen Singh was not supported by any medical certificate or otherevidence which could prima facie establish that he was really sick for ten months. This is the reason why the prescribed uthority refused to reconsider the order dated 27-11-1975 and the appellate authority declined to entertain his prayer for remand of the case to the prescribed authority for the purpose of fresh determination of surplus area case. Notwithstanding this, in the writ petition filed before the High Court a misleading statement was made that due to serious illness, Shri. Praveen Singh could not file objection and, as a matter of fact, he did not have any knowledge of the dates of proceedings which were conducted by the prescribed authority. In view of that statement, the learned Single Judge of the High Court felt persuaded to stay the orders passed by the prescribed authority and the appellate authority which, as mentioned above, resulted in frustration of the action to be taken by the authority concerned for distribution of the surplus land to landless persons for a good period of more than eleven years and enabled the heirs of Shri Praveen Singh to retain possession of the surplus land and enjoy the same. Before the High Court also, no evidence was produced in support of the assertion regarding serious illness of Shri. Praveen Singh.

23) Insofar as this Court is concerned, Shri. Sunil Kumar Singh, grandson of Shri. Praveen Singh and son of the appellant, boldly made a false statement that his grandfather did not receive notice dated 29- 11-1975 along with the statement of surplus land prepared under Section 10 (1) and he could not file any show cause without going through .the statement. We are amazed at the degree of audacity with which Shri Sunil Kumar Singh could make a patently false statement on oath.

24) From what we have mentioned above, it is clear that in this case efforts to mislead the authorities and the courts have transmitted through three generations and the conduct of the appellant and his son to mislead the High Court and this Court cannot, but be treated as reprehensible. They belong to the category of persons who not only

attempt, but succeed in polluting the course of justice. Therefore, we do not find any justification to interfere with the order under challenge or entertain the appellant's prayer for setting aside the orders passed by the prescribed authority and the appellate authority.

25) In the result, the appeal is dismissed. We would have saddled the appellant with exemplary costs but, keeping in view the fact that possession of the surplus land was taken in 2002 and the same has been distributed among landless poor persons, we refrain from doing so.

Advocates who appeared in this case : M.K. Ramamurthy, Senior Advocate (Faqir Chandra, Advocate, with him) , for the Appellant; P.N. Lekhi, Senior Advocate (Girish Chandra, Advocate, with him) , for the Respondents. The Judgment of the Court was delivered by

P.N. SHINGHAL, J.— This appeal by special leave is directed against an order of the Delhi High Court dated November 24, 1976, dismissing the appellant's writ petition in limine.

2. The appellant was promoted to the post of Director in the All India Radio after some thirty years of service under the Government of India. She was working as Joint Director, Family

Planning, in the Directorate General of the All India Radio, when she was served with an order dated March 26, 1976, retiring her prematurely from service, with immediate effect, on the ground that she had already attained the age of 50 years on April 11,1972, and the President was of the opinion that her retirement was in the . public interest, . The appellant made a representation on April 6, 1976, but it was rejected on July 1, 1976. She therefore filed a writ petition in the Delhi High Court under Article 226 of the Constitution in which she, inter alia, made a mention of the hostile attitude of one V.D. Vyas who took over as Chairman of the Central Board of Film Censors from her on February 11,1972. She also made a mention of the adverse remarks made by Vyas in her service record after she had ceased to work under him which, according to her, were, totally unfounded, biased, malicious and without any justification. . She stated that, her integrity had never been considered doubtful 28 years before or 4 years after the period of 21/2 months she spent under him. It was also contended that some basless allegations were made against her because of 3 malicious vendetta, carried on by Vyas, and that the order of premature retirement was not in public interest but was 3 arbitrary and capricious, , and that the retiring authority had not. applied its mind to the record, of her case. It was particularly pointed out that as she was confirmed in the post of Director on April 28, 1973, with retrospective effect from July 10, 1970 any adverse remark in her confidential report before that date could not legitimately form the basis of the order of her premature retirement. The appellant

also pointed out that the order cast a stigma on her conduct, character and integrity and amounted to the imposition of one of the major penalties under the Central Civil Services (Classification, Control and Appeal) Rules, 1965.

3. It is not in controversy, and has in fact been specifically stated in the order of premature retirement dated March 26, 1976, that the appellant was retired in the . public interest, under clause *Q (1)* of Rule 56 of the Fundamental Rules. That rule provides as follows:

. *Q* Notwithstanding anything contained in this rule the appropriate authority shall, if it is of the opinion that it is in the public interest to do so have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice.

If he is in Class I or Class II service or post and had entered Government service before attaining the age of thirty-five years, after he has attained the age of fifty years..

It is also not in dispute that the power under the aforesaid rule had to be exercised in accordance with the criteria and the procedure laid down in Office Memorandum No. F-33/13/61-Ests (A) dated June 23, 1969, of the Ministry of Home Affairs Government of India. It is however the grievance of the appellant that her premature retirement was not made in accordance with the requirements of the rule and the memorandum, but was ordered because of malice, and was arbitrary and capricious as the Government did not apply its mind to her service record and the facts and circumstances of her case. It has been specifically pleaded that the power under FR 56 (*J)* has not been exercised , for the furtherance of public interest, and has been based on. collateral grounds, . The appellant has pointed out in this connection that her service record was examined in March, 1976, by the Departmental Promotion Committee, with which the Union Public Service Commission was associated, and the Committee considered her fit for promotion to the selection grade subject to clearance in the departmental proceedings which were pending against her, and that she was retired because of bias and animosity .Our attention has also been invited to the favorable entry which was made in her confidential report by the secretary of the ministry.

4. Mr Lekhi, learned Counsel for the Union of India, produced the relevant record of the appellant for our perusal. While doing so he frankly conceded that there was nothing on the record which could justify the order of the appellant's premature retirement. He went to the extent of saying that the Government was not in a position to support that unfair order.

5. We have made a mention of the plea of malice which the appellant had

taken in her writ petition. Although she made an allegation of malice against V.D. Vyas under whom she served for a very short period and got an adverse report, there is nothing on the record to show that Vyas was able to influence the Central Government in making the order of premature retirement dated March 26, 1976. It is not therefore the case of the appellant that there was
actual malicious intention on the part of the Government in making the alleged wrongful order of her premature retirement so as to amount to malice in fact. Malice in law is however, quite different. Viscount Haldane described it as follows in *Shearers/. Shields^-:*
. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently..

Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.

6. It is however not necessary to examine the question of malice in law in this case, for it is trite law that if a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. As was stated by Lord Goddard. C.J. in *Pilling* v. *Abergele Urban District Council* where a duty to determine a question is conferred on an authority which state their reasons for the decision,
and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the court to which an appeal lies can and ought to adjudicate on the matter.

7. The principle which is applicable in such cases has thus been stated by Lord Esher, M.R. in *Queen on the Prosecution of Richard Westbrooks. The Vestry of St. Pan era &*
. If people who have to exercise a public duty by exercising their discretion take guidance of their discretion, then in the eye of the law they have not exercised their discretion take into account matters which the courts consider not to be proper for the
This view has been followed in Sadlers. Sheffield CorporadorA.

8. We are in agreement with this view. It is equally true that there will be an
error of fact when a public body is prompted by a mistaken belief

in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go these may well be said to run into one another.

9.The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of government servants only in the. publicninterest, , to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must therefore be held to be infected with an abuse of power.

10.So when it has been conceded by Mr Lekhi that there was nothing on the record which would justify the impugned order dated March 26, 1976, of the appellant's premature retirement under clause (j) of Rule 56 of the Fundamental Rules, and that the Government was not in a position to support that unfair order, that order must be set aside, for it amounts to an abuse of the power which was vested in the authority concerned. The appeal is allowed with costs and it is ordered accordingly.
+_ Appeal by special leave from the Judgment and Order dated November 24, 1976 of the Delhi High Court in CRP 1264 of 1976.

-:CHAPTER = 9:-

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LAW RELATING TO PROSECUTION OF GOVERNMENT PLEADERS AND ADVOCATES

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RESPONSIBILITY OF GOVERNMENT PLEADER / ADVOCATES : -

Hon'ble Supreme Court in the case of **Capt. Amrinder Singh Vs. Prakash Singh Badal 2009 (3) Crimis 174 (SC)** specifically laid down that the public prosecutor should not act merely on the dictates of the state but he should act fairly and place truth before the court as he is also an officer of the Court.

Full Bench of Hon'ble Supreme Court in the case of **Shiv Kumar --*Versus*- Hukam Chand And Another (1999) 7 Supreme Court Cases 467** observed as under

Criminal Procedure Code, 1973 — Ss. 301, 302 and 225 & 24 —Duty of the Public Prosecutor to act fairly and not merely to obtain conviction by any means fair or foul — If the accused is entitled to any legitimate benefit the Public Prosecutor should make it available to him or inform the court even if the defence counsel overlooked it.

Also relied on: (2013) 2 Supreme Court Cases (Cri) 978 where it has been laid down that ;

Duty of the Public Prosecutor to act fairly- He is not a mouthpiece of investigating agency and should scrupulously avoid suppression of material available establishing innocence of accused – He should refuse to use evidence obtained by wroungful means.

Full Bench of Hon'ble Bombay High Court in the case of **STATE OF MAHARASHTRA Vs JAGAN GAGANSINGH NEPALI 2011 ALL MR (Cri) 2961 (Full Bench)** held that,

> Misuse of Power by police officials as well as Presiding Officers and Public Prosecutors of the Designated courts – held – As has been held by constitution Bench of Apex Court in Prakash Bhutto's Case [(2005) 2 SCC 409] it is many time noted that the prosecution unjustifiably invokes the provisions of the Special Act's like TADA Act with an oblique motive of depriving the accused persons from getting bail – The public prosecutors and the Presiding Officers of the Court are cautioned to act objectively – Public prosecutors are prosecutors on behalf of public and not the police – The Presiding Officers of the Designated Court have been assigned the role of the sentinel on the quivive – They expected to discharge their judicial functions keeping in view the fundamental rights particularly of the personal right and liberty of the citizen – These are essential for achieving legislative intent – The above observation of Apex court is sufficient to caution police officials as wells as Presiding Officers from misusing the Act.

In **E.S. Raddi Vs. The Chief Secretary 1987 (3) SCC 258** Hon'ble Supreme Court observed the duties of the senior Counsel some of the portion of para is as follows :

> As *an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession,* ***he must not withhold authorities or documents which may tell*** **against his clients** ***but which the law or the standards of his profession require him to produce.*** *By so acting he may well incur the displeasure or worse of his* ***lost his client would*** **or** *might seek legal redress if that were open to him.*

It has also been laid down by Hon'ble Supreme Court that arguing the case before court on basis of overruled citation is a falling standard of professional ethics.

[**2004 ALL MR (Cri) 3421 (SC)]**

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Cross Citation :A.I.R. 1927 ALLAHABAD 45

ALLAHABAD HIGH COURT

(FULL BENCH)

Hon'ble Judge(s) : MEARS, C.J., LINDSAY AND DALAL., JJ.

Ahmad Ashrab, Vakil
In the matter of Civil Mis. Case No. 43 of 1926,
Decided on 22nd February 1926.

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I.P.C. 466, 193 – A Vakil was sentenced to two rigorous imprisonment of 5 years for filling document containing false statement – Held, If Legal practitioner signs a document it is presumed that he fixes signatory with knowledge of contents – A Vakil so signing cannot plead that he did not know the contents – A man who signs his name to a document makes himself responsible in every way – He is bound to answer for every word, line, sentence and paragraph, and it will be no defence that somebody else wrote it and he only signed it – signature implies association and carries responsibility – He will be bound by all the implications arising from it just as much as if he had written every word – Practitioners must realize that if they associate themselves with statements which they know to be dishonest and untruthful for the purpose of misleading the Court then they should be punished - practitioner suspended.

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Kailas Nath Katju and A. Sanyal – for the Vakil.
Lalit Mohan Banerji— for the Crown.

Judgment. — On the 15th of .July 1924, Mr. Tej Narain Mulla, Sessions Judge of Gorakhpur, sentenced a Vakil named Raghubir Prasad, to two concurrent, sentences of five years' rigorous imprisonment for offences coming within under Ss. 466 and 193- of the India Penal Code. These offences were committed by Raghubir Prasad and, Others in the course of a Civil Suit - No. 298 of 1923, *Hari Har Prasad* v. *Shyam Lai,.* At the close of the judgment (page 65) the learned Sessions Judge called the attention of the High Court to the conduct of Ahmad Ashraf, a Vakil engaged along with Raghubir Prasad, particularly in relation to a document, Ex. 37, and to certain statements made by him when under examination by the Committing Magistrate under S. 164 of the Criminal. P. G. which the learned Sessions Judge believed to be deliberately untrue The app.al of Raghubir Prasad having been heard by a Bench of this Court and dismissed, notice was .issued to Ahmad Ashraf to show cause why disciplinary action should not be taken against him for having on the 10th of January 1924, joined with Raghubir Prasad in filing a petition of reply to an application for review of judgment presented by the plaintiffs, well knowing that the said petition contained false statements and intending fraudulently and dishonestly thereby to defeat the said application.

The further charge was in respect of statements made by him on the 24th of September 1924, in the Court of the Committing Magistrate, which were known by him to be untrue, and made with the object of dissociating himself from Raghubir Prasad and the other conspirators.-

By the 10th of January 1924 Raghubir Prasad, Shed Autar, Deo Narain Pande and Ganjeshri were in a position of great peril.

Ganjeshri .had forged three birth certificates of the sons of Jokhu Mal, the father of some of the defendants in the civil suit. Raghubir Prasad. Sheo Autar and Deo Narain Pande were also involved in the conspiracy and had used I these documents in Court. These documents, known as X, Y and Z, purported to be extracts from birth registers, were apparently duly sealed and officially | vouched for, but were in fact forgeries and inventions. That is to say, the registers did not contain any entry corresponding to anything contained in X, Y and *Z.* They were not copies of any documents. They were entirely fictitious. On the strength of these documents the learned Judge had in the civil suit on the 12th of December 1923, declared brie Sahdeo to be a minor. This was an issue of the greatest importance to the-defendants. By the 17th of December the plaintiffs, being suspicious, had made careful and diligent enquiries and inspected the original registers. On that day they submitted to the Court an application for review, which exposed the whole fraud. The document was drafted with precision and particularity, and was convincing on the face of it. On its perusal Raghubir Prasad, Sahdeo After, Deo Narain Pande and Ganeshji must have been aware that they could escape an ultimate conviction by a miracle only.

In the circumstances it occurred to someone that the position might be alleviated by fresh forgeries. An attempt was made to insert even at this late data entries of births of sons in accordance with the imaginary copies already filed by the defendants. That, however, was too dangerous and was abandoned. Some astute dishonest person suggested that the issue would be greatly confused if instead of Jokhu Lai having only four sons, it could be proved tha[1]; he had a fifth. This was in comparison, an elementary forgery and if was duly carried out by Ganjeshri, who obtained access to the register of deaths of Patarhat and inserted the death of a son as on the 27th of February, 1905. The forgery having been committed, Ahmad Ashraf, at the request of Raghubir Prasad inspected the register: He reported to Raghubir Prasad that he had discovered the entry of the death. In making this inspection Ahmad Ashraf may have been acting innocently Raghubir Prasad's object in getting him to inspect the register was no doubt that he wanted to be on sure ground as to the existence in fact of the entry.

On January 3rd, 1924, an application was made by Ahmad Ashraf for an adjournment of the review on the ground inter alia of Raghubir Prasad's illness and the need for the production of evidence. Ahmad Ashraf admitted before us that the evidence was the entry in the death register of Pa fear hat. So that he must have been to some extent in the confidence of Raghubir Prasad, who was the vakil principally if not exclusive!; engaged in this affair.

It must have struck Ahmad Ashraf a-a most extraordinary circumstance tha the" case had all along been fought or "" the basis of Jokhu Lai having only four sons, and that none of the defendants who w.31-3 the sons of Jokhu Lal, had ever previously mentioned this most important fact. A son born in 190 would have helped the defendants in establishing the minority of Sahdeo.

A conference of the lawyers and the defendants., and their pairokars was held on the 8th of January 1924. The documents of the 17th of December 1923, was considered. For reasons best known Raghubir Prasad and to Ahmad Ashraf no mention was made to the other lawyers present of the notable discovery of the existence between 1901 and 1905 of a son of Jokhu Lai. We can have no doubt that the other lawyers were kept designedly in the dark. Mr. Abmad Ashraf has admitted that a vakil of the plaintiffs had told him, sometime before the meeting ;that forged documents were being used by-his side, he admitted that he thought it was so, and that the forger was Sheo Autar. He says that when he went to the interview he was ' frightened' about the" case. Yet he sat quiet

and did not disclose to his fellow vakils anything about the Patarhat discovery. He says that he thought they had already been told. -If so, he must have been amazed that no one mentioned it. Whilst acquitting Ahmad Ashraf of any knowledge of the antecedent forgery arranged by Raghubir Prasad and Ganjeshri Prasad, we believe that at the meeting he acted in concert with Raghubir Prasad and on instructions from him avoided all reference to the alleged fifth son. By this date Raghubir Prasad and the other conspirators had undoubtedly decided to cut their way through if they could, and they did not want inconvenient enquiries from the other vakils. On the assurances of the pairokars that X, Y and Z were genuine and without any effort to substantiate this by inspection of the registers, it was decided to resist the application for review.

Thereupon Raghubir Prasad drafted a document (Ex. 37) which was the answer to the application. Notwithstanding that the plaintiffs had pointed out in their application, which was being answered by Raghubir Prasad, that there were no entries in the registers corresponding to X, Y and Z, the answer opened with an assertion that these documents were genuine copies. This was a falsehood easily and immediately demonstrable on inspection of the registers. Paragraph 3 contained a most offensive charge, entirely without foundation, -of possible malpractice by the plaintiffs, in collusion with officials, of the copying department or record room.

Paragraph 4 was an impudent assertion that the copies filed by the plaintiffs ' are untrustworthy and seam to be altogether fictitious, and concludes with the definite charge that ' whei relating to age was decided and the plaintiffs had no hops of being successful in the principal case, they took invalid proceedings and produced forged copies.'

Then came the allegation that' besides the four sons a son was born to Jokhu Lai in 1901, who died at a very tender age on the 27th of February 1905, at the house of his maternal grandfather at Patarhat ; consequently no documentary or oral evidence was produced in respect of him nor was he mentioned in any way in the course of evidence.' On the - 10th of January 1924, this very disgraceful document was sent by Raghubir Prasad to Ahmad Ashraf and he signed it. The learned Sessions Judge says :

When lie put his signature on Ex. P-37 the defendants' reply to the plaintiffs' application for review, lie must have fully realized that he was making himself responsible for setting up an entirely false case on behalf of the defendants. In fast the whole of his conduct between the 2nd of January 1924 up till the end of the case, is open to the gravest suspicion. T have very carefully considered the question but, I find if most impossible to believe that any vakil appearing on. "behalf of the defendants could have put his signature on Ex. P-37 without realizing that an entirely false case was.. being set up.

We invited Ahmad Ashraf to put, if .he could, any innocent interpretation pf his silence as to the fifth son at the meeting and to give us some reasons which would justify his having identified himself with Raghubir Prasad in the answer of the 10th of January. He could really give no explanation to show that he had any honest belief in the genuineness of the new case set up in para: 5 or of the charges of forgery, collusion and fraud made against the plaintiffs and officials in the copying and record departments.

His defence really amounted to this : that he wasen't if cled'to sign anything that Raghubir Prasad submitted to him, and that, no matter how unfounded or scandalous the statements might be and how great an abuse of the privileges of counselor of the processes of the Court, he was-protected by the fact that the document had been drafted by a man senior to him.

This sort of defence has been put up more than once, and we wish the profession to understand that a man who signs his name to a- document makes himself thereby in every way as responsible for it as if he was the original drafter of it. If it turns out that the document is one which no man acting honestly could in! the circumstances have **drafted,**

then **he** ' will be bound to answer for every word, line, sentence and paragraph, and it will not be the least defence that somebody else wrote it out and he only signed it. Signature implies association and carries responsibility. We are of opinion that Ahmad Ashraf having already been told that forgeries had been committed, and having accepted that statement, and being, ag he says, frightened on the 8th of January, could not honestly have believed the assertions of forgery by the plaintiffs and Court officials alleged by Raghubir Prasad on the 10th of January. .Even if the very definite statements in the application for review as to the actual non-existence of X, Y and *Z* had been doubted by him, a visit to the Collector's office and a five minutes' inspection of the registers would have convinced him of what he already had little doubt about, that the defendants were the forgers and not the plaintiffs.

We, therefore, find that Ahmad Ashraf did on the 10th of January 1924, join with Raghubir Prasad in filing the document of that date, and that he well knew .that the petition contained false statements, and that these - were made to deceive the Court and fraudulently and dishonestly to defeat the application.

The second part of the charge against Ahmad Ashraf can be dealt with quite shortly. When he was examined as a witness on the 24th September 1924, the Magistrate was anxious to as certain to what extent he had been previously connected with Sheo Autar, Deo Narain Pande and the defendants. He said had no concern with Sheo Aufear, Deo Narain and the defendants from before and to the best of my recollection did not appear as a pleader for them in any case previous to this. He in fact, was at the very time appearing for the defendants in another case which had been instituted shortly before No. 298 of 1923 and he was in fact engaged in August 1924 (i.e., a month before making his Deposition) in execution proceedings in that very case.

He sought to justify his answer 'to the Magistrate by telling us that he thought point of the question turned upon _the words ' from before' that he made a mistake in not remembering that the Bother case was in fact earlier in date. He also said that on September 24, 1924, he had forgotten that he had signed three-papers in August with reference to the execution proceedings.

These answers did not meet with our approval, nor did we give weight to the argument, which was addressed to us. It was said, as it has been before in these cases, that it is the common practice of clerks in the mufussil to draft applications a not, documents even of importance and, that the vakil almost invariably signs them without reading them. Ahmad Ashraf explained that he had not read any one of the documents in the execution proceedings and that was why he remembered nothing about the concurrent case.

Again we wish it to be understood that a defence of this kind will not be accepted and that if a legal practitioner puts his signature to a document, he will be deemed to have read it and to carry it in his recollection to the extent that an ordinarily competent, careful and reasonable man would carry it, and he will be bound by all the implications arising from it just as much as if he had written every word of it with his own hand. Practitioners must realize that if they make, or associate themselves with, statements which they know are dishonest and untruthful for the purpose of misleading the Court, they must ON Proof of misconduct bear personal responsibility, and that it will be no defence for them to say that it was done in the interests of the client or at his instigation or at the instigation of a colleague at the Bar, or that they were so negligent in the matter that they did not read the document or consider it at all.

We find the second charge proved against Ahmad Ashraf, and we suspend him on both charges for six months, such period of suspension to run concurrently. If subsequently cases similar to this are brought before' the Court, we shall not show the

future wrong-doers the leniency we now extend to Ahmad Ashraf, We assess the fee of the learned Government Advocate at Rs. 200. ….***Practitioner suspended.***

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Cross Citation :AIR 2011 SC (Criminal)193

IN THE SUPREME COURT OF INDIA

Hon'ble Judge(s) : MARKANDEY KATJU, GYAN SUDHA MISHRA,JJ

A.S. Mohammed Rafi ….Vs… State of Tamil Nadu WITH

CRIMINAL APPEAL NO. 2310 of 2010 (arising out of S.L.P.(Crl.) No.6820 of 2008)

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Advocates Act – Professional ethics – Resolution of Bar Association that none of its members will appear for a particular accused is against constitution – Such resolution is in fact, a disgrace to the legal community – All such resolutions of Bar Association in India are declared as null and void – The right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country – It is the duty of lawyer to defend irrespective of consequences – To put quietus to the FIR against both the parties stands quashed – Without going in to merits of controversy compensation of Rs. 1,50,000/- awarded to appellant and F.I.R. against him also quashed.

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1. Leave granted.

2. Heard learned counsel for the parties.

3. This appeal has been file against the impugned judgment and order of the High Court of Madras dated 29.4.2008 passed in Writ Petition No.716 of 2007.

4. The facts have been set out in the impugned judgment and order and hence we are not repeating the same here.

5. The High Court had appointed a Commission of Enquiry headed by Hon'ble Mr. Justice K.P. Sivasubramaniam, a retired Judge of the High Court of Madras which is on record.

6. During the course of the proceedings today, we had requested Mr. Altaf Ahmad, learned senior counsel, to assist us as Amicus Curiae in this case and we are grateful to Mr. Altaf Ahmad and we appreciate his assistance to us in this case.

7. As suggested by Mr. Altaf Ahmad, without going into the merits of the controversy, we direct that a sum of Rs.1,50,000/- (Rs. One Lakh and Fifty Thousand only) be given to the appellant by the State of Tamil Nadu as compensation. We have been informed that the appellant had already received a sum of Rs.50,000/- (Rs. Fifty Thousand only) and hence the remaining sum of Rs.1,00,000/- (Rs. One Lakh only) shall be paid by the State of Tamil Nadu to the appellant within a period of two months from today.

8. FIR No.2105 of 2006 dated 15.12.2006 on the file of B-4 Police Station (Law and Order), Race Course Police Station, Coimbatore city against the appellant stands quashed.

9. To put quietus to the matter FIR No.2106 of 2006 on the file of B-4 Police Station (Law and Order), Race Course Police Station, Coimbatore city against the police also stands quashed under Article 142 of the Constitution of India.

10. The impugned judgment and order of the High Court is substituted by our order. The appeal is disposed off accordingly. CIVIL APPEAL NOS. 10304-10308 of 2010 (arising out of S.L.P.(C) Nos.26659-26663 of 2008)

11. Leave granted.

12. Mr. P.H. Parekh, learned senior counsel, appears for the Coimbatore Bar Association.

13. We agree with the submission of Mr. P.H. \ that the observations made against the Coimbatore Bar Association in para 13 of the impugned judgment and order of the High Court should be quashed. We order accordingly.

14. Before parting with this case, we would like to comment upon a matter of great legal and constitutional importance which has caused us deep distress in this case. It appears that the Bar Association of Coimbatore passed a resolution that no member of the Coimbatore Bar will defend the accused policemen in the criminal case against them in this case.

15. Several Bar Association all over India, whether High Court Bar Associations or District Court Bar Associations have passed resolutions that they will not defend a particular person or persons in a particular criminal case. Sometimes there are clashes between policemen and lawyers, and the Bar Association passes a resolution that no one will defend the policemen in the criminal case in court. Similarly, sometimes the Bar Association passes a resolution that they will not defend a person who is alleged to be a terrorist or a person accused of a brutal or heinous crime or involved in a rape case.

16. In our opinion, such resolutions are wholly illegal, against all traditions of the bar, and against professional ethics. Every person, however, wicked, depraved, vile, degenerate, perverted, loathsome, execrable, vicious or repulsive he may be regarded by

society has a right to be defended in a court of law and correspondingly it is the duty of the lawyer to defend him.

17. We may give some historical examples in this connection.

18. When the great revolutionary writer Thomas Paine was jailed and tried for treason in England in 1792 for writing his famous pamphlet `The Rights of Man' in defence of the French Revolution the great advocate Thomas Erskine (1750-1823) was briefed to defend him. Erskine was at that time the Attorney General for the Prince of Wales and he was warned that if he accepts the brief, he would be dismissed from office. Undeterred, Erskine accepted the brief and was dismissed from office.

19. However, his immortal words in this connection stand out as a shining light even today :

From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of the Judge; nay he assumes it before the hour of the judgment; and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused in whose favour the benevolent principles of English law make all assumptions, and which commands the very Judge to be his Counsel & quota;

20. Indian lawyers have followed this great tradition. The revolutionaries in Bengal during British rule were defended by our lawyers, the Indian communists were defended in the Meerut conspiracy case, Razakars of Hyderabad were defended by our lawyers, Sheikh Abdulah and his co-accused were defended by them, and so were some of the alleged assassins of Mahatma Gandhi and Indira Gandhi. In recent times, Dr. Binayak Sen has been defended. No Indian lawyer of repute has ever shirked responsibility on the ground that it will make him unpopular or that it is personally dangerous for him to do so. It was in this great tradition that the eminent Bombay High Court lawyer Bhulabhai Desai defended the accused in the I.N.A. trials in the Red Fort at Delhi (November 1945 - May 1946).

21. However, disturbing news is coming now from several parts of the country where bar associations are refusing to defend certain accused persons.

22. The Sixth Amendment to the US Constitution states & quot; In all criminal prosecutions the accused shall enjoy the right .....to have the assistance of counsel for his defence & quot;.

23. In Powell vs. Alabama 287 US 45 1932 the facts were that nine illiterate young black men, aged 13 to 21, were charged with the rape of two white girls on a freight train passing through Tennessee and Alabama. Their trial was held in Scottsboro, Alabama, where community hostility to blacks was intense. The trial judge appointed all members of the local bar to serve as defense counsel. When the trial began, no attorney from the local bar appeared to represent the defendants. The judge, on the morning of the trial,

appointed a local lawyer who undertook the task with reluctance. The defendants were convicted. They challenged their convictions, arguing that they were effectively denied aid of counsel because they did not have the opportunity to consult with their lawyer and prepare a defense. The U.S. Supreme Court agreed. Writing for the court, Mr. Justice George Sutherland explained : & quot; It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid....."

24. In the same decision Justice Sutherland observed: & quot What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense & quot;.

25. In this connection we may also refer to the legendry American lawyer Clarence Darrow (1857-1930) who was strongly of the view that every accused, no matter how wicked, loathsome, vile or repulsive he may be regarded by society has the right to be defended in court. Most lawyers in America refused to accept the briefs of such apparently wicked and loathsome persons, e.g. brutal killers, terrorists, etc. but Clarence Darrow would accept their briefs and defend them, because he was firmly of the view that every persons has the right to be defended in court, and correspondingly it was the duty of the lawyer to defend. His defenses in various trials of such vicious, repulsive and loathsome persons became historical, and made him known in America as the `Attorney for the Damned', (because he took up the cases of persons who were regarded so vile, depraved and despicable by society that they had already been condemned by public opinion) and he became a legend in America (see his biography `Attorney for the Damned').

26. In Re Anastaplo, 366 US 82 (1961), Mr. Justice Hugo Black of the US Supreme Court in his dissenting judgment praised Darrow and said : & quot; Men like Lord Erskine, James Otis, Clarence Darrow, and a multitude of others have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it.& quot;

27. At the Nuremberg trials, the Nazi war criminals responsible for killing millions of people were yet defended by lawyers.

28. We may also refer to the fictional American lawyer Atticus Finch in Harper Lee's famous novel `To Kill a Mocking Bird'. In this novel Atticus Finch courageously defended a black man who was falsely charged in the State of Alabama for raping a white woman, which was a capital offence in that State. Despite the threats of violence to him and his family by the racist white population in town, and despite social ostracism by the predominant while community, Atticus Finch bravely defended that black man (though he was ultimately convicted and hanged because the jury was racist and biased), since he believed that everyone has a right to be defended. This novel inspired many young Americans to take up law as a profession in America.

29. The following words of Atticus Finch will ring throughout in history : & quot; Courage is not a man with a gun in his hand. It is knowing you are licked before you begin, but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do & quot;

30. In our own country, Article 22(1) of the Constitution states : & quot; No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for which arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice & quot;.

31. Chapter II of the Rules framed by the Bar Council of India states about `Standards of Professional Conduct and Etiquette', as follows : & quot; An advocate is bound to accept any brief in the Courts or Tribunals or before any other authorities in or before which he proposes to practice at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief & quot;.

32. Professional ethics requires that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the Statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Associations in India are null and void and the right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of the Gita.

33. The Registry of this Court will circulate copies of this judgment/order to all High Court Bar Associations and State Bar Councils in India. The High Court Bar Associations are requested to circulate the judgment/order to all the District Court Bar Associations in their States/Union territories.

34. With these observations, these appeals are disposed of. No costs. ….. J

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Cross Citation :2000 SCC (7) 264

SUPREME COURT OF INDIA

Hon'ble Judge(s) : K.T.THOMAS, R.P.Sethi, JJ

R.D. Saxena …..Vs…. Balram Prasad Sharma

DATE OF JUDGMENT: 22/08/2000

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[A] Change of Advocate – A litigant must have the freedom to change his advocate when he feels that the advocate engaged by him is not capable of handling the case or his conduct is prejudicial to the case of the litigant for any other reason – If for whatever reason the client does not want to continue the engagement of a particular advocate then that advocate is bound to return the brief to the client – It is absolute right of the litigant to get back his brief – The advocate cannot withhold the brief for any reason including his outstanding fee – Failure to observe this procedure is a professional misconduct and the advocate is liable for action.

[B] Civil P.C. order 3, Rule 4 (1) – Article 22 (1) of the constitution – Right to have advocate of his choice – Held- Supreme Court in earlier decision (in AIR 1966 SC 1910) made it clear that the word 'of his choice' in Article 22(1) indicate that the right of the accused to change an advocate whom he once engaged in the same case, cannot be whittled down by that advocate by withholding the case bundle on the premise that he has to get fees for the services already rendered to the client.

[C] Professional Misconduct – Advocates Act Sec.35 – Professional Misconduct may consist in betraying the confidence of a client, in attempting by any means to practice a fraud or deceive the court or the adverse party or his counsel, and any conduct which tends to bring reproach on the legal profession – OR – Anything done which would be regarded as disgraceful or dishonorable by his professional brethren of good repute and competency.

[D] Quantum of Punishment – As the Supreme court had not pronounced any Judgment on this issue earlier therefore the advocate would have bonafidely believed in the light of decisions of certain High courts that his act is legal – Therefore, it is not desirable to impose a harsh punishment – A reprimand would be sufficient in the interest of justice – However it is made clear that the lesser punishment imposed now, need not be counted as a precedent.

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JUDGMENT:

THOMAS, J.

The main issue posed in this appeal has sequential importance for members of the legal profession. The issue is this: Has the advocate a lien for his fees on the litigation papers entrusted to him by his client? In this case the Bar Council of India, without deciding the above crucial issue, has chosen to impose punishment on a delinquent advocate debarring him from practicing for a period of 18 months and a fine of Rs.1000/-. The advocate concerned was further directed to return all the case bundles which he got from his client respondent without any delay. This appeal is filed by the said advocate under Section 38 of the Advocates Act, 1961.

As the question involved in this appeal has topical importance for the legal profession we heard learned counsel at length. To appreciate the contentions we would present the factual backdrop as under:

Appellant, now a septuagenarian, has been practicing as an advocate mostly in the courts at Bhopal, after enrolling himself as a legal practitioner with the State Bar Council of Madha Pradesh. According to him, he was appointed as legal advisor to the Madhya Pradesh State Co- operative Bank Ltd. (Bank, for short) in 1990 and the Bank continued to retain him in that capacity during the succeeding years. He was also engaged by the said Bank to conduct cases in which the Bank was a party. However, the said retainership did not last long. On 17.7.1993 the Bank terminated the retainership of the appellant and requested him to return all the case files relating to the Bank. Instead of returning the files the appellant forwarded a consolidated bill to the Bank showing an amount of Rs.97,100/- as the balance payable by the Bank towards the legal remuneration to which he is entitled. He informed the Bank that the files would be returned only after setting his dues.

Correspondence went on between the appellant and the Bank regarding the amount, if any, payable to the appellant as the balance due to him. Respondent Bank disclaimed any liability outstanding from them to the appellant. The dispute remained unresolved and the case bundles never passed from appellants hands. As the cases were pending the Bank was anxious to have the files for continuing the proceedings before the courts/tribunals concerned. At the same time the Bank was not disposed to capitulate to the terms dictated by the appellant which they regarded as grossly unreasonable. A complaint was hence filed by the Managing Director of the Bank, before the State Bar Council (Madhya Pradesh) on

3.2.1994. It was alleged in the complaint that appellant is guilty of professional misconduct by not returning the files to his client.

In the reply which the appellant submitted before the Bar Council he admitted that the files were not returned but claimed that he has a right to retain such files by exercising his right of lien and offered to return the files as soon as payment is made to him.

The complaint was then forwarded to the Disciplinary Committee of the District Bar Council. The State Bar Council failed to dispose of the complaint even after the expiry of one year. So under Section 36-B of the Advocates Act the proceedings stood transferred to the Bar Council of India. After holding inquiry the Disciplinary Committee of the Bar Council of India reached the conclusion that appellant is guilty of professional misconduct. The Disciplinary Committee has stated the following in the impugned order:

On the basis of the complaint as well as the documents available on record we are of the opinion that the Respondent is guilty of professional misconduct and thereby he is liable for punishment. The complainant is a public institution. It was the duty of the Respondent to return the briefs to the Bank and also to appear before the committee to revert his allegations made in application dated 8.11.95. No such attempt was made by him.

In this appeal learned counsel for the appellant contended that the failure of the Bar Council of India to consider the singular defence set up by the appellant i.e. he has a lien over the files for his unpaid fees due to him, has resulted in miscarriage of justice. The Bank contended that there was no fee payable to the appellant and the amount shown by him was on account of inflating the fees. Alternatively, the respondent contended that an advocate cannot retain the files after the client terminated his engagement and that there is no lien on such files.

We would first examine whether an advocate has lien on the files entrusted to him by the client. Learned counsel for the appellant endeavoured to base his contention on Section 171 of the Indian Contract Act which reads thus:

Bankers, factors, wharfingers, attorneys of a High Court and policy- brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

Files containing copies of the records (perhaps some original documents also) cannot be equated with the goods referred to in the section. The advocate keeping the files cannot amount to goods bailed. The word bailment is defined in Section 148 of the Contract Act as the delivery of goods by one person to another for some purpose, upon a contract that they shall be returned or otherwise disposed of according to the directions of the person delivering them, when the purpose is accomplished. In the case of litigation papers in the hands of the advocate there is neither delivery of goods nor any contract that they shall be returned or otherwise disposed of. That apart, the word goods mentioned in Section 171 is to be understood in the sense in which that word is defined in the Sale of Goods Act. It must be remembered that Chapter-VII of the Contract Act, comprising sections 76 to 123, had been wholly replaced by the Sales of Goods Act, 1930. The word goods is defined in

Section 2(7) of the Sales of Goods Act as every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached, to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Thus understood goods to fall within the purview of Section 171 of the Contract Act should have marketability and the person to whom it is bailed should be in a position to dispose it of in consideration of money. In other words the goods referred to in Section 171 of the Contract Act are saleable goods. There is no scope for converting the case files into money, nor can they be sold to any third party. Hence, the reliance placed on Section 171 of the Contract Act has no merit.

In England the solicitor had a right to retain any deed, paper or chattel which has come into his possession during the course of his employment. It was the position in common law and it later recognized as the solicitors right under Solicitors Act, 1860. In Halsburys Laws of England, it is stated thus (vide paragraph 226 in volume 44): 226. Solicitors rights. At common law a solicitor has two rights which are termed liens. The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity, and the second is a right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery. In addition, a solicitor has by statute a right to apply to the court for a charging order on property recovered or preserved through his instrumentality in respect of his taxed costs of the suit, matter or proceeding prosecuted ordefended by him.

Before India attained independence different High Courts in India had adopted different views regarding the question whether an advocate has a lien over the litigation files kept with him. In P. Krishnamachariar vs. The Official Assignee of Madras, (AIR 1932 Madras 256) a Division Bench held that an advocate could not have such a lien unless there was an express agreement to the contrary. The Division Bench has distinguished an earlier decision of the Bombay High Court in Tyabji Dayabhai & Co. vs. Jetha Devji & Co. (AIR 1927 Bombay 542) wherein the English law relating to the solicitors lien was followed. Subsequently, a Full Bench of the Madras High Court in 1943 followed the decision of the Division Bench. A Full Bench of the Patna High Court in In re B.N. Advocate in the matter of Misc. Judl. Case No.18/33 (AIR 1933 Pat 571) held the view that an advocate could not claim a right to retain the certified copy of the judgment obtained by him on the premise that an appeal was to be filed against it. Of course the Bench said that if the client had specifically instructed him to do so it is open to him to keep it.

After independence the position would have continued until the enactment of the Advocates Act 1961 which has repealed a host of enactments including Indian Bar Council Act. When the new Bar Council of India came into existence it framed Rules called the Bar Council of India Rules as empowered by the Advocates Act. Such Rules contain provision specifically prohibiting an advocate from adjusting the fees payable to him by a client against his own personal liability to the client. As a rule an Advocate shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client,(vide Rule 24). In this context a reference can be made to Rules 28 and 29 which are extracted below:

28. After the termination of the proceeding, the Advocate shall be at liberty to appropriate towards the settled fee due to him, any sum remaining unexpended out of the amount paid or sent to him for expenses, or any amount that has come into his hands in that proceeding.

29. Where the fee has been left unsettled, the Advocate shall be entitled to deduct, out of any moneys of the client remaining in his hands, at the termination of the proceeding for which he had been engaged, the fee payable under the rules of the Court, in force for the time being, or by then settled and the balance, if any, shall be refunded to the client.

Thus, even after providing a right for an advocate to deduct the fees out of any money of the client remaining in his hand at the termination of the proceeding for which the advocate was engaged, it is important to notice that no lien is provided on the litigation files kept with him. In the conditions prevailing in India with lots of illiterate people among the litigant public it may not be advisable also to permit the counsel to retain the case bundle for the fees claimed by him. Any such lien if permitted would become susceptible to great abuses and exploitation.

There is yet another reason which dissuades us from giving approval to any such lien. We are sure that nobody would dispute the proposition that the cause in a court/tribunal is far more important for all concerned than the right of the legal practitioner for his remuneration in respect of the services rendered for espousing the cause on behalf of the litigant. If a need arises for the litigant to change his counsel pendente lite, that which is more important should have its even course flowed unimpeded. Retention of records for the unpaid remuneration of the advocate would impede such course and the cause pending judicial disposal would be badly impaired. If a medical practitioner is allowed a legal right to withhold the papers relating to the treatment of his patient which he thus far administered to him for securing the unpaid bill, that would lead to dangerous consequences for the uncured patient who is wanting to change his doctor. Perhaps the said illustration may be an over-statement as a necessary corollary for approving the lien claimed by the legal practitioner. Yet the illustration is not too far-fetched. No professional can be given the right to withhold the returnable records relating to the work done by him with his clients matter on the strength of any claim for unpaid remuneration. The alternative is that the professional concerned can resort to other legal remedies for such unpaid remuneration.

A litigant must have the freedom to change his advocate when he feels that the advocate engaged by him is not capable of espousing his cause efficiently or that his conduct is prejudicial to the interest involved in the lis, or for any other reason. For whatever reason, if a client does not want to continue the engagement of a particular advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client. It is time to hold that such obligation is not only a legal duty but a moral imperative.

In civil cases, the appointment of an advocate by a party would be deemed to be in force until it is determined with the leave of the court, (vide order 3, Rule 4(1) of the Code of Civil Procedure). In criminal cases, every person accused of an offence has the right to consult and be defended by a legal practitioner of his choice which is now made a fundamental right under Article 22(1) of the Constitution. The said right is absolute in itself

and it does not depend on other laws. In this context reference can be made to the decision of this Court in State of Madhya Pradesh vs. Shobharam and ors. (AIR 1966 SC 1910). The words of his choice in Article 22(1) indicate that the right of the accused to change an advocate whom he once engaged in the same case, cannot be whittled down by that advocate by withholding the case bundle on the premise that he has to get the fees for the services already rendered to the client.

If a party terminates the engagement of an advocate before the culmination of the proceedings that party must have the entire file with him to engage another advocate. But if the advocate who is changed midway adopts the stand that he would not return the file until the fees claimed by him is paid, the situation perhaps may turn to dangerous proportion. There may be cases when a party has no resource to pay the huge amount claimed by the advocate as his remuneration. A party in a litigation may have a version that he has already paid the legitimate fee to the advocate. At any rate if the litigation is pending the party has the right to get the papers from the advocate whom he has changed so that the new counsel can be briefed by him effectively. In either case it is impermissible for the erstwhile counsel to retain the case bundle on the premise that fees is yet to be paid.

Even if there is no lien on the litigation papers of his client an advocate is not without remedies to realise the fee which he is legitimately entitled to. But if he has a duty to return the files to his client on being discharged the litigant too has a right to have the files returned to him, more so when the remaining part of the lis has to be fought in the court. This right of the litigant is to be read as the corresponding counterpart of the professional duty of the advocate.

Misconduct envisaged in Section 35 of the Advocates Act is not defined. The section uses the expression misconduct, professional or otherwise. The word misconduct is a relative term. It has to be considered with reference to the subject matter and the context wherein such term occurs. It literally means wrong conduct or improper conduct.Corpus Juris Secundum, contains the following passage at page 740 (vol.7):

Professional misconduct may consist in betraying the confidence of a client, in attempting by any means to practise a fraud or impose on or deceive the court or the adverse party or his counsel, and in fact in any conduct which tends to bring reproach on the legal profession or to alienate the favourable opinion which the public should entertain concerning it.

The expression professional misconduct was attempted to be defined by Darling, J., in In re A Solicitor ex parte the Law Society [(1912) 1 KB 302] in the following terms: It it is shown that an Advocate in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to say that he is guilty of professional misconduct.

In this context it is to be mentioned that the aforesaid definition secured approval by the Privy Council in George Frier Grahame vs. Attorney-General, Fiji,(1936 PC 224). We are also inclined to take that wide canvass for understanding the import of the expression misconduct in the context in which it is referred to in Section 35 of the Advocates Act.

We, therefore, that the refusal to return the files to the client when he demanded the same amounted to misconduct under Section 35 of the Act. Hence, the appellant in the present case is liable to punishment for such misconduct.

However, regarding the quantum of punishment we are disposed to take into account two broad aspects: (1) this court has not pronounced, so far, on the question whether advocate has a lien on the files for his fees. (2) the appellant would have bona fide believed, in the light of decisions of certain High Courts, that he did have a lien. In such circumstances it is not necessary to inflict a harsh punishment on the appellant. A reprimand would be sufficient in the interest of justice on the special facts of this case.

We, therefore, alter the punishment to one of reprimanding the appellant. However, we make it clear that if any advocate commits this type of professional misconduct in future he would be liable to such quantum of punishment as the Bar Council will determine and the lesser punishment imposed now need not be counted as a precedent.Appeal is disposed of accordingly.

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Cross Citation :2005-ALLMR-5-270 , 2005-AIR(SC)-0-540

SUPREME COURT OF INDIA

Hon'ble Judge(s) : Arijit Pasayat, S.H.Kapadla,JJ

Dattaraj Nathuji Thaware ….Vs ….. State of Maharashtra

Special Leave Petition (C) 26269 Of 2004 Dec 14,2004

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Advocate to gain private profit and to gain ulterior purposes filed petition and claiming it to be in the interest of public- official document annexed to the petition but no explanation is given as to how he come in

possession thereof –the attractive brand name of public interest litigation should not be used for suspicious product of mischief and it should not be publicity oriented or founded on personal vendetta – Bar Council and Bar Association directed to ensure that no member of the bar becomes party as petitioner file frivolous petitions- no one should be permitted to bring disgrace to the noble profession and high traditions of the bar. Imposition of cost Rs 25000/ on advocate is proper- Copy of order sent to Bar Council for necerry action against advocate.

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Arijit Pasayat, J.

(1.) This case is a sad reflection on members of the legal profession and is almost a black spot on the noble profession. The petitioner who belongs to this profession filed a petition styled as "Public Interest Litigation" before the Nagpur Bench of the Bombay High Court. By the impugned judgment, the High Court dismissed it holding that there was no public interest involved and in fact the petitioner had resorted to black mailing respondent Nos. 6 and 7 and was caught red handed accepting "black mailing" money. The High Court also noticed that the allegations of unauthorized constructions made in the petition were also not true.

(2.) Cost of Rs. 25.000/- (Rupees twenty five thousand only) which was levied, was directed to be paid to the affected respondent Nos. 6 and 7 before the High Court.

(3.) It is, in fact, a black day for the black robed professionals, if the allegation, as found by the High Court to be true and which presently appear to be the subject matter of further proceedings in a criminal case, are true. This will leave the members of the legal profession black faced for the black deed of the petitioner who may be as the High Court found a black sheep in the profession. Though the petition filed by the petitioner carried the attractive brand name of "Public Interest Litigation", the least that can be said is that it smacks of every thing what the Public Interest Litigation should not be.

(4.) When there is material to show that a petition styled as a public interest litigation is nothing but a camouflage to foster personal disputes, said petition is to be thrown out. Before we grapple with the issue involved in the present case, we feel it necessary to consider the issue regarding public interest aspect. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation " or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". The High Court has found that the case at hand belongs to the last category. If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant borne out of wishful thinking. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have a locus standi and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any

oblique consideration. These aspects were highlighted by this Court in The Janta Dal v. H.S. Chowdhary (1992 (4) SCC 305) and Kazi Lhendup Dorji vs. Centra / Bureau of Investigation, (1994 Supp (2) SCC 116). A writ petitioner who comes to the Court for relief in public interest must come not only with clean hands like any other writ petitioner but also with a clean heart, clean mind and clean objective. (See Ramjas Foundation vs. Union of India, (AIR 1993 SC 852) and K.R. Srinivas v. R.M. Premchand, (1994 (6) SCC 620).
(5.) It is necessary to take note of the meaning of expression 'public interest litigation'. In Stroud's Judicial Dictionary, Volume 4 (IV Edition), 'Public Interest' is defined thus:
"Public Interest (1) a matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

(6.) In Black's Law Dictionary (Sixth Edition), "public interest" is defined as follows:
"Public Interest something in which the public, or some interest by which their legal rights or liabilities are affected. It does not mean anything the particular localities, which may be affected by the matters in question. Interest shared by national government....."

(7.) In Janata Dal case (supra) this Court considered the scope of public interest litigation. In para 52 of the said judgment, after considering what is public interest, has laid down as follows:
"The, expression litigation' means a legal action including all proceedings therein initiated in a Court of law for the enforcement of right or seeking a remedy. Therefore, lexically the expression "PIL" means the legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

(8.) In paras 60, 61 and 62 of the said judgment, it was pointed out as follows:
"Be that as it may, it is needless to emphasis that the requirement of locus standi of a party to a litigation is mandatory, because the legal capacity of the party to any litigation whether in private or public action in relation to any specific remedy sought for has to be primarily ascertained at the threshold."

(9.) In para 96 of the said judgment, it has further been pointed out as follows:
"While this Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that Courts should not allow its process to be abused by a mere busy body or a meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."

(10.) In subsequent paras of the said judgment, it was observed as follows:
"It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have as locus standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly a vexatious petition under the colour of PIL,brought before the Court for vindicating any personal grievance, deserves rejection at the threshold".
(11.) It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumerable days are wasted, which time otherwise could have been

spent for the disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, un-represented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters - government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the doors of the Courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they loose faith in the administration of our judicial system.

(12.) Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or pubic injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

(13.) The Council for Public Interest Law set up by the Ford Foundation in USA defined the "public interest litigation" in its report of Public Interest Law, USA, 1976 as follows: "Public Interest Law is the name that has recently been given to efforts provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the proper environmentalists, consumers, racial and ethnic minorities and others."

(14.) The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being

not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect.

(15.) Courts must do justice by promotion of good faith, and prevent law from crafty invasions. Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (See State of Maharashtra vs. Prabhu, (1994 (2) SCC 481), and Andhra Pradesh State Financial Corporation vs. M/s GAR Re-Rolling Mills and Anr., (AIR 1994 SC 2151). No litigant has a right to unlimited draught on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (See Dr. B.K. Subbarao vs. Mr. K, Parasaran, (1996 (7) JT 265). Today people rush to Courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in Courts and among the public. (16.) As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that Courts are flooded with large number of so called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, Courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. Though in Dr. Duryodhan Sahu and Ors. v. Jitendra Kumar Mishra and Ors. (AIR 1999 SC 114), this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the Courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Apart from the sinister manner, if any, of getting such copies, the real brain or force behind such cases would get exposed to find out the truth and motive behind the petition. Whenever such frivolous pleas, as noted, are taken to explain possession, the Court should do well not only to dismiss the petitions but also to impose exemplary costs. It would be desirable for the Courts to filter out the, frivolous petitions and dismiss them with costs as afore-stated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts. (17.) In S.P. Gupta v. Union of India (1981 Supp. SCC 87) it was emphatically pointed out that the relaxation of the rule of locus standi in the field of PIL does not give any right to a busybody or meddlesome interloper to approach the Court under the guise of a public interest litigant. He has also left the following note of caution: (SCC p.219, para 24)

"But we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or

political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective."

(18.) In State of H.P. vs. A Parent of a Student of Medical College, Simla and Ors. (1985 (3) SCC 169), it has been said that public interest litigation is a weapon which has to be used with great care and circumspection.
(19.) These aspects have been highlighted in Ashok Kumar Pandey v. State of West Bengal (2004 (3) SCC 349) and Dr. B. Singh v. Union of India and Ors. (2004 (3) SCC 363).
(20.) It is disturbing feature which needs immediate remedial measure by the Bar Councils and the Bar Association to see that the process of law is not abused and polluted by its member. It is high time that the Bar Councils and the Bar Associations ensure that no member of the Bar becomes party as petitioner or in aiding and/or abetting files frivolous petitions carrying the attractive brand name of "Public Interest Litigation". That will be keeping in line with the high traditions of the Bar. No one should be permitted to bring disgrace to the noble profession. We would have imposed exemplary cost in this regard but taking note of the fact that the High Court had already imposed costs of Rs. 25.000/-, we do not propose to impose any further cost.
(21.) Let copy of this judgment be sent to Bar Council of India and the Supreme Court Bar Association by the Registry for necessary action.
(22.) The petition deserves to be dismissed, which we direct. Appeal dismissed.
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Cross Citation :2003 CRI. L. J. 350

KARNATAKA HIGH COURT

Hon'ble Judge(s) : K. SREEDHAR RAO, J
Ajay Mehta …Vs … State of Karnataka
Cri. R. P. No. 851 of 2002, D/- 24 -9 -2002.

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[A] Criminal Trial – Representation by Advocate without filing vakalatnama – Like in Civil cases the advocate need not to file Vakalatnama in criminal cases – Filing of memo of appearance is sufficient – Court should be liberal in such type of cases – The prosecution have no right to put objection on the memo of appearance by the advocate.

[B] Failure by Junior Advocate to file Vakaltnama and memo of appearance on behalf of accused can be no ground for the court to reject the application for exemption filed by the junior advocate – The act of Magistrate rejecting the application and issuing N.B.W. is illegal – Order is set aside and N.B.W. recalled.

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Sri/Smt. G. Jairaj and Associates, for Petitioners; M. Marigowda, Addl. S.P.P., for Respondent.

Judgement

ORDER :- Revision filed against the order of the XXI Additional City Civil and Sessions Judge and Special Judge in Special Case No. 131/1997. On 20-9-2002 the accused No. 1 was present before the Court. Accused to 4 were absent. An application was filed for exemption by Smt. Vanitha, a Junior colleague of Sri. Dhanraj. It is unfortunate, on the previous day, Sri Dhanraj had expired. The trial Court took exception that the Junior Counsel has no authority to represent the accused to file an exemption application, thus rejected the application and issued N.B.W. Being aggrieved, the present Revision is filed.

2. The impugned order of the trial Court appears to be palpably erroneous. May be some technical lapse might have occurred on the part of the Junior Counsel in not filing a memo of appearance along with the exemption application. The Court should have considered the matter liberally in the facts and circumstances of the case. Unlike in civil cases, it is not necessary in criminal case that a vakalath has to be filed. In criminal cases, it is sufficient if a memo of appearance is filed by an advocate with a declaration that he has instructions from his client to represent him in the case. Such memo of appearance enable sufficient authority and power to represent the accused. The contents of memo of appearance cannot be challenged by the prosecution. It is only the accused for whose benefit the memo is filed can challenge. In the given set of the legal propositions, the Court was not proper in rejecting the application for exemption.

Accordingly, the Revision is allowed. The order of the trial Court is set aside. The N.B.W. issued against the petitioners is recalled. .. Revision allowed.

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Cross Citation :1975 CRI. L. J. 1808

MADHYA PRADESH HIGH COURT

Hon'ble Judge(s) : N. M. GOLVALKAR, J.

State of M. P. …Vs... Lohra

Criminal Revn. No. 661 of 1973, D/- 25 -3 -1975.

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Cri. P.C. Sec 4 (1) (r) and Sec. 205 – Appearance of advocate without vakalatnama – District Magistrate rejected application on ground that no Vakalatnama is filed by said advocate – Held – Rejection of

application by ADM is illegal – In criminal cases the advocate need not to file Vakalatnama – the advocate can act on behalf of accused without any formal vakalatnama in his favour – His own declaration of his being authorized by the accused is sufficient – The act of Addl. Dist. Magistrate is highly illegal – Such order betray a lamentable lack of judicial mind and approach – Judge is warned that he shall not pass such puerile orders hereafter and waste time not only of his own but also of higher Courts – Order of A.D.M. is quashed and set aside.

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Judgement

ORDER :- The Sessions Judge Sarguja at Ambikapur has, by his report under Section 438 of the Criminal Procedure Code, recommended that the order dated 26-7-1973 passed by the Additional District Magistrate (J), Ambikapur in Criminal Case No. 505/73, whereby the prayer of Shri N.N. Singh, Advocate to dispense with the attendance of the accused Lohra on that date of hearing, was rejected on the ground that no Vakalatnama was filed by him authorising him to appear for the accused, be set aside as it was patently illegal and unwarranted.

2. The learned Additional District Magistrate lost sight of the fact that under Article 22, an accused has a right to be defended by a legal practitioner of his choice and in the instant case. Shri Singh Advocate had been so appearing till then and that not only he appeared, but could also appear, act and fully represent the said accused on the basis of a memo of appearance under his own signature declaring himself to be authorised and instructed to so appear. No Vakalatnama, as is required in civil proceedings, is necessary for pleading and acting for any party to any criminal proceedings.

3. 'Pleader' is defined in Section 4(1)(r) of the Criminal Procedure Code as a Pleader or Mukhtyar authorised under any law for the time being in force to practise in a Court of law and includes (1) an Advocate a Vakil and an Attorney of a High Court so authorised ..... Shri Singh, being an Advocate, was authorised to practise in a Court. What the expression 'Practise' means is duly laid down by the Supreme Court to include both acting and pleading. (See AIR 1952 SC 369). Thus on the date of hearing, Shri Singh Advocate, when he proved for grant of exemption to accused Lohra from personal appearance in Court for that date, he was acting for the said accused and he could do that without any formal Vakalatnama in his favour. His own declaration of his being authorised by the said accused Lohra was sufficient.

4. I, therefore, accept this reference, set aside the order dated 26-7-1973 and direct the Additional District Magistrate concerned to formally pass now an order granting exemption to the accused Lohra for the hearing on 21-7-1973. He shall also note for his future guidance that he shall not pass such puerile orders hereafter and waste time not only of his own, but also of higher Courts. Such orders betray a lamentable lack of judicial mind and approach.

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Cross Citation : 2003 CRI. L. J. 4302

GAUHATI HIGH COURT

Hon'ble Judge(s) : A. H. SAIKIA, J.
Union of India and others, ..Vs...Hariram
Criminal Appeal No. 4 of 2001, D/- 11 -9 -2002

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Central Reserve Police Force Act (66 of 1949), S.9 - CRIMINAL PROCEDURE CODE - Opportunity to be defended by lawyer of choice of accused is constitutional mandate- Non providing opportunity to defend the case by engaging lawyer of choice of accused - Offends provisions of S. 303 of Cri. P.C. and Arts. 22 and 14of Constitution-trial vitiated – Conviction set aside.

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P. N. Choudhury, Addl. Sr. CGSC, for Appellants; B. K. Sarma, P. K. Tiwari and M. M. Ali, for Respondent.

Judgement

JUDGMENT :- The Assistant Commandant/Judicial Magistrate Ist Class of 87 Bn. Central Reserve Force Police (hereinafter referred to as 'the CRPF') by his order dated 17-2-88 in Case No. 1/88 convicted the respondent under Sections 10(m) and 10(n) of the Central Reserve Police Force Act, 1949 (hereinafter referred to as 'the Act') and sentenced him under Section 10(m) till rising of the Court and under Section 10(n) to undergo Simple Imprisonment for 90 days.

2. Being aggrieved by the said conviction, the respondent preferred an appeal under Section 374 of the Code of Criminal Procedure (Cr. P.C.) before the learned Addl. District Magistrate (J) Aizawal District, Aizawal being Criminal Appeal No. 19/95 who after hearing the learned counsel for the appellant and recording the absence of present appellant/Union of India (Respondent in the said appeal) despite notice, by his impugned order dated 25-10-1995 set aside and quashed the conviction so awarded by the Asstt. Commandant/Judicial Magistrate Ist, Class holding that the Asstt. Commandant/Judicial Magistrate Ist Class, not being a Magistrate according to provisions of Rule 36(B) of Central Reserved Police Rules, 1955 (hereinafter referred to as 'the Rules'), had no power to try charges under sub-clause (m) and (n) of Section 10 of the Act for which the punishment awarded by the said authority against the respondent was held to be illegal.

3. I have heard Mr. P. N. Choudhury, learned Addl. CGSC appearing on behalf of the appellant and also heard Mr. M. N. Ali, learned counsel appearing on behalf of the respondent.

4. The crucial issue involved in this present criminal appeal is whether the Asstt. Commandant exercising power of Judicial Magistrate Ist Class has been vested with the power of Magistrate under Section 16(2) of the Act to try the offences charged under sub-clause (m) and (n) of Section 10 of the Act against the respondent.

5. Assailing the impugned judgment, Mr. P. N. Choudhury, learned Addl. CGSC has vehemently argued that the finding of the Appellate Court is ex-facie perverse because the learned Addl. District Magistrate committed a grave error in coming to the conclusive finding to the effect that the learned Asstt. Commandant/Judicial Magistrate Ist Class has not been vested with the power of the Magistrate to try the offences against the respondent on the basis of Rule 36(B) of the Rules and as such, the impugned judgment is liable to be quashed. According to Mr. Choudhury the Appellate Court had also no jurisdiction to entertain the appeal so preferred by the respondent before him since the

matter relates to the Para Military Force i.e. Central Reserved Police being governed by a special enactment in the nature of the Act.

6. Defending the impugned judgment Mr. M. M. Ali, learned counsel appearing on behalf of the respondent has contended that the Appellate Court had the jurisdiction to hear and dispose of the appeal preferred against the conviction passed by the learned Asstt. Commandant/Judicial Magistrate Ist Class who is not a Magistrate in terms of Rule 36(B) of the Rules. His further contention is that the respondent was not afforded any opportunity to defend his case by a pleader of his choice as per provisions of Section 303 of the Cr. P.C. It is contended that according to Rule 36 of the Rules all trials in relation to any one of the offences mentioned in Sections 9 and 10 of the Act is required to be held in accordance with the procedure laid down in Cr. P.C. and as such, the conviction imposed by the Asstt. Commandant/Judicial Magistrate Ist Class cannot be sustained for non compliance of Section 303 Cr. P.C.

7. For better appreciation of the contentions made on behalf of the parties, it would be expedient and necessary to refer to the relevant provisions of law involved in this present case.

8. Sub-section (m) and (n) of Section 10 read as follows :-

"10. Leas heinous offences-Every member of the Force who.....

(m) absent himself without leave, or without sufficient cause over-stays leave granted to him, or

(n) is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline, or shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to three months' pay or with both".

9. Section 16(2) may be referred as follows :-

"16. Powers and duties conferrable and imposable on members of the Force.

(1) .....

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (now II of 1974), the Central Government may invest the Commandant or an Assistant Commandant with the powers of a Magistrate of any class for the purpose of inquiring into or trying any offence committed by a member of the force and punishable under this Act, or any offence committed by a member of the force against the person or property of another member :

Provided that :-

(i) When the offender is on leave or absent from duty, or

(ii) When the offence is not connected with the offender's duties as a member of the Force, or

(iii) When it is a pretty offence, even if connected with the offender's duties as a member of the Force,

The offence may, if the prescribed authority within the limit of whose jurisdiction the offences has been committed, so directs, be inquired into or tried by an ordinary Criminal Court having jurisdiction in the matter."

10. Rule 36 and 36(B) may be extracted as follows :-

"36. Judicial Trials - (a) All trials in relation to any one of the offences specified to any one of the offences specified in Sections 9 and 10 shall be held in accordance with the procedure laid down in the Code of Criminal Procedure, 1898 (1973).....

(b) All persons sentenced to imprisonment under the Act shall be confined in the nearest jail.

Provided that if the sentence of imprisonment is for one month or less, "or where the Commandant is satisfied that due to the difficulty of transport and escort of the person

sentenced to imprisonment to the nearest jail. It is so desirable, such persons shall be confined in the Quarter Guard of the Force."

"36.(B). Definition :- For the purpose of this chapter "Magistrate" means a Magistrate other than the Commandant or an Assistant Commandant on whom the powers of a Magistrate has been conferred under sub-section (2) of Section 16."

11. On perusal of the provisions of law above noted, it is noticed that offences prescribed under Sections 10(m) and 10(n) of the Act are triable by the Assistant Commandant/Judicial Magistrate, 1st Class being invested with the power of Magistrate according to the provision of Section 16(2) of the Act. The said section has clearly enshrined that the Central Govt. may invest the Commandant or Assistant Commandant with the power of Magistrate of any Class for the purpose of inquiring into or trying any offence committed by a Member of the Force and punishable under this Act. There is no dispute as regards such investing powers of Magistrate upon the Commandant or Assistant Commandant as for such purpose the Central Govt. had already notified vide GSR 161(E) dated 30-3-1974 which was published in Gazette of India dated 30-3-74 (see foot note A of Section 16 of the Act). The Rule 36(B) which was mainly relied upon by the Appellate Court, has been incorporated under Chapter VI-A under the heading of 'place of Trial and Adjustment of Jurisdiction of Ordinary Courts'. The expression 'Magistrate' occurring in Rule 36-B under this Chapter VI-A of the Rules has been defined in the context of place of trial and adjustment of jurisdiction of only ordinary Courts and not in the context of power conferred upon the Central Government under Section 16(2) of the Act to invest the Commandant or Assistant Commandant to exercise power of a Magistrate to try offence under the Act. That being so, the Appellate Court it appears, misconstrued and misinterpreted this provision of Rule 36-B which has clearly referred to ordinary Courts other than Special Courts constituted under the Act. In Section 16(2) of the Act some special power or duties have been conferred or imposed on members of the Force entrusting special judicial powers for inquiry or trial of any offences committed by a member of the Force and also for resultant punishment under the Act. Therefore, the magisterial power so invested by the Central Govt. on the Commandant or the Asstt. Commandant for trial of any offence under the Act cannot be taken away by Rule 36-B wherein the meaning of Magistrate has been defined in relation to the ordinary Courts only. It is clearly provided under Section 16(2) of the Act that in case of offences like

(i) When the offender is on leave or absent from duty or;

(ii) When the offence is not connected with the offender's duty as a member of the force or;

(iii) When it is a petty offence, even if connected with the offender's duties as a member of the Force. the prescribed authorities like Commandant or Asstt. Commandant within the limit of whose jurisdiction such offence has been committed may direct that such offence may be inquired into or tried by an ordinary Criminal Court having jurisdiction in this matter. In case of trial of such offences by the ordinary Courts only, the definition of Magistrate as per the Rule 36-B is significant. In that view of the matter, I unhesitatingly hold that the Assistant Commandant exercising the power of Magistrate under Section 16(2) of the Act has the legal authority to try the offences which are exclusively covered under this Special Act enacted for the purpose of constitution and regulation of an Armed Central Reserve Police Force and the learned Addl. District Magistrate was absolutely wrong in holding that the Assistant Commandant/Judicial Magistrate has no power to convict the respondent.

12. Now coming to the contentions made on behalf of the respondent to the effect that the respondent was not given the privilege of defending his case by engaging a pleader of his choice as envisaged under Section 303, Cr. P.C. which provides that any

person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code may of right be defended by a pleader of his choice. Ordinary reading of this provision makes it amply clear that a person is entitled to defend his case by engaging a pleader of his choice if he is accused of an offence before a Criminal Court or if any proceeding is initiated against him under this Code. Rule 36 of the Rules on the other hand seemingly envisages that all judicial trials in relation to the offences under Section 9 or 10 of the Act shall be held in accordance with the procedure laid down in Cr. P.C. A bare perusal of the provisions of the Act and Rules goes to indicate that no procedure whatsoever for inquiry or trial for any offences committed by a member of the force under this Act has been prescribed under the Act and Rules save and except Rule 36. Therefore, it may be safely said that since a judicial trial of any offence under Section 9 or 10 of the Act is required to be held in accordance with the procedure laid down in the Cr. P.C. in terms of Rule 36 of the Rules, the respondent was entitled to such privilege of defending his case by engaging a pleader of his choice. On perusal of the records made available before this Court by the learned Addl. CGSC it patently transpires that no such opportunity was given to the respondent to defend his case by engaging a lawyer of his choice. Hence this Court finds that the conviction of the respondent by the Assistant Commandant/Judicial Magistrate 1st Class is in contravention of the provision of Section 303, Cr. P.C. and the same is also hit by principles of natural justice as the respondent was deprived of adequate opportunity to defend his case. Rule of natural justice requires that one should not be deprived of his vested right or be punished without having been given an opportunity to offer an explanation on his behalf. This principle stems from the maxim "Audit alteram partem" which means no one should be condemned unheard. The requirement of this maxim has two elements :- (1) The opportunity to make representation must be afforded, and (2) such opprtunity must be reasonable. The instant case is a glaring example of violation of such settled principle being contrary to the provision of Section 303 Cr. P.C. as the respondent was denied of his right to be defended by a pleader of his choice, a fundamental right guaranteed under Art. 22(1) of the Constitution of India.

13. As regards the question of jurisdiction of the appellate Court i.e. the learned Addl. District Magistrate, Aizawl to entertain the appeal in question, raised by the learned counsel for the appellant, on plain reading of the provisions of the Act and Rules, it is seen that there is no provision for appeal prescribed under the Act and the Rules to be preferred before the learned District Judge/District Magistrate under the ordinary Court against the conviction and sentence under Section 10 of the Act passed by the learned Assistant Commandant under Section 16(2) of the Act. Rule 36 only prescribing judicial trials does not speak of any provision of such appeal. In that view of the matter I find enough force in the submissions of the learned CGSC and accordingly it is held that the learned District Magistrate/Addl. District Magistrate in the present case, in absence of any specific provision of appeal in the Act itself, lacks jurisdiction to entertain the appeal in question arising out of conviction and sentence passed under this Special Act.

14. Having regard to the provisions of law referred herein above and upon hearing the learned counsel for the parties, this Court proposes to pass the following orders:-

(a) The learned Assistant Commandant/Judicial Magistrate, Ist Class has the power under Section 16(2) of the Act to try offence committed by the Member of the Force and to punish accordingly and is not a Magistrate as defined under Rule 36-B of the Rules.

(b) The conviction of respondent awarded by the learned Assistant Commandant/Judicial Magistrate, Ist Class is hereby set aside and quashed being violative of Section 303, Cr. P.C.

(c) The learned Additional District Magistrate (J) Aizawl has no jurisdiction to entertain the appeal preferred by the respondent against the conviction and sentence passed by the learned Assistant Commandant/Judicial Magistrate Ist Class exercising power under Section 16(2) of the Act.

For the reasons, discussions and observations as indicated above, this Criminal Appeal is partly allowed.

Records placed before this Court be handed over to Mr. P. N. Choudhury, learned Addl. CGSC forthwith.

Appeal partly allowed.

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Cross Citation :1970 CRI. L. J. 396 (V. 76, C. N. 91)

ASSAM HIGH COURT

(Division Bench)

Hon'ble Judge(s) : P. K. GOSWAMI AND M. C. PATHAK, JJ.

Nasia Pradhan .. Versus… State

Criminal Appeal No. 96(J) of 1965, D/- 29 -5 -1968,

from order of Addl. S.J., U. A. D. Dibrugarh, D/- 14 -5 -1965.

Datta, for Appellants; A.M. Mazumdar, Public Prosecutor, for Respondent.

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Constitution of India, Art.226 - Criminal P.C. (5 of 1898), S.304 - COURT OF SESSIONS – Right of accused to be defended by advocate during trial

- Duty is cast on public prosecutor to bring it to notice of Court, so that Court can appoint somebody to defend accused – Non following the procedure entire trial is vitiated- even if the accused at one stage intimated that he would have his own defence but on the date of hearing he is undefended, a duty is cast on the public prosecutor to bring it to the notice of the Court so that the Court can appoint somebody to defend the accused. If none is available as per the list, a gentleman of the Bar present in Court may be requested to defend the accused. The object underlying this provision is that no accused who is accused of a charge which may lead to the extreme penalty under the law should be deprived of a defence. Otherwise this leads to inadequate defence of the accused persons before the court of session and the entire trial is vitiated for the accused not having got a proper and fair trial. (Para 7)

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Judgement

GOSWAMI, J. :- This appeal from jail is directed against the judgement of conviction under Section 304 part I read with Section 34 and also under Section 326 read with Section 34, I.P.C. and sentence of rigorous imprisonment for ten years on the first count and three years under the second count to run concurrently passed by the learned Additional Sessions, Upper Assam Districts at Dibrugarh.

2. The prosecution case is that the deceased Bharat Pradhan was in possession of a plot of land with bamboos standing thereon. There was already a dispute with respect to that land for which there was a proceeding under Section 145, Criminal Procedure Code, and the preliminary order was drawn on 14-5-1962 and also the land was attached on the same day, as will appear from Exhibit 2. It is said that the accused armed with axes and daos started cutting the bamboos on the land, whereupon the deceased Bharat Pradhan along with others went and protested, at which the accused persons dealt dao and axe blows on Bharat, who succumbed to the injuries. Mahi Chandra Pradhan also was in that group and when he intervened, he was also assaulted and he sustained grievous injuries. After the incident they were both lying injured on the land.

3. The defence of the accused is that they claim possession of the land and on that day in order to save their crops from damage by cattle they were cutting bamboos on the land to make some fencing.

4. Initially there were six accused who were charged, but the learned Additional Sessions Judge acquitted Dhaneswar Goala and Pacha Mura on the view that these two persons were merely labourers and had not shared any common intention to assault the complainant party.

5. At the outset our attention has been drawn to the fact that the accused were undefended before the Court of Session. It also appeared that initially there was a counsel appointed by the learned Additional Sessions Judge to defend the accused persons, who appeared to be undefended at that stage. Later on, however, on the adjourned date when they signified their intention to engage their own counsel, the learned Additional Sessions Judge terminated the appointment of the State counsel and allowed their prayer. It so happened that on the adjourned date of hearing when the accused were brought to trial

they appeared to be undefended and the order-sheet showed that the trial proceeded. When we have perused the entire record we find that there is some cross-examination of the prosecution witnesses although in a meagre and unsatisfactory way; perhaps the accused themselves did what their wits would allow them to do under the circumstances of the case.

6. Section 340 of the Criminal Procedure Code may be read :

"(1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.

x x "

Even under the Constitution, Article 22 makes provision for an opportunity to be given to the accused to be represented by a lawyer of his own choice. Article 22(1) is in the following words :

"(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

X X X X"

Both Section 340, Cr. P.C. and Article 22 of the Constitution do not refer particularly to a case under Section 302, I.P.C. nor for providing for free legal aid under the law. All the same we find that the State Government in conformity with the object or intention underlying Sec. 340, Cr. P.C. and later engrafted in the Constitution, has made some provision for defence of pauper accused who have got to face a charge where the extreme penalty is provided under the law, namely death. Rule 19 in the Assam Law Department Manual, published under the authority of the State Government of Assam, provided for defence of pauper accused of murder. It runs thus :

"(1) When an accused is committed for trial on a charge of murder, the committing Magistrate shall at the time of passing order for his commitment enquire of the accused whether he will make arrangements for his own defence in the Court of Sessions or wishes to be defended at the expense of Government, and shall communicate the result of his enquiry to the Sess. Judge direct filing a copy of the letter with the commitment record. If the accused expresses a wish to be defended at Government expense, the committing Magistrate shall state in the letter whether in his opinion the accused can afford to engage a pleader in the Sessions Court, giving the grounds for his opinion. It shall be stated whether the accused was defended by a pleader or muktar in the Lower Court.

(2) On receipt of intimation that a prisoner committed to the Court of Sessions on a charge of murder desires to be defended at the expense of Government, it has been arranged that the Sessions Judge shall unless he sees reason to believe that the prisoner is in a position to pay for his own defence, appoint a pleader for the purpose. To this end the Sessions Judge shall maintain a list of Barristers or pleaders of the districts in which Sessions trials are ordinarily held who are willing to accept briefs for the defence of prisoners on their trial for murder; and ordinarily one of the persons on such list should be engaged.

(It is not necessary to refer to some corrections made in this sub-rule by certain correction slip No. 25).

(3) If notwithstanding these precautions it appears at the commencement of the trial that an accused charged with murder is undefended, the public prosecutor shall bring the fact to the notice of the presiding Judge, and request him to appoint a pleader for the defence of the prisoner. The Judge may then appoint any Barrister or pleader on the list referred to above, or any member of the Bar present in Court, to defend the prisoner.

x x x x x"

7. It is clear, therefore, from sub-rule (3) of Rule 19 that even if the accused at one stage intimated that he would have his own defence but on the date of hearing he is undefended, a duty is cast on the public prosecutor to bring it to the notice of the Court so that the Court can appoint somebody to defend the accused. If none is available as per the list, a gentleman of the Bar present in Court may be requested to defend the accused. The object underlying, this provision is that no accused who is accused of a charge which may lead to the extreme penalty under the law should be deprived of a defence. This is a salutary procedure and is in the wake of clamour of all accused persons in a criminal trial who are indigent to receive free defence at the expense of the State. We are, therefore, surprised that the learned Additional Sessions Judge having once appointed a Counsel to defend these accused persons should have thought it fit to terminate the appointment and refrain from resummoning his assistance when the accused were in fact undefended before him. All this has led to inadequate defence of the accused persons before the Court of Session.

According to the prosecution, the land was under attachment, which means that it was in the custody of the Court, and any one entering upon the land after the order of attachment was promulgated would be committing an act of trespass. If the accused had gone there, they were committing trespass; so also the complainant party when they entered the land, it is the prosecution case that the accused were first there and were cutting the bamboos. They claimed to use the bamboos as fencing to protect their crops. We have put the question to the public prosecutor, who is unable to show from the records that this plea of the accused that they were cutting the bamboos in order to preserve their crops has been denied by any prosecution witness. If, therefore, the accused were merely cutting the bamboos in order to put up a fence to save their crops, it may be debatable whether they were actually entering the land with intention to commit an offence. Be that as it may, the land being already under attachment, the complainant party also had no business to enter on the land but only could report to the Court which attached the land for taking appropriate steps against the accused persons. The question which arose in the entire circumstances of the evidence in the case was, who the aggressor was. This point however, was absolutely ignored by the learned Additional Sessions Judge. This has happened because the accused were not properly defended and it is a case where we may say that the entire trial is vitiated for the accused not having got a proper and fair trial. We are, therefore, unable to uphold the conviction of the accused persons under all the sections charged.

8. The next question would be, whether this is a fit case where we should think of remanding the case for retrial. The occurrence took place on 15th October, 1962. Apart from the fact that Bharat Pradhan died as a result of the injuries and Mahi Chandra Pradhan and three others received injuries, amongst the accused we find there are three persons Garbaria Pardhan, Petua Pradhan and Nasia Pradhan, who also had similarly received injuries. The accused have already served three years in jail. We are, therefore, unable to accede to the request of the learned public prosecutor for a remand of the case for retrial of the accused. The accused-appellants are acquitted of the charges under Section 304 Part I, read with Section 34 and also under Section 326 read with Section 34, Indian Penal Code. They shall be discharged from their jail custody forthwith.

9. The appeal is allowed.

10. . C. PATHAK, J. :- I agree.

Appeal allowed.

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Cross Citation :2004-BCR-5-196 , 2004-MhLJ-2-810

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : R.M.S.Khandeparkar, J

Bharatiya Bhavan Co-operative Housing Society Limited ..Vs.. Krishna H. Bajaj
Writ Petition 197 of 2004 Of Feb 24,2004

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Advocate Act – There is no total bar for the private person/non advocate to represent the case of litigant - Court can allow power of attorney holder of a party to appear before the Court.

It is the choice of the party to decide who should represent him or her and such right having been assured in terms of Article 19(1) (A) of the constitution of India and there being no bar for non-advocate being allowed to represent a party in a proceeding – Supreme Court Judgment AIR 1978 SC 1019 relied and referred to.

(1.) THE order of the Co-operative Appellate Court passed on 24th December, 2003 in Revision Application No. 673 of 2003 permitting the respondent No. 1 to plead through his attorney instead of an Advocate, is sought to be challenged in this petition. The notice of the hearing of the matter was issued to the respondents for final disposal of the same, at the admission stage. However, apart from the respondent No. 1, none has appeared. In any case, there is no case for proceeding against the respondent Nos. 2 and 3 and the petition is liable to be dismissed in limine against the said respondents and is accordingly dismissed. Upon hearing the learned Advocate for the petitioner and the respondent No. 1, while issuing the rule, by consent, the matter was heard forthwith for final disposal.

(2.) THE respondent No. 1 filed acase for recovery of amount of Rs. 51 lakhs as damages and Rs. 20 lakhs towards repairs charges from the petitioner No. 1 society and by order dated 19th March, 2003 passed in Writ Petition No. 2661 of 2002, the hearing and disposal of the said dispute was expedited, and it was expected to completed within a period of six months. In the course of recording of evidence before the Co-operative Court, and after the conclusion of the recording of the evidence of the respondent No. 1 and while the 1st witness of the petitioner-society was under cross-examination, after having been partly cross-examined, the Advocate for the respondent No. 1 sought to withdraw his appearance by an application dated 20th December, 2003 which was allowed by the Co-operative Court. Simultaneously, an application was filed by the respondent No. 1 for allowing his power of attorney holder viz. Shailesh H. Bajaj, Constituted Attorney, to represent her and to continue the cross-examination of the witness of the petitioner/society. The said application, however, was rejected by the Co-operative Court on 20th December, 2003 on the ground that the right to plead is not available to any person other than the person practising as an Advocate. The said order was challenged in the revision application and by the impugned order while setting aside the order of the Co-operative Court, the power of attorney holder of the respondent No. 1 was allowed to represent the respondent No. 1 and also to continue with the cross-examination of the witness of the petitioner No. 1-society. Hence, the petition,

(3.) IT is sought to be contended on behalf of the petitioners that in terms of the provisions of law contained in the Advocates Act, 1961 read with the provisions of the Maharashtra Co-operative Societies Act, 1960 as well as the Maharashtra Co-operative Societies Rules, 1961, only the Advocates are entitled to practice and a person who is not qualified as Advocate is not be entitled to practice, and, therefore, the impugned order is bad in law. On the other hand, the learned Advocate for the respondent No. 1 has contended that it is a matter of choice for the parties to decide who should represent him or her and such right having been assured in terms of Article 19 (1) (A) of the constitution of India, and there being no bar for non advocate being allowed to represent a party in a proceeding before the Co-operative Court under the Maharashtra Co-operative Societies Act, 1960 or the Rules framed thereunder and in a situation where the Advocate had withdrawn his appearance for the party and it was not possible for the party to engage another advocate within a short span of time and considering that the proceedings were required to be concluded within the specified time in terms of the order of the High Court, there is no case made out for interference in the impugned order. Reliance is sought to be placed in the decisions in the matter of (Aswin Shcunbhuprasad Patel and others v. National Rayon Corporation Ltd.), reported in A. I. R. 1955 Bom. 262, and in the matter of (Murlidhar Datoba Nimanka and others v. Harish Balkrushna Latane and others), reported in 2003 (6) Bom. C. R. 153 : 2003 (4) Mh. L. J. 196, (Sanjay R. Kothari and another v. South Mumbai Consumer Disputes Redressal Forum and another), reported in 2002 (6) Bom. C. R. (O. O. C. J.)637 : A. I. R. 2003 Bom. 15, and of the Apex Court in the matter of (Perfect Paper and Steel Converters Private Ltd. and others v. The Bombay National General Workers Union and others), reported in 1989 (1) C. L. R. 492 and in the matter of (Harishankar Rastogi v. Girdhari Sharma and another), reported in A. I. R. 1978 S. C. 1019.

(4.) IT cannot be disputed that the Advocates Act, 1961 prohibits any person others than Advocate to practice profession of law in any Court or before any authority or person except as otherwise provided in the said Act or in any other law for the time being in force. Section 33 of the Advocates Act 1961 is very clear in that regard, and it reads that "except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practices in any Court or before any authority or person unless he is enrolled as an Advocate under this Act. " The provisions of section 33 came into force with effect from 1st June , 1969 consequent to the Notification No. S. O. 1500 dated 5th April, 1969 issued under section 1 (3) of the Advocates Act, 1961. The Division Bench of this Court in Sanjay Kothari's case (supra), after taking note of the said provisions of law, has observed that "the Advocates Act, thus, prohibits any person other than Advocate to practice profession of law in any Court or before any authority or person except as otherwise provided in this Act or in any other law for the time being in force. "

(5.) THE learned Single Judge of this Court in Aswin Shambhuprasad Patel's case (supra), while dealing with the issue as to whether a constituted attorney has right or audience in the High Court on behalf of a party, in a case werein the petitioner in civil revision application was seeking audience through his attorney, after referring to Order III, Rules 1 and 2 as well as Clause X of Letters Patent and section 8 of the Bar Councils Act, 1926 and section 9 of the Bombay Pleaders Act, 1920, held that "the expression" appearance, application or act in or to any Court in Order 3, Rule 1 of Civil Procedure Code does not include pleading. The right of audience in Court, the right to address the Court, the right to examine and cross-examine witnesses, are all parts of pleading. " It was further held that the expression right to practise in section 8 of the Bar Councils Act is an expression much wider than the right to plead and includes both the pleading and acting,

and such right is conferred only upon those persons who have been enrolled as Advocates of the High Court under the said Bar Councils Act, which is in conformity with Clause X of letters Patent. In Murlidhar Datoba Nimanka's case (supra), it was held by me that the provisions of Civil Procedure Code are not applicable to the proceed ings before the Co-operative Court while dealing with the disputes under the Maharashtra Co-operative Societies Act, 1960 though in relation to such procedure wherever the provisions of law contained in the said Act and the Rules made thereunder are totally silent, the Principles of the Civil Procedure Code can be made applicable to such proceedings.

(6.) THE Apex Court in Harishankar Rastogi's case (supra), while dealing with a case pertaining to criminal proceedings wherein the party was seeking permission of the Court to be represented by a person, who was not an Advocate, held that it is open to a person, who is party to a proceeding to get himself represented by a non-advocate in a particular instance or case. Simultaneously, it was ruled that "a private person, who is not an Advocate, has no right to barge into Court and claim to argue for a party. He must get the prior permission of the Court, for which the motion must come from the party himself. It is open to the Court to grant or withhold permission in its discretion. In fact the Court may, even after grant of permission, withdraw it half-way through if the representative proves himself reprehensible. The antecedents relationship, the reasons for requisitioning the services of the private person and a variety of other circumstances must be gathered before grant or refusal of permission.

(7.) THE Division Bench of this Court in Perfect Paper and Steel Converters Private Ltd. 's case (supra), while dealing with a question as to whether in a proceeding before the Industrial Court under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, a party has a right to be represented by a person of his choice notwithstanding the fact that he does not fall in any of the categories mentioned in Regulation 11 of the Industrial Court Regulation, 1975 made by the Industrial Court pursuant to the power conferred upon it under section 33 of the M. R. T. U. and P. U. L. P. Act, 1971, after taking note of the Article 19 (l){a) of the Constitution of India, held that thereunder every citizen has right to effective speech and expression and that such right would include a right of a party to appoint a person of his choice to represent himself assured under the provisions of section 32 of the Advocates Act, 1961, and observed that :-

"a party may appoint a person to represented himself before any Court or authority because of his expertise in the subject concerned or because he is his friend or adviser. When such a person is appointed in any particular case with the permission of the authority concerned, he does not practise the profession and contravene section 33 of the Advocates Act. Section 32 of the said Act infact permits such appearance notwithstanding the fact that the person concerned is not enrolled as an Advocate under that Act. Secondly, the privileged to practices the legal profession which is conferred on the Advocate enrolled under the said Act who practices as a matter of right and has to be distinguished from the appearance of a person with the permission of the Court or the authority as the case may be. "

It was further observed that:

"in fact, the application to appoint a non-advocate to represent a party must proceed from the party himself. When such application is made, the Court, authority or the person as the case may be has to take into consideration several circumstances before granting or refusing the permission. "

(8.) CONSIDERING the above referred rulings and the provisions of law, it is clear that it is privilege of the Advocate enrolled under the said Act to practices in any Court or before any authority or the person, unless the said privilege is restricted in any manner

under any law in force. This conclusion is inevitable from the provisions of law contained in section 33 and well clarified by the two decisions of the Division Bench of this Court, one in Perfect Paper and Steel's case (supra) and another in Sanjay Kothari's case (supra). This is also clear from the decision of the Apex Court in Harishankar Rastogi's case (supra). Infact, it was elaborately clarified by the Apex Court in Harishankar Rastogi's case (supra) after taking note of the provisions of article 19 (l) (a) of the Constitution of India that :-

"while it is true that Article 19 of the Constitution guarantees the freedom to practise any profession, it is open to the State to make a law imposing, in the interest of the general public, reasonable restrictions on the exercise of the right. The Advocates Act, by section 29, provides for such a reasonable restriction, namely, that the only class of persons entitled to practise the profession of law shall be Advocates. "

It was further ruled that:

"practising a profession means something very different from representing some friend or relation on one occasion or in one case or on a few occasions or in a few cases. . . . . It is absolutely clear that anyone who is not an Advocate, cannot as of right, force himself into this Court and claim to plead for another. Permission may, however, be granted by this Court taking the justice of the situation and several other factors into consideration for such non-professional representation. "

Being so, while privilege of practising the profession of law is reserved for the Advocates enrolled under the said Act, there is no total prohibition for allowing a party to be represented by a person of his choice, other than one practising the Advocate, for justifiable reasons, to be established to the satisfaction of the Court by the party seeking leave to be represented by a non-Advocate.

(9.) AS regards the proceedings before the Co-operative Court, the Maharashtra Co-operative Societies Act, 1960, under section 94 (2) provides that "except that the permission of the Co- operative Court, no party shall be represented at the hearing of a dispute by legal practitioners," The said provision of law apparently discloses that a legal practitioner cannot appear in the Co-operative Court as a matter of right. Indeed, section 33 of the Advocates Act, while ensuring right of appearance to the Advocate before any Court or authority clearly carves out an exception to the said Rule in the cases where "otherwise provided in any other law". Obviously, section 94 (2) is one of such provision under which the right of a legal practitioner to appear in the Court is restricted. At the same time, there is no total bar for appearance by the Advocates before the Co-operative Court and this is evident from section 94 (2) itself.

(10.) APART from section 94 (2), there is no other provision either in the Maharashtra Co-operative Societies Act, 1960 or in the Maharashtra Co-operative Societies Rules, 1961 relating to the representation of the parties to the disputes before the co-operative courts. In other words, the provision of the Advocates Act, 1961, subject to the restrictions imposed in section 94 (2) would be attracted. Consequently, the decision of the Apex Court in Harishankar Rastogi's case (supra) would squarely apply in such cases. Beides, it stands to reason that in a case where the party is unable to secure the assistance of an Advocate and if he is in a position to get the help of his well wisher, who can effectively defend his/her case and assist the Court in arriving at the appropriate solution to the dispute under adjudication by the Court, certainly technicalities cannot be allowed either to imperil the justice or to bulldoze the cause of justice. In such cases, the technicalities will have to be set apart and practical approach will have to be adopted.

(11.) AS regards the decision in, undoubtedly Sanjay Kothari's case (supra), it is restricted to the matters before the Consumer forums. It was held therein that:

'the Party before the Consumer Forum/state Commission cannot be compelled to engage services of an Advocate. If the party before the Consumer Forum/state Commission does

not engage an Advocate, it has to appear before the Consumer Forum on date/dates of hearing either in person or through its authorized agents. "

(12.) REVERTING to the facts of the case, it is apparent that the Co-operative Court by its order dated 22nd December, 2003 had rejected the application filed by the respondent No, 1 for allowing her to be represented by her power of attorney holder in the absence of Advocate and to cross-examine the witnesses on her behalf. The Appellate Co-operative Court, however, set aside the said order on the ground that the Advocate had abruptly withdrawn his appearance and there was a direction for expeditious disposal of a case crossexamination was required to be completed expeditiously, and on account of vacation, the party was not able to engage another Advocate immediately, and in those circumstances, the party was justified in seeking representation through her attorney.

(13.) UNDISPUTEDLY, the matter was required to be disposed of within the specified time in terms of the order of this Court. The ground disclosed for allowing the party of be represented by the attorney was the abrupt withdrawal of the appearance by her Advocate and on account of vacation, it was difficult for the party to secure presence of another Advocate, and the said facts were not disputed by the petitioners, and in those circumstances, Shailesh H. Bajaj, the attorney of the party, who is stated to be conversant with the facts, was allowed to represent the party. The main ground for seeking representation through attorney was that the Advocate appearing for the party, had abruptly withdrawn his appearance and it was difficult for the respondent to secure the presence of another Advocate on account of vacation. It cannot be disputed that the vacation was for 15 days. If the matter was required to be concluded expeditiously, certainly the ground that on account of vacation, it wad difficult to secure presence of another Advocate, was also a justifiable ground. In those circumstances, there was a clear case made out for representation of a party through her power of attorney particularly during the period of vacation and till the party was able to secure the presence of another Advocate.

(14.) IT is sought to be contended that the Court even did not consider the antecedents of the person who is allowed to represent the party to the proceedings and that the said attorney was arrested for economic offences. Certainly the said allegation is made for the first time when the matter has come up in this Court and there was no whisper about it till the impugned order was passed. Besides, it cannot be disputed that the permission given to a party to be represented by non-advocate is not final for all purposes, but such order is always subject to the modification, even during the pendency of the proceedings in the same Court, depending upon the facts and circumstances of the case. There is no prohibition for the petitioners from approaching the Co-operative Court for modification of the impugned order, if so desired, on cogent ground to be made for such modification. In case of any such application by the petitioners, the Co-operative Court will have to deal with the same in accordance with law and bearing in mind the rulings in Harishankar Rastogi's case (supra) and the decision of Division Bench in Perfect Paper and Steel's case (supra).

(15.) IN the circumstances, the impugned order does not disclose any cause for interference therein in writ jurisdiction and the petition, therefore, fails and is dismissed. Rule is discharged with no order as to costs. Petition dismissed.

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NO VAKALATNAMA SHALL BE NECESSARY : -

Criminal Manual –Chapter VI (4)(A)- States that no *Vakalatnama* shall be necessary in the case (iv) a Pleader engaged to plead on behalf of any party by any Pleader who has been duly appointed to act as a Pleader on behalf of such party.

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Cross Citation :2002 CRI. L. J. 788

BOMBAY HIGH COURT

Coram : VISHNU SAHAI AND Dr. PRATIBHA UPASANI, JJ. (Division Bench)

B. A. Shelar ..Vs..M. S. Menon and another
Contempt Petn. No. 2 of 2000, D/- 12 -3 -2001.

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Contempt of Court by Advocate - Criminal contempt – Malicious statement made by an Advocate before Court during pendency of cases is criminal contempt – He is an advocate and not layman – He made statement with having knowledge that the malicious statement is per se contemptuous – Mere offer of unconditional apology by contemnor should not allow him to go scot-free – Contemnor advocate liable to be punished – Fine of Rs. 2000/- imposed and in default to go 3 months imprisonment.

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Judgement

VISHNU SAHAI, J. :- On a reference made by Mr. B. A. Shelar, Metropolitan Magistrate, 21st Court, Bandra, Mumbai, under Section 15(2) of the Contempt of the Courts Act to this Court, for taking cognizance of the criminal cotnempt committed by M. S. Menon, Advocate, a Division Bench of this Court (Coram; G.D. Patil and A. M. Khanwilkar, JJ.), vide its order dated 4-12-2000, issued notice to M. S. Menon, Advocate.

2. The fatual matrix from which this notice arises, in short, is as under : In the Court of Mr. B. A. Shelar, Metropolitan Magistrate, 21st Court, Bandra, Mumbai, two criminal cases, namely, Criminal case No. 4/S/2000 and 5/S/2000 : both under Section 500/504 of I.P.C., were pending. In the said cases, M.S. Menon, Advocate, made the following statements :

In criminal case No. 4/S/2000 :-

"I say that the presiding officer intentionally chose to overlook the above evidence as I have filed a complaint against him before SID and CMM and which is pending enquiry.

I say that the process has been issued out of malice/prejudice/vengeance and bias ignoring to look into the contents of letter dated 16-8-99 which in themselves are insufficient to attract an offence under Section 504."

In criminal case No. 5/S/2000 :-

"I say that the presiding officer is admittedly aware of the complaint I have filed against him before the SID and CMM, and which is pending enquiry.

I say that the issuance of process is out of malice/prejudice/bias and Vengeance and with intent to cause injury to me for which too action for criminal contempt and sanction for prosecution of the presiding officer is being sought."

3. Mr. M. S. Menon, Advocate, who, as directed by us vide our order dated 7-3-2001, is present in the Court today. Although he has filed a detailed reply, but has not in any manner sought to justify the statements quoted above. Instead he has offered his unconditional apology and has expressed profound regret at making the said statements. He has urged that we should accept his unconditional apology and discharge the notice.

4. We have reflected over Mr. M. S. Menon's submission. We are constrained to observe that the offence of criminal contempt, under Section 2(c) of the Contempt of Courts Act, 1971, is made out against Mr. M. S. Menon, the contemnor. In our view, this is not a case, where on a mere acceptance of uncnditional apology, the contemnor Mr. M. S. Menon, should be allowed to go scot-free. The reasons which have warranted us to reach such a conclusion are as under:

The contemnor, on his own admission made before us, is an advocate of 15 years standing. He is not a layman. He was expected to know that the said statements made by him, were per se contemptuous. Despite that, he has made them. We make no bones in observing that an Advocate must always remember that he is an Officer of the Court and should discharge his duties with dignity and restraint. His advocacy should not reflect his identification with the party he represents.

5. It should be borne in mind that the bed-rock on which the Courts survive, is public confidence and when lawyers make such reprehensible imputations against judicial officers, this Court cannot remain a mute spectator. If this Court were to do so, then public confidence in Judiciary would stand eroded and the citizenry would start believing that the imputations may be true. That indeed would be distressing.

6. (sic) It are the said circumstances which have prompted us not to accept the unconditional apology simpliciter made by Mr. M. S. Menon, the contemnor.

7. The question is what should be the punishment that should be inflicted on the contemnor. Since the contemnor has shown penitence and there appears to be contriteness in his apology, in our view, a fine of Rs. 2,000/-, in default, a sentence of three months S.I. would meet the ends of justice.

8. In the result, we find the contemnor Mr. M. S. Menon, guilty of the offence of criminal contempt under Section 2(c) of the Contempt of Courts Act, 1971 and sentence him to pay a fine of Rs. 2,000/-, in default to undergo three months S.I. The fine shall be paid by the contemnor, within two weeks from today, before the Registrar of this Court, who shall accept the same on production of a true copy of this order duly authenticated by the Sheristedar of this Court.

A true copy of this order shall be sent to the Court of Mr. B.A. Shelar, Metropolitan Magistrate, 21st Court, Bandra, Mumbai by the Office within one week from today.

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Cross Citation :1987-SCC-3-258

SUPREME COURT OF INDIA

Coram : A.P.SEN,B.C.RAY, JJ

(E.S.Reddy) T.V.Choudhary,A Member Of The Indian Administrative Service (UnderSuspension) **-Versus-** Chief Secretary Of Andhra Pradesh

Civil Miscellaneous Petition 25533 Of 1986, Special Leave Petition 14045 Of 1985 May 01,1987

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A) Duty of Advocates towards Court – Held, he has to act fairly and place all the truth even if it is against his client – he should not withhold the authority or documents which tells against his client – It is a mistake to suppose that he is a mouthpiece of his client to say that he wants – He must disregard with instruction of his client which conflicts with their duty to the Court. **(Para 11 & 12)**

B) Duty and responsibility of senior counsel - By virtue of the pre-eminence which senior counsel enjoy in the profession, they not only carry greater responsibilities but they also act as a model to the junior members of the profession. A senior counsel more or less occupies a position akin to a Queen's counsel in England next after the Attorney General and the Solicitor General. It is an honor and privilege conferred on advocates of standing and experience by the chief justice and the Judges of this court. They thus become leading counsel and take precedence on all counsel not having that rank- A senior counsel though he cannot draw up pleadings of the party, can nevertheless be engaged "to settle" i.e. to put the pleadings into "proper and satisfactory form" and hence a senior counsel settling pleadings has a more onerous responsibility as otherwise the blame for improper pleadings will be laid at his doors. (Para 10)

> *"(11) Lord Reid in Rondel v. Worsley has succinctly set out the conflicting nature of the duties a counsel has to perform in his own inimitable manner as follows :*
> *Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, , which he thinks will help his client's case. As an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. By so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.*

(12) Again as Lord Denning, M. R. in Rondel v. W would say :
He (the counsel) has time and again to choose between his 265 duty to his client and his duty to the court. This is a conflict often difficult to resolve; and he should not be under pressure to decide it wrongly. . . . When a barrister (or an advocate) puts his first duty to the court, he has nothing to fear. (words in brackets added).
In the words of Lord Dinning:
It is a mistake to suppose that he is the mouthpiece of his client to say what he wants :. . . . He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honor. If he breaks it, he is offending against the rules of the profession and is subject to its discipline. . "

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JUDGEMENT

A.P. SEN, J

(1) This is an application made by one T. V. Choudhary, a member of the Indian Administrative Service, under suspension, for recalling the court's orders dated 5/05/1986 and 11/08/1986 passed in Special Leave Petition No. 14045 of 1985.
(2) We shall first deal with the special leave petition of E. S. Reddi, a member of the Indian Administrative Service belonging to Andhra Pradesh cadre and who worked as the Vice-Chairman-cum-Managing Director of the Andhra Pradesh Mining Corporation. It is directed against a judgment of the division bench of the High court dated 18/10/1985 reversing the judgment and order of a learned Single Judge dated 2/09/1985 and dismissing his petition under Article 226 of the Constitution. By the writ petition, the petitioner had called in question the validity of an order of the State government of Andhra Pradesh dated 11/02/1985 placing him under suspension under sub-rule (1) of Rule 13 of the Andhra 260 Pradesh Civil Services (Classification, Control and Appeal) Rules, 1963. The main grievance of the petitioner before the High court was that the impugned order of suspension was wholly mala fide, arbitrary and irrational and violative of Article 14 of the Constitution as there was no justification for the differential treatment meted out to him while the applicant T. V. Choudhary, also a member of the Indian Administrative Service, who worked in various capacities viz. as General Manager, Functional Director, Member, Board of Directors and Vice-Chairman-cum-Managing Director and was involved in the commission of the alleged irregularities, had merely been transferred from the Corporation and posted as Managing Director, Andhra Pradesh State Textile Development Corporation. That objection of his was sustained before the learned Single Judge who by his judgment dated' 2/09/1985 quashed the impugned order of suspension. The Division bench however by the judgment under appeal has reversed that judgment and dismissed the writ petition holding that the findings arrived at by the learned Single Judge are not warranted by the material on record.
(3) Civil Miscellaneous Petition No. 25510/86 is filed by R. Parthasarthy, a member of the Indian Administrative Service who was Vice-Chairman-cum-Managing Director of the Corporation for the period from March 197 9/10/1979 and was working as the Commissioner of Commercial Taxes, while Civil Miscellaneous Petition No. 25533/86 is by T. V. Choudhary. also a member of the Indian Administrative Service and who was working as the Managing Director of the Andhra Pradesh State Textile Development Corporation.

These two applications are for recalling the court's orders dated 5/05/1986 and August II. 1986 on the ground that they prejudicially affect the applicants. The matter relates to defalcation of a huge amount of Rs.1.50 crores by certain officers of the State government whose services were placed on deputation with the Corporation. Admittedly, the Anti-Corruption Bureau, Andhra Pradesh has registered a case against these officers for having committed alleged offences punishable under S. 120-B read with S. 420 of the Indian Penal Code and S. 5(1)(d) of the Prevention of Corruption Act, 1947 as its preliminary report revealed a prima faces case against them.

(4) On 12/12/1985 the court issued notice on the special leave petition. It appeared from the counter-affidavit filed by the State government that the Anti-Corruption Bureau had finalised the investigation and the Director General had submitted his report dated 25/03/1986 which was under consideration of the government. It also appeared that the State government of Andhra Pradesh had 261 addressed letters dated 2/05/1984 for sanction of the central government under S. 6(l)(a) of the Prevention of Corruption Act, 1947 for the prosecution of R. Parthasarthy and of the State government of Maharashtra for the prosecution of P. Abraham, INDIAN ADMINISTRATIVE SERVICE as he is borne on the Maharashtra cadre and was on deputation to Andhra Pradesh. In compliance with the court's order, the State government placed before us the letter of the State government dated 2/05/1984 as also the report of the Director General, Anti-Corruption Bureau, Andhra Pradesh dated 25/05/1986. After hearing the parties on 5/05/1986, we made the following order:

In compliance to this court's order, Shri P. Ram Reddy, learned counsel for the Stale government places before us the letter of the State government dated 2/05/1984 .as also the report of the Director General, Anti-Corruption Bureau, Andhra Pradesh dated 25/03/1986. It appears from the letter that sanction of the central government is necessary under S. 6 (1) (a) of the Prevention of Corruption Act, 1947 for the prosecution of R. Parthasarthy, INDIAN ADMINISTRATIVE SERVICE and that of the State government of Maharashtra for the prosecution of P. Abraham. We have perused the report of the Director General and it cannot be said that the charges levelled against the petitioner are groundless. It is somewhat surprising that the petitioner alone should have been placed under suspension by the State government pending contemplated departmental enquiry under Rule 13 of the A. P. Civil Services (Classification, Control and Appeal) Rules, 1963 and not the other two officers T. V. Choudhary and S. M. Rao Choudhary, the then Managing Director who it appears are equally culpable.

The matter is adjourned till after vacation to enable the State government to obtain the requisite sanction from the central government for the prosecution of R. Parthasarthy and that of the State government of Maharashtra for the prosecution of P. Abraham under S. 6(l)(a) of the Act. Shri P. Ram Reddy learned counsel for the State government shall in the meanwhile convey to the State Government the concern expressed by this court that the petitioner alone could have been placed under suspension and not the other officers who are alleged to be co-accused. We are afraid, if the State government does not pass any order placing the other officers under suspension it may become necessary for the court to revoke the suspension of the petitioner at the next hearing.

(5) When the matter came up after vacation on 11/08/1986 it had to be adjourned with a direction that the State government 262 should in the meanwhile pass necessary orders for suspension of the delinquent officers. In anticipation of action by the State government, the two applicants R. Parthasarthy and T. V. Choudhary moved applications on September 2 and September 3, 1986 for recalling the directions made on 5/05/1986 and 11/08/1986. The applications were listed for directions on 5/09/1986. On motion being made by learned counsel appearing for the applicants, it was directed that the

applications be placed for hearing on 9/09/1986. The State government in the meanwhile on 6/09/1986 passed orders for suspension of R. Parthasarthy and T. V. Choudhary under Rule 13(1) of the Rules. We were apprised of this fact when the applications came up for hearing on 9/09/1986 that the State government had already placed them under suspension.

(6) In the special leave petition, the only contention of the petitioner E. S. Reddi was that the action of the State government in making selective suspension suffered from the vice of arbitrariness and offended against Article 14 of the Constitution inasmuch as persons like the applicant T. V. Choudhary who were equally culpable have merely been transferred while he has been singled out and placed under suspension under sub-rule (1) of Rule 13 of the Rules without any rational basis and that such arbitrary action of the State government was tantamount to denial of equal treatment to persons similarly placed. In view of the subsequent order passed by the State government on 6/09/1986 placing other officers including the applicant T. V. Choudhary under suspension under Rule 13(1) of the Rules pending their prosecution, the- special leave petition has become infructuous. It is accordingly dismissed.

(7) That takes us to C.M.P. Nos. 25510/86 and 25533/86 filed by R. Parthasarthy and T. V. Choudhary respectively. We impressed upon the learned counsel appearing for them that the proper course for the applicants was to move the government by way of appeal and/or representation against their suspension and not by these applications for recalling the court's orders. After the matter was heard at a considerable length, Smt. Shyamala Pappu, learned counsel appearing for R. Parthasarthy very properly prayed for leave to withdraw C. M. P. No. 25510/86 as the applicant had already made a representation to the State government. She prayed that a direction be made requiring the government to consider the representation at an early date. Dr Y. S. Chitale, learned counsel appearing for the State government fairly agreed that the said representation would be considered by government on merits.

(8) Turning next to C. M. P. No. 25533/86. We must strongly 263 deprecate the conduct of the applicant T. V. Choudhary, a member of the Indian Administrative Service and working as Managing Director of the Andhra Pradesh State Textile Development Corporation, to have made reckless allegations and cast aspersions on the court. After denying his complicity, the applicant T. V. Choudhary goes on to assert :

The order of this Hon'ble court directing the government to suspend the other delinquent officers is made without affording an opportunity to the applicant and presumably without considering the relevant provisions of law, case law and the parameters of judicial power and the necessity to observe the principles of natural justice.

It is submitted that the order of this Hon'ble court dated 11/08/1986 is illegal, insofar as it directed the government to suspend the applicant and others, in view of the fact that the government has exercised its discretion and transferred the applicant taking into consideration the recommendation of the Anti-Corruption Bureau. It is well settled that a court of law cannot compel a statutory authority to exercise its statutory discretion in a particular manner. The legislative will in conferring discretion in an essentially administrative function cannot be interfered with by courts.

To say the least, the averments are highly objectionable. It was expected that the applicant, who is a very senior member of the Indian Administrative Service, should have shown greater responsibility before making such unfounded allegations and uncalled for aspersions. On a motion being made on 5/09/1986 by Shri P. P. Rao, learned counsel for the applicant, it was directed that the application shall be listed for hearing on 9/09/1986. At the same time, we drew the attention of the learned counsel to the -improper and objectionable averments made by the applicant. We were given the impression that the

application had been settled by the learned counsel without noticing the offending averments.

(9) We wish we could have rested content with concluding the judgment with the operative portion of our conclusions on the merits of the case but we find with a sense of anguish and heaviness of heart that we have to express our disapproval of the manner in which the arguments were advanced before us on behalf of the applicant T. V. Choudhary. Not only were the arguments advanced with undue vehemence and unwarranted passion, reflecting identification of interests beyond established conventions but were of degrees not usual of enlightened senior counsel to adopt. The majesty of law and the dignity of courts cannot be maintained unless there is mutual respect between the bench and the Bar and the counsel act in full realization 264 of their duty to the court alongside their duty to their clients and have the grace to reconcile themselves when their pleas and arguments do not find acceptance with the court. It is needless for us to say that neither rhetoric nor tempestuous arguments can constitute the sine qua non for persuasive arguments.

(10) By virtue of the pre-eminence which senior counsel enjoy in the profession, they not only carry greater responsibilities but they also act as a model to the junior members of the profession. A senior counsel more or less occupies a position akin to a Queen's counsel in England next after the Attorney General and the Solicitor General. It is an honor and privilege conferred on advocates of standing and experience by the chief justice and the Judges of this court. They thus become leading counsel and take precedence on all counsel not having that rank. A senior counsel though he cannot draw up pleadings of the party, can nevertheless be engaged "to settle" i.e. to put the pleadings into "proper and satisfactory form" and hence a senior counsel settling pleadings has a more onerous responsibility as otherwise the blame for improper pleadings will be laid at his doors.

(11) Lord Reid in Rondel v. Worsley has succinctly set out the conflicting nature of the duties a counsel has to perform in his own inimitable manner as follows :

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, , which he thinks will help his client's case. As an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. By so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.

(12) Again as Lord Denning, M. R. in Rondel v. W would say :

He (the counsel) has time and again to choose between his 265 duty to his client and his duty to the court. This is a conflict often difficult to resolve; and he should not be under pressure to decide it wrongly. . . . When a barrister (or an advocate) puts his first duty to the court, he has nothing to fear. (words in brackets added).

In the words of Lord Dinning:

It is a mistake to suppose that he is the mouthpiece of his client to say what he wants :. . . . He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honor. If he breaks it, he is offending against the rules of the profession and is subject to its discipline. . ..

(13) We are constrained to give expression to our views with a feeling of remorse to remind the counsel of that sense of detachment and non-identification they are expected to maintain with the causes espoused by them and not with a view to belittle the profession or cast aspersions on counsel.

(14) After bestowing our dispassionate consideration of the matter we found ourselves left with no other alternative but to dismiss the application made by T. V. Choudhary which was clearly misconceived and we direct the applicant to pay Rs.5,000.00 as costs to the State government in view of the disapprobation his case and conduct has warranted.

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Cross Citation :2011 ALL MR (Cri) 381

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

A. M. KHANWILKAR & P. D. KODE, JJ.

High Court on its own Motion Vs. Mr. N. B. Deshmukh
Suo Motu Contempt Petition No.4 of 2008 21st December, 2010.

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A) Contempt of Courts Act (1971), S.23 - Contempt of Courts (CAT) Rules (1992), Rr.10, 11, 12 - Advocates Act (1961), Ss.30, 34, 49 - Right to appear in Advocate's robes before Court is statutory right - It is available to person who appears in his capacity as Advocate for any other party and not in his own

cause- When the Advocate appears to espouse his own cause or facing proceedings such as for having committed contempt of Court personally, even if he wants to appear in-person before the Court, cannot claim the privileges bestowed on the Advocates and is free to appear like any other ordinary litigant. The right to appear in Advocate's robes before the Court is a statutory right. That right is available only to a person who appears in his capacity as Advocate for any other party or litigant and not in his own cause and more so, while defending contempt action initiated against him personally.*(Paras 23 , 24)*

B) Action against Advocate for representing the cause of his close relative as Advocate - At the outset, we may notice that the said Writ Petition was filed by Kumari Bhagyashree B. Deshmukh who incidentally is the relative of the Respondent/Contemner. Whether it was appropriate for the Respondent/Contemner to appear as Advocate for his close relative is a matter which will be in the domain of the Bar Council- Therefore, whether the Bar Council should initiate any action against the Respondent/Contemner for representing the cause of his close relative as Advocate in the Writ Petition, is left open. We express no opinion on the said aspect. (Para 8)

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Cross Citation :1985-AIR(SC)-0-28 , 1984-SCC-Supp1-571

SUPREME COURT OF INDIA

Hon'ble Judge(S) : D. A. Desai, V. Balakrishna Eradi And V. Khalid, JJ.
(FULL BENCH)

M.Veerabhadra Rao ....Vs....Tek Chand
Civil 1019 Of 1978 Oct 18,1984

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Advocates Act (25 of 1961), Ss. 38, 35 – Advocate attested forged affidavit causing wrongful loss to party – Respondent – On basis of that forged

document income tax clearance certificate obtained – Bar council failed to take stern action but only condemned the conduct of advocate – Held, Reprimand was no punishment strict sense – Supreme Court criticized the lenient view taken by the Bar Council - It has been held that if this not a profession misconduct then it would be time to wind up this jurisdiction – The act of advocate is of unbecoming of member of noble profession-advocate is guilty of gross professional misconduct and must be suspended from practice for five years.

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DESAI, J.

(1) The appellant was ill-advised in filing this appeal because the more the learned counsel appearing for the appellant dived deep into a veritable dustbin of facts, the further hearing caused deep anguish more on account of the realisation as to how occasionally, and we are happy to record very occasionally, a member of the Nobel profession sinks to the lowest and to vindicate his actions tries to clutch at the highest.

(2) One M. Ram Mohan Rao, who was described as a senior of appellant M. Veerabhadra Rao has been a practising advocate at Hyderabad. Appellant M. Veerabhadra Rao was enrolled as an advocate in the year 1961 as stated in his evidence. He joined the chamber of his senior and at the relevant time he was working in the chamber of his senior. Shri M. Ram Mohan Rao was a tenant of the premises bearing Municipal No. 3242 situated at Rashtrapathi Road, Kingsway, Secunderabad of which respondent Tekchand son of LalaMoti Ram was the owner. It is alleged that the respondent, his wife Mohini and son Subhash Chandra sold and conveyed the house in question by a deed of conveyance in favour of Premlata wife of Sohan Lal Saloot and daughter of Hastimal Jain for a consideration of Rs. 65,000.00 . As the sale was for a consideration of more than Rs. 50,000.00 the vendor was required to produce on income-tax 575 clearance certificate as required by S. 230 of the Income-tax Act, 1961 before the sale deed could be registered. It may be mentioned that sometime before the alleged transaction of sale, a suit was filed by respondent Tek Chand against Shri M. Ram Mohan Rao, the tenant for eviction on the ground of non-payment of rent etc. This suit had ended in a decree and at the relevant time, an appeal preferred by Shri M. Ram Mohan Rao was pending. To resume the narrative Tek Chand had already obtained the necessary income-tax clearance certificate on 5/07/1972. When the sale deed was presented for registration, the Registrar of Conveyances asked for the income-tax clearance certificate and respondent Tek Chand said that on payment of the full consideration, the same will be produced. From thereon the distressing events leading to the present appeal started.

(3) Respondent Tek Chand filed a complaint No. 14 of 1974 under S. 35 of the Advocates Act, 1961 before the Bar council of the State of Andhra Pradesh alleging that one Mr M. Ram Mohan Rao, advocate was a tenant of a house situated at Rashtrapathi Road, Secunderabad of which he was the owner. This house was agreed to be sold for Rs. 65,000.00 to Premlata daughter of Shri Hastimal Jain and Rs. 10,000.00 was paid as earnest money. The sale deed was to be completed within a period of three months on the vendee paying the balance of consideration of Rs. 55,000.00 . The vendee did not pay the amount and the respondent alleged that he had cancelled the agreement for sale. It was further alleged that as the consideration for sale was exceeding Rs. 50,000, the sale deed cannot be registered unless an income-tax clearance certificate is produced, but as the

balance of consideration was not paid, agreement to sell the house was cancelled. However as the vendee Premlata wanted to grab the house without paying the balance of consideration, in order to get the sale deed registered, it was decided to get the income-tax clearance certificate and with this end in view an application purporting to be in the name of the respondent with his signature forged thereon bearing the date 31/10/1972 and with an incorrect address was prepared. As an affidavit is necessary in support of the application, the same was prepared on a stamp paper of Rs. 2.00 with the signature of respondent Tek Chand forged thereon. This affidavit was attested by the appellant as he is an advocate authorised to attest affidavits. On the strength of the forged documents, an income tax clearance certificate was obtained in the name of the respondent and the sale deed was got registered. It was alleged that the signature of respondent Tek Chand was attested by the present appellant, the junior of Mr M. Ram Mohan Rao, on being paid Rs. 300.00 through one Mulchand, Munshi of Lalchand, who is the uncle of the father of Premlata, the vendee. It was specifically averred that respondent Tek Chand neither signed the application for income tax clearance certificate nor swore the affidavit. It was alleged that someone impersonated Tek Chand and this must be known to the appellant because he knew respondent Tek Chand for many years 576 prior to the attestation of affidavit. It was alleged that a suit had been filed by Tek Chand against Mr M. Ram Mohan Rao for recovering the arrears of rent in the amount of Rs. 17,000.00 and obviously to cause damage to Tek Chand, appellant the junior of Mr M. Ram Mohan Rao attested a forged signature on the affidavit. The application with the affidavit annexed was submitted to the income-tax department on the same day, and the income-tax clearance certificate was procured through Mulchand which was produced in the office of sub-Registrar, Secunderabad. Thus the vendee Premlata got the sale deed registered on the strength of forged documents to which tlie appellant was a party and that wrongful loss was caused to the appellant in the amount of Rs. 1,35,000.00 which was facilitated by the appellant. It was alleged that this constitutes a very serious professional misconduct and necessary enquiry be made and appropriate action be taken.

(4) The appellant appeared and filed a counter-affidavit denying all the allegations. It was specifically admitted that the affidavit on the strength of which the income-tax clearance certificate was obtained on 2/11/1972 was attested by him. As the decision largely turns upon the explanation offered by the appellant his positive case may be extracted. Says he:

Either on 31/10/1972 or on 1/11/1972 the complainant (Tek Chand) came to this respondent with an affidavit purporting to bear his signature and requested this respondent to attest the same. The complainant admitted that the .signature appearing oh. the affidavit as that of his and therefore this respondent attested the same. On this admission of the complainant in person to this respondent in the office of Mr M. Ram Mohan Rao, advocate, this respondent attested the same in good faith and believing the representations made by the complainant. This respondent was aware that even prior to the date of attestation of the affidavit, the complainant had issued a notice to this respondent's then senior Shri M. Ram Mohan Rao attorning him to pay rents to Premlata as the complainant had sold the house to the said Premlata. It is therefore, emphatically denied that this respondent received Rs. 300.00 from Mulchand and he attested a forged affidavit as alleged. It is only on the admission and representation made by the complainant himself in person, that this respondent attested the affidavit in good faith.

(5) The State Bar council referred the complaint to its Disciplinary Committee. The complainant-respondent examined himself and he examined one Mohan Lal as his witness. He produced four documents marked Ex. A-1 to A-4. The important document is Ex. A-1, the affidavit dated 31/10/1972 purporting to be of respondent Tek Chand. Ex. A-2 is the

application addressed to the Income-tax Officer for issuing income-tax clearance certificate. Ex. A-3 is the reply of Income-tax Officer dated 8/03/1973 to the inquiry made by the respondent. Ex. A-4 is another letter from the Income-tax Officer dated 20/03/1973 to the respondent. Ex. A-1 (a) and Ex. A-1 (b) are the disputed signatures of the respondent on the 577 affidavit and the application respectively. The appellant himself gave evidence and examined Mr N. Satyanarayana, advocate who was another junior of Mr M. Ram Mohan Rao as his witness and produced documents marked Ex. B-1 to B-4.

(6) The Disciplinary Committee of the State Bar council ('State Committee' for short) to whom the complaint was referred for disposal after minutely analysing the oral and documentary evidence, rejected the evidence of Public Witness 2 Mohan Lal witness examined by the complainant and RW 2 Mr N. Satyanarayana, advocate examined as witness by the appellant, observing that both were partisan witnesses and no credence can be given to their evidence. The Committee also rejected the allegation that the appellant was paid Rs. 300.00 by Mr Hastimal for attesting affidavit Ex. A-1, observing that there was no cogent and unimpeachable evidence in support of this allegation. The Committee further held that complainant Tek Chand never approached the appellant with Ex. A-1 and therefore, the explanation of the appellant that he attested the affidavit on the statement made by the respondent that it bears his signature cannot be accepted. The Committee concluded that the attestation of Ex. A-1 amounts to witnessing the fact that the deponent affirmed the truthfulness and genuineness of what was stated in the affidavit and signed in his presence, but this would be untrue without the presence of deponent Tek Chand and therefore, the endorsement becomes false and rendered the attestation invalid. The Committee concluded that the appellant advocate attested Ex. A-1 knowing that the respondent-complainant had not sworn the affidavit in his presence nor was it signed in his presence by the respondent and therefore, this act of attestation of the affidavit giving a misleading information is improper and comes within the mischief of professional misconduct and contrary to the norms of the professional etiquette. The State Committee also concluded that on account of this misconduct on the part of the appellant, income-tax clearance certificate was obtained and therefore, the appellant was guilty of professional misconduct. Having found the appellant guilty of serious misconduct, namely, attesting an affidavit which appears to be a forged one and which was used to obtain an unfair advantage by Premlata by obtaining income-tax clearance certificate on the strength this respondent with an affidavit purporting to bear his signature and requested this respondent to attest the same. The complainant admitted that the .signature appearing oh. the affidavit as that of his and therefore this respondent attested the same. On this admission of the complainant in person to this respondent in the office of Mr M. Ram Mohan Rao, advocate, this respondent attested the same in good faith and believing the representations made by the complainant. This respondent was aware that even prior to the date of attestation of the affidavit, the complainant had issued a notice to this respondent's then senior Shri M. Ram Mohan Rao attorning him to pay rents to Premlata as the complainant had sold the house to the said Premlata. It is therefore, emphatically denied that this respondent received Rs. 300.00 from Mulchand and he attested a forged affidavit as alleged. It is only on the admission and representation made by the complainant himself in person, that this respondent attested the affidavit in good faith.

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by the respondent. Ex. A-4 is another letter from the Income-tax Officer dated 20/03/1973 to the respondent. Ex. A-1 (a) and Ex. A-1 (b) are the disputed signatures of the respondent on the 577 affidavit and the application respectively. The appellant himself gave evidence and examined Mr N. Satyanarayana, advocate who was another junior of Mr M. Ram Mohan Rao as his witness and produced documents marked Ex. B-1 to B-4.

(6) The Disciplinary Committee of the State Bar council ('State Committee' for short) to whom the complaint was referred for disposal after minutely analysing the oral and documentary evidence, rejected the evidence of Public Witness 2 Mohan Lal witness examined by the complainant and RW 2 Mr N. Satyanarayana, advocate examined as witness by the appellant, observing that both were partisan witnesses and no credence can be given to their evidence. The Committee also rejected the allegation that the appellant was paid Rs. 300.00 by Mr Hastimal for attesting affidavit Ex. A-1, observing that there was no cogent and unimpeachable evidence in support of this allegation. The Committee further held that complainant Tek Chand never approached the appellant with Ex. A-1 and therefore, the explanation of the appellant that he attested the affidavit on the statement made by the respondent that it bears his signature cannot be accepted. The Committee concluded that the attestation of Ex. A-1 amounts to witnessing the fact that the deponent affirmed the truthfulness and genuineness of what was stated in the affidavit and signed in his presence, but this would be untrue without the presence of deponent Tek Chand and therefore, the endorsement becomes false and rendered the attestation invalid. The Committee concluded that the appellant advocate attested Ex. A-1 knowing that the respondent-complainant had not sworn the affidavit in his presence nor was it signed in his presence by the respondent and therefore, this act of attestation of the affidavit giving a misleading information is improper and comes within the mischief of professional misconduct and contrary to the norms of the professional etiquette. The State Committee also concluded that on account of this misconduct on the part of the appellant, income-tax clearance certificate was obtained and therefore, the appellant was guilty of professional misconduct. Having found the appellant guilty of serious misconduct, namely, attesting an affidavit which appears to be a forged one and which was used to obtain an unfair advantage by Premlata by obtaining income-tax clearance certificate on the strength of Ex: A-1 which did not appear to be genuine to the Committee, and which caused wrongful loss to the respondent, the Committee developed cold feet and imposed a ludicrously paltry punishment of reprimand which is no punishment strict sensu.

(7) Emboldened by this timid performance of the Disciplinary Committee of the State Bar council, the appellant filed D.G. Appeal No. 6 of 1976 before the Disciplinary Committee of the Bar council of India. ('Appellate Committee' for short). The Appellate Committee held that the explanation of the appellant that he attested the affidavit on the strength of the statement made to him by the respondent that the affidavit bears 578 his signature and that there was nothing improper in attesting the affidavit on the acknowledgement made by the deponent about his signature cannot be accepted because the affidavit in question categorically states that the party deponent put his signature before the attesting advocate, when it was common ground that it was not so done and the affirmation by the advocate clearly amounts to a false statement. The Appellate Committee then became facetious and observed that it would take a serious and strict view of the matter and hold that an advocate should not be a party to such an irregular procedure amounting to a false declaration by him. After so observing the Committee affirmed the order made by the State Committee imposing the punishment of reprimand and conveying a warning to the appellant that he should be careful in future in such matters. The Appellate Committee then proceeded to accept one contention on behalf of the learned advocate appearing for the appellant and expunged the observation of the

State Committee that the appellant had not attested Ex. A-1 in the presence of the complainant and that this act of the appellant was improper and comes within the mischief of professional misconduct and contrary to the norms of professional etiquette on the ground that these observations were uncalled for especially in view of the fact that the Committee disbelieved the evidence of Public Witness 2 on the question of payment of Rs. 300.00 and presentation of affidavit by Mulchand. It would be presently pointed out that the expunging of those remarks was uncalled for and betrays total non-application of mind while disposing of the appeal.

(8) Undaunted by two failures but presumably encouraged by the ludicrous punishment, the appellant filed this appeal in this court under S. 38 of the Advocates Act, 1961. By the order made on 7/08/1978, the appeal was admitted and directed to be included in the list of short matters.

(9) The respondent on being served, appeared and filed cross-objections inter alia contending that there was a conspiracy between M. Ram Mohan Rao, senior of the present appellant and vendee Premlata as well as Hastimal to cause wrongful loss to the respondent. To this conspiracy even the appellant was a party. M. Ram Mohan Rao, who was a tenant of the house which Premlata claims to have purchased was under a decree of eviction and in order to thwart it he hatched the plot to which the appellant lent his assistance by purchasing two stamp papers of Rs. 2.00 each in the name of the respondent and after drawing up a false affidavit in the name of the respondent a signature was forged thereon to which the appellant lent his attestation so as to give it an appearance that the forged signature was a genuine signature of the respondent knowing full well that on the strength of this forged affidavit an income-tax clearance certificate was to be obtained which would facilitate registration of the sale deed which Premlata claimed to have taken and which was objected to by the respondent. It was alleged that for rendering such service he charged and accepted 579 Rs. 300.00 in the presence of Public Witness 2 witness Mohan Lal. It was alleged that this forged affidavit was submitted to the Income-tax officer on the strength of which an income-tax clearance certificate was obtained which enabled M. Ram Mohan Rao and Premlata to get registration of the sale deed. The respondent prayed for enhancement of punishment imposed upon the appellant.

(10) The appellant filed his rejoinder to the cross-objections filed by the respondents inter alia contending that in the absence of any provision in the Advocates Act, 1961, the respondent is not entitled to file cross objections. It was submitted that if the respondent was aggrieved by the order of the State Committee or the Appellate Committee, it was open to him to prefer an appeal but that having not been done, the cross-objections cannot be entertained.

(11) The appeal came up for hearing on 23/09/1980 before a bench comprising A.C. Gupta and A.P. Sen, JJ. After hearing Mr Vepa P. Sarathi, learned counsel appearing for the appellant, the court proceeded to hear Mr V.A. Bobde who appeared amicus curiae for the respondent. After hearing both the sides, the court made the following order:

Issue notice to the appellant in this appeal as to why having regard to the findings recorded by the State Bar council and the other facts and circumstances of the case the punishment awarded against him should not be enhanced. This appeal will be heard along with cross-objection filed by the respondent. C.A. No. 1019/78 to be treated as P.H.

(12) Mr Govindan Nair, learned counsel who appeared for the appellant submitted that the facts found both by the State Committee and the Appellate Committee would not constitute professional misconduct for which the appellant may incur a penalty.

(13) Before we proceed to examine what constitutes professional misconduct, we may briefly point out the facts concurrently found by the State Committee and the Appellate Committee.

(14) After extensively reproducing the evidence led in the case and after rejecting the evidence of Public Witness 2 Mohan Lal, a witness examined by the respondent and RW 2 N. Satyanarayana, a witness examined by the appellant, the State Committee concluded that the affidavit Ex. A-1 was not taken to the appellant by the respondent nor did he admit his signature on the affidavit Ex. A-1 in the presence of the appellant. The affidavit Ex. A-1 contains certain obviously incorrect statements in that even though respondent was aged more than 60 years, his age was shown to be 45 years in Ex. A-1 and that the address of the respondent shown in the affidavit on the date of the affidavit was incorrect because he was not residing in the House No. 3242, Rashtrapathi Road, Secunderabad as set out in Ex, A-1 but was residing at Red Hills, Hyderabad. It was also found that the respondent did not go to the office of advocate Shri M. Ram Mohan Rao 580 where the appellant was at the relevant time sitting for getting Ex. A-1 attested. It was noticed that the appellant admitted that Exs.A-1 (a) and A-1(b) were not signed by the respondent in the presence of the appellant and that he attested the same on the statement of the respondent complainant. It was found as a fact that the affidavit bears the date 31/10/1972 and was filed in the income-tax department on the same date, while the attestation of the appellant thereon bears the date 1/11/1972. It was concluded that either without the presence of the respondent or his so-called admission of his signature the appellant should not have attested his signature on an affidavit and therefore the attestation was invalid. And that this constitutes professional misconduct.

(15) The Appellate Committee in a cryptic albeit laconic order, brevity being its only merit, broadly agreed with the findings recorded by the State Committee observing that the affidavit on its own face would tend to show that the attestation was done after the signatory had put his signature in the presence of the appellant and there after the appellant attested the signature while it is admitted by the appellant that the signature was not put by the respondent on the affidavit in his presence but merely stated that he had signed the same. Therefore according to the Appellate Committee the affirmation of the same by the appellant clearly amounts to a false statement and that the appellant was a party to a false declaration and therefore, he is guilty of professional misconduct as found by the State Committee. Curiously thereafter, the Appellate Committee for reasons which are neither comprehensible nor convincing deleted the observation made by the State Committee which was clearly borne out by the evidence observing "that the finding was uncalled for in view of the fact that the State Committee disbelieved the evidence of Public Witness 2 on the question of payment of Rs. 300.00 and presentation of the affidavit by Mulchand". It has been very difficult for us to appreciate this disjointed reasoning. However, it is crystal clear that both the fact-finding authorities concurrently agreed that the respondent did not put his signature on Ex. A-1 in the presence of the appellant and yet the appellant by contributing his attestation to the affidavit made a declaration that the signature was of the appellant made in his presence, and admittedly that not being true the appellant was guilty of misconduct. Does this constitute professional misconduct is the question?

(16) The narrow question that falls for our consideration in this case is whether the appellant, an enrolled advocate, who was authorised to attest an affidavit that can be used in civil or criminal proceedings committed impropriety in attesting an affidavit which attestation would apply that the deponent subscribed his signature to the affidavit in his presence after taking the requisite oath that ought to be administered to him because there is no dispute that an affidavit is a sworn statement of the deponent.

(17) The expression 'affidavit' has been commonly understood to mean a sworn statement in writing made especially under oath or on affirmation 581 before an authorised Magistrate or Officer. Affidavit has been defined in sub-clause (3) of S. 3 of the General Clauses Act, 1897 to include "affirmation and declaration in the case of person by law allowed to affirm or declare instead of swearing". The essential ingredients of an affidavit are that the statements or declarations are made by the deponent relevant to the subject matter and in order to add sanctity to it, he swears or affirms the truth of the statements made in the presence of a person who in law is authorised either to administer oath or to accept the affirmation The responsibility for making precise and accurate statements in affidavit were emphasised by this court in Krishan Chander Nayar v. Chairman, central Tractor Organisation. The part or the role assigned to the person entitled to administer oath is no less sacrosanct. S. 3 of the Oaths Act, 1969 specifics persons on whom the power to administer oath or record affirmation is conferred. It inter alia includes "any court. Judge, Magistrate or person who may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalf - (a) by the High court, in respect of affidavits for the purpose of judicial proceedings; or (b) by the State government, in respect of other affidavits". The Schedule to the Act prescribes forms of oaths or affirmation that is required to be administered to the party seeking to make his own affidavit. Rule 40 of the Civil Rules of Practice framed by the Andhra Pradesh High court provides that "the officer before whom an affidavit is taken shall state the date on which, and the place where, the same is taken, and sign his name and description at the end, as in Form No. 14, otherwise the same shall not be filed or read in any matter without the leave of the court". Form No. 14 prescribes the form of affidavit on solemn affirmation. It requires a solemn affirmation or oath before the person authorised to administer the same and then at the foot of which the signature of the deponent must appear and below that the officer entitled to administer oath must put his signature in token of both that he administered the oath and that deponent signed in his presence and by his attestation he has subscribed to both the aspects. Rule 34 of the aforementioned rules sets out officers authorised to administer oath for the purpose of affidavits and an advocate or pleader other than the advocate or pleader who has been engaged in such a proceeding have been included in the list of officers authorised to administer oath. The appellant as an advocate enrolled by the State Bar council was thus authorised to administer oath for the purpose of an affidavit and attest the same. This was not disputed before us.

(18) It is not in dispute that Ex. A-1 is an affidavit purporting to have been made by the respondent in the presence of the appellant and attested by him. The appellant admits in no uncertain terms that Ex. A-1 bears his attestation. If the matter were to rest here, it would mean that the respondent appeared before the appellant with his affidavit. Thereupon, the appellant administered oath to him and on the respondent taking the 582 oath and affirming the truth of the statement made in the affidavit, put his signature on the affidavit in the presence of the appellant and then the appellant subscribed his signature to the affidavit in token of his having administered the oath and the respondent having affixed his signature in his presence. The content of the affidavit clearly spells out the purpose for which the affidavit was being made namely for obtaining an income-tax clearance certificate which the respondent as vendor had to produce before the Registrar of Conveyances acting under the Indian Registration Act for the purpose of registering the sale deed which the respondent was alleged to have executed in favour of Smt. Premlata. To narrow down the area of controversy, it may be mentioned that the appellant admits that the affidavit Ex. A-1 is attested by him. He further concedes that the respondent did not affix his signature in his presence on the affidavit Ex. A-1 but admitted the same in his

presence whereupon he attested the same. This statement of the appellant clearly shows dereliction of duty in two aspects: (i) that he did not administer any oath or did not call up the respondent to make an affirmation though Ex. A-1 purports to be an affidavit and secondly, the respondent did not subscribe his signature in the presence of the appellant and the appellant merely acted on an alleged statement of the respondent that the affidavit bears his signature. The enquiry therefore, in this case is a very narrow one. It centres round whether the respondent personally appeared before the appellant when he was sitting in the office of his senior M. Ram Mohan Rao and produced the affidavit Ex. A-1 for attestation by the appellant?

(19) The State Committee clearly recorded an unambiguous finding which we consider wholly incontrovertible in the facts of this case that the appellant never appeared before the respondent either on 31/10/197 2/11/1972. There are tell-tale circumstances on record which would clearly render this finding unassailable. The appellant was the junior of M. Ram Mohan Rao who claimed to be occupying the very house as tenant of the respondent which was the subject matter of the disputed sale and the respondent had filed a suit against M. Ram Mohan Rao for eviction on the ground of non-payment of rent in the aggregate amount of over Rs. 11,000.00 and the suit had already ended in a decree in favour of the respondent against M. Ram Mohan Rao and the matter was pending in appeal. There was thus no love lost between M. Ram Mohan Rao and the respondent. In this background the respondent would never think of going to the office of M. Ram Mohan Rao to contact his junior the present appellant for the purpose of swearing the affidavit. If the Oath Commissioners were a scarce commodity, one may have to go in search of a rare commodity but the relevant Rules 34 and 40 clearly show that every advocate was authorised to administer oath for the purpose of affidavit and attest the same. Secondly, the affidavit was for the purpose of obtaining an income-tax clearance certificate. Now there is unimpeachable evidence on record that the respondent had already obtained an income-tax clearance 583 certificate way back on 5/07/1972. In his examination-in-chief in the course of disciplinary proceedings, the respondent stated that on 5/07/1972, he obtained income-tax clearance certificate from the income-tax office. There is no cross-examination on this point. It clearly amounts to an acceptance of the fact that way back on 5/07/1972 the respondent had already obtained an income-tax clearance certificate. Therefore, it is not necessary for him to obtain any fresh income-tax clearance certificate. He had therefore no reason to approach the appellant for attesting the affidavit for the avowed object of obtaining an income-tax clearance certificate. Add to this the circumstance that the respondent at the relevant time was not staying at House No. 3242, Rashtrapathi Road, Secunderabad and this is not in dispute. If he was not staying at Rashtrapathi Road, Secunderabad, the Income-tax Officer, J Ward, Circle III, Hyderabad to whom the application appears to have been addressed for income-tax clearance certificate on 31/10/1972 would have no jurisdiction to entertain the application. The appellant at the relevant time was staying at Red Hills, Hyderabad. It was obviously not necessary for him to approach the appellant at such a long distance for attesting an affidavit, more so in view of the fact that he had already obtained an income-tax clearance certificate. There is also a letter on record from the Income-tax Officer, J Ward, Circle III, Hyderabad dated 21/04/1973 addressed to the respondent in which he has categorically stated that the income-tax clearance certificate issued on the basis of the affidavit dated 31/10/1972 was collected from his office by one Mulchand and let it be recalled that Mulchand is none other than the person against whom allegations were made that he was acting on behalf of Premlata and Hastimal, and whom the appellant knew intimately as it transpired from his statement in the course of the investigation wherein he has stated that if he remembered correctly Sri Mulchand and one Sohanlal son-in-law of Hastimal also followed

Tek Chand and were present while he (the appellant) was attesting the affidavit. Thus the appellant knew both the respondent and Mulchand and it is this Mulchand whom the I.T.O. referred as having taken away the income-tax clearance certificate which was issued on the basis of a forged affidavit along with a forged application. There is further intrinsic evidence to show that document Ex. A-1 is either a forged one or fake one. Ex. A-1 the affidavit bears the date 31/10/1972. Attesting the same, the appellant appended his own signature which he admits he has put. It bears the date 1/11/1972. Therefore, one can say with reasonable certainty that this affidavit Ex. A-1 was attested by the appellant on 1/11/1972. Now if we refer to the letter Ex. A-2 addressed to the Income-tax Officer, J Ward, Circle III, Hyderabad for the purpose of obtaining the income-tax clearance certificate, it bears the date 31/10/1972. The Income-tax Officer in his letter Ex. A-3 addressed to the respondent states that an application for obtaining an income-tax clearance certificate was presented in the name of the respondent on 31/10/1972. If the application 584 was thus made to the Income-tax Officer on 31/10/1972, it creates a grave doubt about the existence of affidavit Ex. A-1 which has been attested by the appellant on 1/11/1972. Of course, we are not inclined to attach much importance to this aspect for the reason that the Income-tax Officer may have committed a mistake in referring to the application dated 31/10/1972 by merely looking at. the date on the application and not the date on which it was presented. Now the cumulative effect of these various pieces of evidence accepted as wholly reliable and practically un controverted is that the respondent did not approach the appellant either on 31/10/197 2/11/1972 nor did he present any affidavit for attestation nor did he admit his signature on Ex. A-1 to the appellant.

(20) What conclusion can be deduced from the totality of aforementioned evidence? And this has to be ascertained in the context of the affirmative stand taken by the appellant. The appellant admits that he knew the respondent long before the attestation on Ex. A-1. Therefore, one can easily rule out impersonation or the appellant being taken by someone for a joy-ride. If the appellant knew the respondent intimately before the date of Ex. A-1 and if the incontrovertible conclusion is that the respondent did not appear before the appellant either on 31/10/1972 or on 1/11/1972 nor did he present any affidavit for the attestation by the appellant nor did he admit his signature, the stark albeit unpalatable conclusion that flows therefrom is that the appellant is a party to a document which is not genuine. It can be safely said that it was a false document purporting to be in the name of the respondent. It would- in law become a forged document. The appellant by attesting his signature to it gave a solemnity which is being relied upon by the Income-tax Officer on which a very valuable document namely, income-tax clearance certificate was issued which facilitated registration of a sale deed in respect of which the contention is that the consideration has not been paid to the respondent. The appellant thus facilitated commission of a fraud by becoming a party to the forged document. In reaching this conclusion we have completely kept out of consideration the opinion of the handwriting expert which was not placed on record in the enquiry proceedings but which was submitted to the criminal court in criminal proceedings.

(21) The appellant is thus shown to have violated his statutory duty conferred by the Oaths Act, 1969. He has also acted in a manner unbecoming of a member of a noble profession. He has knowingly become a party to the forgery of a very valuable document and he has by his conduct facilitated the commission of a fraud which would to some extent benefit his senior M. Ram Mohan Rao.

(22) Does this conduct constitute professional misconduct? After the initial enthusiasm of arguing the appeal evaporated when distressing and disturbing dirty facts started un raveling from the evidence and when Mr Govindan Nair, learned counsel for the appellant was requested by us to submit his reply 585 to the notice issued by this court to the

appellant to show cause why the punishment imposed should not be enhanced, he practically buckled up and almost conceded that the conduct attributed to the appellant would certainly constitute professional misconduct. Let us keep this concession aside and come to our own conclusion whether the actions indulged in by the appellant by becoming a party to the forged documents so as to facilitate commission of fraud would constitute professional misconduct.

(23) Provisions contained in Ch. II in Part VI of the Bar council of India Rules of 1975 prescribe "Standards of Professional Conduct and Etiquette". In the preamble to this part, it is stated that "an advocate shall, at all times, comport himself in a manner befitting his status as an officer of the court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an advocate". There follows enumeration of the conduct expected of a member of the profession. It is however, made clear that the rules in Ch. II contain canons of conduct and etiquette adopted as general guides ; yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned. It inter alia includes that an advocate shall not act on the instructions of any person other than his client or authorised agent. If Mulchand followed the respondent as admitted by the appellant to his office and if Mulchand presented the forged documents to the Income-tax Officer, one can say that the appellant has acted to the detriment of his client at the instance of an outsider whose interest was detrimental to his client. But apart from anything else, under Rule 34 of the Civil Rules of Practice if the appellant was authorised to administer oath in respect of affidavits to be used in judicial proceedings, in the absence of any authorisation by the State of Andhra Pradesh, the appellant could not have subscribed to aft affidavit claiming to be authorised by Rule 34 in respect of an affidavit not likely to be used in a judicial proceeding. An affidavit to be placed before an Income-tax officer for claiming an income-tax clearance certificate could not be said to be one sworn in for the purpose of being used in judicial proceedings, under the Oaths Act. In the absence of any authorisation from the State government, the appellant would not have the power to attest an affidavit which could be used in a proceeding other than judicial proceeding. One can legitimately expect an advocate of 10 years' standing to know that under Rule 34, the appellant was not entitled to attest an affidavit which includes administration of oath which was likely to be used in a proceeding other than a judicial proceeding and yet he pretended to act in his assumed capacity, arrogated to himself the jurisdiction which he did not possess and attested the affidavit in the name of someone whom he knew personally and who was not present before him personally and successfully misled the Income-tax Officer to issue the income-tax clearance certificate. Add to 586 this that he made a blatantly false statement in the proceedings of disciplinary enquiry that the respondent had appeared before him and admitted his signature. This is not only a false statement but it is false to his knowledge. If this is not professional misconduct, it would be time to wind up this jurisdiction.

(24) Both the State Committee and the Appellate Committee have soft-peddled the matter when. imposing adequate punishment. The appellant is guilty of gross professional misconduct.

(25) The Appellate Committee clearly committed an error in deleting some of the observations of the State Committee and that shows not only non-application of mind but a conclusion contrary to record which is wholly unsustainable. This aspect is open to us for our consideration as this court has issued a notice as contemplated by the proviso to S. 38 of the Advocates Act, 1961 under which the appeal lies to this court. This court has jurisdiction to vary the order of the Appellate Committee which may even prejudicially

affect the person aggrieved subject to this prerequisite that it can do so only after a notice to such person and after giving him an opportunity of being heard. By Act 60 of 1973, specific power has been conferred on this court that in an appeal by the person aggrieved by the decision of the Disciplinary Committee of the Bar council of India to this court, this court may pass such order including the order varying the punishment awarded by the Disciplinary Committee of the Bar council of India thereon as it deems fit. This jurisdiction will comprehend the jurisdiction to vary the finding of the Appellate Committee.

(26) The next question is: what should be the adequate punishment that must be imposed upon the appellant? The ludicrously low punishment frankly no punishment imposed by the State Committee makes a mockery of its finding. The appellant has merely been reprimanded for his professional misconduct and this punishment has been upheld in the appeal of the appellant by the Appellate Committee.

(27) Ss. (3) of S. 35 of the Advocates Act, 1961 prescribes the various punishments that may be imposed upon a delinquent advocate: They are: (a) reprimand the advocate, (b) suspend the advocate from practice for such period as it may deem fit, and (c) remove the name of the advocate from the State roll of advocates.

(28) Adjudging the adequate punishment is a ticklish job and it has become all the more ticklish in view of the miserable failure of the peers of the appellant on whom jurisdiction was conferred to adequately punish a derelict member. To perform this task may be an unpalatable and onerous duty. We, however, do not propose to abdicate our function howsoever disturbing it may be.

(29) Mr Nair urged that there are certain extenuating and mitigating circumstances that may be kept in proper perspective before this court 587 proceeds to review the punishment already imposed upon the appellant. It was pointed out that by the relevant time in October-November, 1972, the appellant had put in only ten years of practice at the Bar. He was still attending the office of his senior who may have influenced his decision. Further there is no material to show that the respondent had already obtained an income-tax clearance certificate. It was urged that affirmance of affidavit is a routine job and the court should not view it with such seriousness as to charge the appellant with dereliction of duty. And add to this the finding that the allegation of payment of Rs. 300.00 is not held proved. None of these grounds are either valid or persuasive. If the appellant had been in practice for a period of ten years at the Bar at the relevant time, he had qualified not only for being appointed as a High court Judge but as a Judge of this court. This is sufficient to dispel arguments of immaturity. It was said he may be acting under pressure from his senior. In fact this itself should have awakened him all the more to his responsibility when he attested the affidavit. And if he knew the respondent, one can only say that it was not because he did not discharge the duty with the amount of seriousness expected of him in attesting the affidavit, but he was consciously becoming a party to a serious conspiracy. None of the extenuating or mitigating circumstances appeals to us.

(30) Legal profession is monopolistic in character and this monopoly itself inheres certain high traditions which its members are expected to upkeep and uphold. Members of the profession claimed that they are the leaders of thought and society. In the words of Justice Krishna Iyer in Bar council of Maharashtra v. M.V. Dabholkar the role of the members of the Bar can be appreciated. He said :

The Bar is not a private guild, like that of 'barbers, butchers and candlestick-makers' but, by bold contrast, a public institution committed to public justice and porno public service. The grant of a monopoly licence to practice law is based on three assumptions: (1) There is a socially useful function for the lawyer to perform, (2) The lawyer is a professional person who will perform that function, and (3) His performance as a professional person is regulated by himself and more formally, by the profession as a whole. The central function

that the legal profession must perform is nothing less than the administration of justice ('The Practice of law is a Public Utility'-'The Lawyer, the Public and Professional Responsibility' by F. Raymond Marks et al-Chicago American Bar Foundation, 1972, pp. 288-289). A glance at the functions of the Bar council, and it will be apparent that a rainbow of public utility duties, including legal aid to the poor, is cast on these bodies in the national hope that the members of this monopoly will serve society and keep to canons of ethics befitting an honourable order. If pathological cases of member mis behaviour occur, the reputation and credibility of the Bar suffer a mayhem and who, but the Bar council, is more concerned with and sensitive to this potential disrepute the few black sheep bring about? The official heads of the Bar, i.e. the 588 Attorney General and the Advocates-General too are distressed if a lawyer 'stoops to conquer' by resort to soliciting, touting and other corrupt practices.

If these are the high expectations of what is described as anoble profession, its members must set an example of conduct worthy of emulation. If any of them falls from that high expectation, the punishment has to be commensurate with the degree and gravity of the misconduct. We need not reiterate the seriousness of the misconduct as we have repeatedly pointed out the same above. Usually, precedent-minded as we generally are, we searched for some precedent to assist us in determining adequate penalty. In P. J. Ratnam v. D. Kanikaram this court upheld suspension from practice for a period of five years for a misconduct of not refunding the amount which was taken by the advocate on behalf of his client observing that the court was surprised at the request of the learned counsel for reducing the punishment and in fact it is a case in which the court left to itself would have struck off the name of the advocate from the State roll of advocates. The court concluded by saying that suspension of five years errs on the side of leniency and no case is made out for interfering with the same. In Dabholkar case, the professional misconduct charged was that the advocate Dabholkar stood at the entrance of the court House at the Presidency Magistrate's court, Esplanade, Fort, Bombay and solicited work and generally behaved at that place in an undignified manner. Frankly speaking, if Dabholkar was starving, his professional misconduct could have been overlooked because between hunger and soliciting work, the latter is less pernicious. However, the seven-Judges Constitution bench of this court at that stage did not interfere with the punishment of suspension from practising as advocate for a period of three years. Of course, the Constitution bench was concerned with the narrow point about the maintenance of the appeal by the Bar council of India. In V. C. Rangudurai v. D. Gopalan, the delinquent lawyer Rangadurai was charged with duping the complainant T. Deivasenapathy, an old deaf man aged 70 years and his aged wife Smt. D. Kamalammal by not filing suits on two promissory notes. The Disciplinary Committee of the state Bar council had ' imposed a penalty of suspension from practice for a period of six years. Sen, J. in his judgment had grave reservations about the majority decision by which the period of suspension was reduced and the advocate was directed to work under an Official/Legal Aid Board in Tamil Nadu where his service free of charge were required. Justice Sen would dismiss the appeal without the slightest reduction in punishment.

(31) Having given the matter our anxious consideration, looking to the gravity of the misconduct and keeping in view the motto that the punishment must be commensurate with the gravity of the misconduct, 589Swe direct that the appellant M. Veerabhadra Rao shall be suspended from practice for a period of five years that is up to and inclusive of 31/10/1989. To that extent we vary the order both of the Disciplinary Committee of the State Bar council as well as the Disciplinary Committee of the Bar council of India.

(32) Accordingly this appeal fails and is dismissed and the punishment of reprimand imposed upon the appellant is varied and he is suspended from practice for a period of five

years i.e. up to and inclusive of 31/10/1989. The appellant shall pay the costs of the respondent quantified at Rs. 3,000.00.

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Cross citation : (1999) SUPREME COURT CASE 467

SUPREME COURT OF INDIA

(BEFORE S.P. RURDUKAR, K.T. THOMAS AND N. SANTOSH HEGDE, JJ.)

(FULL BENCH)

Shiv Kumar –V*s.*- Hukam Chand and another

Criminal appeal no. 1048 of 1998, decided *on* august 30, 1999

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A) **Criminal Procedure Code, 1973 — Ss. 301, 302 and 225 & 24 — Duty of the Public Prosecutor to act fairly and not merely to obtain conviction by any means fair or foul — If the accused is entitled to any legitimate benefit the Public Prosecutor should make it available to him or inform the court even if the defence counsel overlooked it .**

The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts-involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle or conceal it On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes this knowledge. A private counsel, if allowed a free hand to conduct prosecution, would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor. (Para 13)

privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter. (Para 14)

B) Criminal Procedure Code, 1973 — Ss. 301 and 302 — Unlike S. 302, S. 301 is applicable to all courts of criminal jurisdiction- Right of private counsel to conduct prosecution in a Sessions Court — Prosecution in sessions case cannot be conducted by anyone other than the Public Prosecutor — Role of private counsel is limited to act under the direction of the Public Prosecutor — However, he can submit written arguments after closure of the evidence with prior permission of the court.

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Queen-Empress v. *Durga,* ILR (1894-96) 16 All 84 : 1894 AWN 7; *Medichetty Ramakistiah* v. *State ofA.P.,* AIR 1959 AP 659 : 1959 Cri LJ 1404; *Bhupalli Malliahj*
Re, AIR 2959 AP477 : 1959 Cri LJ 1045, *approved*

Advocates who appeared in this case:

B.S. Mor, M.S. Dahiva and Ms Kusum Singh, Advocates, for the Appellant;

C.S. Ashri and Mahabir Singh, Advocates, for the Respodents.

The Judgment of the Court was delivered by **THOMAS, J**.— It is as well for the protection of the accused persons in sessions trials (in India) that provision is made to have the case against him prosecuted only by a Public Prosecutor and not by any counsel engaged by any aggrieved private party. Fairness to the accused who faces prosecution is the raison d'etre of the legislative insistence on that score.

2. In this case, the appellant is aggrieved because a counsel engaged by him was not allowed by the High Court to conduct prosecution in spite of obtaining a consent from the Public Prosecutor concerned. The first respondent was the accused in the sessions trial wherein the appellant wanted his counsel's active role to be played. The appellant and the respondent are advocates practising at

the same station. The grievance of the appellant developed in the following fact situation:

Hie appellant is the brother of five sisters, and the youngest among them, Suman, had secured creditable academic laurels; She was given in marriage to Dr Dinesh Kumar Gupta (the son of the respondent). But about 4 months after her marriage she met with a tragic death by burns. On a complaint lodged by the appellant, FIR under Sections 302 and 120-B of the Indian Penal Code (IPC) was registered by the local police against the respondent. But after completion of the investigation a charge-sheet was laid against him for the offence under Section 304-B of the Indian Penal Code.

3. The appellant, on his part, engaged Shri R.C. Gugnani, Advocate to appear for him in the Sessions Court during trial of the case. On 1-7-1996 when the appellant was to be examined as a witness for prosecution, Shri R.C. Gugnani, Advocate ventured to conduct the chief examination of that witness. It was objected to by the counsel for the accused on the premise that a private counsel cannot conduct prosecution in a sessions trial. The appellant then moved an application on the same day, the relevant portion of which reads thus:

"That the Public Prosecutor has no objection if the case is conducted by Shri R.C. Gugnani, Advocate. That as per the prevailing practice being followed by this Hon'ble Court and as per provisions of Section 301 (2) Cr.P.C. my counsel has a right to conduct the case under the directions of the Public Prosecutor. It is , therefore, prayed that in view of the facts stated above, necessary permission may please be given to the applicant for conducting the case under the directions of the Public Prosecutor."

4. It seems, the Public Prosecutor in the trial court endorsed the said application. The trial court passed an order thereon, the material portion of which is the following:

"I accept the application and allow Shri R.C. Gugnani, Advocate of the complainant to conduct under the supervision, guidance and control of the Public Prosecutor, while conducting the same case and the Public Prosecutor shall retain with himself the control over the proceedings."

5. The accused was not prepared to have his case prosecuted by the complainant's counsel and hence he approached the High Court in revision. The impugned order of the High Court was passed by a Single Judge, The operative portion of the said order reads thus:

"I allow this revision and direct that the lawyer appointed by the complainant or private person in this case shall act under the directions from the Public

Prosecutor and may with the permission of the Court submit written arguments after evidence is closed in the case. I further direct that the Public Prosecutor in charge of the case shall conduct the prosecution. Revision petition is disposed of accordingly."

6. Learned counsel for the appellant informed us that trial in the case is over by now. Nonetheless he pleaded for consideration of the issue as he feels that a decision thereon by this Court is necessary for future guidance also. He contended that Section 302(2) of the Code of Criminal Procedure (for short "the Code") must be so construed as to enable the pleader of an aggrieved private person to conduct the prosecution in as best a manner as he deems fit. Section 301 of the Code reads thus:

"301. *Appearance by Public Prosecutors.*—(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under enquiry, trial or appeal.

2) If in any such case any private person instructs a pleader to prosecute any person in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the court, submit written arguments after the evidence is closed in *the* case."

7. Section 302 of the Code has also some significance in this context and hence that is also extracted below:

"302. *Permission to conduct prosecution.*—(1) Any Magistrate enquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part *hi* the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

8. It must be noted that the latter provision is intended only for Magistrate Courts. It enables the Magistrate to permit any person *to* conduct the prosecution. The only rider is that Magistrate cannot give such permission to a police officer below the rank of Inspector. Such person need not necessarily be a Public Prosecutor.

9. In the Magistrate's Court anybody (except a police officer below the rank of Inspector) can conduct prosecution, if the Magistrate permits him to do so. Once the permission is granted the person concerned can appoint any counsel to conduct the prosecution on his behalf in the Magistrate's Court.

10. But the above laxity is not extended to other courts. A reference to Section 225 of the Code is necessary in this context. It reads thus:

"'225. *Trial to be conducted by Public Prosecutor.*—In every trial before a court of Session, the prosecution shall be conducted by a Public prosecutor."

11. the Old Criminal Procedure Code (1898) contained an identical provision in Section 270 thereof. A Public Prosecutor means "any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor" [vide Section 2(«) of the Code].

12. In the backdrop of the above provisions we have to understand the purport of Section 301 of the Code. Unlike its succeeding provision in the Code, the application of which is confined to Magistrate Courts, this particular section is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words "any court in Section 301. In view of the provision made in the succeeding section as for Magistrate Courts the insistence contained in Section 301(2) must be understood as applicable to all other courts without any exception. The first sub-section empowers the Public Prosecutor to plead in the court without any written authority, provided he is in charge of the case. The second subsection, which is sought to be invoked by the appellant, imposes the curb on a counsel engaged by any private party. It limits his role to act in the court during such prosecution "under the directions of the Public Prosecutor". The only other liberty which he can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if the court permits him to do so.

13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/ conceal it. On the contrary, it is the duty of the Public Prosecutor to winch

it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

14. It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter.

15. An early decision of a Full Bench of the Allahabad High Court in *Queen-Empress* v. *Durga*[1] has pinpointed the role of a Public Prosecutor as follows:

"It is the duty of a Public Prosecutor to conduct the case for the Crown fairly. His object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that justice is vindicated; and, in exercising his discretion as to the witnesses whom he

1 ILR (1894-96) 16 All 84 : 1894 AWN 7 should or should not call, he should bear that in mind. In our opinion, a Public Prosecutor should not refuse to call or put into the witness box for cross-examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might in some respects be favourable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness box, he is not bound, in our opinion, to call that witness or to tender him for cross-examination."

16. As we are in complete agreement with the observation of a Division Bench of the High Court of Andhra Pradesh in *Medichetty Ramakistiah v. State ofA.P.*[2] we deem it fit to extract the said observation:

'"A prosecution, to use a familiar phrase, ought not to be a persecution. The priniciple that the Public Prosecutor should be scrupulously fair to the accused and present his case with detachment and without evincing any anxiety to secure a conviction, is based upon high policy and as such courts should be

astute to suffer no inroad upon its integrity. Otherwise there will be no guarantee that the trial will be as fair to the accused as a criminal trial ought to be. The State and the Public Prosecutor acting for it are only supposed to be putting all the facts of the case before the Court to obtain its decision thereon and not to obtain a conviction by any means fair or foul. Therefore, it is right and proper that courts should be zealous to see that the prosecution of an offender is not handed over completely to a professional gentleman instructed by a private party."

17. Another Division Bench of the same High Court in *Bhupalli Malliah,* had in fact deprecated the practice of the Public Prosecutor's sitting back and permitting private counsel to conduct prosecution, in the following terms:

"We would like to make it very clear that it is extremely undesirable and quite improper that a Public Prosecutor should be allowed to sit back, handing over the conduct of the case to a counsel, however eminent he may be, briefed by the complainant in the case."

18. Equally forceful is the observation of Bhirnasankaram, J. for the Division Bench in *Medichetty Ramakistiah*[2] which is worthy of quotation here:

> *"Unless, therefore, the control of the Public Prosecutor is there, the prosecution by a pleader for a private party may degenerate into a legalised means for wreaking private vengeance. The prosecution instead of being a fair and dispassionate presentation of the facts of the case for the determination of the court, would be transformed into a battle between two parties in which one was trying to get better of the other, by whatever means available. It is true that in every case there is the overall control of the court in regard to the conduct of the case by either party. AIR 1959 AP 659 : 1959 Cn LJ 1404 AIR 1959 AP 477 : 1959 Cri LJ 1045. But it cannot extend to the point of ensuring that in all matters one party is fair to the other."*

19. We, therefore, conclude that the High Court in the impugned order has correctly approached the issue and it does not warrant any interference. We, therefore, dismiss this criminal appeal.

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Cross Citation :2012 ALL MR (CRI) 1624, LAWS(BOM)-2012-2-115

HIGH COURT OF BOMBAY

Coram :- R.P.Sondurbaldota J.
Decided on February 13, 2012
CRIMINAL WRIT PETITION NO. 8 OF 2010

Kishore Wadhwani s/o Shri Khanchand WadhwaniAppellant
VERSUS
State of MaharashtraRespondents

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Criminal P.C. (1973), Ss.239, 301, 302 -Application for discharge - First informant- No right to address orally - Opportunity of hearing cannot be refused to him - His role will be limited and he cannot take place of Public Prosecutor - He cannot be allowed to take over the control of prosecution by allowing to address the court directly.

If the first informant appears before the Court and desires to participate in the application, opportunity cannot be refused to him. Now the next question would be about the nature of the hearing to be given to the first informant. Should the hearing be independent to the hearing to the Public Prosecutor or it be through the Public Prosecutor, His role will have to be limited as under Section 301 Cr.P.C. and keeping in focus the role of the Public Prosecutor. He cannot be allowed to take over the control of prosecution by allowing to address the court directly.
(para 16)

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Referred Judgements :R. BALAKRISHNA PILLAI VS. STATE OF KERALA ,1995 CLJ 1244
AHMED MAHOMED ISMAIL VS. EMPEROR ,AIR 1940 220
BHAGWANT SINGH VS. COMMISSIONER OF POLICE ,AIR 1985 SC 1288

Acts and Rules Cited :CODE OF CRIMINAL PROCEDURE, 1973 , S.154(1) , S.156(3) , S.173(2) , S.239 , S.302 ,

Advocates :- Mahesh Jethmalani , Pranav Badeka , Vinod Bhagat , Prashant Pawar , V.A.Bhagat , Punit Jain , Amit Desai , Subhash Jadhav , Vishwajeet Sawant

JUDGEMENT
1. THE single question that arises for consideration in this writ petition is whether the first informant has a right of hearing at the time of consideration of the application for discharge under Section 239 of Code of Criminal Procedure (hereinafter Cr.P.C." for short). THE brief facts of the case required to be stated for consideration of the question are that the petitioners are accused in Case No.927/PW/2007 pending in the Court of Additional Chief Metropolitan Magistrate, 8th Court, Mumbai. THE case had been registered, pursuant to the order passed under Section 156(3) Cr.P.C. by the Court on the complaint filed by respondent no.2. THE petitioners had filed Criminal Writ Petition No.93 of 2007 seeking quashing of MECR No.16 of 2006 registered by the police. That writ petition was dismissed

on 16th April 2007. THE petitioners then approached the Hon'ble Supreme Court by filing S.L.P. (Cri.) No. 2414 of 2007, during the pendency of which, chargesheet came to be filed before the trial court. THErefore on 16th November 2009, the petitioners withdrew the S.L.P. and filed application for discharge under Section 239 Cr.P.C. In that application, respondent no.2 appeared before the trial Court with a request to be heard in the matter. THE request made was an oral request. THE petitioners objected to the request. After hearing rival arguments, the oral request of respondent no.2 was allowed by the trial Court by it's order dtd. 30th August 2010, impugned in the present petition. THE reasons set out in the short order read as follows:

"3) Especially I have gone through the ratio laid down in the authorities of the Hon'ble Apex Court in the case of Bhagwant Singh vs. Commissioner of Police, AIR 1985 SC page 1288 and the ratios down in other authorities mentioned supra. 4) THE question that has been raised by Defence is as to whether, at this stage i.e. at the stage of discharge of accused, whether the original complainant could have a right to be heard. On this point, it was argued that the complainant can be heard at the initial stage, but he has no right to be heard at this stage. 5) I have carefully gone through the submissions made at the bar as well as ratios laid down in reported authorities as discussed supra. It is pertinent to note that golden principle of law is that nobody should be condemned unheard. May it be any stage and the original complainant is not an alien to this proceeding. So as per the ratios laid down in the authorities relied upon by Ld. Counsel for the original complainant, the original complainant has a right to be heard even at this stage. Hence, as there is no application filed on record by either of the parties and as everything went on orally, this order is passed below Exhibit No.1. THE original complainant has got a right to be heard even at this stage. Hence, matter shall proceed further."

2. THE petitioners challenge the impugned order contending that Section 239 Cr.P.C., under which the application for discharge is made, in express terms, gives right of hearing only to the prosecution and the accused. THE section does not contemplate hearing to the first informant either in person or through advocate. Secondly under the scheme of Cr.P.C., it is the public prosecutor who has to conduct the case and the first informant can only assist the public prosecutor and can address the court through the public prosecutor. THErefore according to the petitioners, the trial Court could not have passed the impugned order. In reply, respondent no. 2 seeks to justify the impugned order contending that it is in keeping with the evolvement of law in giving equal importance to the first informant and victim of the crime. Besides, participation by way of advancing arguments on law and facts would not

bring any element of unfairness but would actually assist the court.

Undoubtedly the first informant and to some extent, the injured i.e. victim of crime or relatives of the deceased, if the incident has resulted into death have now been vested with better rights. with increased participation at different stages of criminal proceedings. Before going into the question arising for consideration in the petition, it will be convenient to take note of the rights conferred upon them by the statute as well as by judicial pronouncements. It will also be necessary to refer to few provisions of Cr.P.C. to appreciate the submissions advanced.

Section 154(1) Cr.P.C. requires that every information relating to the commission of a cognizable offence if given orally to an officer-in-charge of a police station shall be reduced in writing by him or under his direction and be read over to the informant and every such information whether given in writing or reduced into writing shall be signed by the person giving it. Section 154(2) requires that a copy of such information shall be given forthwith, free of cost, to the first informant. Section 157(2) requires that if it appears to the officer-in-charge of the police station that there is no sufficient ground for entering on an

investigation, he shall forthwith notify to the first informant the fact that he will not investigate into the complaint or cause it to be investigated. In case investigation is undertaken, Section 173(2)(ii) provides that on completion of investigation, the officer shall communicate, in such manner as may be prescribed by the State Government, the action taken by him to the first informant. It can be noted that all the above three provisions relate to the action to be taken by the police i.e. the officerin7 charge of the police station. The purpose and reasons of the three provisions have been stated by the Apex Court in it's decision in Bhagwant Singh Vs. Commissioner of Police, reported in A.I.R. 1985 Supreme Court, page 1285 relied upon by respondent no.2 and also referred to in the impugned order. The reasons stated are as under :

"3. ..... Obviously the reason is that the informant who sets the machinery of investigation into motion by filing the First Information Report must know what is the result of the investigation initiated on the basis of the First Information Report. The informant having taken the initiative in lodging the First Information Report with a view to initiating investigation by the police for the purpose of ascertaining whether any offence has been committed and, if so, by whom, is vitally interested in the result of the investigation and hence the law requires that the action taken by the officer in charge of a police station on the First Information Report should be communicated to him and the report forwarded by such officer to the Magistrate under subsection 2(i) of Section 173 should also be supplied to him."

3. NEXT are the provisions of Section 301 and 302 Cr.P.C., which allow participation of the first informant into the conduct of the trial to the extent permitted therein. Section 301 permits a first informant to instruct a pleader to prosecute any person in any court but limits participation of such pleader to assistance to the Public Prosecutor or Assistant Public Prosecutor. The pleader may, with the permission of the Court, submit written arguments after the evidence in the case is closed in the case. Section 302 relates to the proceedings before a Magistrate. Any Magistrate enquiring into trying a case, may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector. No such permission is required for the prosecution to be conducted by Advocate General or Government Advocate or Public Prosecutor or Assistant Public Prosecutor. In other words, ordinarily the prosecutions are conducted by Public Prosecutor or Assistant Public Prosecutor. However, it is open for a private person to seek permission to conduct the prosecution by himself. If the Court thinks that the cause of justice would be served better by granting such permission, the Court would grant such permission. The scope of Sections 301 and 302 Criminal Procedure Code has been commented upon by the Apex Court in its decision in J.K. International V/s. State Govt of NCT of Delhi & Ors. reported in (2001) 3 SCC page 462. The same reads as under :

"12. The private person who is permitted to conduct prosecution in the Magistrate"s Court can engage a counsel to do the needful in the Court in his behalf. It further amplifies the position that if a private person is aggrieved by the offence committed against him or against any one in whom he is interested he can approach the Magistrate and seek permission to conduct the prosecution by himself. It is open to the Court to consider his request. If the court thinks that the cause of justice would be served better by granting such permission the Courts would generally grant such permission. Of course, this wider amplitude is limited to Magistrate's Courts, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is very much restricted and is made subject to the control of the Public Prosecutor. The limited role which a private person can be permitted to play for prosecution in the Sessions Court has been adverted to above. All these would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based

on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them."

Coming to the judicial pronouncement, the decisions relied upon on behalf of respondent no.2, on recognising right of hearing to the first informant in different stages of criminal proceedings are as follows :

(i) Bhagwant Singh's case (supra). (ii) J.K. International's case (supra) (iii) Vinay Poddar V/s. State of Maharashtra & anr. reported in 2009 ALL M.R. (Cri.) page 687.

4. IN Bhagwant Singh's case, the question considered by the Apex Court was whether in a case where the First INformation Report is lodged and after completion of investigation initiated on the basis of the First INformation Report, the police submits a report that no offence appears to have been committed, the Magistrate can accept the report and drop the proceedings without issuing notice to the first informant or to the injured or in case the incident has resulted in death, to the relatives of the deceased. The Apex Court held that if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceedings or takes a view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against those mentioned in the First INformation Report, the informant would certainly be prejudiced because the First INformation Report lodged by him would have failed of its purpose, wholly or in part. It opined that if the interest of the first informant in prompt and effective action being taken on the First INformation Report lodged by him is recognised by the provisions contained in Section 154(2), Section 156(2) and Section 173(2)(ii), it must be presumed that he would be equally interested in seeing that the Magistrate takes cognizance of the offence and issues process. Therefore, it held that in a case where the Magistrate to whom a report is forwarded under Section 173(2)(i) decides not to take cognizance of the offence and to drop the proceedings or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the First INformation Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. The Apex Court, however, treated the injured or in case of the incident resulting into death, the relatives of the deceased differently. It held that they were not entitled to any notice from the Magistrate, however, if they chose to remain present before the Court and desired to make submissions, the Magistrate is bound to hear him.

The question in the case of J.K. International (supra) related to hearing of the first informant in the petition filed under Article 226 of the Constitution of India praying for quashing of the criminal proceedings pending before the Magistrate's Court pursuant to the chargesheet filed by the police. In the petition, the first informant was not made a party. He had therefore applied for impleading himself to the petition. That application came to be dismissed on the ground that in a case proceeding on a police report, a private party has no locus-standi. For deciding that application, the High Court had placed reliance on the decision of the Apex Court in the case of Thakur Ram V/s. State of Bihar reported in A.I.R. 1966 SC page 911. The Apex Court opined that reliance upon the decision in Thakur Ram's case by the High Court was not correct as the situations in the two cases were different. In Thakur Ram's case, the complainant had sought to challenge the order of the trial Court rejecting prosecution application for amending the charge and committing the case to the Court of Sessions. The Apex Court in that case, had disapproved a private person trying to interject in the case to rechannelise the course of the prosecution when the Public Prosecutor was in management of the prosecution case. The situation in J.K. International's case was found to be different, where the accused had approached the High Court for quashing of the criminal proceedings initiated by the appellant. The Apex

Court held that in case of a petition for quashing of criminal proceedings, it would be a negation of justice to the complainant, if he is foreclosed from being heard.
The stage of hearing in the third case i.e. Vinay Poddar (supra) was completely different. The first informant had sought hearing in an application for anticipatory bail. While allowing the application, what had weighed with the Court was that when an application for anticipatory bail is considered, the police may not place all factual details before the Court as the investigation in most of such cases, is at a preliminary stage. Therefore, some role can be played by the complainant by pointing out the factual aspects. The other factor that had weighed with the Court was recognition of right of the first informant by the Apex Court to challenge the order granting bail.
5. THUS, it can be seen that the different stages of criminal proceedings in which participation of the first informant was allowed by judicial pronouncements, in the absence of specific provision in Criminal Procedure Code are (i) dropping of the proceedings by the Magistrate on receiving report under Section 173 Criminal Procedure Code from police, (ii) quashing of the criminal proceedings on the petition made by the accused and (iii) hearing of an application for anticipatory bail. The third stage is an entirely different stage, unconnected to the first two stages where one of the outcome of the application was the criminal complaint initiated by the first informant coming to an end.
6. THE above is the background against which the question arising in the present petition is required to be considered.
Mr. Mahesh Jethmalani, the learned Senior Counsel appearing for the petitioners submits that Sections 238 and 239 of Code of Criminal Procedure are a complete code in themselves in the matter of procedure to be followed for the purpose of discharging the accused or for framing of charge in any warrant case instituted on a police report. He points out that Section 239 makes provision for every aspect of hearing of the application for discharge. It provides for the parties to be heard, documents to be considered, the test to be applied and the order to be passed. He refers to the principle of 'Expressio unis est exclusio alterius" in the matter of statutory construction to submit that express mention of one or more persons of a particular class has to be regarded as by implication exclusion of all others of that class. According to Mr. Jethmalani, since Section 239 enumerates class of persons to be heard i.e. Prosecutor and the accused, by implication, it would exclude any other person from the hearing. Mr. Jethmalani relies upon decision of Kerala High Court in R. Balakrishna Pillai Vs. State of Kerala, reported in 1995 Criminal Law Journal, 1244 in the connection. In the proceeding before the Kerala High Court, a third party i.e. the Leader of Opposition in Kerala Legislative Assembly had filed an objection to the discharge application filed by the accused. The Kerala High Court held that Sections ' 238 and 239 being a complete code in the matter of procedure to be followed for the purpose of discharging the accused, a third party cannot have any say in the matter". In my opinion, the facts of the present case are different from the facts before the Kerala High Court. The person making an application before the Kerala High Court for hearing was an altogether a third person, whereas the applicant herein is the first informant. He cannot be said to be a third person. As regards Section 239 of Cr.P.C. being a complete code by itself for the procedure to be followed for the purpose of discharging the accused, that by itself need not deter the court in considering the question in view of the expanded scope given to the first informant in the matter if hearing to him.
Mr. Jethmalani next emphasises the role of a public prosecutor. By referring to Sections 24 and 25 Cr.P.C., he submits that prosecutions in the Court of Magistrates and the Court of Sessions are conducted by the Assistant Public Prosecutor and Public Prosecutor/Additional Public Prosecutor respectively appointed by the State Government. An advocate privately engaged is not permitted to conduct prosecution. He submits that there is a sound reason

for the criminal prosecutions to be conducted by public prosecutors appointed by the State Government. The State is the custodian of social interest of the community at large. Therefore though all the offences relate to public as well as the individual, in all the prosecutions, the State is the Prosecutor and the Public Prosecutor appointed by the State acts only in the interest of administration of justice. He is not a protagonist of any party. He stands for justice. Mr. Jethmalani draws support for his submission from following observations of Sind High Court in the case of Ahmed Mahomed Ismail vs. Emperor, reported in A.I.R. 1940 Sind 220. an advocate privately engaged ' to represent the complainant should have no other place than that of one strictly subordinate to the officer who prosecutes on behalf of the Crown, for, as I have already said, the Crown stands not necessarily for a conviction but for justice. It also does not stand for the acquittal of one accused represented by a particular advocate at the cost of others and at the cost of justice"

7. MR. Jethmalani submits that because the function of a Public Prosecutor relates to a public purpose, he is in-charge of the prosecution all the time. For the very reason, the private counsel engaged by the first informant is given the limited role of assisting the Public Prosecutor under Section 301 and 302 Cr.P.C. MR. Jethmalani relies upon decision of a Single Judge of this Court in Anthony D'Souza vs. MRs. Radhabai Brij Ratan Mohatta and Others, reported in 1984(1) Bombay C.R. page 157, wherein Sections 301 and 302 of Cr.P.C. were interpreted. The decision holds that the first subsection of 301 gives absolute power to the Public Prosecutor or Assistant Public Prosecutor to appear and plead without written authority before any court in any inquiry trial or appeal Sub-Section (2) provides that if in such a case any private person instructs a pleader to prosecute any person, the pleader so instructed shall act under the directions of the Public Prosecutor or Assistant Public Prosecutor-in-charge of the case. This would mean that the Public Prosecutor or Assistant Public Prosecutor as the case may be, is the sole master of the prosecution and conduct of the prosecution is solely governed by his decision as to the policy to be adopted during the course of the trial and another pleader instructed has to act under the directions of the Public Prosecutor. No permission of the court is required for a private person to instruct a Pleader under Subsection (2). Permission is required for submitting written arguments after the evidence is closed in the case. As regards Section 302(1), the court observed the power is undoubtedly vested 'in the court to authorise conduct of prosecution by a private person. This power cannot be used by the court except on special grounds. It must not be the intention of the legislature that any other pleader or advocate be permitted to conduct the prosecution before a trying Magistrate". (emphasis supplied).

Mr. Amit Desai, the learned Senior Counsel appearing for respondent No. 2 seeks to distinguish Anthony D'Souza's case with the submission that it deals with a different stage of criminal proceedings and that the decision is of a period prior to Bhagwant's case. The submissions of Mr. Desai are self destructive. The fact that the decision is of a period prior to Bhagwant's case becomes irrelevant because the two cases deal with different situations. The stage in Bhagwant's case is a preliminary stage of consideration of Police report filed under Section 173(2) Cr.P.C. for which, there is no statutory provision for hearing to the first informant. The stage in Anthony D'Souza's case is of recording of evidence in the criminal trial for which there are specific provisions of Sections 301 and 302 Cr.P.C. Therefore merely because the first informant is recognised at the preliminary stage of hearing, the decision cited does not lose it's significance.

8. MR. Desai submits that the impugned order should be sustained since it is in keeping with the evolvement of law in giving increased participation to the first informant in the matter of prosecution. Undoubtedly the first informant now enjoys a role higher than earlier as already seen in the preceding paragraphs. In fact perusal of the petition shows

that the petitioners also not wish to deny participation of the first informant altogether. They only want his role to be limited as under Section 301 Cr.P.C. An application for discharge can result into putting an end to the prosecution either partly or fully. This stage is in that respect similar to the stage of consideration of the police report by the Magistrate under Section 173(2) Cr.P.C and the proceedings for quashing of the complaint filed by the accused person. The first informant, therefore, is likely to be interested in seeing that the matter reaches the stage of trial and is disposed off after recording of evidence. If by judicial pronouncements, he is now granted hearing at the earlier two stages, he can be granted hearing at the stage of discharge also, though the Criminal Procedure Code does not make provision for hearing to him at that stage. If the first informant appears before the Court and desires to participate in the application, opportunity cannot be refused to him. Now the next question would be about the nature of the hearing to be given to the first informant. Should the hearing be independent to the hearing to the Public Prosecutor or it be through the Public Prosecutor. In my opinion, his role will have to be limited as under Section 301 Cr.P.C. for the same reasons, as given in Anthony D'Souza's case and keeping in focus the role of the Public Prosecutor. He, cannot be allowed to take over the control of prosecution by allowing to address the court directly. In this connection, the decisions in Bhagwant Singh's case and J.K. International's case will have no bearing since the situations considered in the two proceedings were different. In one case, it was a very preliminary stage and in the other, it was invocation of inherent powers of the High Court. Therefore, the petition is partly allowed. The impugned order is modified to the extent that the Counsel engaged by respondent no. 2 shall act under the directions of the Assistant Public Prosecutor in-charge of the case.

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Equivalent citation : 2013 Cri. L. J. (NOC)301

IN THE HIGH COURT OF BOMBAY AT GOA

CORAM :- A.P. LAVANDE & U.V. BAKRE, JJ.

Kashinath Jairam Shetye, Applicant.
V/s
Ramakant Mahadev Sawant, and ors .... Respondents.
Criminal Application (Main) No.239 of 2012, D/- 20-12-2012

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(C) Criminal P.C. (2 of 1974), S. 438 – Anticipatory bail- Application for – Has to be decided expeditiously –Court deciding application for

anticipatory bail has to balance right of applicant of his liberty – Investigating expected to be ready with reply at earliest point of time and to cooperate with court for early disposal of application of anticipatory bail – Pendency of such applications for considerable length of time seriously prejudices applicant in case no interim protection is granted. (Paras 18,19)

(D) Criminal P.C. (2 of 1974) ,S. 438- Anticipatory bail- Complainant/first informant is entitled to be heard by court while deciding application for anticipatory bail- However , his rights are not unfettered and cannot be construed as giving him liberty to make submissions for any length of time –Interest of justice would be served if he is called upon to file his say, in writing containing facts and legal submissions pointing out as to why anticipatory bail should not be granted – If such a course is adopted , it would save valuable time of court(Para 21)

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Ms.Prema Mathkar, Advocate for the applicant.

Mr. D. Pangam, Advocate for respondent No.1.
Mr. A. N. S. Nadkarni, Advocate General with Mr. D. Lawande, Addl.
Public Prosecutor for respondents No.2 and 3.

Reserved on : - 5th December, 2012.
Dictated on :- 20th December, 2012.

ORAL JUDGMENT : (Per A.P. LAVANDE, J.)

Heard Ms. Mathkar for the applicant, Mr. Pangam for respondent No.1 and Mr. Nadkarni, learned Advocate Generalappearing on behalf of respondents No.2 and 3.

2. Rule. By consent heard forthwith.

3. By this application, the applicant seeks cancellation of bail granted to respondent No.1 by the Sessions Judge, North Goa, Panaji by order dated 23rd August, 2012. The applicant has also sought further relief to the extent of holding an inquiry against the learned Sessions Judge for not disposing of the matter expeditiously.

4. Since the issue regarding delay in disposal of the anticipatory bail was raised in the application, we deemed it appropriate to take up the matter although the application seeking only cancellation of bail or anticipatory bail would lie before learned Single Judge in terms of the Bombay High Court, Appellate Side Rules.Moreover, learned Single Judge before whom the matter was placed,ordered that the same be placed before Division Bench. Even Mr.Pangam, learned Counsel appearing for respondent No.1 stated that he has no objection if we take up the matter and lay down some guidelines regarding disposal of the anticipatory bail applications filed before the Sessions Courts.

5. Briefly, the facts leading to the filing of the present application are as under :An FIR No.113/2009 dated 24.7.2009 was registered at Pernem Police Station at the instance of Assistant Director of Education under Section 406 r/w. Section 334 of Indian Penal Code. In the said report, respondent No.1 and other members of the erstwhile School Managing Committee of Durga English School were shown as accused. The allegation was that an amount of Rs.18.00 lakhs sanctioned by the Directorate of Education for the purpose of upkeep and maintenance of the school was misappropriated and in the said misappropriation, the said accused were involved. The applicant herein filed Criminal Writ Petition No.41/2012, inter alia, making a grievance that investigation was not being carried out properly by the investigating agency. In the course of hearing, we noticed that the investigation was not being carried out properly as it ought to have been carried out and issued directions to file affidavit by the Inspector General of Police and accordingly, affidavits were filed. Ultimately, by Judgment dated 5th September, 2012, the writ petition was disposed of, and the statement made by the learned Public Prosecutor that the investigation would be completed within a period of 3 months was accepted.

6. Respondent No.1 herein filed an application seeking anticipatory bail before the learned Sessions Judge on 29th March, 2012.

7. Since a grievance has been made that there has been an inordinate delay in disposal of the bail application, we deem it appropriate to refer in some detail to various dates to which the said application was adjourned.

8. On 29.3.2012, respondent No.1 filed anticipatory bail application in respect of FIR No.113/09. On the same day, notice was issued to the respondent returnable on 31st March, 2012, on which date, respondent/State sought time and on 3.4.2012 reply was filed on behalf of the respondent and arguments were also heard. Thereafter, the matter was fixed on 7.4.2012 for order. However, the order could not be passed and the matter was adjourned to 18.4.2012. At that stage, an intervention application came to be filed by the present applicant, of which reply was sought on 21.4.2012. Reply was accordingly filed. Ultimately, the application came to be allowed by order dated 11.5.2012. It appears that the learned Sessions Judge was transferred to the South Goa, Margao from June, 2012.

9. The bail application was placed before the new incumbent on 27.6.2012, on which date, the learned Sessions Judge was on leave and, as such, it was adjourned to 12.7.2012, on which day, the matter was adjourned for reargurments. On 20.7.2012, arguments were heard and the matter was fixed on 24.7.2012 for order by directing the intervenor to file written arguments, if any. Thereafter, the matter was adjourned from time to time for order, and ultimately, by the impugned order dated 23rd August, 2012, the learned Sessions Judge allowed the application on certain terms and conditions.

10. Ms. Mathkar, learned Counsel appearing for the applicant who is intervenor in the said application, submitted that having regard to the nature of the offence alleged against respondent No.1 and other accused, the learned Sessions Judge ought not to have granted the relief under Section 438 of Cr.P.C. to respondent No.1. According to the learned Counsel, the offence was of grave nature and in the facts and circumstances of the case, learned Sessions Judge was not justified in granting the relief under Section 438 of Cr.P.C. to respondent No.1.According to the learned Counsel, respondent No.1 was the main accused who was involved in the misappropriation of huge amount belonging to the State and, as such, respondent No.1 should not have been released on anticipatory bail. According to the learned Counsel, the investigation was at the preliminary stage and considering that the misappropriation was of public funds, the impugned order is clearly not justified. Ms. Mathkar placed reliance upon unreported order dated12.3.2012 passed by the learned Single Judge at Aurangabad in Mohd. Rafioddin Rehan Siddiqui v/s. The State of Maharashtra and others
(Criminal Application No. 578/2012 with connected matters.) Learned
Counsel further submitted that there is inordinate delay in disposal of
the anticipatory bail application.

11. On the other hand, learned Counsel Mr. Pangam, appearing for respondent No.1 submitted that absolutely no case was made out by the applicant for cancellation of the anticipatory bail granted to respondent No.1 inasmuch as the impugned order cannot be said to be patently illegal or perverse and there are no supervening circumstances, warranting cancellation of the anticipatory bail. According to the learned Counsel, there are irrelevant pleadings, both in the main application, as well as in the rejoinder. In any case, according to Mr. Pangam, the applicant has not even urged the grounds on which custodial interrogation of respondent No.1 is warranted. Mr. Pangam further pointed out that even the State has not challenged the said order by filing appropriate proceedings before this Court. According to Mr. Pangam, considering the nature of the offence alleged and the punishment prescribed under the Indian Penal Code, no
fault can be found with the learned Judge in passing the impugned order. Mr. Pangam pointed out that the maximum punishment provided for the offence punishable under Section 406 of IPC is 3 years imprisonment and hence, the said offence cannot be said to be serious offence, warranting custodial interrogation of respondent No.1 and that too after a period of three years from the date of registration of the FIR. Mr. Pangam pointed out that the FIR was registered on 24.7.2009, whereas the impugned order was passed on 23.8.2012. Lastly, Mr. Pangam submitted that absolutely no interference is warranted with the impugned order. Mr. Pangam submitted that at times the disposal of anticipatory bail applications are delayed by prolix and/or irrelevant submissions made by the first informant/ complainant. Mr. Pangam placed reliance upon the following
judgments:-

(1)***Hazari Lal Das vs. State of West Bengal and another***, 2009 (10)
SCC 652; and

(2) ***Sanjay Chandra vs. Central Bureau of Investigation,*** (2012) 1
SCC 40.

12. Mr. Nadkarni, learned Advocate General appearing on behalf of respondents No.2 and 3 fairly submitted that having regard to the materials available before the learned Sessions

Judge, no fault can be found with the impugned order. Mr. Nadkarni invited our attention to the Order dated 5.9.2012 passed by the Division Bench of this Court in Criminal Writ Petition No.41/2012, in which this Court clearly took note of the negligent and lackadaisical manner in which the investigation was carried out till notices were issued by this Court in the said Writ Petition. However, Mr. Nadkarni submitted that the State reserves its right to file proceedings for cancellation of the anticipatory bail granted, if situation demands. Learned Advocate General submitted that the parameters to be considered by the Court while considering an application for anticipatory bail have been clearly laid down by the Apex Court in the case of ***Siddharam Satlingappa Mhetre vs. State of Maharashtra and ors.*** (2011) 1 SCC 694.

13. We have carefully considered the submissions made by the learned Counsel for the parties and the learned Advocate General, as also the judgments relied upon. We have also perused the original record in the anticipatory bail application No.115/2012.

14. Coming to the merits of the application filed by the applicant seeking cancellation of anticipatory bail, it is pertinent to note that the FIR was registered on 24/7/2009 and practically for a period of almost two and half years hardly any investigation was carried out by the investigating officers, who were incharge of Pernem Police Station. Moreover, from a perusal of the judgment dated 5/9/2012, in Criminal Writ Petition No.41/2012, it is evident that the investigation carried out in Crime No.113/2009 was lethargic and lackadaisical and in this factual background, we accepted the statement made by the learned Public Prosecutor that the investigation would be carried out in right earnest and would be completed within a period of three months which period, of course, has been extended by a further period of three months pursuant to the order passed by this Court. Thus, it is evident that for a period of almost two and half years, hardly any investigation was carried out in Crime No.113/2009 and no arrest was effected by the investigating agency of any of the accused, including respondent No.1 who were very much available for interrogation and for effecting arrest, if warranted. In addition, as rightly pointed out by Mr. Pangam, for the offence alleged against the accused under Section 406, read with Section 34 IPC, the maximum punishment is three years imprisonment.

15. A perusal of the impugned order dated 23.8.2012 which is assailed by the applicant, discloses that the learned Sessions Judge has taken into consideration the legal position emanating from several judgments of the Apex Court, including the judgment in the case of ***Siddharam Satlingappa Mhetre (supra)***. The learned Sessions Judge has further observed that though the offence was registered in July, 2009, there was no allegation that respondent No.1 had not cooperated with the investigating agency. Moreover, in the intervening period, respondent No.1 had reported to the police station and his statement was recorded. Learned Sessions Judge, therefore, held that it was not a fit case for custodial interrogation. The learned Sessions Judge also held that there was no possibility of respondent No.1 absconding or thwarting the course of justice. What transpires from the findings recorded by the learned Sessions Judge is that the findings were based on material placed before the learned Sessions Judge and, therefore, the impugned order granting anticipatory bail to respondent No.1 cannot be faulted and in any case, cannot be termed as perverse, warranting interference by this Court.

16. It is well settled by a catena of decisions of the Apex Court that bail or anticipatory bail granted to the accused can be interfered in two circumstances. Firstly such bail can be

cancelled on account of supervening circumstances like tampering with evidence, noncooperation with the investigating agency, breach of conditions, etc., and in such a case, it is necessary to approach the same Court for cancellation of bail/anticipatory bail granted by that Court. However, if the order granting bail/anticipatory bail passed by the Sessions Judge is patently illegal or perverse, the only option available to the investigating agency or the person having locus to challenge the said order is to approach this Court under Section 439(2) and seek cancellation of such bail; (See Puran vs. Rambilas and another, (2001) 6 SCC 338). Considering the material available before the learned Sessions Judge at the time of passing of the impugned order, we are of the considered opinion that no fault can be found with the impugned order, granting anticipatory bail to respondent No.1. We do not deem it necessary to refer to the various judgments relied upon on behalf of the applicant, as well as respondent No.1, having regard to the findings given hereinabove. Moreover, the parameters to be considered by the Court while considering the anticipatory bail by now are well settled in view of the judgment of the Apex Court in the case of ***Siddharam Satlingappa Mhetre (supra).***

17. In the case of ***Joginder Kumar vs. State of U.P. and others,*** (1994) 4 SCC 260, a Three Judge Bench of the Supreme Court, after considering the guidelines laid down by the Third Report of the National Police Commission, held that no arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person and it would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a
complaint and a reasonable belief, both as to the person's complicity and even so as to the need to effect arrest. The maximum sentence prescribed for the offence punishable under Section 406, I.P.C. is three years imprisonment. Having regard to the principles laid down in the case of ***Joginder Kumar (supra),*** we are of the considered opinion that the findings of the learned Sessions Judge cannot be faulted.

18. Coming to the aspect of delay in disposal of the anticipatory bail application by the learned Sessions Judge, what transpires from the record is that the application was filed on 29.3.2012 and the same was disposed of on 23.8.2012 i.e. almost after five months. The record also discloses that the application was fixed for passing orders before the learned Sessions Judge and before any order could be passed, an application for intervention was filed by the present applicant and, thereafter, the matter was adjourned on several occasions for one reason or the other, including transfer of the incumbent to South Goa, as the Principal District and Sessions Judge. We find merit in the submission made by the learned Counsel for the applicant that the applications for anticipatory bails have to be decided expeditiously. When an application for anticipatory bail is filed, the learned Judge dealing with the same, while passing order, has to balance the right of the applicant of his liberty and the right of the investigating agency to carry out proper investigation, having regard to the nature of the offence/s alleged against the accused. Needless to mention that an application for anticipatory bail deals with liberty of an accused ordinarily at the stage of investigation and, therefore, it is expected of the investigating agency to render all assistance to the Sessions Judge dealing with the

application for its early disposal. At times, in applications for anticipatory bail replies are not filed for quite some time, thereby jeopardizing the interest of the applicant, more particularly when interim order is not passed in favour of the applicant. In the present case also it is to be noted that no interim protection was granted to respondent No.1 and an order came to be passed almost after a period of five months. We are conscious of the fact that at times, several bail/anticipatory bail applications are on the daily board of learned Sessions/Additional Sessions Judge and it may not be possible for the learned Judge to dispose of all such applications on the same day. But, it is surely expected of the Sessions/Addl. Sessions Judges to deal with such applications on priority basis and dispose of the same, expeditiously. However, it is not possible to fix outer time limit for disposal of anticipatory bail applications, since it would depend upon the number of matters which come up before the learned Judge on a particular day and the facts and circumstances of each case.

19. Be that as it may, the Sessions Judge dealing with such applications has to make endeavour to dispose of the applications at the earliest. As stated above, the investigating agency to whom the notice is given by the Sessions Judge is expected to be ready with reply at the earliest point of time and to cooperate with the Sessions Judge for early disposal of the application inasmuch as pendency of such applications for considerable length of time seriously prejudices the investigating agency in case interim order is granted and prejudices the applicant in case no interim protection is granted. Therefore, the investigating agency and the concerned Public Prosecutor appearing in the matter are expected to ensure that reply to anticipatory bail application is filed within a shortest possible time, so as to enable early disposal of such application.

20. Coming to the aspect of intervention in an application seeking anticipatory bail filed by the accused, learned Single Judge of this Court in the case of ***Vinay Poddar vs. State of Maharashtra and anr.***, 2009 ALL MR (Cri.) 687 after considering several judgments of the Apex Court, as well as of the High Courts, in paragraph 13 observed that when an application for anticipatory bail is considered, the police may not place all factual details before the Court as the investigation in most of such cases is at a preliminary stage and, therefore, some role can be played by the complainant by pointing out factual aspects. The learned Single Judge further held that the complainant or the first informant can appear before the Court and claim right of hearing in the said anticipatory bail application. But the said right cannot be allowed to be exercised in a manner which would delay the disposal of an application for anticipatory bail and the delay in disposal of such application may adversely affect the investigation. The learned Single Judge further held that the complainant/first informant has a right to make oral submissions pointing out factual aspects of the case during the course of hearing of such application and such a right can be exercised either by himself or through his Counsel. Learned Single Judge further held that though the complainant or the first informant has such a right, but it is not necessary for the learned Judge to issue notice either to the complainant or the first informant.

21. In the course of hearing, Mr. Pangam submitted that at times the disposal of anticipatory bail applications are delayed on account of prolix and/or irrelevant lengthy submissions made by the first informant/complainant appearing in person who is not well versed with the legal provisions, which also ultimately delay disposal of such applications. In our view, although the complainant/first informant is entitled to be heard in an anticipatory bail application filed by the accused his rights are not unfettered and cannot be construed as giving him liberty to make submissions for any length of time. In our view,

the interest of justice would be served if the complainant/first informant is called upon to file his say, in writing containing facts and legal submissions pointing out as to why the anticipatory bail should not be granted to the accused. If such a course is adopted, the same would save valuable time of the Court. No doubt, the complainant/first informant is entitled to make oral submissions, but in the event the complainant/first informant files his say pointing out the material
available with him against the accused/the applicant seeking relief, the Sessions Judge would be in a position to restrict the oral hearing to be given to the applicant/intervenor, having regard to the material placed by the investigating agency against the accused. Moreover, the accused would also be in a position to meet the case set up by the complainant/first informant. Therefore, although we are in respectful agreement with the view taken by the learned Single Judge in the case of ***Vinay Poddar (supra),*** that the complainant/first informant is entitled to be heard in an application for anticipatory bail filed by the accused, the same has to be understood in the light of the observations made above, so that the disposal of the anticipatory bail application is not delayed, thereby causing no prejudice either to the applicant or to the investigating agency.

22. With the above observations, the present application stands disposed of. Prayer clauses (i) and (ii) stand rejected. The application stands accordingly disposed of.

23. Considering the importance of the issue involved in the matter, we deem it appropriate to direct the Registrar (Judicial) to circulate copies of this order to the Principal District and Sessions Judges, both North and South Goa Districts who shall, in turn, circulate the same to the Additional Sessions Judges, functioning within their jurisdiction.

24. The original record in Bail Application No. 115/2012 be sent expeditiously to the learned Sessions Court, North Goa, Panaji.

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-: CHAPTER = 10 :-

SAFEGUARDS /PROTECTION FOR ADVOCATES

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Cross citation : AIR 1966 BOMBAY 19 (Vol. 53, C. 5)

BOMBAY HIGH COURT

Coram : 2 TAMBE AND NAIK, JJ. (Division Bench)

Mrs. Damayanti G. Chandiramani, Plaintiff v. S. Vaney, Defendant, Registrar, City Civil Court, Bombay Referer.

Misc. Civil Appln. No. 21 of 1963, D/- 16 -9 -1964.

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Contempt of Courts Act (32 of 1952), S.1 - CONTEMPT OF COURT - Threatening by a party to prosecute plaintiff's Advocate in course of argument before Judge- The threat was intended to operate upon the mind

of the Advocate so that he should flinch from performing his duties towards his client amounts to contempt of Court - Not words but conduct is essence of matter- Disrespect or disregard to an advocate in certain circumstances so as to deter him from discharging his duties would amount to contempt of Court. Conduct which is intended or calculated to bring pressure upon a party and his advocate, not to pursue the matter according to his choice, amounts to interference with the administration of justice even though such threat is not direct, in the sense that the contemner specifically asserted that he would take such action- In Nandlal Bhalla v. Kishori Lal, 48 Cri LJ 757 (Lah) the Inspector of Police issued threats and used insulting language towards an advocate. It was held that the Advocate was threatened in the performance of his duties, and although there was no contempt of the Court directly, there was contempt inasmuch as an officer of the Court such as an advocate appearing for the party- In (1824) 1 Hog 134 an insult was given to a counsel while he was attending in the Master's office, which was situated within the precincts of the Court. It was held that "Advocates who appear for the parties being officers of Court, any abuse or insult or aspersions cast on them, which would interfere with the course of administration of justice, must necessarily be held to amount in contempt of Court."

Contempt of Court may be said to be constituted by any conduct that lends to bring the authority and administration of law into disrespect of disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation If the context showed that the action contemplated was the action of the contemner himself, it is sufficient.

In order to amount to a threat, the language used need not necessarily be aimed at causing bodily injury or hurt. If it is calculated to injure the reputation so as to restrain the freedom of action of that person, it is sufficient. The essence of the matter is the course of conduct adopted by the contemner and not that the words amounted to a threat. It is enough if the conduct on the whole has tendency to interfere with the course of administration of justice or to subvert the court of justice. The nexus between the threat and the demand for doing something or refraining from doing something need not be express or need not lie expressly staled. It is enough it from the context the link between the two is apparent. The subsequent conduct of the contemner in so far as it relates to the carrying out of the threat would, also be relevant.

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Cases Referred : Courtwise Chronological Paras

('52) AIR 1952 SC 149 (V 39) : 1952 Cri LJ 832, B. Ramakrishna v. State of Madras 17

('59) AIR 1959 SC 102 (V 46) : 1959 Cri LJ 251, State of Madhya Pradesh v. Revashankar 17

('62) AIR 1962 SC 1172 (V 49) : 1962 (2) Cri LJ 262, Pratap Singh v. Gur baksh Singh 16

('23) AIR 1923 All 193 (2) (V 10) : ILR 45 All 272 24 Cri LJ 750, Allu v. Emperor 17

('35) AIR 1935 All 117 (V 22) : ILR 57 All 573, Rajendra Singh v. Uma Prasad 11, 14

('52) AIR 1952 All 674 (V 39) : ILR 1950 All 530, 1952 Cri LJ 1160, Kamla Prasad v. Ram Agyan 14
('48) AIR 1948 Bom 6 (V 35) : 49 Bom LR 393 : 48 Cri LJ 929, Emperor v. Jehangir M. Jassawala 15
('60) Misc Civil Appln No. 188 of 1960 (Bom) 19
('47) 48 Cri LJ 757 : 231 Ind Cas 284 (Lah), Nandlal Bhalla v. Kishori Lal 12
('56) AIR 1956 Mad 621 (V 43) : ILR (1956) Mad 1239, Thirumalaiappa v. Kumaraswami 11
('40) AIR 1940 Nag 110 (V 27) : 41 Cri LJ 709, Telhara Cotton Ginning Co., Ltd. v. Kashinath Gangadhar 11
(1824) 1 Hog 134, French v. French 11
(1856) 26 LJ Ch 305 : 2 Jur (NS) 1202, Smith v. Lakeman 11, 14

V. K. Punwani, for Plaintiff; S. Vaney, Defendant, in Person; V. S. Deshpande, Asst. Govt. Pleader, for the State.

Judgement

NAIK, J. : This proceeding for contempt of Court has been initiated by the High Court on the report submitted by Mr. Vimadalal, Judge, City Civil Court, Bombay, (as be then was) in respect of an incident which took place in his Court on 4th March 1963. The facts leading up to the incident on 4th March 1963 may be briefly outlined as follows : The Plaintiff, Mrs. Damayanti G. Chandiramani, filed a suit against the defendant, S. Vaney, for recovery of possession and arrears of compensation on the basis that the defendant was a licensee and that the licence was revoked. That suit was filed on 26th October 1962. After the service of the summons, the defendant attended the office of Advocate Punwani, who appeared on behalf of the Plaintiff in the suit, for inspection of the documents. This was on 10th November 1962. On 10th January 1963 the defendant started prosecution under Section 24 of the Rent Control Act against the plaintiff, her parents and Advocate Punwani on the basis that the Plaintiff had withheld essential services in respect of the flat which he had taken from the Plaintiff. The Presidency Magistrate, before whom the prosecution was launched, issued process only against the plaintiff and not against the rest. The plaintiff then loot out a Notice of Motion in the suit for possession asking for temporary injunction restraining the defendant from proceeding with the prosecution launched by him under Section 24 of the Rent Control Act. The mother of the plaintiff, who held the power of attorney for the plaintiff, put in an affidavit in support of the Notice of Motion. The Notice came up for hearing on 4th March 1963, and it is in the course of the arguments on the Notice of Motion that the incident, from which this proceeding has arisen, took place. Before dealing with the happenings of 4th March 1963 in the Court of Judge Vimadalal, it is necessary to set out a few more facts.

2. On 10th January 1963 the defendant launched a prosecution against Advocate Punwani for defamation. This complaint arose in the following circumstances. The defendant had started a criminal case (No. 588/S of 1962) on 23rd October 1902 against the members of the managing committee of Bela Housing Society for defamation. It may be mentioned that the flat in respect of which the plaintiff had asked for possession in the suit in the City Civil Court was a part of the building known as Bela Court, which belonged to Bela Co-operative Housing Society. In Criminal Case No. 588/8 of 1962 Advocate Punwani appeared for the accused, i.e., the members of the managing committee. Mr. Punwani argued that the defendant, who complained of a libel against himself, had no reputation to defend, it was the case for the Defendant that the statements made by Mr. Punwani in the course of the argument amounted to defamation and that is why he started prosecution against Advocate Punwani on 10th January 1963 under Section 500 Indian Penal Code. On 20th February 1963 the defendant started a criminal case against the plaintiff's lather, her mother, members of the managing committee and Advocate Punwani for intimidation and insult and abetment of the said offence. It may he mentioned at this stage that Advocate

Punwani happens to be the legal adviser of the Bela Co-operative Housing Society. The defendant had refused to become a member of the said Housing Society. Because of his refusal to become a member of the said Society, the managing committee passed a resolution that the use of the lift should be refused to the occupants who were not members of the Housing Society. A notice was put up in that regard. The defendant alleged that the two lift-men and Advocate Punwani actually prevented him from using the lift and in that way insulted him. It is on that basis that he lodged the complaint on 26th February 1963 for insult and intimidation. It would thus be seen that the two cases launched by the defendant against Advocate Punwani were pending on the day, when the Notice of Motion came up for hearing before Judge Vimadalal on 4th March 1963. It appears that the criminal case launched by the defendant on 26th February 1963 was dismissed on 13th March 1963 without issuing process against any of the accused.

3. Let us now turn to the happenings of 4th March 1963. Advocate Punwani, in the course of his arguments, referred to the contents of paragraph (6) of the affidavit put in by the Plaintiff's attorney in support of the Notice of Motion. Paragraph (6) of the affidavit runs thus :

"I say that the defendant seems to be a notorious litigant. He has been convicted four limes for offences under the Indian Penal Code, the last of which was for assaulting a lady (Case No. 135/P of 1951) for which he was sentenced lo rigorous imprisonment for three months, as recorded in the judgment, dated 3rd October 1952 of the 8th Court, Esplanade, Bombay. He has filed many cases against the owners of the Guest Houses or Hotels, where he used to reside before shifting lo the suit premises . ..."

The apparent object of Advocate Punwani in referring to the contents of paragraph (6) of the said affidavit was to show that the defendant

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was in the habit of launching upon vexatious cases and complaints and the complaint lodged by him under S. 24 of the Rent Control Act against the plaintiff stood in the same category. It may be recalled that by the Notice, of Motion, the plaintiff had asked for a temporary injunction restraining the defendant from proceeding with the criminal complaint lodged by him under Section 24 of the Rent Control Act. The learned City Civil Court Judge asked the defendant as to whether he had to say anything with regard to the allegations contained in paragraph (6) of the affidavit. The defendant stated that he would see to it that the plaintiff's advocate, Mr. Punwani would go to jail, that two criminal cases had already been filed by the defendant himself against the plaintiff's advocate the said Mr. Punwani and that he would file two more criminal cases against him shortly. It appears that Judge Vimadalal made a note of these statements on the docket sheet and asked the defendant to explain as to why he should not be proceeded with for contempt of Court. The defendant did not offer any explanation and on the 12th March 1968, Judge Vimadalal submitted a report to the High Court requesting that action for contempt of Court should be taken against the defendant. On the same day, he disposed of the Notice of Motion and made the rule, which was already granted restraining the defendant from proceeding with criminal case under Section 24 of the Rent Control Act, absolute.

4. It is also necessary to refer to certain events, which took place after 4th March 1963, because one of the contentions raised by Mr. Punwani in the course of these proceedings was that, the threat given by the defendant was not just a piece of bravado, but he actually carried that threat into action. We will consider the question as to whether and how far these happenings are relevant for deciding the present case, at a later stage of this judgment, for the time being, we will proceed to narrate the events as have taken place after 4th March 1963. On 6th March 1963 the defendant stinted prosecution against the plaintiffs father, members of the managing committee, two lift-men and Advocate

Punwani for insult and intimidation in respect of an incident which took place on 5lh March 1963, in which, according to the defendant, he was refused the use of the lift. On 7th March 1963 the criminal case No. 588/S of 1962, to which a reference has already been made, was taken up for hearing. Advocate Punwani was appearing on behalf of the accused in that case. The defendant made an application requesting that Advocate Punwani should be made a co-accused on the ground that he had instigated the managing committee to pass the resolution refusing the services of the lift to the defendant. Notice was issued to Advocate Punwani and on his showing cause, Mr. Punwani was discharged on 26th June 1963. The defendant went in appeal from the order in the Notice of Motion passed on 12th March 1963. He obtained an interim stay order on 30th March 1963. On 3rd April 1963 he launched a second prosecution under Section 24 of the Rent Control Act against the plaintiff, her parents, members of the managing committee, the two lift-men and Advocate Punwani. The plaintiff appeared in the appeal before the High Court and eventually, the stay was vacated. The High Court passed an order restraining the defendant from starting fresh proceedings under Section 24 of the Rent Control Act pending the hearing of the appeal. The High Court, however, refused to pass any stay order in respect of the prosecution already launched by the defendant on 3rd April 1963 and suggested that the plaintiff may approach the Magistrate for such relief. On 9th May 1963 the defendant started another prosecution for defamation against the plaintiff's mother and Advocate Punwani in regard lo the contents of paragraph (6) of the affidavit put in by the plaintiff's mother in support of the Notice of Motion.

5. The defendant has appeared in answer to the notice and put in his affidavit showing cause as to why he should not be punished for contempt of Court. He has given his own version as to what transpired on 4th March 1963 and denied some of the statements attributed to him by Judge Vimadalal in his report. The defendant has complained that Judge Vimadalal did not allow him to read his affidavit. At paragraph (8) of the affidavit, the defendant has set out a lengthy conversation which according to him, took place between him and Judge Vimadalal. He has suggested that it was only after the Judge asked him as to what was his occupation that he told him that he was engaged in writing a book about the administration of justice and when the Judge further asked him as to what he was doing prior to his engagement of writing the book, the defendant told the Judge that he could have become a Judge if he wanted to. When further asked as to what Government posts were offered to him, the defendant told the Judge that he was offered a nomination to the Indian Civil Service and if he had accepted the same, he would have started as an Assistant Judge and in that case, he would have become senior to the present Chief Justice of Bombay in the Civil Service Cadre. At paragraph (11), he has explained as to how Advocate Punwani has gone on making defamatory statements about him wherever he appeared against the defendant. According to him, Mr. Punwani made some defamatory statements on 10th December, 1962 at the hearing of the Notice of Motion before Judge Walavalkar; that again he made the same statements before the Court of the Sixteenth Presidency Magistrate on 10th January 1963 and that he repeated the same statements on 4th March 1963. He has admitted that he filed a criminal case for defamation against Advocate Punwani (No. 101/S of 1963), which is pending in the 28th Presidents Magistrate's Court in regard to the defamatory statements made by Mr. Punwani on 10th January 1963 in the Court of the 16th Presidency Magistrate. He has then referred to the incident, which took place in the Court

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of Judge Vimadalal and according to the defendant, this is what has happened :

"In this court the learned Judge Vimadalal himself asked me, if I had anything to say regarding the allegations made against me. I replied, 'Yes, a good deal, Sir. Then the

learned Judge asked, 'Have you suffered imprisonment for three months ?' I replied, 'These are false allegations. I have never suffered any sentence of imprisonment at any time. But, apart from that your Honour would appreciate that even if it were true that I had spent a number of years in prison, there is no occasion or justification for the plaintiff's Advocate to make that fact known here as it has no bearing on the issues before the Court. I respectfully submit that the purpose of this Advocate in making these statements is to defame me and create an atmosphere of prejudice and provoke me to make a brawl in Court or indulge in violence and, therefore, he is guilty of contempt of Court, and I request that the Court will be pleased to take action against him .....'. I thereupon continued, '.. .. .. If the certificate granted to the Society is cancelled, this advocate stands to lose his job. He, therefore, bears me great malice und everywhere he goes, he makes defamatory statements about me. Already I have filed a complaint of defamation against him which is case No. 101/S of 1963 in the 28th Presidency Magistrate's Court. Also he is an accused in another criminal case in his capacity of an employee of the said Housing Society. And in a day or two, I intend to file two more criminal cases in which this Advocate will he one of the accused for his 'wrong doing'. I have also made an application to the Bar Council for suspending him on account of his professional misconduct in five counts, one being that he has been an employee of the Housing Society for more than two years, and the President of the Bar Council informed me that my application would be kept pending and action will be taken when the Chapter V of the Advocates Act comes into force. I am hoping that there would be a conviction in each of the four cases in which he will appear as an accused, and that there will be a jail sentence.' "

The defendant has denied that he gave any threat or intimidated the advocate. He hits also denied that he uttered the words 'I would sec to it that the plaintiffs advocate would go to jail". He has argued that he has no power of sending anybody to jail and therefore, it is unlikely that he would utter any such words towards the advocate. In short, his contention is that he warned the advocate of the consequences of his own 'wrong doing' and what he contemplated was to take action against the advocate to vindicate his own legal rights.

6. It is also necessary to refer to certain stages through which the contempt proceedings have gone on in this Court. The proceedings came up for hearing before a Division Bench comprising Patel and Kantawala, JJ. on 7th August 1963. It appears that the defendant was then represented by Mr. K.L. Gauba, a senior advocate of this Court. After some brief discussion, the Division Bench adjourned the case and gave a direction to the City Civil Court Judge to expedite the suit filed by the plaintiff against the defendant. It appears that thereafter the suit was heard and disposed of in March 1964. On 15th April 1964 this case came up for hearing before another Division Bench comprising the Chief Justice and Gokhale, J. It was adjourned and then it was placed before the Division Bench comprising Kotwal and Palekar, JJ. This was on 25th June 1964. At that time, the defendant put in a written affidavit stating that Patel, J. had expressed the view that the statements attributed to the defendant, even if true, would not amount to contempt. The Division Bench felt that in view of the various allegations contained in the affidavit put in by the defendant against Judge Vimadalal, it would be more appropriate if a report was called for from Judge Vimadalal. Accordingly, a report was called for from Judge Vimadalal, who submitted the report on 26th August 1964. In May 1964 the defendant launched another prosecution against the plaintiff, her parents, Advocate Punwani and certain lift-men.

7. In the affidavit put in by the defendant, in order to show that the case was part-heard and that certain views were expressed by the Division Bench comprising Patel and Kantawala, JJ., the defendant has formulated four propositions as follows :-

"(a) Whether the report against me which is made by a senior Judge of the Bombay City Civil Court bears a semblance of correctness ?
(b) Whether the alleged vague statements amount to contempt ?
(c) Whether if the statements amount to contempt, they fall within the mischief of S. 228, Indian Penal Code and the jurisdiction of this Court is excluded by Section 3(2) of the Contempt of Courts Act ?
(d) Whether Section 3(1) of the Contempt of Courts Act offends Article 14 of the Constitution and is invalid."
The defendant, who has himself argued his case in detail has developed his arguments on the basis of the tour propositions formulated by him in his affidavit, dated 22nd June 1964.
8. The defendant has strenuously contended that the version set out by Judge Vimadalal as to what transpired on 4th March 1963 is not correct. He has argued that there is intrinsic evidence in the report to show that some of the statements attributed to him could not possibly be true. In that connection, be pointed out that he is a man of good education; that he knows English very well and that he has also considerable experience about the working of Courts. In these circumstances, it is unimaginable that he would make a statement to the effect that he would see to it that Advocate Punwani would go to jail. He has pointed out that he has no powers in send even a thief of a murderer to jail and all that he can do is to make a report in regard to the offence of theft or murder. That being the case, it is unlikely that he would utter
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the said words as regard Advocate Punwani. It is necessary to note that Judge Vimadalal has made the following note on the docket sheet presumably on the day of the argument on 4th March 1963;
"The defendant states that the advocate would go to jail. Two cases already filed and two more proceedings".
The defendant has argued that assuming that the learned Judge made the said note at the time of the argument in his Court, even so, the note does not say that he (defendant) uttered the words 'He would see to it that advocate Punwani would go to jail'. There is undoubtedly slight difference in the wording of the report on this point and the wording in the note made on the docket sheet. But the distinction is without difference and no importance can be attached to the small hairsplitting distinction, which the defendant has ingeniously pointed out to us. The version that the defendant has set out in great detail at paragraph (11) of his affidavit is not also materially different from the one which the learned Judge has set out in his report. The defendant has admitted in the affidavit at paragraph (11) that he has lodged a complaint for defamation against Advocate Punwani and has gone a step further and stated that Advocate Punwani bears malice towards him. This complaint of defamation relates to the statements made by Advocate Punwani in the course of his arguments in criminal case No. 588/S of 1962. The statements made by Mr. Punwani were similar to the statements which he made in the course of the arguments in support of the Notice of Motion in the City Civil Court. The defendant has also admitted that Advocate Punwani is an accused in another criminal case, which was filed against the members of the managing committee of the Housing Society. He has also admitted that he stated that he intended to file two more criminal cases in which Advocate Punwani would be an accused. He has then proceeded to say. 'I am hoping that there would be a conviction in each of the four cases in which he will appear as an accused and that there will be a jail sentence'. This is what he stated before Judge Vimadalal on his own admission in this affidavit. Therefore, whether the version set out by judge Vimadalal is accepted as true in its entirely, and we see no reason as to why we should not accept the same or not, on his own admissions contained in the affidavit, it is quite clear that the

defendant did say in the course of his arguments in respect of the Notice of Motion that he had already launched a criminal not for defamation against Advocate Punwani in respect of the statements made by the advocate to the effect that the defendant is a notorious litigation-monger and that he has been convicted four times. On his own admission, the defendant also gave a threat that he intended to file two more criminal cases for what he calls the advocate's 'wrong doing'. Of course, in this affidavit, he does not admit that he told the Court that he would launch a prosecution for defamation against Advocate Punwani for the defamatory words uttered by him on 4th March 1963. At the same time, taking the context into account, it is clear that what the defendant hinted was that, he would launch such a prosecution and that too in respect of the statement made by the advocate in the course of the arguments. According to the defendant, the statements made by him do not amount to threat and what he stated was that he would take such legal action as he would be entitled to take on the basis of the wrong deeds committed by Advocate Punwani. The question as to whether the statements made by the defendant amounted to threat or not would be considered by us at a later stage of this discussion. We will also consider the question as to whether, assuming that the statements do not amount to threat, they amounted to a conduct, which would interfere with or subvert the administration of justice. For the time being, we are only considering the two rival versions that have been placed before us and on a due consideration of the two versions, we have no hesitation in preferring the version put forward by the learned Judge, Vimadalal, particularly, when the admissions contained in the affidavit of the defendant support the version of the learned Judge in its broad outline. It may be pointed out that Advocate Punwani also has put in his affidavit fully supporting the version set out by Judge Vimadalal.

9. The next point that was urged by the defendant was that he had sufficient justification to make the comments which he made. According lo him, the statements made by Advocate Punwani were entirely irrelevant and beside the point, which was being considered by the City Civil Court. The defendant suggested that Advocate Punwani went out of his way to make these defamatory statements so that he would be provoked into engaging himself into a brawl with the Advocate. In the course of his arguments, he went so far as to say that had he been a little younger, he would perhaps have engaged himself in a brawl with the advocate on account of the highly provocative statements made by him. We are unable to accept that Advocate Punwani's statements were beside the point or that they were provocative. Advocate Punwani was within his rights in referring to the past history of the defendant, and in particular, his conduct in launching upon unwarranted prosecutions and indulging in frivolous litigation. Mr. Punwani wanted to suggest that the defendant's action in launching the prosecution under Section 24 of the Rent Control Act was a piece of his genera! conduct. In other words, his argument was that the action of the defendant in going to the Criminal Court under Section 24 of the Rent Control Act was utterly vexatious and made with a view to bring pressure upon the plaintiff to withdraw the suit. Nor do we think that the reference made by Advocate Punwani in regard to the previous convictions of the defendant was beside the point. In the first place, these statements were based on the contents of the affidavit sworn to by the attorney of the plaintiff. In the second place, Mr. Punwani says that not only he was instructed

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by his client but that he tried to ascertain the truth of these statements and that he was supplied with a copy of the judgment in criminal case No. 135/P of 1951, which was pronounced on 3rd October 1952. That was a prosecution under Section 323 Indian Penal Code against the defendant initialed by the Colaba Police Station, in which the defendant was sentenced to undergo three months' rigorous imprisonment and to pay a fine of Rs.

150 or in default to undergo further three months rigorous imprisonment. The defendant admitted in the above case that he had three previous convictions to his credit. In view of these circumstances, Advocate Punwani was fully justified and enjoyed a privilege in making the statements, which he made in the course of his arguments, it is significant to note that in his affidavit the defendant has not denied the fact of any of these four previous convictions. He has only stated that these statements were defamatory. In the course of his arguments before us, the defendant asserted with considerable vehemence that he had preferred an appeal or a revision (he said, he did not remember which) from the conviction and sentence in criminal case No. 135/P of 1951 and that the conviction and sentence were quashed by the higher authorities. He has gone to the length of adding that the higher authorities had passed strictures against the Magistrate, who recorded the conviction. We repeatedly asked the defendant to give us the number of the appeal or revision or at least the year in which these proceedings were instituted. He told us frankly that he did not know either the number or the year when he preferred the appeal or revision. He has, however, advanced a somewhat ingenious argument before us in this respect. He quoted the maxim 'every saint has a past and every sinner a future', he pointed out that the convictions to which reference was made is a matter of past history and that many developments had taken place since 1952 and there has been no conviction against him since then. It is not necessary for us to pursue this line of reasoning any further. It is sufficient for us to observe that it is implicit in the argument advanced by the defendant himself that he does not dispute the factum of previous convictions. If that is so, Advocate Punwani would be within his rights to make that statement.

10. In the course of his arguments, the defendant also made reference to the fact that he had made applications to the Bar Council for starting proceedings for misconduct against Advocate Punwani. It is not disputed that the defendant has made an application on 20th April 1963 to the High Court for starting proceedings for misconduct in respect of certain acts committed by Advocate Punwani between April 1963 and April 1964. It is not necessary for us to enter into the details of this question. The defendant however contended that this was not the first application made by him, but that he had made applications earlier, one in December 1962 and another in February 1968. Whatever that may be it is quite clear that he has made these applications against Advocate Punwani after the institution of the suit by the plaintiff against the defendant for eviction. We have referred to the multiplicity of the proceedings, which the defendant had started against Advocate Punwani. We have to see in perspective as to whether the object of the defendant in launching these cases was to deter Advocate Punwani from appearing on behalf of the plaintiff in the said suit or at least preventing him from discharging his duties fearlessly and impartially towards his client. The answer to this question will depend upon the answer to another question viz., whether the statements attributed to the defendant by Judge Vimadalal amount to threat or, at any rate, amount to a course of conduct motivated with the object of frightening the advocate from discharging his duties towards his client. One of the arguments advanced by the defendant was that, assuming that all the statements attributed to him are true, still they do not amount to any kind of threat.

11. We will first consider the effect, in law of the words uttered to the defendant. In the present case, the defendant has not been accused of having committed any act of contempt, disregard or defiance or disobedience to the Judge. He has been accused of having made statements in reaped of an advocate of the opposite party, and the point for consideration is, whether the statements amount to interference with the administration of justice. Oswald in his book on Contempt of Court, 3rd Edition, page 6, says :

"To speak generally, contempt of Court may be said to be constituted by any conduct that lends to bring the authority and administration of law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation".

At p. 91 of 'Contempt, Committal and Attachment' by Oswald, occurs the following passage :

"An insult to counsel may be punished as contempt. All publications which offend against the dignity of Court or calculated to prejudice the course of justice will constitute contempt".

It is settled law that disrespect or disregard to an advocate in certain circumstances so as to deter him from discharging his duties would amount to contempt of Court. The decision very much to the point was given by Niyogi, J. in Telhara Cotton Ginning Co. Ltd. v. Kashinath Gangadhar, AIR 1940 Nag 110. In that case, the defendant had addressed a notice to the Advocate of the plaintiff demanding that certain allegations in the written statement of his client should he withdrawn unconditionally and an apology tendered on pain of legal proceedings being taken against him. Another letter was sent by the defendant or somebody interested in him to the plaintiff complaining against the counsel for his refusal to withdraw the allegations described as foolish. It was held :

"In sending the notice containing threats to the counsel, the defendant made a clear invasion of the counsel's right to represent his client's case loyally and properly and further interfered with the due performance of his duty towards his client. The addressing of

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notice and the letter was calculated to interfere with and to obstruct or divert the course of justice. Hence, he was guilty of contempt of Court."

In the course of his judgment, Niyogi, J. observed :

"The law of contempt covers the whole field of litigation itself. The real end of a judicial proceeding, civil or criminal, is to ascertain the true facts and dispense justice. Various persons have their respective contributions to make in the proper fulfilment of that task. They are necessarily the Judges or the Magistrates, the parties to the proceeding, their agents or pleaders or advocates, the witnesses and the ministerial or menial staff of the Court. All these persons can well be described as the limbs of the judicial proceedings. For proper administration of justice, it is essential that all these persons are in the performance of their respective duties, ensured such fullness of freedom as is fail and legitimate. Anything that tends to curtail or impair the freedom of the limbs of the judicial proceedings must of necessity result in hampering the due administration of law and in interfering with the course of justice. It must therefore be held to constitute contempt of Court."

The view taken by the Nagpur High Court has been endorsed by the Allahabad. Madras and Lahore High Courts. In Rajendra Singh v. Uma Prasad, ILR 57 All 573 : (AIR 1935 All 117) during the pendency of the suit a notice was sent on behalf of the plaintiff through his advocate to the defendant, threatening him that unless he withdrew the plea and paid a certain sum as damages he would be criminally prosecuted for defamation of the plaintiff's deceased father. Proceedings for contempt were taken out on this notice. It was held :

"Interference with the administration of justice is one of the well recognised heads of contempt of Court. In the present case, the notice was undoubtedly intended to put extraneous pressure on the defendant in order to compel him, under threat of drastic action being taken against him, to withdraw the plea which had been taken by him specifically in the written statement. It amounted to a direct interference with the administration of justice in preventing or attempting to prevent the defendant from pressing the plea, which might prove in be a very substantial and legitimate defence; and

in that way an indirect attempt was made to exclude that plea from the consideration of the Court."

In the course of the judgment, the learned Judges relied upon the decision in Smith v. Lakeman, (1856) 26 LJ Ch 305 in which an unsigned letter had been sent by the plaintiff to the defendant with a view to intimidating him in the conduct of his defence. The letter warned the defendant that he had a suit pending in Chancery and should it go up for judgment, he would at once be indicted for swindling, perjury and forgery and thus bring disgrace on his family. If was not mentioned who would start such prosecution, but the threat was that certain legal action in court would be taken if the matter was pressed to final conclusion. Stuart, V.C., in committing the plaintiff for contempt remarked that the letter amounted to a threat for the purpose of intimidating him as a suitor, and therefore, whether it had had that effect or not, was unquestionably a contempt of Court. It would be clear from the above decisions that a piece of conduct intended or calculated to bring pressure upon a party, which must necessarily include his advocate, not to pursue the matter according to his choice, would amount to an attempt to interfere with the administration of justice. Secondly, the threat need not be direct, in the sense that the contemner specifically, asserted that he would take such action. It is sufficient if the context showed that the action contemplated was the action of the contemner himself. A similar question arose in Thirumalaiappa v. Kumaraswami, AIR 1956 Mad 621, The Madras High Court referred to the leading case of French v. French, (1824) 1 Hog. 134, which formed the basis of the statement on this subject contained in Oswald's Contempt of Court. The passage in Oswald (part of which has already been quoted) runs thus :

"An insult to counsel may be punished as a contempt. All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice, will constitute contempt Offences of this nature are of three kinds, namely, those which (1) scandalise the Court, or (2) abuse the parties concerned in causes there, or (3) prejudices mankind against persons before the cause is heard. Under the first head fall libels on the integrity of the Court, its Judges, officers or proceedings; under the second and third beads anything which tends to excite prejudice against the parties or their litigation, while it is pending. For example, attacks on or abuse of a party, not amounting to an interference with the course of justice, does not amount to contempt, the party being left to his remedy by action". In (1824) 1 Hog 134 an insult was given to a counsel while he was attending in the Master's office, which was situated within the precincts of the Court. It was held : (p. 623) -

"Advocates who appear for the parties being officers of Court, any abuse or insult or aspersions cast on them, which would interfere with the course of administration of justice, must necessarily be held to amount in contempt of Court."

Reference was made by the Madras High Court to the Nagpur case and the observations of Niyogi, J. have been cited with approval. At the same time, the Madras High Court did not take any action in regard to the insult levelled against the counsel, because the incident took place two days after the termination of the case.

12. In Nandlal Bhalla v. Kishori Lal, 48 Cri LJ 757 (Lah) the inspector of Police issued threats and used insulting language towards an advocate. It was held that the Advocate was threatened in the performance of his duties, and although there was no contempt of the Court directly, there was contempt inasmuch as an officer of the Court such as an advocate appearing

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in his professional capacity was threatened and insulted while in the performance of his professional duties in the Court.

13. In this background, let us now examine some of the arguments that were advanced by the defendant-contemner. The defendant referred to the meaning of the word 'threat' contained in the Concise Oxford Dictionary. Several meanings of that word are mentioned. The defendant wanted to rely on the first and second meanings viz., 'Declaration of intention to punish or hurt'; 'such menace of bodily hurt or injury to reputation or property as may restrain person's freedom of action'. The third meaning of that word as given is, 'indication of coming evil' and the fourth meaning is, 'threat of calamity". Even under the second meaning, it is quite clear that the language in order to amount lo a threat need not necessarily be aimed at causing bodily injury or hurt. It is enough if it is calculated to cause injury to the reputation sit as to restrain the freedom of action of that person. On examining the words used by the defendant, we feel no hesitation in holding that in effect the words amounted to a threat. As stated above, the question as to whether the words amounted to a threat is not of the essence of the matter. What is of the essence of the matter is the course of conduct adopted by the contemner, and if, on the whole, the conduct has a tendency to interfere with the course of administration of justice or subvert the course of justice, it would amount to contempt of Court. The defendant also argued that unless the threat is accompanied by a demand that the party or the counsel should not proceed with his action, the threat does not amount to contempt of Court. We do not think that the nexus between the threat and the demand for doing something or refraining from doing something need be express or need be expressly stated, it is enough if from the context the link between the two is apparent. In the present case, it is necessary to note that the threat was issued in the presence of the Court and in the course of the arguments before the Judge. It is quite clear that the object of the defendant was to bring undue pressure upon the Advocate not to perform his duties in a fearless and proper manner. As we have already mentioned, the defendant had started a prosecution for defamation against Advocate Punwani on account of similar statements made by him in the course of his arguments in criminal case No. 588/S of 1962. He also expressly stated that he would start two more prosecutions against the advocate and actually, he did start a prosecution on the 9th May 1968 in connection with the arguments advanced by Mr. Punwani on 4th March 1963. The subsequent conduct of the defendant in so far as it relates to the prosecutions having been started against Advocate Punwani is concerned, would, in our view, he relevant, and taking an overall view of the matter and having regard to the entire conduct of the defendant and further taking into account the circumstance that the threat was uttered in the course of the arguments and in the presence of the Judge, we feel no hesitation in holding that the threat was intended to operate upon the mind of the counsel so that he should flinch from performing his duties towards his client.

14. The defendant relied upon a decision of the Allahabad High Court in Kamta Prasad v. Ram Agyan, ILR 1950 All 530 : (AIR 1952 All 674). In that case the privity to the dispute had made an offer for settlement of the dispute between the parties out of Court and as part of the settlement he suggested that the pending litigation should be withdrawn. He suggested that failing this, he would take legal proceedings open to him under the law. It was held that the party could not be said to be interfering with the course of justice, because all that he suggested was that if the suggested terms were not accepted, he would take such proceedings us were open to him to lake in the matter. We are unable to understand how the decision of the Allahabad High Court, which proceeded on the peculiar facts of that case would in any way help the defendant in the arguments, which he is advancing. We notice that the Allahabad High Court referred to its earlier decision in Ranjendra Singh's case, ILR 57 All 573 : (AIR 1935 All 117) and expressed its approval of the view taken in that Case. It also referred to the decision in (1856) 26 LJ Ch 305 and

pointed out that in the circumstances of that case, the threat issued by the party amounted to contempt of Court. The Allahabad High Court explained that in the notice merely an offer for compromise of a pending dispute was made and that offer was coupled with a warning that proceedings which were open in law to the opposite parties would be taken in case the offer was rejected. At pages 541 and 542 (of ILR All) : (at p. 678 of AIR) the learned Judges have set out five propositions, and it was the contention of the defendant, in the present case, that these propositions assist him in the argument, which he is advancing. Now, the first proposition was based on the decision of (1856) 26 LJ Ch 305, and in our view, the present case would fall within the ambit of the first proposition laid down in the said case. The other propositions enunciated in that case have no relation to the facts of the present case. Some of the propositions were not necessary, even for the decision of the case and therefore, will have to be treated as obiter dicta. The facts of the present case are particularly strong, as we have repeatedly pointed out, because unlike in most of the cases referred to above wherein the threats were given outside the Court in the present case, the threat was given in the presence of the Court and in the course of the hearing of the case, and one prosecution for defamation was launched before the threat was administered and again a second prosecution for defamation against the Advocate Punwani, for the arguments advanced by him in the present case, was actually started by the defendant and in that way, the threat was carried out.

15. It may he pointed out that just as the statements made by Advocate Punwani viz., that @page-Bom28 the defendant was an ex-convict, was supported by the judgment, a certified copy of which was with him, in the same way, his statement that the defendant was a notorious litigant was also supported from the observations made by Stone, C.J. in Emperor v. Jehangir M. Jassawala, 49 Bom LR 393 : (AIR 1948 Bom 6). It is not necessary to refer to the facts, of that case and it is enough to point out that the defendant had started as many as twenty prosecutions against one Jasawalla, who in his turn had also started some prosecutions against the defendant restraining him from starling subsequent prosecutions against the same party and it was in that connection that the learned Chief Justice observed :

"..... in Mr. Vaney's case there is no doubt that he is a vexatious litigant."

Now, to give a threat to an advocate suggesting that prosecution for defamation would be launched against him in respect of the statements made by him against the defendant which were supported by unimpeachable evidence, is certainly to try to bring pressure on the Advocate with the object of deterring him from performing his duties towards his client. It is established law that a statement made by an advocate on the basis of instructions taken from the client and after verifying that it is well founded is privileged and protected. It is in respect of a privileged statement that the defendant had taken the extra-ordinary step of launching prosecution for defamation. Again, it is in respect of a similar statement made in support of the notice of motion that the defendant brandished a threat of prosecution. Later on, he has implemented that and started a second prosecution. And in his affidavit in this Court, he has repeatedly stated that the statements of the Advocate are per se defamatory. The course of conduct on which the defendant had launched himself will have to be taken into account for the purpose of finding out whether it was the object of the defendant to pressurise Advocate Punwani into withdrawing from the case so as to avoid further harassment or, at any rate, to deter him from discharging his duties to his client, honestly, efficiently and fearlessly, by keeping the sword of prosecution hanging over his head.

16. The law on this question has been clarified in n recent judgment of the Supreme Court in Partap Singh v. Gurbaksh Singh, AIR 1962 SC 1172. In that case, after citing the

passage from Oswald's Contempt of Court, which has already been quoted by us above, their Lordships referred to the facts of the case and observed that although departmental proceedings were started against the officer in accordance with the directions contained in the circular still the launching of these proceedings would have a deterring effect upon the officer, who had already filed a suit to ventilate his grievances. At page 1177, their Lordships observed :

"..... What would be the effect of these proceedings mi the suit which was pending in the Court of the Senior Subordinate Judge, Amritsar ? From the practical point of view, the institution of the proceedings at a time when the suit in the Court of the Senior Subordinate Judge, Amritsar, was pending could only be to put pressure on the respondent to withdraw his suit, or face the consequences of disciplinary action. This, in our opinion, undoubtedly amounted lo contempt of Court. There are many ways of obstructing the Court and any conduct by which the course of justice is perverted, cither by a party or a stranger, is a contempt; thus the use of threats, by letter or otherwise, to a party while his suit is pending; or abusing a party in letters lo persons likely to be witnesses in the cause have been held to be contempts.' The question is not whether the action in fact interfered, but whether it had a tendency to interfere with the due course of justice. The action taken in ibis case against the respondent by way of a proceeding against him can, in our opinion, have only one tendency, namely, the tendency to coerce the respondent and force him to withdraw his suit or otherwise not press if. If that be the clear and unmistakable tendency of the proceedings taken against the respondent, then there can be no doubt that in law the appellants have been guilty of contempt of Court, even though they were merely carrying out the instructions contained in the circular letter".

It may be noted that in the above case, there were no threats issued by the Government. What the Government did was that it started departmental disciplinary action against the respondent, and it was this action which was taken by the Government in accordance with a circular issued by it which raised the question as to whether it amounted to contempt. Their Lordships held that launching of departmental proceedings itself amounted to contempt of Court, because it would exert pressure upon the respondent either to withdraw from the case or at any rate not to press if. Their Lordships have considered the question from the practical point of view and have considered the possible effect of the institution of the proceedings upon the respondent. In the present case also, Advocate Punwani would be placed on the horns of dilemma either withdraw from the case or face the consequences of multiplicity of criminal proceedings and all these in respect of the statements made by him in the discharge of his duties as a counsel. We, therefore, feel no hesitation in holding that judged, as a whole, the words used by the defendant and his conduct amounted to contempt of Court.

17. We may consider one more argument that was urged by the defendant. The defendant contended that since the words, which, according to the Judge, amount to contempt, were uttered in his presence, the matter can be dealt with under Section 228, Indian Penal Code, and therefore, the High Court cannot take cognizance of that matter in view of the provisions of Section 3(2) of the Contempt of Courts Act. Sub-Section (2) of Section 3 of the said Act runs thus :

"No High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code."

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Section 228 Indian Penal Code, runs thus :

"Whoever intentionally offers any insult, or causes any interruption any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend in one thousand rupees or with both". The offence under Section 228 Indian Penal Code can arise only in the case of a public servant, while he is sitting in a judicial proceeding. In the present case, the threat has not been addressed to the Judge, but it has been addressed to the Advocate. Although the Advocate is a part of the machinery of the administration of justice, he is not a public servant within the meaning of that expression in Section 228, Indian Penal Code. It is on this short ground that the argument advanced by the defendant can be disposed of. But the matter does not rest there. In order that the proceedings are barred under Section 3(2) of the Contempt of Courts Act, it is further necessary to establish that the offence committed by the contemner in the presence of the Court is such as can be punished as contempt. It is not enough that the offence is punishable under any other law. This position is clear from the wording of Section 3(2) of the Contempt of Courts Act. There is also ample authority in support of the said proposition, vide B. Ramakrishna v. State of Madras, AIR 1952 S.C. 149 and State of Madhya Pradesh v. Revashankar AIR 1959 SC 102. As against this, the defendant relied upon the decision of the Allahabad High Court in Allu v. Emperor, ILR 45 All. 272 : (AIR 1923 All 193 (2)). We, however notice that the learned Judge (it was a decision of a single Judge) has not discussed the question at all and since the conclusion is slated without any discussion or reasoning, we do not think that that conclusion is entitled to much weight. Although the defendant had urged as one of the points in the affidavit that Section 3 of the Contempt of Courts Act was ultra vires the Constitution, in the course of his arguments however he fairly conceded that that would not be position and did not press the matter further.

18. Before concluding, we may refer to one more circumstance and it is this. We are told at the bar that when this matter came up before the Division Bench comprising the Chief Justice and Gokhale, J. and when it was suggested that the defendant should offer an apology the defendant told the Court that he would offer an apology if he was convinced that he had committed a wrong. The defendant accepted the above statement made by Advocate Punwani at the bar. When the matter came up before the Division Bench comprising Patel and Kantawala, JJ. the defendant told us that he did offer an apology, but he added that the Government Pleader as also the plaintiff's advocate objected to accepting his apology and requested that the matter should he proceeded with. When the defendant started his arguments before us, he began by asking us as to what would happen if he were to tender an apology. We told him that if he thought it proper, he may tender an unconditional apology, because after all, the apology should be born out of repentance or remorse. We also pointed out to him that he could not enter into any kind of stipulation with the Court. The matter rested at that.

19. We have now to consider the quantum of punishment to be imposed on the defendant. We asked the learned Assistant Government Pleader as also the defendant as to what should he the proper punishment for this offence. The learned Assistant Government Pleader pointed out that this is a third contempt committed by the defendant. The first contempt committed by the defendant appears to have taken place before 1947. Reference to the same is to be had at p. 395 in 49 Bom LR 393 : (AIR 1948 Bom 6 at p. 7) where Stone C.J. during the course of the narration of the antecedents of the defendant observed :

'.. .. ... Mr. Vancy was fined for his contempt of Court."

The learned Assistant Government Pleader also drew our attention to a recent case, wherein the defendant was charged with the same offence by this Court. That was in Misc.

Civil Appln. No. 188 of 1960 (Bom). That matter came up before the Chief Justice and one of us viz., Tambe, J. on 9th January 1961. The defendant having tendered an unconditional apology the proceedings were dropped. It, therefore, appears that the defendant has been in the habit of making reckless allegations against the Court or the officers of the Court. Ordinarily, we would have awarded a sentence which would have deterred him from taking similar action in future. When we asked the defendant as to what he has to say about the punishment, he stated that the matter is left in our hands. In the course of his arguments, the defendant told us that he was suffering from low blood pressure and he found it difficult to argue the matter beyond the first part of the day on the 14th. He, therefore, requested that the matter should be adjourned to the next day. The defendant also appears to be an old man. In view of his age and the condition of his health, we feel averse to sending him to jail. In our view, the ends of justice would be met if we direct him to pay a fine of Rs. 1,000. We hope that the imposition of the said punishment, which errs on the side of leniency, would have a sobering effect upon the defendant. We also direct that the defendant should pay the costs of these proceedings. We grant two months' time from today the defendant to pay the amount of fine

Order accordingly.

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(2012) 3 Supreme Court Cases (Cri) 1183

SUPREME COURT OF INDIA

(BEFORE P. SATHASIVAM AND RANJAN GOGOI, JJ.)

Central Bureau Of Investigation -Vs- K. Narayana Rao

Criminal Appeal No. 1460 of 2012t, decided on September 21, 2012

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A) Advocates — Duties — Legal opinion rendered by advocate — Negligent or improper legal advice or opinion — Criminal liability cannot be fastened — Criminal conspiracy to defraud Bank — Panel Advocate of Bank when can be made liable for such criminal conspiracy — Need for evidence to show that lawyer in question aided or abetted the other conspirators — Held, although a lawyer owes an

unremitting loyalty to clients interest, however , merely because his legal opinion may not be acceptable (in present case respondent Panel Advocate had been given ownership documents of conspirators' pledged properties, for vetting), he cannot be fastened with criminal prosecution in absence of tangible evidence that he had aided or abetted other conspirators — At the most, he may be liable for gross negligence or professional misconduct if established by evidence — In present case, there being no such tangible evidence against respondent, criminal proceedings against him, held, rightly quashed .

B) Tort Law — Negligence — Professional negligence — Standard of requisite skill applicable — Held, a professional's only assurance which can be given by implication is that: (1) he is possessed of the requisite skill in that branch of profession which he is practising, and (2) while undertaking performance of the task entrusted to him, he would exercise his skill with reasonable competence —A professional may thus be held liable for negligence on one of the two findings viz. either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable.

C) Criminal Procedure Code, 1973 — Ss. 227, 228 and 209 — Framing of charge /Discharge of accused — Exercise of jurisdiction— Held, Judicial Magistrate enquiring into a case is not to act as a mere post office or mouth piece of the prosecution and has to arrive at a conclusion whether the case before him is fit for commitment of accused to Court of Session — He is entitled to sift and weigh materials on record, but only to see whether there is sufficient evidence for commitment, not whether there is sufficient evidence for conviction — If Magistrate finds no prim a facie evidence or evidence placed on record is totally unworthy of credit, it is

his duty to discharge accused at once — While exercising jurisdiction under S. 227, Magistrate should not make a roving enquiry into pros and cons of the matter or weigh the evidence as if he were conducting a trial (para 14)

"Exercise of jurisdiction under Sections 227 and 228 CrPC

On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not not been properly explained, the court will be fully justified in farming a charge and proceeding with the trial. (iii) The court cannot act merely as a office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.""

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Shivnarayan Laxminarayan Joshiv. State of Maharashtra, (1980) 2 SCC 465 : 1980 SCC (Cri) 493, *referred to*

B-D/50789/CVR

Advocates who appeared in this case :

H.P. Raval, Additional Solicitor General (Rajiv Nanda, Ms Padmalakshmi Nigam and

Arvind Kr. Sharma, Advocates) for the Appellant;

R.Venkataramani , senior Advocate (Ashok Panigrahi , Aljo Joseph and Surajit Bhaduri, Advocates) for the Respondent.

JUDGEMENT

1. LEAVE granted.

2. THIS appeal is directed against the final judgment and order dated 09.07.2010 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Petition No. 2347 of 2008 whereby the High Court allowed the petition filed by the

respondent herein under Section 482 of the Code of Criminal Procedure, 1973 (in short "the Code ") and quashed the criminal proceedings pending against him in CC No. 44 of 2007 (Crime No. 36 of 2005) on the file of the Special Judge for CBI cases, Hyderabad.

Brief facts:

(a) According to the prosecution, basing on an information, on 30.11.2005, the CBI, Hyderabad registered an FIR being RC 32(A)/2005 against Shri P. Radha Gopal Reddy (A-1) and Shri Udaya Sankar (A-2), the then Branch Manager and the Assistant Manager, respectively of the Vijaya Bank, Narayanaguda Branch, Hyderabad, for the commission of offence punishable under Sections 120-B, 419, 420, 467, 468 471 read with Section 109 of the Indian Penal Code, 1860 (in short 'the IPC ') and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 for abusing their official position as public servants and for having conspired with private individuals, viz., Shri P.Y. Kondala Rao the builder (A-3) and Shri N.S. Sanjeeva Rao (A-4) and other unknown persons for defrauding the bank by sanctioning and disbursement of housing loans to 22 borrowers in violation of the Bank 's rules and guidelines and thereby caused wrongful loss of Rs. 1.27 crores to the Bank and corresponding gain for themselves. In furtherance of the said conspiracy, A-2 conducted the pre-sanction inspection in respect of 22 housing loans and A-1 sanctioned the same. (b) After completion of the investigation, the CBI filed charge sheet along with the list of witnesses and the list of documents against all the accused persons. In the said charge sheet, Shri K. Narayana Rao, the respondent herein, who is a legal practitioner and a panel advocate for the Vijaya Bank, was also arrayed as A-6. The duty of the respondent herein as a panel advocate was to verify the documents and to give legal opinion. The allegation against him is that he gave false legal opinion in respect of 10 housing loans. It has been specifically alleged in the charge sheet that the respondent herein (A-6) and Mr. K.C. Ramdas (A-7)-the valuer have failed to point out the actual ownership of the properties and to bring out the ownership details and name of the apartments in their reports and also the falsity in the permissions for construction issued by the Municipal Authorities. (c) Being aggrieved, the respondent herein (A-6) filed a petition being Criminal Petition No. 2347 of 2008 under Section 482 of the Code before the High Court of Andhra Pradesh at Hyderabad for quashing of the criminal proceedings in CC No. 44 of 2007 on the file of the Special Judge for CBI Cases, Hyderabad. By impugned judgment and order dated 09.07.2010, the High Court quashed the proceedings insofar as the respondent herein (A-6) is concerned. (d) Being aggrieved, the CBI, Hyderabad filed this appeal by way of special leave. Heard Mr. H.P. Raval, learned Additional Solicitor General for the appellant-CBI and Mr. R. Venkataramani, learned senior counsel for the respondent (A-6).

3. AFTER taking us through the allegations in the charge sheet presented before the special Court and all other relevant materials, the learned ASG has raised the following contentions:

(i) The High Court while entertaining the petition under Section 482 of the Code has exceeded its jurisdiction. The powers under Section 482 are inherent which are to be exercised in exceptional and extraordinary circumstances. The power being extraordinary has to be exercised sparingly, cautiously and in exceptional circumstances; (ii) The High Court has committed an error in holding that no material had been gathered by the investigating agency against the respondent herein (A-

That he had conspired with the remaining accused for committing the offence; and

(iii) There is no material on record to show That the respondent herein (A- 6) did not verify the originals pertaining to housing loans before giving legal opinion and intentionally changed the proforma and violated the Bank 's circulars.

4. ON the other hand, Mr. Venkataramani, learned senior counsel for the respondent (A-6), after taking us through the charge sheet and the materials placed before the respondent seeking legal opinion, submitted that he has not committed any offence much less an offence punishable under Section 120-B read with Sections 419, 420, 467, 468, 471 and 109 of IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. He further submitted that based on the documents placed, the respondent herein after perusing and on satisfying himself, furnished his legal opinion for which he cannot be implicated as one of the conspirators for the offence punishable under Section 420 read with Section 109 IPC. We have carefully perused all the relevant materials and considered the rival submissions.

In order to appreciate the stand of the CBI and the defence of the respondent, it is necessary to refer the specific allegations in the charge sheet. The respondent herein has been arrayed as accused No. 6 in the charge sheet and the allegations against him are as under:

"Para 20: Investigation revealed that legal opinions in respect of all these 10 loans have been given by Panel Advocate Sri K. Narayana Rao (A-6) and valuation reports were given by Approved Valuer Sri V.C. Ramdas(A-7). Both, the advocate and the valuer, have failed to point out the actual ownership of the property and failed to bring out the ownership details and name of the apartments in their reports. They have also failed to point out the falsehood in the construction permission issued by the municipal authorities. Para 28: Investigation revealed that the municipal permissions submitted to the bank were also fake. Para 29: Expert of Finger Print Bureau confirmed that the thumb impressions available on the questioned 22 title deeds pertain to A-3, A-4 and A-5. Para 30: The above facts disclose that Sri P. Radha Gopal Reddy (A-1) and Sri M. Udaya Sankar (A-2) entered into criminal conspirary with A- 3 and abused their official position as public servants by violating the bank norms and in the process caused wrongful gain to A-3 to the extent of Rs.1,00,68,050/- and corresponding wrongful loss to the bank in sanctioning 22 housing loans. Sri P.Y. Kondal Rao(A-3) registered false sale deeds in favour of borrowers using impostors as site owners, produced false municipal permissions and cheated the bank in getting the housing loans. He is liable for conspiracy, cheating, forgery for the purpose of cheating and for using forged documents as genuine. Sri B. Ramanaji Rao(A-4) and Sri R. Sai Sita Rama Rao(A-5) impersonated as site owners, executed the false sale deeds. They are liable for impersonation, conspiracy, cheating, forging a valuable security and forgery for the purpose of cheating. Sri K. Narayana Rao (A-6) submitted false legal opinions and Sri K.C. Ramdas(A-7) submitted false valuation reports about the genuineness of the properties in collusion with A-3 for sanction of the loans by Vijaya Bank, Narayanaguda branch, Hyderabad and abetted the crime. Sri A.V. Subba Rao(A-8) managed verification of salary slips of the borrowers of 12 housing loans in collusion with A-3 and abetted the crime. Para 33: In view of the above, the accused A-1, A-2, A-3, A-4, A-5, A- 6, A-7 and A-8 are liable for offences punishable under Section 120-B read with Sections 419, 420, 467,

468, 471 and 109 read with Section 420 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act and substantive offences thereof. "

With the above details, let us consider whether there is prima facie allegation(s) and material(s) in order to pursue the trial against the respondent herein. In the same way, we have to see whether the reasoning and the ultimate conclusion of the High Court in quashing the charge sheet against the respondent herein (A-6) is sustainable. We are conscious of the power and jurisdiction of the High Court under Section 482 of the Code for interfering with the criminal prosecution at the threshold.

Mr. Raval, learned ASG in support of his contentions relied on the following decisions:

i) State of Bihar vs. Ramesh Singh, (1977) 4 SCC 39; ii) P. Vijayan vs. State of Kerala and Another, (2010) 2 SCC 398; and iii) Sajjan Kumar vs. Central Bureau of Investigation, (2010) 9 SCC 368.

5. THE first decision Ramesh Singh (supra) relates to interpretation of Sections 227 and 228 of the Code for the considerations as to discharge the accused or to proceed with trial. Para 4 of the said judgment is pressed into service which reads as under:

"4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. THEreafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. THE Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing ", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which - ... (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused ", as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. THE standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. THE presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. It the evidence which the Prosecutor

proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227. "

6. DISCHARGE of accused under Section 227 of the Code was extensively considered by this Court in P. Vijayan (supra) wherein it was held as under:

"10. ... . If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words "not sufficient ground for proceeding against the accused " clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts. 11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him. "

While considering the very same provisions i.e., framing of charges and discharge of accused, again in Sajjan Kumar (supra), this Court held thus:

"19. It is clear that at the initial stage, if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the prosecution proposes to adduce proves the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. 20. A Magistrate enquiring into a case under Section 209 CrPC is not to act as a mere post office and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is the duty of the Magistrate to discharge the accused,

on the other hand, if there is some evidence on which the conviction may reasonably be based, he must commit the case. It is also clear that in exercising jurisdiction under Section 227 CrPC, the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. Exercise of jurisdiction under Sections 227 and 228 CrPC 21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge: (i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case. (ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial. (iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. (iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. (v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. (vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. (vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal. " From the above decisions, it is clear that at the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, in that event, it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. A judicial magistrate enquiring into a case under Section 209 of the Code is not to act as a mere post office and has to arrive at a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. On the other hand, if the Magistrate finds that there is no prima facie evidence or the evidence placed is totally unworthy of credit, it is his duty to discharge the accused at once. It is also settled law that while exercising jurisdiction under Section 227 of the Code, the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. This provision was introduced in the Code to avoid wastage of public time and to save the accused from unavoidable harassment and expenditure. While analyzing the role of the respondent herein (A-6) from the

charge sheet and the materials supplied along with it, the above principles have to be kept in mind.

In Rupan Deol Bajaj (Mrs.) and Another vs. Kanwar Pal Singh Gill and Another, (1995) 6 SCC 194, this Court has considered the scope of quashing an FIR and held that it is settled principle of law that at the stage of quashing an FIR or complaint, the High Court is not justified in embarking upon an enquiry as to the probability, reliability or genuineness of the allegations made therein. By noting the principles laid down in State of Haryana vs. Bhajan Lal, 1992 Supp (1) SCC 335, this Court held that an FIR or a complaint may be quashed if the allegations made therein are so absurd and inherently improbable that no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

7. IN Mahavir Prashad Gupta and Another vs. State of National Capital Territory of Delhi and Others, (2000) 8 SCC 115, this Court considered the jurisdiction of the High Court under Section 482 of the Code and held as under:

"5. The law on the subject is very clear. IN the case of State of Bihar v. Murad Ali Khan (1988) 4 SCC 655 it has been held that jurisdiction under Section 482 of the Code of Criminal Procedure has to be exercised sparingly and with circumspection. It has been held that at an initial stage a court should not embark upon an inquiry as to whether the allegations in the complaint are likely to be established by evidence or not. Again in the case of State of Haryana v. Bhajan Lal 1992 Supp. (1) SCC 335 this Court has held that the power of quashing criminal proceedings must be exercised very sparingly and with circumspection and that too in the rarest of rare cases. It has been held that the court would not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint. It has been held that the extraordinary or inherent powers did not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. Regarding conspiracy, Mr. Raval, learned ASG after taking us through the averments in the charge sheet based reliance on a decision of this Court in Shivnarayan Laxminarayan Joshi and Others vs. State of Maharashtra, (1980) 2 SCC 465 wherein it was held that once the conspiracy to commit an illegal act is proved, act of one conspirator becomes the act of the other. By pointing out the same, learned ASG submitted that the respondent herein (A-6), along with the other conspirators defrauded the Bank 's money by sanctioning loans to various fictitious persons.

8. WE have already extracted the relevant allegations and the role of the respondent herein (A-6). The only allegation against the respondent is that he submitted false legal opinion to the Bank in respect of the housing loans in the capacity of a panel advocate and did not point out actual ownership of the properties. As rightly pointed out by Mr. Venkataramani, learned senior counsel for the respondent, the respondent was not named in the FIR. The allegations in the FIR are that A-1 to A-4 conspired together and cheated Vijaya Bank, Narayanaguda, Hyderabad to the tune of Rs. 1.27 crores. It is further seen that the offences alleged against A-1 to A-4 are the offences punishable under Sections 120B, 419, 420, 467, 468 and 471 of IPC and Section 13(2) read with Section 13 (1)(d) of the Prevention of Corruption Act, 1988. It is not in dispute that the respondent is a practicing advocate and according to Mr. Venkataramani, he has experience in giving legal opinion and has conducted several cases for the banks including Vijaya Bank. As stated earlier, the only allegation against him is that he submitted false legal opinion about the genuineness of the properties in question. It is the definite stand of the respondent herein that he has

rendered Legal Scrutiny Reports in all the cases after perusing the documents submitted by the Bank. It is also his claim that rendition of legal opinion cannot be construed as an offence. He further pointed out that it is not possible for the panel advocate to investigate the genuineness of the documents and in the present case, he only perused the contents and concluded whether the title was conveyed through a document or not. It is also brought to our notice that LW-5 (Listed Witness), who is the Law Officer of Vijaya Bank, has given a statement regarding flaw in respect of title of several properties. It is the claim of the respondent that in his statement, LW-5 has not even made a single comment as to the veracity of the legal opinion rendered by the respondent herein. In other words, it is the claim of the respondent that none of the witnesses have spoken to any overt act on his part or his involvement in the alleged conspiracy. Learned senior counsel for the respondent has also pointed out that out of 78 witnesses no one has made any relevant comment or statement about the alleged involvement of the respondent herein in the matter in question. In order to appreciate the claim and the stand of the respondent herein as a panel advocate, we have perused the legal opinion rendered by the respondent herein in the form of Legal Scrutiny Report dated 10.09.2003 as to the title relating to Sri B.A.V.K. Mohan Rao, S/o late Shri Someshwar Rao which is as under. 6-8 xxx xxx xxx 9. CERTIFICATE I am of the opinion that Shri NS Sanjeeva Rao is having clear marketable title by virtue of Regd. Sale Deed No. 1243/1980 dated 19.09.1980 referred document No. 5 of this opinion. He can convey a valid clear marketable title in favour of Shri BAVK Mohan Rao (applicant) in respect of the schedule property (referred under Item No. 3 of this opinion) by duly executing a Regd. Sale Deed in his favour. Shri BAVK Mohan Rao (applicant) can create a valid equitable mortgage with the Bank by depositing the original Regd. Sale deed executed in his by the vendors and also depositing all the documents as mentioned in the list in Item No. 2 of this opinion. I further certify that:- |1. |There are no prior mortgage/charge | | | |whatsoever as could be seen from the | | | |encumbrance certificate for the period | | | |from 28.06.1980 to 20.04.2003 pertaining to|Yes | | |the immovable property covered by the above| | | |title deed(s). | | |2. |There are prior mortgages/charges to the | | | |extent, which are liable to be cleared or | | | |satisfied by complying with the following. |NA | |3. |There are claims from minors and | | | |his/her/their interest in the property to | | | |the extent of (specify) the share of |NA | | |minor(s) with name | | |4. |The undivided share of minor of (specify | | | |the liability that is fastended or could be|NA | | |fastened on the property). | | |5. |The property is subject to the payment of | | | |Rupees (specify the liability that is | | | |fastened or could be fastened on the |NA | | |property) | | |6. |Provisions of Urban Land (Ceiling and | | | |Regulation) Act are not applicable. |NA | | |Permission obtained. | | |7. |Holding/Acquisitions in accordance with the| | | |provisions of the land: |NA | |8. |The mortgage if created will be perfect and| | | |available to the bank for the liability of | | | |the intending borrower: Shri BAVK Mohan Rao| | | |(Applicant) | | The Bank is advised to obtain the encumbrance certificate for the period from 21.04.2003 till the date after obtaining a registered sale deed in favour of Shri BAVK Mohan Rao (applicant) SEARCH REPORT: I have verified the title deed of Shri N.S. Sanjeeva Rao in the office of sub-Registrar of Uppal, Hyderabad on 18.07.2003 and found that the sale transaction between parties, schedule property stamp papers, regd. Sale Deed No. 1243/1980 are genuine. The verification receipt is enclosed herewith. (K. NARAYANA RAO) ADVOCATE " The above particulars show that the respondent herein, as a panel advocate, verified the documents supplied by the Bank and rendered his opinion. It also shows that he was furnished with Xerox copies of the

documents and very few original documents as well as Xerox copies of Death Certificate, Legal heir-ship Certificate, Encumbrance Certificate for his perusal and opinion. It is his definite claim that he perused those documents and only after that he rendered his opinion. He also advised the bank to obtain Encumbrance Certificate for the period from 21.04.2003 till date. It is pointed out that in the same way, he furnished Legal Scrutiny Reports in respect of other cases also. We have already mentioned that it is an admitted case of the prosecution that his name was not mentioned in the FIR. Only in the charge- sheet, the respondent has been shown as Accused No. 6 stating that he submitted false legal opinion to the Bank in respect of the housing loans in the capacity of a panel advocate and did not point out actual ownership of the properties in question.

9. MR. Venkataramani, learned senior counsel for the respondent submitted that in support of charge under Section 120B, there is no factual foundation and no evidence at all. Section 120A defines criminal conspiracy which reads thus:

"120A. Definition of criminal conspiracy.- When two or more persons agree to do, or cause to be done,- 1) an illegal act, or 2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. Explanation.- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object. "

Section 120B speaks about punishment of criminal conspiracy. While considering the definition of criminal conspiracy, it is relevant to refer Sections 34 and 35 of IPC which are as under:

"34. Acts done by several persons in furtherance of common intention.- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. " "35. When such an act is criminal by reason of its being done with a criminal knowledge or intention. - Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention. "

10. THE ingredients of the offence of criminal conspiracy are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing of an illegal act or for doing, by illegal means, an act which by itself may not be illegal. In other words, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and in a matter of common experience that direct evidence to prove conspiracy is rarely available. Accordingly, the circumstances proved before and after the occurrence have to be considered to decide about the complicity of the accused. Even if some acts are proved to have committed, it must be clear that they were so committed in pursuance of an agreement made between the accused persons who were parties to the alleged conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. In other words, an offence of conspiracy cannot be deemed to have

been established on mere suspicion and surmises or inference which are not supported by cogent and acceptable evidence.

In the earlier part of our order, first we have noted that the respondent was not named in the FIR and then we extracted the relevant portions from the charge-sheet about his alleged role. Though statements of several witnesses have been enclosed along with the charge-sheet, they speak volumes about others. However, there is no specific reference to the role of the present respondent along with the main conspirators. The High Court while quashing the criminal proceedings in respect of the respondent herein has gone into the allegations in the charge sheet and the materials placed for his scrutiny and arrived at a conclusion that the same does not disclose any criminal offence committed by him. It also concluded that there is no material to show that the respondent herein joined hands with A-1 to A-3 for giving false opinion. In the absence of direct material, he cannot be implicated as one of the conspirators of the offence punishable under Section 420 read with Section 109 of IPC. The High Court has also opined that even after critically examining the entire material, it does not disclose any criminal offence committed by him. Though as pointed out earlier, a roving enquiry is not needed, however, it is the duty of the Court to find out whether any prima facie material available against the person who has charged with an offence under Section 420 read with Section 109 of IPC. In the banking sector in particular, rendering of legal opinion for granting of loans has become an important component of an advocate 's work. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skills.

11. A lawyer does not tell his client that he shall win the case in all circumstances. Likewise a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

In Jacob Mathew vs. State of Punjab and Anr. (2005) 6 SCC 1 this court laid down the standard to be applied for judging. To determine whether the person charged has been negligent or not, he has to be judged like an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices.

12. IN Pandurang Dattatraya Khandekar vs. Bar Council of Maharashtra & Ors. (1984) 2 SCC 556, this Court held that " ...there is a world of difference between the giving of improper legal advice and the giving of wrong legal advice. Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct. Therefore, the liability against an opining advocate arises only when the lawyer was an active

participant in a plan to defraud the Bank. In the given case, there is no evidence to prove that A-6 was abetting or aiding the original conspirators.

However, it is beyond doubt that a lawyer owes an "unremitting loyalty " to the interests of the client and it is the lawyer 's responsibility to act in a manner that would best advance the interest of the client. Merely because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in the absence of tangible evidence that he associated with other conspirators. At the most, he may be liable for gross negligence or professional misconduct if it is established by acceptable evidence and cannot be charged for the offence under Sections 420 and 109 of IPC along with other conspirators without proper and acceptable link between them. It is further made clear that if there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials are lacking in the case of the respondent herein.

13. IN the light of the above discussion and after analysing all the materials, we are satisfied that there is no prima facie case for proceeding in respect of the charges alleged insofar as respondent herein is concerned. We agree with the conclusion of the High Court in quashing the criminal proceedings and reject the stand taken by the CBI.

14. IN the light of what is stated above, the appeal fails and the same is dismissed.

****

Cross Citation:2004(I) Crimes1 (Bom) (DB) = 2003-BCR(Cri)1655,

HIGH COURT OF BOMBAY

Hon'ble Judge(s) : B.B.Vagyani, A.S.Bagga,JJ

Dinkarrao Rajarampant Pole ..V/s ..State of Maharashtra

Criminal Writ Petition 431 of 2001 Of, Mar 13,2003

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A] Wrongful arrest & detention of Advocate in police custody – IPC Ss. 420 & 471 Cr.P.C. S.41-Police Officer is not expected to act in a mechanical manner and in all cases to arrest accused as soon as report of cognizable offence is lodged – Existence of power to arrest is another thing & justification for exercise of it is another thing there must be some reasonable justification in opinion of officer effecting arrest that it

was necessary and justified – Except in heinous offences arrest should be avoided – If Police Officer issue notice to a person to attend the Police Station and not leave the station without permission would do – offence u.s. 420, 471, 468 of IPC are not herious offences – Arrest illegal.

B] Compensation- Petitioner was arrested by respondent Police Officer in case registered U/s 420, 468, 471. If IPC – Offences are not heinous offences - Arrest found malafide and mischievous & not protected by element of good faith – Infringement of fundamental right of a citizen cannot stop by giving a mere declaration – Compensatory relief is to be provided under – Cost of Rs. 25,000/- imposed on Police Officer who arrested the petitioner.

==========

****

Cross Citation :2007 CRI. L. J. 2890

PATNA HIGH COURT

Coram : 1 DHARNIDHAR JHA, J. (Single Bench)

Cri. Misc. No. 50053 of 2006, D/- 26 -4 -2007.

"Dinesh Parwat v. State of Bihar"

==========

(A) Criminal P.C. (2 of 1974), S.437, S.438 - BAIL - ANTICIPATORY BAIL - Criminal Miscellaneous Application before High Court for anticipatory bail - Withdrawn - Regular bail application filed before lower Court - Can be allowed - It is true that a petition being dismissed as withdrawn is

also a dismissal, but if no merit has been touched by the Court in passing such dismissal order on account of withdrawal of the petition then in that case it could never be creating a situation under which the lower Courts could be said to have acted against the rejection order passed by the superior Court so as to allowing or refusing it. Even if the superior Courts touched upon the merits of the case while dismissing a petition under S. 438, Cr. P.C. it could not create a bar for any of the lower Courts to proceed to hear a petition for bail and direct the release of the accused from custody after consideration of all the facts and circumstances. (Para 20)

(B) Criminal P.C. (2 of 1974), S.437(5) - BAIL – Accused an advocate - Application for bail - Rejected by Magistrate - Copies for rejection order made available within few hours - On same day application for release on bail filed before Sessions Court - Such fact could not disentitle Sessions Judge to pass order allowing bail application - More so when applicant was advocate and to avoid revolt by members of bar, the order could have been passed - Moreover as the accused-applicant was an advocate, to avoid situation like the members of the Bar going up in arms and rising in revolt against the Judicial Officers as soon as one of their colleagues is either remanded to custody or is refused the prayer for bail the order for allowing bail could have been passed. It could have been one of the reasons for directing the release of the accused on the same day on which his prayer was rejected by the Chief Judicial Magistrate. (Para 17)

Where on the very date on which the prayer for bail was rejected by the Magistrate, the petition for bail was filed before the Sessions Court and the order for release the accused on bail was passed, the order was not liable to be set aside though this may not be a normal phenomenon obtained in all judgeships of the State that copies of rejection orders or petitions for bail were made available within a few hours and on the same day the orders were passed, but, that could hardly disentitle the Sessions Judge to entertain the petition and hear the same on the same day. There is no rule forbidding any Court to receive petitions on the very day on which a subordinate Court has passed an order. The practice might be otherwise only with a view not to causing discomfiture to the general litigants in presenting their petitions. The normal judicial behaviour do

require uniformity and it was expected that the same uniformity would have been observed in the present case as well as the office of the Sessions Judge, but for that the Sessions Judge could not be faulted. Moreover as the accused-applicant was an advocate, to avoid situation like the members of the Bar going up in arms and rising in revolt against the Judicial Officers as soon as one of their colleagues is either remanded to custody or is refused the prayer for bail the order for allowing bail could have been passed. It could have been one of the reasons for directing the release of the accused on the same day on which his prayer was rejected by the Chief Judicial Magistrate. (Para 17)

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-: CHAPTER = 11:-

SOME LANDMARK CASES HANDLED BY HUMAN RIGHTS SECURITY COUNCIL (NGO) THROUGH NATIONAL PRESIDENT ADV. NILESH C. OJHA

****

HOW CASE LAW ON BAIL IN SANJAY CHANDRA .. Vs.. CBI (2012) 1 SCC (CRI.) 26 FORMED

****

A. COPY OF WRIT PETITION FILED BEFORE NATIONAL HUMAN RIGHTS COMMISSION

B. COPY OF LETTER SENT BY NATIONAL HUMAN RIGHTS COMMISSION TO SUPREME COURT

C. COPY OF NEWS PUBLISHED REGRADING NO OPPOSE TO BAIL BY CBI

D. COPY OF JUDGEMENT IN **SANJAY CHANDRA .. Vs.. CBI (2012) 1 SCC (CRI.) 26**

Assistant Registrar (Law)
Tel No : 011-2338 5368
Fax No. : 011- 2338 6521
Telegram Add : "HUMAN RIGHTS"
Home Page : http;//nhrc.nic.in

Case No. 5879/30/0/2011/OC

NATIONAL HUMAN RIGHTS COMMISSION
(L A W D I V I S I O N)
***
FARIDKOT HOUSE
COPERNICUS MARG NEW DELHI-110001

Case No. 5879/30/0/2011
To,
THE REGISTRAR
THE SUPREME COURT OF INDIA, NEW DELHI

Sir/Madam,

The Complaint dated 29/09/2011 received from RASHID KHAN PATHAN , NATIONAL SECRETARY in respect of victims of Judicial , was placed before the commission on 31,10,2011. Upon perusing the complaint, the commission directed as follows.

The complaint be transmitted to the concerned authority for such action as deemed appropriate.

2. Accordingly, I am forwarding a copy of the complaint to you for its disposal at your end.

Yours faithfully

ASSISTANT REGISTRAR (LAW)

Case No. 5879/30/0/2011
CC TO:
RASHID KHAN PATHAN ,NATIONAL SECRETARY
HUMAN RIGHTS SECURITY COUNCIL,
R/O VASANT NAGAR PUSAD, TAH PUSAD,
YAVATMAL, MAHARASHTRA

ASSSISTANT REGISTRAT (LAW)

BEFORE HON'BLE NATIONAL HUMAN RIGHTS COMMISSION, NEW DELHI

PUBLIC INTEREST LITIGATION

Dt. : 25/09/2011

To,

Hon'ble Chief Justice

Shri K. G. Balkrishnan,

Chairman, National Human Rights Commission, New Delhi.

Former Chief Justice,

Hon'ble Supreme Court of India.

Applicant :- **Rashid Khan Pathan**
National Secretary
Human Rights Security Council, (NGO)
R/o, Vasant Nagar, Pusad
Tah. Pusad, Dist. Yavatmal.

Sub. :- 1) Violation of Article 14 of the constitution of India in case of Smt. Kanimozi, Shahid Balwa etc in 2-G Scam and in case of Shri. Amar Singh in cash for vote scam, Shri Suresh Kalmadi and others in case of CWG scam, Shri Janardana Reddy of Karnataka & all citizens of India who did not get the bail inspite of clear directions from Hon'ble Supreme court in Siddharam Mehtre's case.

2) Appropriate directions to Union of India to formulate rules and making amendments in I.P.C. by making violation of constitution as cognizable non-bailable offence.

3) Filing of Writ Petition before Hon'ble Supreme Court for implementation and strict compliance of Article 14 of the constitution and law of precedents in its letter and spirit.

4) Granting compensation to the accused as per provision 18 (3) of the Human Rights Protection Act 1993 for violation of their fundamental human rights.

5) Direction to appropriate authority to initiate action against counsel for C.B.I. for not following the directions of Hon'ble Supreme Court and also for not bringing to the notice of Court the law laid down by Hon'ble Supreme Court.

6) Appropriate action against Adv. Prashant Bhushan and Mr. Arvind Kejriwal for their unconstitutional acts.

Respondents :-

1) Union of India through appropriate Authority.

2) Director, Central Bureau of Investigation North Block, New Delhi.

3) Adv. Uday Lalit
Senior Counsel,
Supreme court of India.

4) Adv. Prashant Bhushan
Advocate Supreme Court of India.

5) Shri Arvind Kejriwal
Member, India Fights against Corruption.

6) Registrar General
High Court of Delhi.

Hon'ble Sir

1) The petitioner is a social activist and National Secretary of the Human Rights Security Council (NGO)

2) The organization is working for the awareness of the Fundamental Rights as Guaranteed by our constitution and thereby serving the nation.

3) From many days we are watching the cases relating to the 2 G and CWG scam. As being patriot citizen I am of the firm view that the guilty should punished. If the offence is proved in the court to the effect that accused have defrauded the nation then they should be severely punished but for that purpose the condition precedent is that they should be proved guilty the competent court of law. **(Vide 2011 AIR SC (Criminal) 897 State of M.P. Vs. Ramesh)**

4) It is Constitutional mandate as guaranteed by Article 19, 21 of our constitution is that no person shall be deprived of his life and liberty except under due process of the law.

5) To safeguard this fundamental human rights National Human Rights Commission is formed in India also Hon'ble high Courts have power of Suo-motu cognizance.

6) But to the surprise that the gross violation of fundamental rights of the accused in 2G scam and in CWG scam and that of various citizens is not been noticed by any one.

7) The settled principle of law and violation, discrimination of it in case of above accused is capulized as under.

8) As per our constitutional mandate and criminal Justice System it is mandatory presumption that, "Every accused is innocent unless proved guilty by the competent court" (**2011 AIR SC (Criminal) 897)**

9) So far as the law of bail is concerned it is settled by catena of judgements that the bail is rule and jail is exception.

10) As per the landmark judgement of Hon'ble Supreme Court in Joginder Kumar's case 1994 SCC, National Human Rights Commission have framed 'Guidelines Regarding Arrest' A copy of which is also enclosed herewith at **Annexure – A.**

Where it has been laid down that except in heinous crimes like murder, rape, dacoity arrest should be avoided and investigation can be done by issuing notice to the accused.

11) The above law is now been modified in humanitarian aspect more efficiently in the case of **Siddharam Mehetre Vs. State of Maharashtra 2011 (1) SCC (Cri) 514,** where, after taking in to consideration the Joginder Kumar's case (Supra) and all the settled principles of law Hon'ble Supreme Court granted anticipatory bail in murder case (section 302 of I.P.C.). Hon'ble Supreme Court also suggested some guidelines for investigating agency to follow. These guidelines are.

> *"[Para 107] In case, the State considers the folio-wing suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive:*
>
> *(1) Direct the accused to join the investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.*
>
> *(2) Seize either the passport or such other related documents, such as, the title deeds of properties or the fixed deposit receipts/share certificates of the accused.*
>
> *(3) Direct the accused to execute bonds.*
>
> *(4) The accused may be directed to furnish sureties of a number of persons which according to the*

> *prosecution are necessary in view of the facts of the particular case.*
>
> *(5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice be avoided……(etc)*

12) It is settled principle of law that even obitor dicta of the Supreme Court is also binding on all courts in India in absence of direct pronouncement on the subject by Supreme Court **[Jinraj Paper Udyog Pvt. Ltd. Vs. Dinesh Associates 2009 ALL MR (Cri) 89]**

13) It is also settled law that there should be equality before law and equal protection of law. This law is specifically incorporated in the Article 14 of the constitution. Therefore when Mr. Siddharam Mehetre was granted anticipatory bail by Hon'ble Supreme Court in serious charge of murder then the accused in 2-G scam and CWG Scam and all other citizens must be granted bail by the trial court or by the High Court.

In, Arunachalam Swami -Vs- State AIR 1956 Bombay 695 held that,

> *"(para 4) Mr. Kavelkar is right when he urges that Article 14 assures to the citizen equality not only in respect of a substantive law but also procedural law, and if any procedure is set up which deprives a citizen of substantive rights of relief and defence the citizen is entitled to complain of this procedure if two persons equally situated the older procedure is still available where these substantive rights of relief and defence were secured. "*

14) Moreover, the matter of worth mention is that the cases where Ex-Supreme Court Judges are accused and Charge-sheeted by C.B.I. are not arrested nor sent to jail but on similar allegations of corruption the other accused are sent to jail. This is a clear violation of Article 14 of the constitution.

In recent landmark Judgement in the case of **Rathinam Vs. State 2011 (3) SCC (Cri) III** it has been observed by Hon'ble Supreme Court that the Court should not be influenced by the gravity of the charges but he should act only on the legal evidence and law in that regard.

It has been held that,

> *23. We must, however, understand that a particularly foul crime imposes a greater caution on the court which must resist the tendency to look beyond the file, and the insinuation that the rich are always the aggressors and the poor always the victims, is too broad and conjectural a supposition. It has been emphasised repeatedly by this Court that a dispassionate assessment of the evidence must be made and that the Court must not be swayed by the horror of the crime or the character of the accused and that the judgment must not be clouded by the facts of the case. In Kashmira Singh v. State ofM.P.[1] it was observed as under: (AIR p. 160, para 2)*
>
> *"2. The murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more man ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate-judicial scrutiny of the facts and law."*
>
> *24. Likewise in Ashish Batham v. State of M.P.[2] it was observed thus: (SCC p. 327, para 8)*
>
> *"8. Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away*

by the heinous nature of the crime or the gruesome manner in which it was found to have been committed.

Mere suspicion, however strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that "there is a long mental distance between 'may be true' and 'must be true' and this basic and golden rule only helps to maintain the vital distinction between 'conjectures' and 'sure conclusions' to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the-evidence brought on record."

Consistency is necessary to maintain certainity in Law :-

Moreover in the case of Abhay Singh Chautala Vs. CBI 2001 (3) SCC (Cri) 1 Hon'ble Supreme court held that the case Laws/Precedents which stood the time for long years should not be disturbed.

It has been held that,

35. There is one more reason, though not a major one, for not disturbing the law settled in Antulay case[2]-. That decision has stood the test of time for last over 25 years and it is trite that going as per the maxim stare decisis et non quieta movere, it would be better to stand by that decision and not to disturb what is settled. This rule of interpretation was approved of by Lord Coke who suggested—"those things which have been so often adjudged ought to rest in peace". This Court in Shanker Raju v. Union of India[22], confirmed this view while relying on the decision in Tlverton Estates Ltd. v. Wearwell Ltd.[23]

and more particularly, the observations of Scarman, L.J., while not agreeing with the view of Lord Denning, M.R. about the desirability of not accepting previous decisions. The observations are to the following effect: (Shanker Raju case[22], SCC p. 142, para 17)

*"77. ... '... I decline to accept his lead only because I think it is damaging to the law in the long term—though it would undoubtedly do justice in the present case. To some it will appear that justice is being denied by a timid, conservative, adherence to judicial precedent. They would be wrong. Consistency is necessary to certainty—one of the great objectives of law.'**

The Court also referred to the following other cases: Woman Rao v. Union of India[24], Manganese Ore (India) Ltd. v. CST[25], Ganga Sugar Corpn. Ltd. v. State of U.P.[26], Union of India v. Raghubir Singh[21], Krishena Kumar v. Union of India[2], Union of India v. Paras Laminates (P) Ltd.[29] and lastly, Hari Singh v. State of Haryana[30].*

15) But till today the accused are in Jail and they are denied bail even by Higher Courts is clear violation of their fundamental rights.

Hon'ble Supreme Court in Hari Singh's case (1999 SCC) laid down that the Courts of Co-ordinate jurisdiction should have consistent opinion on the identical question of law if this procedure is not followed then instead of achieving judicial harmony it will lead to judicial anarchy. And the person approaching the different courts should get different orders.

[Shri Srinivas cut piece cloth shop Vs. State 2004 ALL MR (Cri) 1802].

16) It may be argued by some of the Judges that they are having discretion in granting or denying bail. In fact it is illegal to have such an issue because the discretion is not arbitrary but it has to be exercised judicially and should be guided by the sound principles of the law. When the case Law is clear then there is no discretion to lower Courts.

The Judge/Magistrate who exercise discretion are expected to bear in mind that

"Discretion when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful, but legal and regular"

[Tinqlev-vs- Dalby, 14 NW 146]

"An appeal to a Judgejs discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with established principles of law."

Gudianti Narsimha -Vs- Public Prosecutor. High Court 1978 Cri. L.J. 502.

"The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure He is not a Knight - errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity or order in the social life.

The Nature of the Judicial Process - Benjamin Cardozo, Yale University press (1921)]

17) The law of Precedent is also clear in this regard. Rule of precedent is an important aspect of legal certainty in the rule of law. It is an accepted precept of law. It is an accepted precept of administration of justice to follow rule of ratio decidendi. In India the rule of precedent is given strict meaning. The law laid down by Supreme Court be followed even by Co-ordinate benches with all its rigours. It is a principle of great significance in the system of administration of justice. One of the essential rudiments of law of precedent is consistency in the judicial decision making.

"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

Union of India Vs. Raghubir Singh
1989 (2) SCC 754

(90) "We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed.

Official Liquidator Vs. Dayanand
(2008) 10 SCC 1

"The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

Govt. of A.P. Vs. B. Satyanarayana Rao (2000) 4 SCC 262

But in the present case the law of precedent is not followed in their proper perspectives, either by the investigating agency or by the courts.

The act on behalf of I.O. and others "We do not care", seems as an affront to the Judicial system as a whole and law declared by Hon'ble Supreme, Court. This cavalier fashion and contemptuous attitude of not obeying the law with regard to judicial administration is gross contempt. It would erode the dignity of the court and even corrode the majesty of it besides impairing the confidence of the public in the efficacy of the institution of the courts.

18) In catena of decisions and more particularly in the case of **2005 ALL MR (Cri) Journal 12** it has been laid down that the pretrial detention could only be for the purpose of helping the investigation and not as a punishment because the accused are not even give chance to defence and directly sending them to put their Jail Placing reliance on the submission of prosecuting agency as a gospel truth is gross violation of fundamental rights and offending the constitutional mandate.

Hon'ble Supreme Court in the case of **Siddharam Mehetre's case Supra** Specifically observed that the rate of Conviction is less than 10% then police should be slow in arresting the accused it has further been observed that as per the National Police Commission's Report it has been revealed that nearly 60% arrest are unjustified and the power of arrest is one of the chief source of corruption by police. It is also made clear by Hon'ble Apex Court that there is no requirement that accused must make out a 'Special Case' for exercise of power for anticipatory bail.

Hon'ble Supreme Court in the case **Sami Ullah Vs. Suprentendant 2008 (4) B. Cr. C. 716 (SC)** speciafically held that when two views are possible in respect of commission of crime then view which leans in favour of accused must be favoured.

Moreover as per our constitutional provision in Article 20 (3) of the constitution of India, the accused has a right of silence till the end of the trial. **[Nandini Satpathy Vs. P.I. Dani 1978 SCC (2) 424]** Secondly the police cannot exert pressure on the accused to give answers which may goes against the accused. Even mental torture is violative of fundamental rights **[Arvinder Singh Bagga Vs. State AIR 1995 SC 117].** Thirdly the accused is entitled to have a legal advisor with him even during the period of remand. **[State Vs. Navjot Siddhu 2005 ALL MR (Cri) 2805 (SC)]**. Fourthly for the purpose of recovery accused need not be in police custody **[Harsh –Sawhney Vs. Union Territory AIR 1978 SC 1016]**

Hence there is no use of PCR or MCR and it is nothing but means of harassment by the police. Therefore the law laid down by Hon'ble Supreme Court in the case of Siddharam Mehre's case (Supra) is the perfect law and right interpretation of the intent of legislature.

Hon'ble Supreme Court in Arvinder Singh Bagga's case (AIR 1995 SC 117) held as follows,

> *"(4).....Torture is not merely physical there may be mental torture and psychological torture calculated to create fright and submission to the demands or commands. When the threats proceed from person in authority and that too by a police officer the mental torture caused by it is even more grave.(A) On a perusal of all the above, we are very pained to note that such things should happen in a country which is still governed by the rule of law. We cannot but express our strong displeasure and disapproval of conduct of the concerned police officers. Therefore, we issue the following direction*
>
> (1) *The State of Uttar Pradesh will to take immediate steps to launch prosecution against all the police officers involved in this affair.*

> *(2) The state shall pay a compensation of Rs. 10,000/- to Nidhi Rs. 10,000/- to Charanjit Singh Bagga and Rs. 5,000/- to each of the other persons who were illegally detained and humiliated for no fault of theirs. Time for making payment will be three months from the date of this judgment. Upon such payment it will be open to the state to recover personally the amount of compensation from the concerned police officers.*

19) Strict compliance of law laid down by Hon'ble Supreme Court is binding on all Courts in India and even if the High Court did not follow it then the High Court Judge is also guilty of contempt of Court (Vide : **Rabindra Nath Singh Vs. Rajesh R. Yadav 2010 (3) SCC (Cri) 165)**

20) Why the above law is required to be settled is the part of our constitutionals rights. But also it has been proved from various cases that how the criminal justice system is misused by the Police Officers & Judges for ulterior purposes out of the thousands and lakhs of examples I would like to quote two classic example where the accused were charged of 'X' person in fact that 'X' person was found to be alive.

These two landmark Judgements are :

Darshan Singh Vs. State 1985 Cri. L.J. (NOC) 71 (DB)

So it will be very dangerous to put any person behind the bar on the basis of police papers which are not been cross-examined in the light of defence version. Non followance of the law of precedent gives room for corruption in the head of discretion. Moreover the poor people are not able to go to higher courts every time.

21) The another serious issue which I would like to raise is the working of C.B.I. in partisian manner. As per the **Shangalu** committee's report the Chief Minister of Delhi Smt. Sheela Dixit is also involved in CWG scam but she is not made accused by the C.B.I. In 2G scam Neera Radia & others were not prosecuted even if they are liable to be prosecuted as per provisions of section

120 (B) of I.P.C. Therefore in view of law of parity all the accused are liable to be discharged from the charges.

Hon'ble Supreme Court in the case of **State of M.P. Vs. Sheetla Sahai & ors 2010 ALL SCR 980** upholding the acquittal under Prevention of Corruption Act held that the proceedings in 'Pick & Choose' manner is indicative of lack of bonafides of prosecution and makes prosecution being illegal. It has been held that;

> *"(56) It is interesting no notice that the prosecution had proceeded against the officials in a pick and choose manner. We may notice the following statements made in the counter-affidavit which had not been denied or disputed to show that not only those accused who were in office for a very short time but also those who had retired long back before the file was moved for the purpose of obtaining clearance for payment of additional amount from the government, viz., M.N. Nadkami who worked as Chief Engineer till 24.03.1987 and S. W. Mohogaonkar, Superintending Engineer who worked till 19.06.1989 have been made accused but, on the other hand, those who were one way or the other connected with the decision, viz., Shri J.R. Malhotra and Mr. R.D. Nanhoria have not been proceeded at all. We fail to understand on what basis such a discrimination was made.*
>
> *(57) In* ***Soma Chakravarty, [(2007) 5 SCC 403 : [2007 ALL MR (Cri) 1707 (S.C.****)] (supra), whereupon strong reliance has been placed by Mr. Tulsi, this Court opined :*
>
> *23. In a case of this nature, the learned Special Judge also should have considered the question having regard to the "doctrine of parity" in mind. An accused similarly situated has not been proceeded against only because, the departmental proceedings ended in his favour. Whether an accused before him although stands on a similar footing despite he having not been*

> *departmentally proceeded against or had not been completely exonerated also required to be considered. If exoneration in a departmental proceeding is the basis for not framing a charge against an accused person who is said to be similarly situated, the question which requires a further consideration was as to whether the applicant before it was similarly situated or not and/or whether the exonerated officer in the departmental proceeding also faced same charges including the charge of being a party to the larger conspiracy. "*

In the another Judgment while quashing the FIR and proceeding under Prevention of Corruption Act, Hon'ble Supreme Court in the case of **Baijnath Jha Vs. Sitaram and others 2008(3) SCC (Cri) 428 held that,**

> *"8. The backgrounds clearly show that the proceedings instituted were mala fide, based on vague assertions and were initiated with mala fide intents and constitute shee abuse of process of law. No reason was shown before the High Court as to why the complainant chose not to proceed against one of the four persons initially named. The cases at hand fit in with Category (7) of Bhajan Lai Case. "*

Hence on this ground of picking and choosing of accused the case of prosecution is vitiated and liable to be quashed.

22) The second illegality is misuse of machinery to harass the political opponents. The partisan manner of C.B.I. can be seen from the very fact that in, the case of 'Adarsh Society Scam' the C.B.I. does not think it necessary to arrest the Ex-Chief Minister Shri. Ashok Chavan and on the other hand they hushed up to arrest the leaders of non ruling party as **in Karnataka they arrested Shri. Janardhan Reddy.** Hence it is necessary that the C.B.I. should be called to give explanation for their violation of Article 14 of the constitution of India and acting in a partisan and one – sided manner. Further more the guilty officer should be prosecuted.

23) The another violation done by the investigating agency is regarding their one sided investigation. It is settled principle of law that investigation should be done from both the angles. If the defence version of the accused is probable and acceptable the I.O. is bound to verify it and should place the truth before the Court.

(1) ***Investigation*** *- Fair investigation is expected from the prosecution - It is to be carried out not only from the stand of the prosecution but also the defence, because onus of proof may shift to the accused at a latter stage.*

2007 ALL MR (Cri.) 555 (S. C.)

(2) ***1990 Cri. L. l. 2257***

One sided investigation Failure to investgate Plea of accused - A dishonest, unfair or one sided investigation would, therefore, violate the constitutional guarantee and justify interfence by a court of Law. (Para 3,4,5)

Simply because the investigation offecer does not conduct full, fair and independant investigation the accused cannot be required to go through the formality of trial and get acquitted by putting the entire material on record by way of defence.

To put an accused person to long lasting trial on an incomplete and one sided investigation and promise to consider full facts only when they are brought before the court at the defence stage ***amounts ignoring default of the 1.0. and clothe him with to authority to harass such a person. It may even amount to judicial sanction of substitution of rule of law by the Police Raj*** *and subversion of our constitutional ideals.* ***These Consequences deserve notice of the***

Additional Sessions judge while interpreting the his own authority and jurisdiction in the matter. 1990 Cri. L. I. 2257

But in almost all the cases the C.B.I. and others are not following these guidelines and only in case of rich and influential persons and in rarest rare cases they are discharging the accused. There can be no case where any poor should get the justice in such system therefore it is necessary that the uniform application of law should be followed.

Hon'ble Dr. Babasaheb Ambedkar's vision that the citizen's of India should get equal justice irrespective of their wealth, power, cast etc is not followed in their right perspective therefore it is necessary that the violation of constitution should be made as cognizable and non-bailable offence.

So it is necessary that Hon'ble National Human Rights Commission may pass appropriate directions to standing Committee of parliament to formulate the "Strong Jan Lokpal Bill' but in conformity with the basis laws of Human Rights.

24) Whether National Human Rights commission is having jurisdiction to entertain the petition alleging violation fundamental rights of the citizen at the hands of Courts is the question no more res integra. Hon'ble Supreme Court in the case of **Ramdev Chauhan Vs. Banikant AIR 2011 SC (Criminal) 31** specifically made it clear that where party is denied protection of any law to which he is entitled even by Courts of law the Human Rights Commission is having jurisdiction to enquire it.

25) Illegality on the part of Adv. Uday Lalit Spl. Counsel appointed by the Supreme Court :-

In the 2G Scam Hon'ble Supreme Court appointed, Mr. Uday Lalit as special counsel for prosecution. It is not doubt that the decision is highly appreciable and whole country appreciated the firm stand taken by Hon'ble Supreme Court against the corruption. As far as Mr. Lalit is concerned, he is highly talented, genius, sober and good advocate to present the prosecution's case. The only illegality which is committed by him is regarding

the withholding of authorities of Hon'ble Supreme Court from the trial Court when the accused applied for bail.

In **E.S. Raddi Vs. The Chief Secretary 1987 (3) SCC 258** Hon'ble Supreme Court observed the duties of the senior Counsel some of the portion of para is as follows :

> As *an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession,* ***he must not withhold authorities or documents which may tell*** **against his clients** ***but which the law or the standards of his profession require him to produce.*** *By so acting he may well incur the displeasure or worse of his* ***lost his client would*** **or** *might seek legal redress if that were open to him.*

It has also been laid down by Hon'ble Supreme Court that arguing the case before court on basis of overruled citation is a falling standard of professional ethics.

[**2004 ALL MR (Cri) 3421 (SC)]**

The law of bail is much clear in the case of Siddharam Mehatre's case (2011) (Supra).

Moreover as per the ratio laid down by 3-Judge Bench of Hon'ble Supreme Court in the case of **Chandraswami Vs. C.B.I. 1997 Cri. L.J.** , it has been made clear that whenever the accused appears or brought before the court and offence committed by him is not punishable for death or life then the accused normally entitled to be released on bail.

That being the position of the law then it was expected from C.B.I. and more particularly from the advocate like Uday Lalit that he should have brought this legal

position to the notice of the Court and fairly contended that the accused entitled to be released on bail however appropriate conditions may be imposed. As being counsel of prosecutor what he can do that he should have made strong efforts for early disposal of the case and nothing more. Moreover in case of Smt. Kanimozi, Shri Amar Singh the I.O. does not feel to arrest them.

However we do not think that action should be taken against Mr. Lalit, but something should be done which can meets the ends of justice and that a massage should go to the public prosecutors.

26) Hon'ble Supreme Court in the case of Capt. Amrinder Singh Vs. Prakash Singh Badal 2009 (3) Crimis 174 (SC) specifically laid down that the public prosecutor should not act merely on the dictates of the state but he should act fairly and place truth before the court as he is also an officer of the Court.

Hon'ble High Court in the case of **Harsha Sisodia Vs. State 2010 ALL MR (Cri) Journal** 209 held that;

> *"9. It is the duty of the State to protect the life and properties of its citizens and to prevent the crime and punish the accused in accordance with law. As a part of criminal justice delivery system, the Courts have been established and the Public Prosecutors have been appointed to assist the courts in conducting trials and other criminal proceedings. The Public Prosecutors and the Advocates are the officers of the court. They have to assist the Court and place all the facts before the court. The Public Prosecutors must present the facts without any bias and without undue emphasis on any aspect of the case leaving the decision to the court. They have to act independently and in the interest of justice. The Public Prosecutors are not the representatives of the investigating officers and the investigating agency. When a defect in the investigation or in the prosecutioin case is noticed by Public Prosecutor, it is his duty to bring the same to the notice of the court. They have to make fair*

submissions with regard to the facts and circumstances of the case and also legal position. In ***Vijay Valia's case 1988 Cri.L.J. 2093,*** *it was held as follows:*

"The role of the prosecutor in any criminal trial (whether at the instance of the State or of a private party) is to safeguard the interests of both the Complainant and the accused. The right to be heard includes the right to be represented by an able spokesman of one's confidence. This right belongs to the Complainant and to the accused, both. The Complainant also needs assistance. The prosecutor is bound by law and professional ethics and by his role as an officer of court to employ only fair measures. Hence, it cannot be said that when Special Public Prosecutors are appointed, whether paid by the state or private party, the trial must be presumed to be biased.

Hon'ble High Court in the case of ***Seethalakshmi -Vs- State 1991 Cri.L.J. 1037*** held that,

"161 This Court has on several occasions pointed out that affidavits should not be treated in a light-hearted fashion and prepared in a hap-hazard manner. Every litigant should understand that an affidavit is a sworn statement and it takes the place of deposition. Responsibility of Government officials is much more in this regard. Their affidavits are not intended fust to point out the flaws in the case of the opponent. Their affidavits should always place all the facts before the Court whether such facts would support the contention of the Government in the case or not."

27) The another important aspect is regarding non-supply of the copy of order when bail is rejected. In this regard the law/ratio/guidelines laid down by Hon'ble Kerala High Court in the

case of **Usman Vs. State 2003 Cri. L.J. 3928** may kindly be taken in to consideration and be followed throughout the country.

28) **Illegalities committed by Mr. Arvind Kejriwal and Mr. Prashant Bhushan** :-

As discussed earlier the law is very clear that every accused should be presumed innocent unless he is proved guilty by the competent court. **[2011 AIR SC (cri) 897].** The above arguments are advanced by Adv. Prashant Bhushan and Adv. Shanti Bhushan in many cases. More particularly Mr. Shanti Bhushan himself represented the case of Siddharam Mehtre (Supra)] where the anticipatory bail was granted to the accused in murder case.

On the contrary in the interview given in **'Aap ki Adalat'** anchored by Mr. Rajat Sharma on 2/09/2011, Mr. Arvind Kejriwal made a categorical Statement that "The parties should ensure that they should not give party tickets to the person against whom cases are filed." It has also been asserted by him that there are around 150 MPS in the a parliament against whom serious criminal cases are pending.

Mr. Kejriwal was sitting along with Adv. Prashant Bhushan and there was implied admission and support of Mr. Prashant Bhushan to Mr. Kejriwal. This is highly condemnable. Moreover the Arvind Kejriwal is now posing himself to be member of team of Hon'ble Shri. Anna Hazare then he is expected to act with more care and caution. He should not have made such a unconstitutional and irresponsible statement.

It seems that Mr. Arvind Kejriwal is having half backed knowledge of the law and he is going to influence the people, investigation machinery and justice delivery system by way of such unconstitutional arguments. His submission with impact of media is the main ground for rejection of bail of Smt. Kanimozi, A-Raja, Janardan Reddi, Suresh Kalmadi and other citizens of India.

Even otherwise their double standard game can be seen from the fact that they themselves accepted the mediation of Shri. Vilasrao Deshmukh who himself is accused in 'Adarsha Society Scam'

Hence it is necessary that Mr. Arvind Kejriwal and Adv. Prashant Bhushan should be dealt for their unconstitutional arguments, and Hon'ble National Human Rights Commission should take appropriate action against them by imposing heavy penalty.

29) So far as the intention of Hon'ble Shri Anna Hazare is concerned. Whole nation is thankful to their work who ignited the nationality in our citizens and lined up the Mission For Corruption Free India.

However, as Gandhiji said, **'The aim should also not be the good, but the way of achieving good aim should also be good.'** Therefore it is necessary that the corruption free India mission" should go through the paths of our constitution and Laws of Human Rights.

30) Need for the prosecution of Judges not following the law uniformly. :-

Hon'ble Supreme Court in **Re: M.P. Dwivedi AIR 1996 SC 2299 (Medha Patkar's case)** punished the Trial Judge under contempt of court Act, because he failed to discharge his judicial duty to safeguard the Fundamental rights of the accused.

As the tendency in the lower judiciary and in bureaucracy is increasing to subvert the law laid down by Hon'ble Supreme court and to stick to their own either due to Judicial indifference or for corrupt the assures stand therefore it is necessary that stern action is required to be taken against the concerned Judges and Magistrates which will be deterrent to others also.

Moreover it will be misappropriation of public funds to make huge payment of 70,000 to a person as Judge of Court of law, who does not know the law or having half backed knowledge of the law.

There are following cases where the Judges are dealt sternly.

However it is sad to say that the judges violating the fundamental rights and sending accused to jail illegally are never sent to jail as per section 220 of the I.P.C.

a) *Wrong interpretation of Supreme Court's order is contempt of Court.* **Promote Telecom Engineers Forum Vs. D.S. Mathur 2008 ALL SCR 2320.**

b) *Sessions Judge acted in violation of Supreme Court order -Supreme Court issued Severe*

Reprimand - Copy of order forwarded to disciplinary committee for further action against said Judge.

AIR 2001 SC 1975

31) The violation of Article 14 of the constitution and unequal treatment to the accused of different category can also be seen from the examples of accused from higher judiciary. In the case of P.F. scam the Supreme Court Judges Viz. Tarun Chaterjee and others were accused. When they were charge sheeted by the C.B.I. then the trial court did not send them to jail as has been done in the case of Smt. Kanimozi, Shri. Amar Singh & others.

The Judges have no immunity from prosecution and they can be dealt as that of any citizen of India [Vide Hon'ble Supreme court 5-Judge Bench) in the case of **K. Veerswami Vs. Union of India 1991 (3) SCC 655.**

32) The following extracts of some of the landmark judgements of Hon'ble Supreme Court is required to be circulated to all the police officers, Government pleaders and Magistrate.

Hon'ble Supreme Court (3 Judge Bench) in the case of **Nandinisatpathy -Vs- P.I. Dani 1978 SCC 121 424** had given specific law regarding Punishment to Police Officers who defy the lawful order of the Court.

It has been held that.

"(17.) Before discussing the core issues we wish to note our regret, in this case, at a higher level police officer, ignorantly insisting on a woman appearing at the police station, in flagrant contravention of the whole-some proviso to Section 160 (1) of the Cr. P.C. ***Such deviance must be idsited with prompt punishment since policemen may not be a law unto themselves expecting others to obey the law.*** *The wages of indifference is reprimand, of transigence disciplinary action. If the alibi is that the Sessions Court had directed to accused to appear at the police station, that is no*

absolution for a police officer from disobedience of the law. There is public policy, not complimentary to the police personnel, behind this legislative proscription which keeps juveniles and females from police company except at the former's safe residence. May be, in later years, community confidence and consciousness will regard the police force as entitled to better trust and soften the stigmatizing or suspicious provisions not writ across the code.

Hon'ble Supreme Court in the case of **Bijav Kuma Mohanty -Vs- Jadu 2002 STPL (LE Crim) 27377** laid down that,

"(1) Police officers are supposed to be members of a disciplined force it is of utmost importance to curb any tendency in them to flout orders of the court. It is more so when flouting of order results in deprivation of personal liberty of an individual. If protector of law to take revenge, defy court orders they will have to be sternly dealt with and appropriate punishment inflicted also with a view to send a message across the board that such an act cannot be countenanced."

(b) Tainted and biased Investigation :-

Investigation by complainant Police officer himself is illegal. The complainant is expected to seek material in support of his complaint and if he himself was investigation independent investigation would be jeopardized :

2001 Cri. L.J. NOC 75 (A.P.)

1976 Cri. L.J. 713 (S.C.)

(c) When investigation is tainted and biased causing serious prejudice to the parties then it is vitiated and liable to be quashed is vitiated and liable to be quashed – Null and void. **[Babubhai Vs. State 2011 (1) SCC (Cri) 336]**

In view of guidelines of Hon hie Supreme Court and in view of provision of Sec. 50 of Cr. P.C. It is mandatory for Police to give details of allegation against accused in writing. Full Bench of Hon'ble High Court in the case of **Selvanathan @ Raghavan -Vs- State 1988 Mad LW fCri) 503** (FB) specifically laid down that the accused is entitled to get copy of F.I.R. at the time of arrest itself.

Taking Suo motu note of such illegality Hon'ble High court in the recent judgement of **Court on its own Motion -Vs- state 2011 Cri. L.J. 1347 (DB)** passed some guidelines for state of Delhi. The same guidelines are required to be given to police in entire country

In another landmark judgement in the case of **'Dr. 'X' Vs. Hospital** *'z'* **1991 (1) ALL MR 469 (SC)** Hon'ble Supreme Court observed that,

> *"(para 43) .....*
>
> *Moreover, where there is a clash of two Fundamental Rights, as in the instant case, 'namely the appellant's right to privacy as part of right to life and Ms. 'Y' 'S' right to lead a healthy life which is her Fundamental Right under Article 21, the RIGHT which would advance the public morality or public interest, would alone be enforced through the process of Court, for the reason that moral consideration's cannot be kept at bay and the Judges are not expected to sit as mute structures of clay, in the Hall, Known as Court Room, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day " (See : Legal Duties : Allen)*

33) **Media Trial :-** Hon'ble Supreme Court in M.P. Lohiya's case **2005 Cri. L.J. 1416.** Specifically observed that when the matter is subjudice then there could be no media trial. This is contempt of court and also against the constitutional mandate. Hon'ble High Court in the case

of **2005 ALL MR (Cri) Journal 143 Specifically prohibited the media persons to take interview of the accused. (D.N. Prasad Vs. Principal Secretary to the State)**

It has been held that,

> *8. The scope of the right of a News Agency, or News Reporter, to interview the persons, who are facing criminal charges, fell for consideration by the Courts in the recent past. A distinction has been maintained between the right to interview the persons, who are already convicted of offences and are serving sentences, on the one hand, and those who are facing charges, but yet to be convicted, on the other hand. In the former category of cases, a relatively liberal approach was adopted and permissions were accorded to interview them, so that the society at large would be appraised of the feelings of the convict, or the factors that led to his conviction, and the like. Reference, in this context, may be made to the judgments of the Supreme Court in* ***Prabha Dutt Vs. Union of India, (1982)1*** *SCC* ***1.*** *While granting permission to interview two individuals, who were sentenced to death; the Supreme Court made the following observations :*
>
> *".....The Press is entitled to exercise its freedom of speech and expression by publishing a matter which does not invade the rights of other citizens and which does not violate the sovereignty and integrity of India, the security of the State, public order, decency and morality. But in the instant case, the right claimed by the petitioner is not the right to express any particular view or opinion but the right to means of information through the medium of an interview of the two prisoners who are sentenced to death. No such right can be claimed by the Press, unless in the first instance, the person sought to be interviewed is willing to be interviewed.* ***The existence of a free Press does not imply or spell out any legal obligation on the citizens to supply information to the Press, such, for example, as there is under Section 161(2) of the Criminal Procedure Code...."***
>
> *9. In the latter category of cases, the approach has been further cautious and careful. The reason is that any information touching upon the involvement or innocence of a person accused in a crime, even*

while the trial is pending, is likely to hamper the investigation or impair the trial. Such instances may result in an unsatisfactory and imperfect disposal of the case. It is immaterial whether the impact of the same is felt by the complainant or the accused.

11. In the Criminal Law, as it prevails in India, the State has the sole prerogative to prosecute an individual for committing an offence. It connotes one of the facets of sovereignty. Prosecution, in turn, has several facets, such as investigation and trial. In the prevalent system, a person, accused of committing an offence, is accorded the right of silence. It is for the prosecution to prove and establish the involvement of an accused in a crime. It is no part of the duty of a person, accused of an offence, to explain or clarify his stand. The provisions of the Cr.P.C. as well as the Evidence Act, make it amply clear that any statement recorded from an accused, during the course of investigation, cannot be used as evidence against him. Similarly (Clause 3) of Article 20 of the Constitution mandates that no person, accused of an offence, shall be compelled to be a witness against himself. It is the cumulative effect of these provisions, that constitute right of silence of an accused.

12. When the State itself cannot violate or infringe such a right, neither any individual nor an agency, like the Press, can be permitted to invade the same. Any intrusion into such right of an accused would certainly expose him to several perils, or make his condition vulnerable. For example, the prosecution may present a case, which proceeds on the footing that the accused was at the scene of offence. If, in fact, the accused was at a different place, he can take the plea of alibi, and demolish the case presented by the prosecution. Such a plea can be effectively taken, only after the prosecution comes with a particular stand, during the course of trial. If the accused is made or forced to speak as to where he was, when the relevant incident occurred, the prosecution would become alert and may frame its evidence in such a way as to suit and conform to the stand taken by the accused. In such an event, the immediate impact is felt by the accused. He would be deprived of the

benefit arising out of the loophole in the case of the prosecution, on account of the untimely and unnecessary revelation elicited through him, in an interview. Examples can be multiplied.

14. The freedom of Press, in the context of trial of criminal cases, came to be considered by the Supreme Court in a recent judgment in ***State*** *of* ***Maharashtra Vs. Rajendra Jawanmal Gandhi,*** *(1997)8* ***SCC*** *386 : [1997* ***ALL MR (Cri) (S.C.)*** *1767], The Court expressed its displeasure over the phenomenon, which it called as "trial by Press, electronic media, or public agitation". The case related to an offence of rape of a minor girl. The accused therein, was convicted for the offence and sentenced to rigorous imprisonment for seven years, by the trial Court. In appeal, the High Court upheld the conviction under Section 354 but set aside the one under Section 376,1.P.C., and the sentence is also modified. An agitation was undertaken by an organization called Nagaric Kriti Samiti, Kolhapur, against the acquittal of accused for the offence under Section 376, I.P.C. The Samithi filed an appeal before the Supreme Court, after obtaining leave. The State of Maharashtra has also filed an appeal.*

15. In its judgment, the High Court expressed its displeasure and concern over the unnecessary publicity that was given to the entire incident and opined that it had caused great harm to the victim. In its Judgment, the Supreme Court held as under:

"Para-37 : We agree with the High Court that a- great harm had been caused to the girl by unnecessary publicity and taking out of morcha by the public. Even the case had to be transferred from Kolhapur to Satara under the orders of this Court. There is procedure established by law governing the conduct of trial of a person accused of an offence. A trial by Press, electronic media or public agitation is the very antithesis of rule of law. It can well lead to miscarriage of justice...."

16. Learned counsel for the petitioners place reliance upon a judgment of the Supreme Court in ***State Vs. Charulata Joshi, (1999)4 SCC 65.*** *In that case, the person, who was accused of an offence under Section 302, I.P.C., was sought to be interviewed by the reporter of a magazine. The trial Court granted the permission without any conditions. In the appeal preferred by the State, the High Court imposed certain restrictions. The State preferred an appeal to the Supreme Court. After referring to its own judgments in* ***Prabha Dutta Vs. Union of India*** *(supra), and that one in* ***Sheela Barse Vs. State of Maharashtra, (1987)4 SCC 373,*** *the Supreme Court observed that blanket permission to Journalists to interview an under-trial prisoner, is impermissible. The relief aspect of it could not be dealt with, because of the reason that the under-trial prisoner was shifted from the Jail, and it was left open to the magazine to renew its request, if the situation warranted.*

17. In the recent past, accuracy and decency of reporting has suffered a set back. It is particularly so, in case of the electronic media. By the time the inaccuracy or indecency is noticed and remedial steps are taken, the damage is already caused. In view of the bitter competition that exists among the various agencies, one tries to excel the other. Ghastly incidents, or those, which by any standard, ought not to have been presented or propagated are telecast live; that too continuously or constantly. The comments made, or the clipping displayed during such telecast, are leaving very little for the prosecution or the Courts to do. Unfortunately, it is not realized that any item of news telecast in the channels would reach persons of all categories, irrespective of age, literacy, and their capacity to understand or withstand. The impact of such a telecast on the society is phenomenal. If any proof in this regard is needed, the consequences of undue publicity, given to the execution of death sentence against Danunjay Chaterjee, would provide one. The telecast was so out of proportion and frequent that the boys of tender age were tempted to test, what hanging would be about. In the process, two boys are said to have lost their lives. Unfortunately, this uncontrolled or unedited telecast or propagation of news is resorted to, in the name of

exercise of right to freedom of speech and expression, or freedom of Press. In England, an agency known as Broadcasting Standards Commission is constituted to regulate these matters. Such an agency does not exist in our country.

19. It must be said to the credit of Press in India that it had played pivotal role at various challenging and testing times. Investigative journalism undertaken by it had unearthed important instances, which were otherwise unnoticed. However, as is common with any other institution, certain disturbing tendencies have crept into this institution also. There cannot be any doubt that such a glorious institution would have the resilience to overcome the shortcomings, before the latter exhibit and unfold their malignancy. The effort of the petitioners cannot be treated an attempt to misuse their freedom, or to sensationalize the matter. They may be having laudable objectives or an intention to dispassionately inform the society of the facts, that may emerge from the person sought to be interviewed. However, it is difficult to accede to the request, because of the reason that, such permission is not only prone to have its impact on the investigation and effectiveness of the trial, but is also likely to invade the rights of privacy of the person, whom they intend to interview.

20. In ***R. Vs. Taylor (Michelle Ann) and Taylor (Lisa Jane), (1994)98 Cr App R 361,*** *an English Appellate Court has this to say about the impact of the Press coverage of sensational instances on the trial of the matters.*

"……Further, it was clear that the Press coverage had been sensational, unremitting, extensive inaccurate and misleading and despite the Judges warning it was impossible to say that the Jury had not been influenced by it. The nature of the publicity was such that a retrial would not be appropriate...."

21. The right to privacy, vis-a-vis the freedom of Press was considered by the Court of Appeal in ***Regina Vs. Broadcasting***

Standards Commission, Ex p. British Broadcasting Corporation, (2001) QB 885. *The Court observed,*

"It would be departure from proper standards, if, for example the B.B.C., without justification, attempts to listen clandestinely to the activities of a Board meeting, the same would be true of secret filming of Board meeting."

22. In ***Express Newspapers Pvt. Ltd. Vs. Union of India, AIR 1986 SC 872*** *(at Para 76), the Supreme Court, even while upholding the freedom of Press and recognizing its importance, sounded a note of caution. It said.*

"This right is one of the pillars of individual liberty - freedom of speech, which our Court has always unfailingly guarded. I wish to add that however precious and cherished the freedom of speech is under Art. 19(l)(a), this freedom is not absolute and unlimited at all times and under all circumstances but is subject to the restrictions contained in Art. 19(2). That must be so because unrestricted freedom of speech and expression which includes the freedom of the Press and is wholly free from restraints, amounts to uncontrolled licence which would lead to disorder and anarchy and it would be hazardous to ignore the vital importance of our social and national interest in public order and security of the State."

23. It is not in dispute that the investigation of the case, in which the person sought to be interviewed, figures as an accused, is at initial stage. Several inconsistent theories have already been highlighted. It was rather surprising that, one after the other persons came forward owning their complicity of the crime. An average man gathers a feeling that a concerted attempt is being made to divert the attention of the prosecution as well as the public and to cover the real culprits. The investigating agency should be accorded the freedom, to proceed in the matter, and any step, which is likely to divert its attention or otherwise interfere with it, may compliciate the issues and make the investigation to deviate from the correct line. The petitioners can certainly extend their services to the society, at large, at appropriate time, for instance, after the

charge-sheet is filed. There is nothing, which prevents the petitioners or other agencies, to help the investigation by providing such information as they possess. However, it is impermissible to provide access to the petitioners to one of the accused, at this stage. They can renew their request after the charge- sheet is filed.

30) Publication of News in pending Matter/F.I.R. isContempt of Court

Interference with course of justice - Prejudicing the public in favour of or against a party in a pending case by writing an article in the Press is contempt'. The reason is that such articles tend to prejudice the mind of the court, to deter witness from giving evidence, to induce a party to abandon his defence and to possibly affect the decision of the court, though as a rule courts are not affected. Such writings tend to prejudice the public opinion by incubating the public with definite opinion about the matter. The result may be that public confidence in court might be lost if the result was otherwise than the opinion formed. In the instant case of **Mankad Probodh Chandra v. Sha Panlal Nanchand, AIR 1954 Kutch. 2,** a police officer was searched by the anti-corruption police on suspicion of bribery against the officer. Meantime a newspaper published a series of articles under the guise of publishing information, suggesting that the officer had accepted the bribe, that the trap was cent per cent successful, that the acceptance of the bribe of Rs. 100 had been ill- ominous to others and hence would be so in the case of that officer also, that the officer had become nervous, he had no other hope of escape except invoke the aid of God, that attempts were being made by the friends of the officer to tamper with the witnesses and that at the instance of some outside agency the Court had advanced the date of the hearing of the case against the officer.

This kind of news conveying was held as flagrant contempt, scandalizing the Court and prejudicing the public mind against the office. The editor, the printer and the publisher are responsible for such publication and cannot escape the consequences by pleading that it was factual news as they bona fide got it or that they had no intention to offend the Court proceedings; intention does not come in at all in such matters. It is the result or the consequence of such publication that counts. There was no doubt that it created disastrous results in interfering with the course of justice.

31) The law of contempt throws a ring of protection around the entire course of litigation. Party, witness, Judge or counsel are all integral parts of that process. Anything which tends to

impair the legitimate freedom of any these cannot but result in obstructing the course of justice. In **Gaini Ram v. Ramnath Dutt, AIR 1955 Raj 123 (DB),** a superior official gave a charge-sheet to his subordinate who was figuring as a witness in a pending case. His evidence was not yet over. The departmental charge-sheet asked him to explain certain statements made by him as a witness. It was held that the action of the superior official was clear interference with the course of justice. He was hampering evidence being given, as he put the witness under departmental censure for the lacuna in the evidence. The Court is thereby deprived of valuable testimony being given without fear or favour.

For a person to be convicted of Contempt of Court for interfering with the course of justice it has to be shown :

(a) that something has been published which is either clearly intended or at least is calculated to prejudice a trial which is pending;

(b) that the offending article was published with the knowledge of the pending cause or with the knowledge that the cause was imminent; and

(c) that the matter published intended substantially to interfere with the due course of justice or was calculated to create prejudice in the public mind.

It has to be borne in mind that an offending act, though not influencing the Judge's mind, may affect the conduct of parties to the proceeding which is likely to affect the course of true justice **[Awadh Narain Singh v. Jwala Prasad, AIR 1956 Pat 321 (DB)**

Hon'ble Bombay High Court in the case of **Anil Tackrey Vs. M.D. 2003 (3) B.Cr. C. 570** held that publication of new with attractive heading in news paper such as 'Director behind bar" is a offence under section 500, 501 etc of I.P.C.

32) **PRAYER :-** It is therefore humble prayed that this Hon'ble National Human Rights commission may please to

(i) Consider this petition as a public interest Litigation (P.I.L.) and take cognizance of it.

(ii) Call for the explanation from the respondent.

(iii) Appoint committee of expert to formulate guidelines to safeguard the fundamental rights of the accused.

(iv) File appropriate writ before Hon'ble Supreme Court for proper implementation of those guidelines.

(v) Give appropriate suggestions to standing parliamentary committee to include laws of Human Rights in the 'LOKPAL BILL'

(vi) Initiate appropriate proceedings against Mr. Arvind Kejriwal, Adv. Prashant Bhushan and others for their unconstitutional acts.

(vii) File appropriate writ before Hon'ble Supreme Court for violation of Article 14 of the constitution of India and for release of accused like Suresh Kalmadi & others which does not get the bail even if they entitled to the same.

(viii) Give appropriate directions to the respondent No. 6 to take disciplinary action and to initiate appropriate criminal proceedings against the Magistrate/Judges for their willful disregard and disobedience of Hon'ble Supreme Court's direction.

(ix) Form a committee to publish another book for the law relating to prosecution of Judges.

(x) Direct Central Government to provide appropriate Police Protection to the Petitioner.

FOR THIS ACT OF KINDNESS AND JUSTICE THE APPLICANT AS IN DUTY BOUND SHALL EVER PRAY.

Signature

Rashid Khan Pathan

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Cross citation: 2012 (1) SCC (Cri) 26

SUPREME COURT OF INDIA

Hon'ble Judges: G. S. Singhvi and H.L. Dattu, JJ.

CRIMINAL APPEAL NO.2178 OF 2011 (Arising out of SLP (Crl.) No. 5650 of 2011)

Sanjay Chandra …Vs…. C.B.I.

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A) Cri. P.c. 439, 437, Bail – Bail is the Rule and Jail an exception – Accused entitled for presumption of innocence till he is convicted – constitutionally protected liberty of accused must be respected unless detention becomes necessary – If any accused is detained before conviction then it will put unnecessary burden on state to keep a person who is not proved guilty – Normally bail should be granted to accused – Apprehension of tampering of evidence without sound proof could not be accepted and this ground could not be considered in each case to deny the bail.

B) Discretion while granting bail – The Jurisdiction to grant bail has to be exercised on the basis of well settled principles and not in arbitrary manner- The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken.

C) DISCRETION : Any order devoid of reasons would suffer from non-application of mind. In the case of Gudikatil Narasimhulu V. Public Prosecutor, (1978) 1 SCC 240, V.R. Krishna Iyer, J., sitting as Chamber Judge, Enunciated the principles of bail thus:

> *"3. What, then, is "judicial discretion" in this bail context ? In the elegant words of Benjamin Cardozo : "The Judge, even when he is free, is still not wholly free. He is not to innovate at Pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and*

unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remain.

D) Criminal Procedure Code, 1973 – Ss. 437 and 439 – Prejudices which may be avoided in deciding bail matters – Public Scams, scandal and heinous offences – Public sentiments and disapproval of alleged misconduct – Bail, held, ought not be denied to teach lesson to a person whose offence is yet to be proved – Conditional bail, is a solution in such types of cases.

E) The approach adopted by the trial court and affirmed by the High Court, is a denial of the whole basis of the Indian system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. Bail is the rule and committal to jail an exception. Refuse of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the constitution. When there is a delay in trail, bail should be granted to the accused.

F) Cr. P.C. Sec. 437, 439 – Change in circumstances – Pre-Charge and post – charge stages – SLP before supreme court dismissed before farming of charges – Bail application filed after framing charges – Held, is change in circumstances – Earlier order is no bar in granting bail to the appellant.

(para 19)

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RS. 6 LAKH COMPENSATION TO 79 YEAR OLD LADY AND HER SON

[News published in MID- DAY Dt. 14 / 06 /2013]

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13th June 2013

BOMBAY HIGH COURT

CORAM : P.V. HARDAS & MRS. MRIDULA BHATKAR, JJ.

CRIMINAL WRIT PETITION NO. 1857 OF 2012

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Cr. P.C. 151- Illegal Arrest – Petitioner Lady and her son were detained and sent to Judicial custody alleging that she wants to commit suicide – Held, we are constrained to come to the conclusion that the petitioners on the day they were called to the police station had not taken any steps at committing suicide. In fact, the petitioners had withdrawn such a threat. The petitioners were called to the police station under a false pretext that an offence would be wregistered on the basis of the report of the first petitioner. We find no reason to question the case of the petitioners that they were detained in the police station and, thereafter, suddenly produced in the court of the Magistrate and to their dismay learnt that they had been arrested. There was no impending threat of the petitioners for committing suicide and in passing, therefore, we may say that their arrest and detention itself was not justified - the authorities have committed a blatant violation of the directives of the Supreme Court in D. K. Basu's case and the petition on that score deserves to succeed - petition is partly allowed. We direct the respondents to pay each of the petitioners an amount of Rs.3,00,000/- (Rupees Three Lakhs Only) within a period of eight weeks

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1. Smt. Mohini Naraindas Kamwani,
Age 77 years, resident of 101,
Mauli Society, A Wing, Plot No.29C,

Sector No.4, Vashi
Navi Mumbai – 400703.
2. Mr. Dilip Naraindas Kamwani,
Age 58 years,
. ... Petitioners.
V/s.
1. Sr. Police Inspector,
Vashi Police Station,
Vashi, Navi Mumbai.

2. Deputy Commissioner of Police,
Zone I, Navi Mumbai,
Maharashtra.

3. Commissioner of Police,
Navi Mumbai,
Maharashtra.

4. Inspector of General of Police,
Maharashtra,
Police Headquarters,
Mumbai, Maharashtra.
5. Principal Secretary,
Home Department, Mantralaya,
State of Maharashtra.

6. State of Maharashtra. ... Respondents.
Mr. Dilip Kamwani, Petitioner No.2-in-person.
Ms. A.S. Pai, APP for the State.

JUDGMENT (PER P.V. HARDAS, J.):-Rule. Rule returnable forthwith. With the consent of the learned Counsel for the parties this Petition is heard finally at the stage of admission. Initially this Petition was filed on behalf of Mohini Naraindas Kamwani as the sole Petitioner.Subsequently, with the leave of the Court this Petition was amended and Dilip Naraindas Kamwani was permitted to be joined as Petitioner No.2. Initially, this Petition was argued by the Advocate representing the Petitioner but subsequently on the Advocate of the Petitioner being discharged, the entire Petition was being conducted and argued by the Petitioner No.2 in-person.

2. Facts in brief as are necessary for the decision of this Petition may briefly be stated thus. The First Petitioner resides with the Second Petitioner, who is her son alongwith a mentally challenged daughter by name Kanta Kamwani. The Second daughter of the First Petitioner named Sumita Karani resides in Vashi alongwith her husband. Sumita Karani has three sons one of whom resides at Andheri while the other two resides in Dubai and in U.S.A. respectively. According to the Petitioners, somewhere in August 2010, Manoj Karani, son of Sumita Karani and grandson of the First Petitioner approached the Petitioner with an intention of forcibly obtaining the signature of the First Petitioner on some documents and also for obtaining the Bank details of the First Petitioner. According to the First Petitioner, she had severed her relations with her daughter Sumita Karani and the

grand children of the First Petitioner some time in 2007. Since the First Petitioner had protested the overtures of her grand son Manoj Karani in obtaining the signature and Bank details of the First Petitioner, Manoj Karani left the premises but had threatened the First Petitioner and the Second Petitioner. The Petitioner No.1 therefore had approached the Respondent on 24.12.2010 for lodging of a report and registration of criminal case against her grandson. It appears that on the basis of the complaint the First Petitioner, a non-cognizable offence was registered and no further action was taken. Despite the registration of the non-cognizable offence, the grandson of the First Petitioner i.e. Manoj Karani continued to visit the house of the First Petitioner on several occasions and threatened the Petitioner with dire consequences. According to the Petitioner, her grandson Manoj Karani had stated that he had links with the underworld and with Hiten Sampat, who had criminal antecedents.

3. Since the Petitioners continued to pursue the report lodged by them, the Petitioners were informed that the dispute which was complained of by the Petitioners was of a civil nature and therefore, no cognizance could be taken. According to the First Petitioner, she had informed the Police that her life was in danger because of the threats of her grandson Manoj Karani. Since no action was being taken onthe complaint of the Petitioner, the Petitioner addressed a communication to the Chief Minister on 11.11.2011 pointing out her grievance and the harassment faced by her. The said communication dated 11.11.2011 is annexed to the Petition as Exhibit 'A'. In the aforesaid communication, the Petitioner had highlighted her plight and had also stated that her entire family had decided to commit suicide. According to the Petitioner, after addressing the said communication to the Chief Minister, the Police Officer approached her on 26.12.2011 promising the Petitioner that appropriate action would be taken and asked her to give a written undertaking stating that she would not sit on a protest fast and accordingly, statement of the First Petitioner was recorded on 27.12.2011 wherein the Petitioner had assured that she would not undertake any protest fast and would not commit suicide. The said statement of the Petitioner is annexed to the Petition as Exhibit 'B'.

4. If further appears that the Petitioner had filed certain proceedings before the Maharashtra State Human Rights Commission. The aforesaid proceedings were closed by the Human Rights Commission, according to the Petitioner, on the basis of the incorrect information/statement made by the Police Inspector of the Azad Maidan Police Station. The Petitioner, therefore, addressed a communication on 2nd January 2012 to the Senior Inspector of Police, Azad Maidan Police Station informing the Police that the Petitioner intended to sit on "peaceful protest hunger strike" on 16.01.2012 atAzad Maidan. The Petitioner accordingly started her peaceful protest fast from 16.01.2012 at Azad Maidan and continued it for three days. The Petitioner addressed variouscommunications to the authorities informing them that she would continue her hunger fast for an indefinite period until justice was done to her. It also appears that the Petitioner had addressed a communication to the High Court and accordingly, the Registrar (Legal and Research) of the Public Grievance Cell of this Court, addressed a communication to the Commissioner of Police dated 21.01.2012, requesting the Commissioner of Police to look into the complaint/grievance of the First Petitioner and to intimate the Registrar (Legal and Research) in respect of the action which was taken.

5. According to the Petitioner, after receipt of the aforesaid communication by the Police, a high ranking Police Officer of the Azad Maidan Police Station visited the Petitioner and convinced her that action would be taken on her grievance and she should not take any steps which would be contrary to the law of the land. The Petitioner therefore called off her fast and gave the same in writing to the Police Officer. The aforesaid communication of the Petitioner is at Exhibit 'D'. It would be useful to refer hereinbelow the ad-verbatim communication of the First Petitioner :-" Sir I respect law. We have never broken any laws in our lives. Now at age 77 years I do not wish to start breaking any law. The accused have again and again broken laws and Vashi Police is not following/respecting any law. I am a freedom fighter widow senior citizen. My husband went to jail with Mahatma Gandhi for freedom fight ". Thus, according to the Petitioner, by virtue of Exhibit 'E', she had in clear terms intimated to the authorities that the protest was called off and she had also withdrawn her threat to commit suicide.

6. According to the Petitioners, two Police Officers, one of whom was addressed as Shri Kadam and another a lady PoliceOfficer who was addressed as Mrs. Chikne, came to her house on 25.01.2012 at about 8.30 a.m. The Petitioners were informed by the Police Officials that they had come to the residence of the Petitioners for registration of a FIR on the complaint of the Petitioners. The Petitioners were, therefore, asked to accompany the Police Officers to the Police Station. Since it was early morning, the Petitioners asked the Police Officers to proceed ahead and they would come to the Police Station in about half an hour. The Petitioners were informed that their presence at the Police Station would be required for about an hour. The Petitioners therefore left the mentally challenged daughter of the First Petitioner in the house and arrived at the Vashi Police Station at about 9.00 a.m. on 25.01.2012. Till about 1.30 p.m. the Petitioner and her son were made to sit inside the Police Station without being informed and without being provided with any food or water.

At about 2.30 p.m. the Petitioner and her son were escorted to the Court premises by the Police Officers and were made to sit on a bench outside the Court room of the Magistrate's Court. At about 4.45 p.m. the Petitioner and her son were produced before the Magistrate and it was only at that stage that the Petitioners realized that they were being produced as accused and not as complainants for completing the formalities. The Petitioners were sent to Judicial Custody for a period of three days. The Second Petitioner requested the Respondents that he be produced before the learned Magistrate once again so that the Petitioner could apprise the learned Magistrate all the facts but instead the Second Petitioner was handcuffed by a Police Officer Shri Kadam and was pushed into the Police Van alongwith the First Petitioner. The First Petitioner requested the Police Officer to allow her to take an extra set of clean clothes and other articles and also to ensure that the neighbors were informed to look after her mentally challenged daughter who was alone at home. The request of the First Petitioner was turned down by the Police Officers. The Second Petitioner had forwarded a complaint to the Commissioner of Police expressing the grievance and complaining about the illegal arrest of the Petitioners. The said complaint dated 10.02.2012 has been annexed by the Petitioners as Exhibit 'G'.

7. On 27.01.2012 the Petitioners were produced before the Trial Magistrate and were ordered to be released. It appears that the principal reason for arrest of the Petitioners

was that the Petitioners had addressed an e-mail to the Police Officer intimating that on 26.01.2012 the Petitioners would commit suicide by self-immolation either in front of the Mantralaya or in front of the official residence of the Chief Minister. In the entire report which was submitted to the Magistrate seeking remand of the Petitioners, there was no reference at all to the fact that the Petitioners vide the document at Exhibit 'E' had intimated that the fast was being called off and that they had not broken any law in their lives and did not wish to start breaking any law.

8. Pursuant to the order passed by the Magistrate on 27.01.2012 ordering the release of the Petitioners, the Petitioners were taken back to the Kalyan Jail for completing the formalities of their release. According to the Petitioners, the Petitioner No.2 was handcuffed on way to the Kalyan Prison despite his protest. The Petitioners claim that their arrest is illegal and contrary to the guidelines laid down by the Supreme Court in D.K. Basu v/s. State of West Bengal [(1997) 1 SCC 416]. The Petitioners have therefore prayed for prosecution of the Police Authorities who were responsible for detaining the Petitioners and for illegally handcuffing the Petitioner No.2. The Petitioners further pray for issuance of a writ of mandamus directing the Respondents to register an offence on the basis of the complaint of the Petitioners against one Shri Manoj Karani. The Petitioners have also prayed for grant of monetary compensation for violation of their fundamental rights. The other reliefs are in respect of the ad-interim reliefs. This Petition was amended by the Petitioners when they were appearing in-person and certain other reliefs are also sought by the Petitioners. By virtue of the amendment dated 27.02.2013, the Petitioners have prayed for issuance of a writ directing the suspension and prosecution of Respondent No.1 – Superintendent of Police Laxman Kale, Superintendent of Police Raosaheb Sardesai and DCP of Vashi Zone. Amendment is also sought by incorporating a prayer for grant of ad-interim relief of compensation of Rs.10.00 lakhs to the Petitioners as well as Rs.10.00 lakhs to the mentally challenged daughter of the First Petitioner by name Kanta Kamwani. The Petition was again subsequently amended by the Petitioners and a relief of a issuance of a writ of mandamus was sought for directing the Police Officers to perform their statutory duties of taking legal action against Sanjeev Karani and Rekha Sanjeev Karani for being in the contact with the underworld person named Hiten Sampat. A writ of mandamus was also sought for directing the Respondents to take "urgent and immediate stern legal action" against all the family members of Karani for threatening the Petitioners. A relief of monetary compensation was again sought. The Petition was subsequently amended and a relief of issuance of a writ was sought for directing the Police Officials for making 114 and 105 calls to suspected Bijlani and for suspension of the Police Officers named in the prayer clause.

9. In response to the notice issued by this court, the respondents have filed affidavits-in-reply. In the affidavit filed by Raosaheb Sardesai, Senior Police Inspector, it is stated that on the basis of the complaint of the first petitioner, N.C. Complaint bearing No. 1571 of 2010 was registered on 24/12/2010 under Sections 506 and 507 of I.P.C. It is also stated that a cross complaint was also registered as N.C. Complaint No. 1580 of 2010 under Sections 506 and 507 of I.P.C. All allegations about illegal arrest and detention by the police officers of Vashi Police have been denied. It is further stated that various complaints have been forwarded by the petitioners, but since no case was made out, no offence was

registered. It is further stated that the petitioners had approached the Human Rights Commission and the Human Rights Commission by order dated 22/12/2011, directed the Vashi Police to examine the complaints and take appropriate action in accordance with law, provided a case was made out in the complaints. It is also stated that the petitioner no.1 had forwarded an application that she would commit suicide along with her son, petitioner no.2 and daughter after hunger strike on 27/12/2011 and 16/1/2012. The affidavit states that the petitioner no.1 had forwarded an application that on 26/1/2012 she would immolate herself in front of the Mantralaya or Varsha Bungalow of the Chief Minister. It is stated that in these set of facts, an action of detaining the petitioners under Section 151(3) of Criminal Procedure Code was taken and the petitioner no.1 was produced before the Magistrate within 24 hours and so also apprised of her right to engage an Advocate of her choice. It is further stated thatthe petitioners were detained on 25/1/2012 at 11.40 a.m. and was then produced before the Magistrate. It is also stated that since the first petitioner had threatened to commit suicide, she was detained along with other petitioner. All allegations about the petitioner no.2 being handcuffed are denied.

10. Another affidavit, styled as additional affidavit, came to be filed by one Laxman Bhausaheb Kale, Police Inspector, who is presently attached to the Nerul Police Station. In the affidavit, it is stated that since the first petitioner and her son had made an application stating that they would commit suicide, counseling was attempted and the petitioner no.1 was persuaded not to take such an extreme step, but the petitioner no.1 declined. It is further stated that, therefore, in accordance with the provisions of Section 151(3) of Cr.P.C., the petitioner and her son were detained. It is also stated that the allegations regarding ill-treatment and handcuffing are false.

11. A reference, at this juncture, to the orders passed by this court needs to be made in order to effectively deal with therival submissions of the parties. Upon filing of the first affidavit of one Raosaheb Sardesai, who at the time of filing of the affidavit was attached to the Vashi Police Station, the Divison Bench of this court by its order dated 20/11/2012, at paras 2 and 3, has observed thus:

"2. We have perused the affidavit of Raosaheb Baburao Sardesai, Senior Police Inspector, presently attached to Vashi Police Station, Navi Mumbai. The affidavit does not throw light on compliance with the directions issued by the Apex Court in the case of D. K. Basu. The so called arrest Panchanama or arrest Memorandum is shown to us, which does not bear signature of the arrestee. Though it is contended that information regarding arrest was given to the petitioner's daughter by name Kanta, no record is shown to us to prove in what manner such information was given. The learned counsel appearing for the petitioner states that said Kanta is mentally challenged. The affidavit filed is totally unsatisfactory. 3. Prima facie, the affidavit shows that the directions of the Apex Court in the case of D. K. Basu have not been complied with. We direct the concerned officer to remain present in this Court on 23 rd November, 2012 at 3 p.m. along with entire record."

12. During the subsequent hearing of the petition, the Division Bench of this court by its order dated 23/11/2012 recorded certain findings, which we find it appropriate to reproduce below:

"1 We have perused the record produced by the learned A.P.P. The learned A.P.P. states that it is true that on the arrest panchnama signatures of

the petitioner and her son were not obtained but there is arrest form drawn at the time of arrest. She states that the petitioner and her son declined to sign on the arrest form.

2 We may note here that in the station diary entry no.26 which is made at the time of arrest of the petitioner and her son, there is not even a reference to the arrest form. There is no entry in the station diary that arrest form was drawn and the petitioner and her son declined to sign the same. Moreover, in the affidavit of Shri Raosaheb Baburao Sardesai dated 3rd August 2012, there is no reference whatsoever to the arrest form being drawn.

3 The learned A.P.P seeks time to file additional affidavit. The prayer will have to be rejected for the simple reason that in the petition not only the violation of directions issued by the Apex Court in case of of D.K.Basu Vs. State of West Bengal [1997 (1) SCC 416] has been alleged, but the directions in the Judgment have been reproduced in the petition. Moreover, the station diary entry does not contain such reference to such arrest form. We have perused the original arrest form of the petitioner and her son. Prima facie, it appears to us that endorsement that arrestees declined to sign the same has been subsequently made as the handwriting appears to be different than the handwriting in which various details have been filled in. In any case, additional affidavit cannot be permitted to be filed to fill up any lacuna.

4 As far as giving of information of arrest to the close relative of the petitioner is concerned, the learned A.P.P stated that the petitioner's daughter Kanta was informed about her arrest. On instructions she stated that a woman constable was deputed for the said work. We may note here that there is no record to show that a constable was deputed and any report was submitted by the constable on record. The learned A.P.P on instructions states that there is no such entry in the station diary or there is no such report. We have noted that the mode by which the communication was allegedly made to the said daughter of the petitioner is not mentioned in the station diary. On the last date, in our order dated 20th November 2012, we have specifically noted that the said Kanta is mentally challenged. The learned A.P.P on instructions states that she is not mentally challenged but disabled.

5 We have also heard the submissions of the learned counsel for the petitioner and the learned A.P.P on other aspects of the case. The learned A.P.P seeks time to take instructions as regards prayer clause (b).6 Stand over till 10th December 2012, to be shown at 3.00 p.m for Judgment."

13. We have heard the petitioner no.2, who appeared in person and the learned APP on behalf of the respondents. The petitioner no.2 has urged before us that there was a gross violation of the human rights and the arrest of the petitioners was in contravention of the directives by the Supreme Court in D.K. Basu vs. State of West Bangal [(1997) 1 SCC 416]. The petitioner no.2 has further urged before us that the petitioners were called to the police station under a false pretext and were never formally arrested, but produced before the Magistrate. It is further stated that no formal arrest panchanama was drawn and, therefore, there was no question of the petitioners declining to sign the arrest form. It is also stated that the sister of petitioner no.2 i.e. daughter of petitioner no.1 is mentally challenged person and consequently the police could not have informed her about the arrest of the petitioners. It is also urged before us that the petitioner no.1 had communicated to the authorities that she had never breached the law earlier and did not

intend to breach it and, therefore, there was no impending threat of the petitioners committing suicide. The petitioner no.2 has further urged before us that the petitioners are, therefore, entitled to be compensated for their illegal arrest and detention which was in gross violation of the directives of theSupreme Court in D.K. Basu's case (Supra) and also are entitled for the issuance of a writ directing the police to register an offence on the basis of the complaint of petitioner no.1. The learned APP has urged before us that the directivesof the Supreme Court in D.K. Basu's case have been followed to the latter and the arrest of the petitioners was justified in the light of the impending threat of the petitioners of committing suicide.

14. The principal challenge in this petition is about the illegal arrest and detention of the petitioners. Whether their arrest was justified or not in the facts of the present case is not a question which this court is called upon to examine. We are required to examine if the petitioners have been arrested contrary to the directives issued by the Supreme Court in D. K. Basu' case. The second question which this court is called upon to examine is, whether a writ of mandamus could be issued directing the police to register an offence against the accused named in the complaint filed by the petitioner no.1.

15. In passing, we may state that the petitioner no.1, though, had initially given threats of committing suicide, subsequently informed the authorities that she had not breached the law earlier and did not intend to do so. It is thus clear that at the time when the police officers visited the residence of the petitioner no.1, the petitioner no.1 was neither sitting on hunger fast nor had the petitioner no.1 taken any steps at initiating the fulfillment of the threat of suicide. If the petitioners had been arrested, as is contended by the respondents, the signatures of the petitioners ought to have appeared on the arrest panchanamas. The contention of the respondents that the petitioners declined to sign the arrest panchanama, according to us is an after thought. Thereis no corresponding station diary entry which would fortify the submission of the respondents that the petitioners had declined to sign the arrest form. We also find that the respondents had not taken any steps whatsoever of informing the petitioners of their rights and had also not informed the relative of the petitioners about arrest of the petitioners. The daughter of the first petitioner, who was alone at home, was a mentally challenged girl, as is borne out from the certificate filed by the petitioners and consequently the respondents could not have effectively communicated to her about the arrest of the petitioners. In these set of facts, therefore, we are constrained to come to the conclusion that the petitioners on the day they were called to the police station had not taken any steps at committing suicide. In fact, the petitioners had withdrawn such a threat. The petitioners were called to the police station under a false pretext that an offence would be wregistered on the basis of the report of the first petitioner. We find no reason to question the case of the petitioners that they were detained in the police station and, thereafter, suddenly produced in the court of the Magistrate and to their dismay learnt that they had been arrested. There was no impending threat of the petitioners for committing suicide and in passing, therefore, we may say that their arrest and detention itself was not justified. However, the fact remains that the authorities have committed a blatant violation of the directives of the Supreme Court in D. K. Basu's case and the petition on that score deserves to succeed.

16. In respect of relief prayed by the petitioners for issuance of a writ of mandamus directing the authorities to register an offence, the petitioners have relied on the judgment of this court in Mrs. Charu Kishor Mehta vs. State of Maharashtra and anr. [2011 ALL MR (Cri) 173]. The Division Bench of this court in Charu Kishor's case came to the conclusion that in the peculiar facts of that case that a serious economic offence of fraud, embezzlement were alleged in relation to public trust property, the court directed the registration of the offence. A reference at this juncture may usefully be made to the judgments of the Supreme Court in Aleque Padamsee and ors. vs. Union of India and ors. [(2007) 6 SCC 171], Sakiri Vasu vs. State of U.P. [(2008) 2 SCC 409 and Kunga Nima Lepcha and ors. vs. State of Sikkim and ors. [(2010) 4 SCC 513]. The ratio of the said judgments of the Supreme Court clearly indicates that a writ of mandamus cannot be issued directing the police to register an offence as the party, who is aggrieved, has the alternate remedy of filing either a private complaint or an application under Section 156 (3) of Cr.P.C. In that light of the matter, therefore, according to us, the petitioners would not be entitled for a relief of issuance of a writ of mandamus directing the authorities to register an offence against the accused named by the petitioner no.1 in her complaint. We, therefore, relegate the petitioners to the remedies available to them in law.

17. A very disquieting incident is brought to our notice bythe petitioner by filing of an affidavit. The petitioners have filed an affidavit on 2/5/2013 during the midst of the hearing of the petition. In the affidavit, it is stated by the petitioner no.2 that on 26/4/2013 at about 10 p.m. two persons had assaulted him by stating that he had lodged a complaint against them. The petitioner no.2 further states that he hadimmediately gone to the Vashi Police Station, but the police refused to register his complaint and also arrested him by stick. Accordingly, petitioner no.2 was taken to theGovernment Hospital on 26/4/2013 and ultimately it appears that there is a fracture of the left thumb. It further appears that on the next day, the petitioner no.2 was taken to the Vashi Police Station and ultimately a non-cognizable offence under Sections 504 and 323 of IPC has been registered. Thedocuments submitted by the petitioner no.2 clearly indicate that there was a fracture of the thumb. It is extremely disturbing to note that during the pendency of this petition, which involved the illegal arrest and detention of the petitioners, the petitioner no.2 was subjected to this assault. Though no specific prayer is made in the petition, we are inclined to issue direction to the police officers to examine the necessary documents and if the report of the petitioner discloses the commission of a cognizable offence to take such steps as are available in law. We further direct that this exercise be carried out within a period of four weeks from today.

18. Coming to the question of awarding damages / compensation to the petitioners for their illegal arrest and detention, according to us, compensation / damages of Rs.3,00,000/- (Rupees Three Lakhs only) each to the petitioners would sub-serve the interest of justice.

19. Accordingly, this petition is partly allowed. We direct the respondents to pay each of the petitioners an amount of Rs.3,00,000/- (Rupees Three Lakhs Only) within a period of eight weeks from today, failing which the respondents shall be liable to pay interest at the rate of 10% per annum on the amount of Rs.3,00,000/- to each of the petitioners from that day till the amount is actually paid to the petitioners. We further direct the police

officers of the Vashi Police Station to examine the complaint submitted by the petitioner no.2 and other necessary documents in support of the grievous injury and if the complaint and the document discloses the commission of a cognizable offence, action in accordance with law be initiated. This petition stands dismissed in so far as it relates to the prayer of issuance of a writ of mandamus directing the police to register an offence on the basis of the complaint of the first petitioner. In that respect, we relegate the petitioners to avail alternate remedies available to them in law.

20. Rule is thus made absolute on the above terms. We quantify the costs of this petition at Rs.15,000/-. (MRS. MRIDULA BHATKAR, J.) (P.V. HARDAS, J.)

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LETTEER OF APPRECIATION BY SMT. MOHINI KAMWANI

To,
Advocate Shri Nilesh C. Ojha
Hon. National President
HUMAN RIGHTS SECURITY COUNCIL (HRSC)

Subject: Thank you for your Kind Help in my Case **in BHC**

I take this Opportunity to Thank you & your Team of Advocates & HRSC Members, for your Kind Help to me, a 79 year old Sr. Citizen Widow of a Freedom Fighter who went to Jail with Mahatma Gandhi ji in 1942 Quit India Movement.I was Fighting my own Case as Petitioner in Person in Hon. Bombay High Court, without an Advocate, when you & your Team Helped me, Throughout my Case, with giving me Case Laws,Guidance in Filing Affidavits, Amendments, Purshish, etc. without my asking + Without Charging me a Single Rupee !

You are like Angels of God for me, sent by God to Help a Poor 79 year Widow Arrested, Detained & JAILED ILLEGALLY. God does not give such Quality & Opportunity to Everyone: He gives it to a very few Chosen Ones like you & your Team at HRSC.

Millions of Blessings to you, your HRSC Colleagues & your Families from a Poor & Helpless 79 year Widow. May God Bless You ALL with Name, Fame & Prosperity.

With Highest Regards
Mohini Kamwani
MOB - 9920412577 - TEL - 022-27823443 - EMAIL
mohini.kamwani@Rmail.com
Address - 101, Mauli, I[sr] Floor, A-Wing, Plot No. 29-C. Sector 4, Vashi, Navi Mumbai

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RS. 3 LAKH INTERIM COMPENSATION TO FAMILY MEMBERS OF DECEASED DIED IN POLICE CUSTODY AT WARDHA

[News published in Daily Lokmat , Daily Sahasik Dt. 03 / 08 /2012]

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Cross Citation :2010-TLMHH-0-510 ,

BOMBAY HIGH COURT

(NAGPUR BENCH)

Hon'ble Judge(s) : S.A. BOBDE and A.B. CHAUDHARI,JJ

Shri. Deepak Shivaji Karande ....Vs...

3) Maharashtra State Human Rights Commission
4) **Shri Nilesh C. Ojha, National President, Human Rights Security Council**.

WRIT PETITION NO. 2697 OF 2010 **, June 16,2010**

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Protection of Human Rights Act, 1993 – Custodial Death – Illegal arrest – Section 151 of Cri. P.C. – The victim was asenior citizen of 78 years old – He was illegally detained by P.S.O. U.S. 151 of cri. P.C. under directions of S.P Wardha Smt. Ashwati Dorje – The Victim was not granted bail by the Tahsildar Deepak Karande – The victim died in jail – The son of victim filed petition before State Human Rights commission, Mumbai through Shri. Nilesh C. Ojha National President of Manav Adhikar Suraksha Parishad – Commission accepted the contention of the petitioner and directed Home secretary to take action against Smt. Ashwati Dorje, S.P. Wardha Shri. Deepak Karande, Tahsildar, Wardha and Shri V.D. Boite Jail Supreintendant, Wardha. The petitioner filed Writ petition challenging the legality of the order - It has been held by

High court that the order passed by State Human Rights commission is legal and does not require interference.

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JUDGEMENT

(1.) Heard learned counsel for the petitioner. The petitioner has challenged order of the Maharashtra State Human Rights Commission, Mumbai recommending that the disciplinary authority shall hold Departmental Enquiry into conduct of the petitioner and two others, in accordance with law, and complete the same as early as possible and preferably within three months. The learned counsel for the petitioner submitted that the order of the State Human Rights Commission is vitiated since admittedly, as recorded by the Commission itself, the petitioner was not heard. Learned counsel for the petitioner further submits that the Commission was bound to hear the petitioner before directing the initiation of enquiry since the proceedings before the Commission are judicial proceedings.

(2.) The Maharashtra State Human Rights Commission (hereinafter referred to as "the Commission") took cognizance of the complaint of one **Nilesh Ojha, President of Manav Adhikar Suraksha Parishad, Pusad**, who complained about the custodial death of one Shankar Ghume, at Wardha District Prison while in illegal detention due to the negligence of three officers of the Police including the petitioner. It is not necessary to go into the details of the custodial death except to observe that the Commission found, after hearing the Collector, Superintendent of Police and Superintendent, District Prison, Wardha that many questions arise regarding action of the police and the Jail authority and that the police should have exercised their discretion to release the deceased on bail, which was granted to him by the Court. The Commission has observed that it is reasonable to believe that the petitioner mechanically passed the order under Section 151 of the Code of Criminal Procedure and illegally refused the bail. However, without giving any finding whether the petitioner and other Police officers are indeed responsible for the custodial death, the Commission found it appropriate to direct that an enquiry should be held against them in connection with the custodial death in the light of its observations, particularly since the officers, including the petitioner, have not been heard.

(3.) Having heard the matter, there is no reason for us to hold that the order of the Commission directing the disciplinary authority to enquire into the conduct of the petitioner is vitiated only because the petitioner was not heard. Section 18 of the Protection of Human Rights Act, 1993, which is relevant, reads as follows.

"18. Steps during and after inquiry.- The Commission may take any of the following steps during or upon the completion of an inquiry held under this Act, namely:- (a) where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority - (i) to make payment of compensation or damages to the complainant or to the victim or the members of his family as the Commission may consider necessary; (ii) to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons; (iii) to take such further action as it may think fit; (b) approach the Supreme Court or the High Court concerned for such directions, orders or writs as the Court may deem necessary; (c) recommend to the concerned Government or authority at any stage

of the inquiry for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary; (d) subject to the provisions of clause (e), provide a copy of the inquiry report to the petitioner or his representative; (e) the Commission shall send a copy of its inquiry report together with the recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission; (f) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission."

It is obvious from Sub-Section (ii) above that upon completion of the enquiry before the Commission, which in this case has undoubtedly been completed, the Commission has discretion to recommend the Government or the concerned authority for prosecution or such other action as the Commission may deem fit. The words "such other suitable action" in (a) (ii) above, would clearly cover the holding of Departmental Enquiry.

(4.) The order of the State Human Rights Commission does not hold the petitioner guilty of custodial death but merely directs an enquiry into the matter. In this view of the matter, we see no reason to interfere with the impugned order. The writ petition is, therefore, dismissed. No order as to costs.

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MAHARASHTRA STATE HUMAN RIGHTS COMMISSION, MUMBAI

ADMINISTRATIVE STAFF COLLEGE COMPOUND, 9 HAJARIMAHAL , OPP. CST, MUMBAI-400001. TEL: 22050791 , FAX:22091804/22093678.
Website:http://mshrc.maharashtra.gov.in

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Case No.2248/2009-10
(Division Bench)

Name of the complaint : **Shri Nilesh Chandrabhushan Ojha**
National President ,
Manav Adhikar Suraksha Parishad,
R/o. Washim Road, Pusad,Dist.Yeotmal.

V/S

1. **Collector and District Magistrate, Wardha**
2. **Superintendent of police , wardha**

3. Superintendent,District Prision class-1 wardha

Date : 09.03.2010.
Coram :**Justice Kshitij R.Vyas(Former Chief Justice),** Chairperson**.**
Shri.Subhas Lalla, Former IAS Member

Proceedings
Per :Justice Khsitiji R. Vyas (Former Chief Justice), Chairperson.

1. The complainant **Nilesh Ojha, National President,Manav Adhikar Surakhsa Parishad**,Pusad, has taken up the Cause regarding custodial death of Shankar Ghume in this complaint.He has filed this complaint on the complaint received from Dilip Ghume, the son of the deceased .The complainant alleges that the victim expired at wardha District Prison due to negligence and illegal detention by the respondent . The complainant alleged that though bail had been granted to the victim , for the alleged offences under the Gambling Act, with a view to frustrate the said order, the victim was again booked U/S .151Cr.P.C. .The deceased was not released from prison ,Despite the fact that he has undergoing treatment for a heart/respiratory ailment , he was not given proper medical attention .The complainant has therefore , prayed /inquiry and action against the respondents. No. 2 and 3.

2. Dr. S,B. Yadav and Dr.P.G Dixit.,head of forensic Medical Dept., Government Medical College , Nagpur , in their report did not notice any marks of injury, fracture on the body of the deceased. As per the Chemical analyzer report of Shri .Sarothe . the Asstt. Chemical Analyzer,Regional Lab., Nagpur ,No poisonous substance was found in his body , and death occurred due to cirrhosis of Liver with Chornic Venous congestion. As per report dated 12.06.2009 submitted by Dr. .P.G. Dixit, he has also confirmed the death occurred due to above mentioned cause.

3. Over and above , the aforesaid reports, the S.P., Wardha , in his report it has pointed out that the deceased had never told the police regarding he being a patient of Asthma or heart problem.He also didn't complained regarding paining in the chest When P.I., Dhule met him .It is also pointed out that the p[olice infact took deceased to the hospital , when he complained about sever chest pain at 2 a.m. In Substance S.P., Wardha justified , police action taken against the complainant .

4. This being a CD Case , the District Magistrate , Wardha asked sub-divisional Magistrate , Hinganghat to hold magisterial enquiry, the commission vide its order dated 09.11.09 also called for the report of the enquiry.

InC ompliance with the said order the sub-divisional Magistrate ,Hinganghat produced the report. In the report the subdivisional Magistrate has recorded statements of as many as 29 persons. It is concluded that deceased Shankar Ghume, aged 67 died in wardha Central Jail , because of cirrhosis of Liver with Chronic Venous Congestion, could have been saved if proper treatment was provided to him.

5. After having gone through all reports produced in the case following facts emerge.

a. On 14.08.08 A.S.I., Gopal Singh Kochar of Wardha Police Station arrested 26 persons including Shankar Ghume , playing cards, Under prevention of Gambling Act. Deceased Shankar Ghume was kept in the lock up of the police station, wardha, at 5p.m. The complainant and his brother went to see their father in the police station, wardha with Advocate , shri Ramteke , who applied for bail .It is the say of the complainant , that his father , complained regarding sever pain in his chest and told them to take him to the house. Whole , completing the formalities of bail , the District Superintendent of Police , Wardha , Smt. Dorje reached the police station, at about 10.30 pm ., asked P.S.O shri. Ghule not to release any persons arrested and orderd to book all U/S. 151 Cr.P.C. . Accordingly deceased Shankar Ghume was again arrested U/S .151 Cr.P.c and couldn't be released on bail .On the same night at 2a.m , because of sever pain in the chest , wardha police took him to General Hospital , Wardha , Where doctors gave medicine and injection to him .Again Wardha Police took station and kept in lock up.

b. On 15.08.08 the deceased along with others produced before the Deputy Tahasildar , Wardha Shri Karande U/S .151 Cr.P.C . There also an application for bail along with documents to release the deceased was filed by the brother of the complainant .It was also requested that his father is heart and asthma patient and was not keeping well and was under continuous treatment .It is alleged in the complaint , though denied in the report that bail application was rejected deliberately by shri.Karande for nonpayment of bribe of Rs.2000/- In the result was sent to District Prison , wardha on the same day along with other accused persons.

It is alleged that the complainant and his brother thereafter went to wardha and requested the jail superintendent to admit the deceased in the

hospital for his proper treatment , as he was heart and asthma patient having sever pain in his chest. The jail Superintendent didn't accept the said request .

c. On 16.08.08 the deceased was released on bail. The complainant and his brother rushed to the jail with release warrant, however , the jail superintendent told them that as the time was over he would release on the next day.
d. On 17.08.08 before the complainant and his brother went to jail to take their father , one jal employee ,come to their house and told them that their father Shri. Shankar Ghume died in jail in the early morning .It is alleged that the deceased was not given proper treatment and was also not admitted in the hospital even though on 16.08.08 in the morning he complained the doctors of the jail about severe pain in his chest and difficulty in breathing .

With the aforesaid facts many question arise regarding the action taken by the police as well as the jail authorities. Even ignoring the gambling raid carried out by A.S.I , Shri Kochar and arresting accused including the deceased , on the ground , that the case is subjudice , the subsequent acts of the police are totally unreasonable and uncalled for and , therefore , not acceptable .**looking to the gravity of the offence , and the age and the aliment of the deceased, the police could have shown grace and discretion by releasing the deceased on bail**. Prima Facie we find substance in the allegations of the complainant that at 10.30 a.m. on 14.08.08 P.S.I. shri .Ghule of Wardha police station was , inclined to release the deceased on bail , he was prevented by S.P. Smt. Aswati Dorje , who ordered to book everybody U/S .151 Cr.P.C with the result the deceased had to remain in the lockup on the night of 14/15.08.08. In our opinion. S.P. Dorje couldn't have taken recourse to section 151 Cr. P.c against the deceased, since the deceased was charged not in the serious offences. Smt. Dhorje could have appreciated the old age and aliment of the deceased. There is no reason for us, not to believe the version , of the complainant that he had already informed the police about the development of chest pain of the deceased **Hon'ble Supreme Court in Jogindar Kumar's Case (1994) 4 S.C.C 260** has laid down that Except in heinous offences like murder , dacotiy, robbery , rape etc .an arrest must be avoided . The power to arrest must be avoided when the offences are bailable and in that there is strong apprehension of the suspect absconding.

In our opinion S.P Dorje while totally ignoring the aforesaid guidelines in the judgment rendered by the Hon'ble Supreme court, misuse her power in ordering arrest of the deceased u/s 151 Cr.P.C

6. It was a matter of fact, the deceased had severe chest pain and was infact taken to the hospital at 2 a.m. on the same night. We have reason to believe that the said facts must have been brought to the notice of Naib Tahasiladar ,Shri Karande, Wardha when the deceased was produced before him on the nest day that is on 15.08.08. Even without giving any importance to the allegations of Rs .2000/- being demanded by She. Karande in releasing the deceased on bail, prima facie it appears that he has failed to take into consideration the request made to release the deceased on bail , prima facie it appears that he has failed to take into consideration the request made to release the deceased on bail because of his sever pain .BY ignoring the fact that the deceased , was already given medical treatment in the Government Hospital ,at Mid–night of the same day, it is reasonable to believe that he has mechanically passed the order, U/S 151 Cr.pc and illegally refused bail.

7. Like wise in our opinion the jail superintendent of District Prison, wardha is also Prima Facie responsible for not admitting deceased Shankar Ghume in the hospital even though he was specially informed regarding sever chest pain of the deceased and thus denying him proper treatment on 16.08.08 It is to be noted that the deceased died in the early morning of 17.08.08.

8. The aforesaid findings prima facie will hold three officers namely smt. Aswati Dor je , S.P., Wardha , Shri Dipak Karande , Naib Tahasiladar , Wardha and Shri V.D. Bhotie, the jail superintendent in performance of their duties responsible for the untimely death of shri.Ghume.We agree with findings recorded by sub divisional Magistrate ,Hinganghat, that proper and timely medical treatment could have, then saved the life of the deceased.

9. Since we have not heard the aforesaid officers' .It is necessary that an inquiry should be held against them in connection, with the untimely death of deceased Shankar Ghume in light of observation made by us.

10. In the result the following recommendatory directions are given . **The appointing authorities of Smt. Aswati Dorje, S.P., Wardha ,Shri .Dilip Karande, Naib Thasildar, Wardha,Shri .V.D.Bhoite,jail Superintendent, Wardha shall hold Departmental Enquiry ,against them , in accordance**

with law and rules made under and shall complete the same as early as possible preferably within 3 months from the date of the receipt of his order, and shall file compliance report to this commission.

Subject to giving further , recommendations , on the compliance report, the case is closed.

The secretary of this commission to communication these recommendation to Government (through secretaries of concerned departments) and expedite compliance as his level.

(Subhas Lalla) **(Justice Kshitiji R.Vyas)**
Member **Chairperson**

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2ND ADDITIONAL SESSIONS JUDGE, THANE.

ORDER BELOW EXH. I

IN CRIMINAL BAIL APPLN. NO. 712/2013

Date : 17.04.2013

1. The applicant/accused who has been arrested on 03.04.2013 for offences punishable under sections 465, 468/ 471, 472, 473, 474, 475, 420 read with section 34 of the I.P.C. registered under section C.R.No.1-110/2013 of Kasar Vadavali Police Station by crime Branch, Wagle Estate Unit, Thane on the basis of the F.I.R. dated 26.03.2013 has preferred this application for being released on bail on the ground that he is innocent. There is no evidence to link the applicant with the alleged offence and that in view of the specific law laid down by the Hon'ble High Court in the case of KHEMLO SAKHARAM SAWANT VS. STATE 2002-BCR-(I)-689 and also in the case of SANJAY CHANDRA VS. C.B.I. 2012(1) SCC (Cri) 26 the accused is entitled for bail. The applicant/accused is ready to abide by all the conditions which may be imposed by the Court. There are no criminal antecedents shown by the police against the applicant. Hence prayed for allowing the application.

2. The prosecution resisted the said application by filing the reply through police inspector Mr. Vijay Shinde of Crime Branch Wagle Estate Unit, Thane below Exh.4 where they went on to submit that the accused Deenadayal Yadav had prepared false and fabricated documents relating to the police licence in respect of running of the security agencies and one of such fake licences was given to the applicant who

was running his security agency by representing that the said licence was genuine and the said fake licence came to be seized from the applicant. Since the investigation is going on in order to ascertain as to whom all such fake licences have been given for running security agencies and further an offence under section 20 of Maharashtra Private Security Agency Act, 2005 has been lodged against the above said applicants under C.R.No. 385/2009, he may not be released on bail and therefore for all the above reasons pressed for the rejection of the bail application.

3. The learned advocate for the applicant argued that Section 467 I.P.C. will not be attracted in the instant case against the applicant as going by the prosecution case itself the preparation of the forged documents was carried by accused Deendayal Yadav. He pointed out that the said Deendayal Yadav is an office bearer of the union of security agencies and therefore it explains as to how the present applicant may have contacted Deenadayal Yadav who may have promised to get the said licence from the competent authority. Therefore, probably he may have acted as an agent for getting the said licence. So it is very difficult at this stage prima facie to believe that the applicant/accused was having any knowledge as to whether the said licence was a fake one.

4. There is no quarrel regarding the proposition of law that ordinarily the person suspected to have committed offence under section 420, 120B I.P.C. would be entitled to bail as laid down by the Apex Court in the case between **CHANDRASWAMI VS. C.B.I. 1997 CRI.L.J. 3124**. In the case between **SANJAY CHANDRA VS. C.B.I. 2012(1) SCC (Cri) 26** bail is the rule and jail is an exception. The jurisdiction to grant bail has to be exercised on the basis of well settled principles and not in arbitrary manner. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Further, at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken. In the case between **KHEMLO SAKHARAM SAWANT VS. STATE 2002-BCR-(I)-689** also it has been held that the Court should not get swayed away by perception of morality but should confine its decision to the requirement of law. **In case of offences not punishable with death or imprisonment for life, grant of bail is rule and jail is an exception**.

6. Now, in the instant case since the allegation of preparing false and fabricated licence is against accused Deendayal Yadav, naturally on the face of it section 467 of I.P.C. will not be applicable against the

aplicant. Since I have already held that accused Deendayal Yadav was the office bearer of the union of security agencies and may have promised the applicant to procure licence from the Commissioner of Police, there is every likelihood of the said applicant/accused having approached the said accused Deendayal for getting the licence from him. So at this stage it is too early to say that the applicant/accused was having knowledge that the said licence which was being used by him for running security agency a forged and fabricated document. The said aspect would be certain taken into consideration at the time of the evidence at appropriate stage by the Court.

6. Now, the police is seeking rejection of the bail application on the sole ground that they are required to ascertain as to whom, apart from the applicant, such fake licences have been given by the accused Deendayal Yadav. Now, for ascertaining said fact there is no question of detaining the present applicant in jail. On the other hand, if the applicant/accused is released on bail and if any condition is imposed on him to co-operate the investigating machinery, that will be more helpful to investigate as to who are the other persons who have been provided such fake licence by accused Deendayal Yadav. Thus, if under such circumstance the applicant/accused is detained in jail, that will amount to punishment without any trial which of course will take some time for its disposal. Hence at this stage I am inclined to release the applicant/accused on bail. I therefore pass the following order –

ORDER

The application is allowed.

The applicant/accused is released on P.R. bond of Rs. 15,000/- (rupees fifteen thousand only) with one surety in the like amount, subject to following conditions -

The applicant shall attend before the investigating officer on' Monday and Friday of each week between 5.00 p.m. to 800 p.m. till further orders and shall co-operate with the investigating machinery in all respects.

He shall not tamper with prosecution evidence and shall also not threaten any prosecution witnesses.

Bail before the concerned J.MF.C.Thane.

Date : 17.04.2013 **(K.R.Warrier)**

2nd Additional Sessions Judge, Thane.

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-: CHAPTER = 12 :-

PROSECUTION OF PUBLIC / GOVT. SERVANTS

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Cross Citation : (2011) 2 Supreme Court Cases (Cri) 1015

(2011) 6 Supreme Court Cases 508

SUPREME COURT OF INDIA

(BEFORE G.S. SINGHVI AND DR. B.S, CHAUHAN, JJ.)

Noida Intrapriniurs Association Petitioner
Writ Petitions (C) No. 150 of 1997t with No, 529 of 1998,
decided on May 9,2011

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A) Inference regarding mala fide exercise of power — When can be made — Undue haste — Allegedly public authority awarding similar work to contractor without inviting tenders when there was no urgency for said haste — On account of such haste in the absence of any urgency, Court can draw an adverse inference regarding the conduct of said public authority — Therefore, it is a matter of investigation to find out whether there was any ulterior motive – C.B.I. directed to conduct preliminary enquiry.

B) Constitution of India — Arts. 32, 14 and 21 — Public Interest Litigation (PIL) — Alleged corruption by public servant — Preliminary CBI inquiry — Public servant allegedly indulging in illegal, arbitrary and colourable exercise of power for favouring himself in allotment and conversion of land and also favouring contractors in awarding tenders and illegally "extending" contractual work for large sums awarding to same contractor additional work worth Crores more than the original work without inviting fresh tenders, without following prescribed procedure and without verifying as to whether contractor was eligible for said additional work — Said award of contract, held, is not permissible — Awarding the contract under the garb of so-called extension amounts to doing something indirectly which may not be permissible to be done directly — Work being worth in Crore more than the amount of original contract cannot be termed as an "addition" or "additional work"

C) Administrative Action — Administrative or Executive Function — Scope for initiating criminal proceedings distinguished from disciplinary proceedings -Doctrine of public trust and manner of utilisation of power vested in State and public authorities, reiterated — Actions of State or its instrumentality must be reasonable and fair and must be exercised

for a bona fide purpose - The State or the public authority which holds the property for the public or which has been assigned the duty of grant of largesse, etc., acts as a trustee and, therefore, has to act fairly and reasonably. A public authority is ultimately accountable to the people in whom the sovereignty vests. (Para 38)

D. Prevention of Corruption Act, 1988 — Ss. 19 and 13 — Corruption cases against public officers after retirement — Held, criminal proceedings after delay against a public officer would depend upon the gravity of offence — Scope for initiating criminal proceedings distinguished from disciplinary proceedings — In present case, despite the matter being 17-18 years old, being of 1993-1995, preliminary CBI inquiry directed by Supreme Court, to determine if there were grounds to initiate criminal proceedings against retired IAS officers concerned — Offence liable to be punished with more than 3 years' imprisonment — No limitation therefore.

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Advocates who appeared in this case :

P.P. Malhotra, Additional Solicitor General, Dr. Rajeev Dhavan (Amicus Curiae), PS. Narasimhan, K.T.S. Tulsi and Rakesh Dwivedi, Senior Advocates [Nikhil Nayyar (Amicus Curiae), Dayan Krishnan (Amicus Curiae), Rakesh U. Upadhyay, Abhijeet Kaketi, E.C. Vidya Sagar, Ms Sangeeta Kumar, Nikhil Sharma, T.A. Khan, M. Khairati, A.K. Sharma, Ravi Prakash Malhotra, Vibhu Tiwari, Ms Deepti R. Mehrotra, Ravinder Singh* M.S. Yadav and Jogy Searia, Advocates] for the appearing parties;

Dr. B.S. CHAUHAN, J.

1. The Legislature of Uttar Pradesh enacted the U.P. Industrial Area Development Act, 1976, (hereinafter referred to as `Act 1976') for the purpose of proper planning and development of industrial and residential units and to acquire and develop the land for the same. The New Okhla Industrial Development Authority (hereinafter referred to as the `Authority'), has been constituted under the said Act, 1976. The object of the Act had been that genuine and deserving entrepreneurs may be provided industrial and residential plots and other necessary amenities and facilities. Thus, in order to carry out the aforesaid object, a new township came into existence. All the activities in the Authority had to be regulated in strict adherence to all the statutory provisions contained in relevant Acts, Rules and Regulations framed for this purpose. However, from the very inception of the

township, there has always been a public hue and cry that officials responsible for managing the Authority are guilty of manipulation, nepotism and corruption. Wild and serious allegations of a very high magnitude had been leveled against some of the officials carrying out the responsibilities of implementing the Act and other statutory provisions.

2. The instant writ petition was originally filed seeking a large number of reliefs including the allotment of industrial and residential plots to the members of the petitioner-Association and a large number of officials who had acted as Chief Executive Officers (hereinafter referred to as `CEO') of the Authority had been impleaded therein as respondents. However, considering the fact that relief for personal benefits of the members had been sought and alternative means for seeking the redressal of grievances in that respect were available, the petitioner made a request to the Court that its petition may be treated as a public interest litigation (in short `PIL') for a limited purpose. This Court vide order dated 21.4.1997 treated the matter as PIL and issued show cause notice only to the extent of the following reliefs:

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"(1) Issue writ of mandamus and/or any appropriate writ and direct the CBI to investigate into all the land allotments and conversion of lands made by the NOIDA during the past 10 years.

(2) Issue an appropriate writ and directions and frame guidelines for allotment of lands by the NOIDA."

3. Dr. Rajeev Dhavan, learned senior counsel who had been appearing for the petitioner in the matter was requested by this Court vide order dated 29.8.1997 to act as Amicus Curiae. The matter was heard several times by this Court and after scrutinising of a very large number of documents, the Court was of the opinion that the allegations made in the petition required investigation. Thus, vide order dated 15.12.1997, this Court issued notice to the State of U.P. to indicate its consent to an investigation being made by the Central Bureau of Investigation (hereinafter referred to as CBI), in view of the very serious nature of the allegations. The State of U.P. had also received similar complaints and thus, it constituted a Commission of Inquiry headed by Justice Murtaza Hussain, a former Judge of Allahabad High Court to enquire about the same. The Commission completed its task and submitted its report. The said report was also placed before this Court in the first week of January 1998. As the report indicated, prima facie view of the 3 Commission, that Mrs. Neera Yadav, IAS, respondent no.7 had committed serious irregularities and illegalities, a copy of the report of the Commission was also directed to be given to her and this Court vide order dated 6.1.1998 asked the State of U.P. as to whether this report had been accepted by the State Government and, if so, what was the likely follow up measure pursuant thereto. The State Government submitted a reply in response to the said show cause pointing out that the State Government proposed to initiate disciplinary proceedings against her.

4. In view of the material on record, this Court expressed tentative opinion that it would be more appropriate that the matter is investigated by the CBI and if such investigation discloses the commission of criminal offence(s), the persons found responsible should be prosecuted in a criminal court. However, considering the fact that allegations of a very high magnitude and gravity had been made against a large number of officials, this Court wanted the CBI to investigate first the cases against Mrs. Neera Yadav, IAS, respondent no.7, as is evident from the proceedings dated 20.1.1998, which reads as under:

"For the time being, we are directing the CBI to conduct an investigation in respect of the 4 irregularities in the matter of allotments and conversions of the plots.....

Shri G.L. Sanghi, the learned senior counsel

appearing for respondent no.7 states that though the respondent no.7 does not admit that she has committed any irregularity in the matter of allotment or conversion of plots in NOIDA but according to respondent no.7 there are other persons who might have committed such

irregularity and she seeks leave to file an affidavit in this regard. She may file an affidavit giving particulars of such irregular allotments and in the event of such affidavit being filed further directions in that regard will be given." (Emphasis added)

This Court by the same order also issued certain directions with regard to irregular allotments and conversion of plots which had been found to have been made in the report of Justice Murtaza Hussain Commission.

5. In view of the above referred to order, Mrs. Neera Yadav, IAS, respondent no.7 filed her affidavit with regard to irregularities committed by other officers, namely, Shri P.K. Mishra, respondent no.5; Shri Bijendra Sahay, respondent no.8; Shri Ravi Mathur, respondent no.4; and one Shri S.C. Tripathi. The affidavit filed by Mrs. Neera Yadav, IAS, respondent no.7 was considered by this Court on 24.2.1998 and took note of the fact that in respect of the 5 same/similar allegations made against Shri Bijendra Sahay, respondent no.8, the State Government had already accepted his explanation. So far as the allegations made against Shri Ravi Mathur, IAS, and Shri P.K. Mishra, respondent nos. 4 and 5 respectively and one Shri S.C. Tripathi are concerned, the State Government vide order dated 18.7.1997 had referred the same to the Chairman of the Board of Revenue for inquiry and the same was pending.

6. In the meanwhile, Shri Mahinder Singh Yadav, husband of Mrs. Neera Yadav, IAS, respondent no.7 and one Shri Bali Ram, Ex. Member of Parliament also filed complaints against the aforesaid officials in 1996-1997, which were also referred to the Chairman, Board of Revenue for inquiry.

7. One Shri Naresh Pratap Singh also filed a complaint against some officers including Shri Ravi Mathur, IAS, respondent no.4 on 27.6.1997 before the Lok-Ayukta of U.P. However, the Lok-Ayukta vide letter dated 21.4.1998 to the State Government expressed his inability to conduct an enquiry against Shri Ravi Mathur, IAS, respondent no.4 and suggested that the matter be referred to the CBI. 6

8. This Court vide order dated 11.1.2005 constituted a Commission headed by Justice K.T. Thomas to examine a large number of issues, including as to why disciplinary proceedings had been dropped by the State of U.P. against several officials who had been impleaded as respondents in this case. The Commission submitted the report dated 24.12.2005, and after considering the same, this Court vide order dated 8.12.2008 closed the proceedings against Shri Bijendra Sahay, respondent no.8. One Shri S.C. Tripathi also stood exonerated in earlier proceedings.

In view of the order passed by this Court, the CBI conducted the enquiry against Mrs. Neera Yadav, IAS, respondent no.7 and filed a charge sheet against her. She was put on trial and proceeded with in accordance with law.

9. Thus, in view of the aforesaid factual matrix, this Court has to examine as to whether any action is warranted against Shri Ravi Mathur, IAS, respondent no.4 and if so, whether it is permissible to initiate the disciplinary proceedings against him as he reached the age of superannuation and has retired and the alleged misconduct had been committed by him in 1993-94, and as to whether the misconduct is of such a grave nature that it warrants the criminal prosecution and 7 if so, what should be the agency which may be entrusted with the investigation and prosecution.

10. Shri K.T.S. Tulsi, learned senior counsel appearing for respondent no.7 submitted that on similar allegations, this Court had directed CBI to initiate criminal proceedings against his client and criminal prosecution has been launched and ended in logical conclusion, thus, there could be no justification not to initiate the similar proceedings against Shri Ravi Mathur, IAS, respondent no.4. Not initiating the proceedings on the similar or more grave charges would amount to treating the said respondent no.7 with hostile discrimination. The disciplinary proceedings cannot be initiated against him in view of delay and latches as the statutory rules applicable do not permit such a course at such a belated stage. The criminal prosecution can easily be launched. The matter requires investigation as to whether the said respondent no.4 had committed an offence under the provisions of Prevention of Corruption Act, 1988 (hereinafter called the Act 1988).

11. Dr. Rajeev Dhavan, learned senior counsel/Amicus Curiae would submit that the gravity of allegations made against the said 8

respondent no.4 is of such a high magnitude that it warrants the same treatment as given to Mrs. Neera Yadav, IAS, respondent no.7. Dr. Dhavan has taken us through all the proceedings including the reports of the Chairman, Board of Revenue and K.T. Thomas

Commission and submitted that it is a fit case directing the CBI to conduct enquiry against the respondent no.4. However, Dr. Rajeev Dhavan has raised serious objection in respect of intervention of the respondent no. 7 and opportunity of hearing accorded to Shri K.T.S. Tulsi, learned senior counsel on her behalf that in a case of this nature the respondent no.7 had no locus standi and right to raise any grievance whatsoever.

12. Shri Rakesh Dwivedi, learned senior counsel appearing for respondent no.4, has vehemently opposed the initiation of disciplinary proceedings or criminal prosecution on the ground that the Authority did not suffer any financial loss. There is nothing on record to show that the said respondent indulged in corruption, thus, the provisions of the Act 1988 were attracted. The said respondent had acted in good faith. The disciplinary proceedings cannot be initiated, being time barred. All the allegations had been made against the said respondent no.4 at the behest of respondent no.7, thus, suffers from mala fide and bias. The said respondent had paid the transfer charges only once to 9 the tune of Rs.1.80 lacs. The second conversion had subsequently been cancelled by the respondent no.7 herself. Due to pendency of this case, the said respondent could not get the physical possession of any of the plots. The change of user of the land in Sector 32 was made in good faith. More so, such a change was cancelled and the green area was restored by the respondent no.7 herself. The contract given by the respondent no.4 to certain contractors had been at the rate on which they had been working earlier. Thus, the Authority did not suffer any loss whatsoever.

13. Before we proceed with the case on merits, we would like to make it clear that Mrs. Neera Yadav, IAS, respondent no.7, had been given an opportunity by this Court vide order dated 20.1.1998 to file her affidavit disclosing the delinquency committed by other officers. In pursuance of the said order, she submitted her affidavit. Therefore, it is not possible for us at such a belated stage to deny her the right of hearing and ignore the submissions made by her counsel, Shri K.T.S. Tulsi. (vide: V.S. Achuthanandan v. R. Balakrishna Pillai & Ors., (2011) 3 SCC 317).

14. We have considered the rival submissions made by learned counsel for the parties and perused the record.

15. The services of Shri Ravi Mathur, IAS, respondent no.4 stood governed by All India Services (Death-cum-Retirement Benefits) Rules, 1958. Rule 6(b), thereof, provides that in case the delinquent had already retired, the proceedings shall not be instituted against him without the sanction of the Central Government and shall be in respect of an event which took place not more than four years before the institution of such proceedings. Thus, it is evident that law does not permit holding disciplinary proceedings against Shri Ravi Mathur, IAS, respondent no.4 at this belated stage and this view stands fortified by the judgments of this Court in B.J. Shelat v. State of Gujarat & Ors., AIR 1978 SC 1109; State Bank of India v. A.N. Gupta & Ors., (1997) 8 SCC 60; State of U.P. & Ors. v. Harihar Bholenath, (2006) 13 SCC 460; UCO Bank & Anr. v. Rajinder Lal Capoor, AIR 2007 SC

2129; Ramesh Chandra Sharma v. Punjab National Bank & Anr., (2007) 9 SCC 15; and UCO Bank & Anr. v. Rajinder Lal Capoor, AIR 2008 SC 1831.

16 So far as the initiation of criminal proceedings is concerned it is governed by the provisions of Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.). Section 468 thereof puts an embargo on the court to take cognizance of an offence after expiry of 1 limitation provided therein. However, there is no limitation prescribed for an offence punishable with more than 3 years imprisonment. Section 469 declares as to when the period of limitation would start. Sections 470-471 provide for exclusion of period of limitation in certain cases. Section 473 enables the court to condone the delay provided the court is satisfied with the explanation furnished by the prosecution or where the interest of justice demands extension of the period of limitation.

This Court in Japani Sahoo v. Chandra Sekhar Mohanty, AIR 2007 SC 2762, dealt with the issue and observed as under: "14. The general rule of criminal justice is that a crime never dies. The principle is reflected in the well-known maxim nullum tempus aut locus occurrit regi (lapse of time is no bar to Crown in proceeding against offenders)..... It is settled law that a criminal offence is considered as a wrong against the State and the Society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a Court of Law has no power to throw away prosecution solely on the ground of delay. Mere delay in approaching a Court of Law would

not by itself afford a ground for dismissing the case though it may be a relevant circumstance in reaching a final verdict."

17. The aforesaid judgment was followed by this Court in Sajjan Kumar v. Central Bureau of Investigation, (2010) 9 SCC 368. 1

18. Thus, it is evident that question of delay in launching criminal prosecution may be a circumstance to be taken into consideration in arriving at a final decision, but it cannot itself be a ground for dismissing the complaint. More so, the issue of limitation has to be examined in the light of the gravity of the charge.

19. Thus, we have to examine as to whether the said respondent could be tried for commission of an offence, if any, under the provisions of the Act, 1988.

Section 13 thereof, reads:

"Criminal misconduct by a public servant.- (1) A public servant is said to commit the offence of criminal misconduct,-

(b) .....

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him

or under his control as a public servant or

allows any other person to do so; or

(d) if he, -

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable

thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any 1 other person any valuable thing or

pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing

or pecuniary advantage without any

public interest." (Emphasis added)

20. Shri Ravi Mathur, IAS, respondent no.4 had been the CEO, NOIDA from July 1993 to 9.1.1994 and the CEO, Greater NOIDA from 10.1.1994 to 26.1.1995. Altogether, there had been 14 allegations against him which the Chairman, Board of Revenue had examined. The findings recorded by the Chairman, Board of Revenue were also placed before Justice K.T. Thomas Commission. However, at the time of arguments, Dr. Rajeev Dhavan, learned Amicus Curiae has submitted that there are three major allegations in respect of which this Court must direct the CBI enquiry. He has drawn our attention to the findings recorded by the Chairman, Board of Revenue on allegation nos. (iv), (ix) and (xiii) which are as under : Allegation No. (iv) :

Shri Ravi Mathur allotted contracts worth Rs.10 crores to different contractors on selection basis without inviting tenders.

Findings:

(i) The award of the contract to M/s. Anil Kumar & Co., was approved by the CEO. The argument that the usual 1 process was not followed on account of urgency is not acceptable. (para 1.4.3.2)

(ii) The award of the contract to M/s. Techno Construction Co. was a pre-detemined decision. No satisfactory explanation why this company only was selected. (para 1.4.3.3.) (iii) The notes in the file for the award of the contract to M/s. Anil Kumar & Co. in Sector Gamma were tailor made and the urgency projected cannot be accepted. (para 1.4.3.4) (iv) There was no urgency warranting the award of contract to Mr. J.K. Jain, which was approved by the CEO also. (para 1.4.3.5)

(v) The proposal to award work to M/s. Fair Deal Engineers was faulty and the urgency clause was not well defined. The note was approved by the CEO. (para 1.4.3.6)

(vi) The argument of urgency advanced is not acceptable in some cases (para 1.4.4). At least in one case there was not even a necessity to award the work. (para 1.4.4) (vii) No cogent regions were given in the note file for selecting a particular contractor. Some of the notes appear to be tailor made. The works were got done by the Manager/Senior Manager through hand picked contractors without inviting tenders and without following financial norms. (para 1.4.4.)

Allegation No. (ix):

Shri Ravi Mathur caused financial loss to NOIDA by not paying conversion charges with respect to the plot allotted to him. He initially asked for conversion from Sector 35 to Sector 27 but since he did not deposit the required amount the offer of conversion was withdrawn. Subsequently he applied for conversion from Sector 35 to Sector 44.

Findings:

The only conversion which took place was from Sector 35 to Sector 44 for which conversion charges were deposited. It is a matter under the exclusive competence of the Authority and its Chief Executive as to whether it was to be treated as two conversions or one conversion only. It appears that it was a subtle and fine way to help a fellow officer. In any event Smt. Neera Yadav had approved the second application on 26.10.1994. The file regarding the allotment and conversion of plot of Shri Ravi Mathur is not traceable in NOIDA but that is for the Authority to take appropriate action. (para 1.9.5) Allegation No. (xiii):

A 13 hectare City Park situated near Sectors 24, 33 and 35 in NOIDA was destroyed and a new residential Sector 32 in violation of the Master Plan was carved out comprising of 200 plots.

Findings:

(i) The procedure as prescribed in the 1991 Regulations was not followed while making the change of land use. (para 1.13.7)

(ii) The decision of land use change was based on logic but the proposal should have been put up before the Board. The then Chief Architect Planner did not point out this legal requirement and failed in his primary duty in advising the ACEO and CCEO. (para 1.13.7)

(iii) There was no urgency for the development work in this sector. The development work was started and awarded without following the tender procedure in flagrant violation of established procedure for which the then Chief Project Engineer and the then General Manager (F) are responsible. (para 1.13.7)

(iv) The Board has taken its duties casually and there was no serious effort to check, analyse and advise. (para 1.13.7) 1

21. So far as these allegations are concerned, it is evident from the record that M/s Anil Kumar & Co. had been allotted originally the work on the basis of tender for Rs. 2.75 crores in Sector `Gamma' in Greater NOIDA, in connection with the construction of water drains. However, they had been awarded additional work by Shri Ravi Mathur, IAS, respondent no. 4, worth Rs.3.75 crores on a &quot;deviation basis&quot;. In fact, awarding such work cannot be termed as an `addition' or `additional work' because the work is worth Rs.1 crore more than the amount of original contract. In such a fact-situation, even if there had been no financial loss to the Greater NOIDA, indisputably, the additional work for such a huge amount had been awarded without following the procedure prescribed in law. More so, there is nothing on record to show as to whether the said contractor M/s Anil Kumar & Co. was eligible to carry out the contract worth Rs.6.50 crores. Awarding the contract under the garb of so-called extension, amounts to doing something indirectly which may not be permissible to do directly. Admittedly, such a course of action is not permissible in law.

22. It is a settled proposition of law that whatever is prohibited by law to be done, cannot legally be affected by an indirect and circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud", which means" "whenever a thing is prohibited, it is prohibited whether done directly or indirectly". (See: Swantraj & Ors. v. State of Maharashtra, AIR 1974 SC 517; Commissioner of Central Excise, Pondicherry v. ACER India Ltd., (2004) 8 SCC 173; and Sant Lal Gupta & Ors. v. Modern Co-operative Group Housing Society Ltd. & Ors., JT (2010) 11 SC 273).

23. In Jagir Singh v. Ranbir Singh & Anr., AIR 1979 SC 381, this Court has observed that an authority cannot be permitted to evade a law by "shift or contrivance." While deciding the said case, the Court placed reliance on the judgment in Fox v. Bishop of Chester, (1824) 2 B &C 635, wherein it has been observed as under:- "To carry out effectually the object of a statute, it must be construed as to defeat all attempts to do, or avoid doing in an indirect or circuitous manner that which it has prohibited or enjoined."

24. The second work had been allotted to M/s Techno Construction Co. worth Rs.1.00 crore without inviting fresh tenders etc., on the ground that earlier a contract for execution of similar work i.e. construction of road had been awarded to it. In view of the fact that there was no urgency, such a contract should not have been awarded. Undoubtedly, the respondent no.4 is guilty of proceeding in haste and that amounts to arbitrariness.

25. While dealing with the issue of haste, this Court in the case of Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia & Ors., (2004) 2 SCC 65, referred to the case of Dr. S.P. Kapoor v. State of Himachal Pradesh & Ors., AIR 1981 SC 2181 and held that:

".....when a thing is done in a post-haste manner, mala fide would be presumed."

26. In Zenit Mataplast Private Limited v. State of Maharashtra & Ors., (2009) 10 SCC 388, this Court held : "Anything done in undue haste can also be termed as arbitrary and cannot be condoned in law".

27. Thus, in case an authority proceeds in undue haste, the Court may draw an adverse inference from such conduct. It further creates a doubt that if there was no sufficient reason of urgency, what was the occasion for the respondent no.4 to proceed in such haste and why fresh tenders had not been invited.

28. It is evident from the record that the respondent no.4 had originally been allotted plot no.118, Sector-35 measuring 360 sq. meters which was converted to plot no.G-25, Sector-27 measuring 392 sq. meters. However, as the respondent no.4 did not deposit the required charges the said order of conversion stood withdrawn. By subsequent conversion, respondent no.4 got plot no.A-15 in Sector-44. Thus, two conversions had been made on different dates. However, he paid the transfer charges only once to the tune of Rs.1.80 lacs. It is alleged that by first conversion, the respondent no.4 not only got the plot in a better location, but also a plot of bigger size. Second allotment was further, as alleged, in a far better geographical position.

29. There is no provision under the Act 1976 or Regulation 1991 for conversion. It is rather governed by Office Order No.4070/ NOIDA/DCEO/92 dated 3.7.1992. The relevant part thereof basically provides that conversion was permissible only in case of residential plots. Relevant part thereof reads as under:

"3. In case of residential plots, only cancelled and surrendered properties shall be offered for conversion.....

The details of availability of properties shall

be available in the office of Dy. Chief Executive Officer.

xx xx xx

xx xx xx

6. All expenses pertaining to conversion such as conversion charges, locational benefit charges, stamp duty, registration charges etc. shall be borne by the allottee.

xx xx xx

8. Conversion shall not be allowed more than once to any allottee.

xx xx xx

11. Chairman-cum-Chief Executive Officer may relax the above guidelines in exceptional circumstances."

30. The aforesaid Office Order dated 3.7.1992 stood modified vide order dated 27.9.1993 (when the respondent no.4 was the CEO, NOIDA) to the effect that a large number of vacant plots were available in old developed sectors. The same may be included in the plots availability list.

31. That the list of available plots had been expanded during the period when the respondent no.4 was CEO, NOIDA and unallotted plots of various sectors including Sector 27 were also included in that list in which the respondent no.4 himself got the first conversion. It is a matter of investigation as to whether the Order dated 3.7.1992 was modified vide Order dated 27.9.1993 with ulterior purpose.

32. Section 12 of the Act 1976 makes the provisions of Chapter VII and Sections 30, 32, 40 to 47, 49, 50, 51, 53 and 58 of the U.P. Urban Planning and Development Act 1973 (hereinafter referred to as the `Act 1973') mutatis mutandis applicable to the Act 1976. Section 17 of the Act 1976 declares that the Act 1976 would have an over- riding effect over the provisions of the Act 1973. Section 18 confers the power on the State Government to make rules by issuing a Notification for carrying out the purposes of the Act 1976. Section 19 of the Act 1976 provides for the framing of regulations by the NOIDA in respect of holding of meetings; defining the powers and duties of the CEO; and management of properties of the Authority etc. In view thereof, the New Okhla Industrial Development Area (Preparation and Finalisation of Plan) Regulations 1991 (hereinafter called as `Regulations 1991') had been framed with the prior approval of the State Government as required under Section 19 of the Act 1976 and, therefore, have statutory force. By virtue of the provisions of sub- section 2(b) of Section 6 of the Act 1976, it is a statutory requirement that in the plan to be prepared by the NOIDA, it must necessarily provide as to for what particular purpose any area/site is to be used, namely, industrial, commercial or residential. The Authority is competent under sub-section 2(c) of Section 6, to regulate the construction etc. having regard to the nature for which the site has been

earmarked. Section 8 of the Act 1976 restrains the use of any site for the purpose other than for which it is earmarked in the Master Plan. Section 9 prohibits the use of any area or erection of any building in contravention of Regulations 1991. Section 14 of the Act 1976 clearly provides for cancellation of allotment and resumption/re- entry, where the allotment had been made in contravention of the rules and regulations. In case the Authority wants to change the user of the land, condition precedent remains to amend the Master Plan.

33. There is nothing on record to show that any amendment had ever been made either in the Master Plan or in the Regulations 1991 before the change of user of land, when a 13 hectare City Park situated near Sectors 24, 33 and 35 was abolished and a new residential Sector 32 was carved out comprising 200 plots. Even if the said change made by Shri Ravi Mathur, IAS, respondent no.4 stood nullified, subsequently by Smt. Neera Yadav, respondent no.7, it does not exonerate him from committing an illegality. It is a matter of investigation as to what was the motive for which such a change had been made by Shri Ravi Mathur, IAS, respondent no.4, unauthorisedly and illegally. Admittedly he was not competent to do so without seeking the amendments as mentioned hereinabove. 2

34. The State or the public authority which holds the property for the public or which has been assigned the duty of grant of largesse etc., acts as a trustee and, therefore, has to act fairly and reasonably. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. Every holder of a public office is a trustee. State actions required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law. The Public Trust Doctrine is a part of the law of the land. The doctrine has grown from Article 21 of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides, as it would only be a case of colourable exercise of power. The Rule of Law is the foundation of a democratic society. (Vide: M/s. Erusian Equipment & Chemicals Ltd. v. State of West Bengal & Anr., AIR 1975 SC 266; Ramana Dayaram Shetty v. The International Airport Authority of India & Ors., AIR 1979 SC 1628; Haji T.M. Hassan Rawther v. Kerala Financial Corporation, AIR 1988 SC 157; Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. & Ors., AIR 1991 SC 537; and M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu & Ors., AIR 1999 SC 2468).

35. Power vested by the State in a Public Authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact-situation of a case. "Public Authorities cannot play fast and loose with the powers vested in them". A decision taken in arbitrary manner contradicts the principle of legitimate expectation. An Authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other. (Vide: Commissioner of Police, Bombay v. Gordhandas Bhanji, AIR1952 SC 16; Sirsi Municipality v. Ceceila Kom Francis Tellis, AIR 1973 SC 855; The State of Punjab & Anr. v. Gurdial Singh & Ors., AIR 1980 SC 319; The Collector (Distt. Magistrate) Allahabad & Anr. v. Raja Ram Jaiswal, AIR 1985 SC 1622; Delhi Administration (Now NCT of Delhi) v. Manohar Lal, (2002) 7 SCC 222; and N.D. Jayal & Anr. v. Union of India & Ors., AIR 2004 SC 867).

36. In view of the above, we are of the considered opinion that these allegations being of a very serious nature and as alleged, the respondent no.4 had passed orders in colourable exercise of power favouring himself and certain contractors, require investigation. Thus, in view of the above, we direct the CBI to have preliminary enquiry and in case the allegations are found having some substance warranting further proceeding with criminal prosecution, may proceed in accordance with law.

It may be pertinent to mention that any observation made herein against respondent no.4 would be treated necessary to decide the present controversy. The CBI shall investigate the matter without being influenced by any observation made in this judgment. The writ petition stands disposed of accordingly. Before parting with the case, we would like to express our gratitude and record appreciation to Dr. Rajeev Dhavan, learned senior counsel for rendering commendable assistance to the Court as Amicus Curiae.

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Cross Citation : 2005-ALL MR (CRI.)841(SC) , 2004-CCC(SC)-4-295

SUPREME COURT OF INDIA

Hon'ble Judge(s) : B.N.AGRAWAL, A.K.MATHUR,JJ

Civil Appeal 3157 Of 1998, Oct 13,2004
E.T.Sunup ..Vs…C.A.N.S.S.Employees Association

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A) CONTEMPT OF COURT – deliberate attempt on the part bureaucracy to circumvent order of court and try to take recourse to one justification or other– this shows complete lack of grace in accepting the order of the Court -this tendency of undermining the court's order cannot be countenanced –in democracy the role of Court cannot be subservient to the administrative fiat – the executive and legislature had to work within constitution framework and judiciary has been given role of watch dog to keep the legislature and executive within check- the appellant office flouted order of this court is guilty of contempt of court.

B) PUNISHMENT TO BUREAUCRATS - apology tendered – order of court complied- held – if the Court's are flouted like this , then people will loose faith in the court –therefore it is necessary that such violation should be dealt with strong hands and to convey to the authorities that the courts are not going to take things lightly - order of the high court convincing the officer under contempt of court's act and imposition of fine of Rs 5000 is affirmed .

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A.K.MATHUR, J.

(1) This appeal is directed against the order passed by the Gauhati High Court dated 26th May 1998 whereby the Division Bench has convicted Shri S.T. Sunup, Commissioner-cum-Secretary to Govt Finance Department , Government of Nagaland: and sentenced him to undergo simple imprisonment of one month and also to pay a fine of Rs 10,000/-, in default, further simple imprisonment of one month However respondent no. 2, A.C. Saikia was impleaded as party in this contempt petition but he was not party in civil rule no 40(K)96 against which this contempt arises, therefore he was discharged More so he stood retired on reaching superannuation some time in the month of June/ July 1997.

(2) The brief facts which are necessary for the disposal of the appeal are as follows. That by a W.T. Message dated 30th December, 1995 the State Government in the Department of Finance had stopped all payments of the employees of the State Government except salaries and pensions. The W.T. Message reads as under:

" NO. BUD/1-2/95-96 DTD 30.12.1995(.) STOP ALL STATES GOVT PAYMENTS RPT STOP ALL STATE GOVT PAYMENTS WITH IMMEDIATE EFFECT UNTIL FURTHER ORDERS EXCEPT SALARIES AND PENSIONS FOR DECEMBER 1995 TO BE PAID FROM 5.1.96 RPT 5.1.96. ONWARDS (.) NO OTHER PAYMENT RPT NO OTHER PAYMENT SHALL BE ALLOWED EVEN AGAINST DRAWAL AUTHORITIES ALREADY ISSUED UNTIL FURTHER ORDERS (.) PLEASE CONFIRM STRICT COMPLIANCE(.)"

(3) The above message was amended on 30th January. 1996 and the ban imposed was relaxed with regard to payment of salaries to regular staff, pension, including arrear of pension, leave encashment and GIS of the retired Government employees.

(4) Earlier on 29th September 1994 it was stated that no application for special relaxation of G.P.P. will be entertained The message reads as under:

" NO FIN/GEN/39/93 DT KMA THE 29th SEPT '94 (.) NO APPLICATION FOR SPECIAL RELAXATION OF G.P.F. WILL BE ENTERTAINED TILL FINANCIAL POSITION IMPROVES (.) REQUEST NOT TO FORWARD ANY APPLN DURING OCT '94 "

(5) Thereafter the above orders were challenged by the Confederation of All Nagaland State Services Empioyees Association (in short CANSSEA). CANSSEA filed a Civil Rule 40(K)96 by its General Secretary The grievance of the petitioner association was banning of withdrawal of G.P F While issuing a rule returnable within 6 weeks the court on 17.5.96 after hearing both the parties, passed an interim order which reads as under:

"In the facts and circumstances of this case and in the light of submission made at the Bar I am of the view that an interim order has become necessary. Accordingly, the impugned order dated 30.12.95 issued by the Finance Department in so far as it concerns withdrawal of G P.F money shall remain suspended until further orders."

(6) The interim order was not complied with by the respondent. Therefore, the CANSSE Association filed a contempt petition which came to be registered as civil original (contemot) petition no 17(K)96 in which the present contemnor Shri E.T. Sunup, Finance Commissioner, Government of Nagaiand. Kohima was arrayed as respondent no. 1 and a notice was issued and he filed a counter. Since the earlier Civil Rule was complete in all respect, therefore, both the Civil Rule and contempt petition were heard together and they were accordingly disposed of vide court's order dated 25.2.97 and the following directions were given:
"14 Having said enough, this petition is disposed with the following directions:- (a) Second respondent is directed to lift the ban with regard to withdrawal/advance of G.P. F. within a week from the date of receipt of this order (b) The G.P.F. withdrawal/advance shall be allowed only after submission of statements with regard to the availability of the amount in the credit of the subscriber. (c) Every Treasury Officer shall, before honouring of withdrawal/advance of G.P.F insist that latest statement showing the accounts in the credit of the subscriber are made available before him. (d) The Accountant General shall see that the latest statements are issued correctly and on the basis of actual subscription

subscribed by the subscriber (e) Every Head of the Department shall also see that before they forward the application of G.P. Fund withdrawal/advance, the latest statement indicating the availability of money in the credit of the subscriber is made available "

(7) The Orders dated 30th September 1995, 30th January, 1996 and 29th September, 1994 were quashed, so far as the withdrawal and advance of GPF was concerned. The contempt petition was also disposed of and it was observed by the High Court under para 4 of the aforesaid order that the contemnor has made a misleading statement in paragraph 3 of the counter because it has been categorically stated by the contemnor that impugned W T. message dated 30.12.95 was effectively withdrawn However the order of withdrawal of ban imposed on 30th December, 1995 was not produced by the contemnor. While disposing of the contempt petition, the following observations were made by the Court

" This Court has given seven days' time from the date of receipt of the order to the contemnors to lift the ban imposed on withdrawal/advance of G.P. Fund on 30 12.95 Contemnors also in paragraph 8 of its counter tender unqualified apology if there is some omission of commission which might have taken place in giving to the effective order of the court Contemnors also categorically averred that he has the highest respect for this Court and he has no intention of showing any disregard or disobedience to any order or direction passed by this Court Wherever the direction of this Court is not carried out to its logical conclusion, it is the Ruler of law that suffers. Carrying out the order of this Court is an enforcement of the Rule of Law. We therefore, insist that our order should be carried out to enforce the Rule of Law. However, although the contempt has been made out, in view of tne averment made in paragraph 8 of the counter by contemnors terdering unqualified apology, this Court with great hesitation accept the unqualified apology tendered by the contemnor keeping in view that the court has already directed the contemnors to lift ban on withdrawal/advance of G P Fund imposed on 30.12 95 and 29th September, 1994 passed in Civil Rule 40(K)96"

(8) Despite the aforesaid order, it was not complied with and, therefore, a second contempt petition was filed which is the subject matter of the present appeal

(9) It was submitted before the Court that despite leniency shown by the court for withdrawing the order within one week, the respondent has deliberately and wilfully not abided by the order and flouted the same thereby bringing the administration of justice into disrespect. A reply was filed to this contempt petition and it was submitted that the copy of the order was not received by the respondent and therefore it could not be complied with and he denied that he had violated the order of the court It was submitted that meanwhile an appeal was filed and operation of order was stayed by the Division Bench. Therefore, no contempt was committed, however, an apology was also tendered for omission and commission if any.

(10) An issue with regard to receipt of the certified copy of order was dealt with by the court at length to show that certified copy was delivered in office of Finance Commission but it is irrelevant now because impugned order was stayed by the Division Bench of High Court on 28.5.1997. However, fact remains that no application was moved for extension of time given by court i.e. one week

(11) Subsequently, the writ appeal was also disposed of by the Division Bench of the Gauhati High Court vide its order dated 11 th March, 2004 and it was observed as under:

"In view of the discussion, we find no good reason to interfere with the order passed by the learned single judge and dismiss the appeal with an observation that whatever applications may be pending or moved for withdrawals by the subscribers/employees, they

shall be dealt with in accordance with Rule applicable as contained in the General Provident Fund(Central Services) Rules, 1960."

(12) A statement was made before the Division Bench by the advocate-general that he is authorized to make a statement that now no ban is there against withdrawal of amount by the employees from their Provident Fund accounts. However, the order of the single judge bench was affirmed by Division Bench The learned counsel for the appellant submitted that there was no ban in reality because provident fund amount was released from time to time, and in support of it he drew our attention to Annexure-'G' showing GPF receipts and disbursements in the year 1996-97 Accordingly, total receipt towards GPF was Rs. 67.36 crore and disbursement was Rs. 25.29 crore. The amount of Rs. 25.29 crore was disbursed after the order passed by the learned single judge. However, learned counsel for appellant was unable to point out at the time of argument whether administrative order passed by authorities was revoked or not. But subsequently he filed an affidavit of Mr. E.T. Sunup, the then Finance Commissioner that Govt. now on 23 9.2004 has withdrawn the Order. The orderreads as under -

" In compliance so the Honourable Gauhati High Court orders dated 2.5.2.97 in Civil Rule 40(K)96 and dated 11.3.99 in writ appeal No 262/97 the following orders of the State Govt given by the Finance Department, in so far relating to advances and withdrawals of G P F by the State government employees that were quashed by the Hon'ble Gauhati High Court, are hereby being revoked with immediate effect (i) NO FIN/GEN/39/93 OF 29.9.1994 (ii) NO. BUS/1-2/95-96 OF 30.12.1995 AND (iii) W/T message of 30.1 1996 (H. KHULU) IAS Finance Commissioner"(13) (But this administrative order was issued after close of arguments.) He also submitted that subsequently a similar ban was imposed and a contempt petition 5/99 was filed in the Gauhati High Court and the Hon'ble Court on 14th March, 2000 set aside the impugned order and directed that whatever applications were pending or moved for withdrawal by the subscribers/ employees be dealt with in accordance with Rules. The contempt petition was thereafter disposed of.

(14) Learned Counsel submitted that on account of subsequent event now the ban does not survive and GPF is being disbursed and order has been withdrawn, appellant's apology be accepted and he be discharged. He submitted that appellant has put in long 30 years of service and he has never shown any disrespect to court's order. Learned counsel for the respondent supported the order of the High Court

(15) We have heard both the learned counsel at length. We are of the opinion that the present order passed by the High Court in the facts and circumstances the case is fully justified. Once a stand was taken by the advocate general that the ban does not survive and amount of GPF was disbursed during the period 1996-97, then there was no reason why the order banning of disbursement of GPF was not revoked The stand taken by the State on one hand that amount of GPF was disbursed still they were not prepared to revoke the order we fail to understand this inconsistent stand. Once the administrative order is issued then it cannot be revoked by oral submission before court. It has to be revoked by another administrative order (which they have now passed). If the advocate general had made a statement before the court then it should have been followed with the administrative order revoking the ban. Till the date of argument learned counsel for the appellant could not produce before us the order revoking the ban, on the contrary the ban was kept in force and the second contempt petition was filed before the court and the advocate genera! again made a statement that GPF applications will be processed that makes the matter worse for the petitioner and it does not mitigate the situation. It is different that now a realization has dawn upon the authorities as they find no escape route for them, therefore, they have now revoked the order dated 25.2.1997 by the Order dated

23.9,2004 after close of arguments(16) It has become a tendency with the Government Officer to somehow or the other circumvent the orders of court and try to take recourse to one justification or other This shows complete lack of grace in accepting the orders of the court This tendency of undermining the court's order cannot be countenanced This Court time and again has emphasized that in democracy the role of the court cannot be subservient to the administrative fait. The executive and legislature has to work within Constitutional frame work ana the judiciary has been given a role of watch dog to keep the legislature and executive witnin check. In the present case we fail to understand the counter filed by the appellant before the Court. On one hand they say that all the cases of GPF have been processed and on the other hand they are not prepared to revoke the administrative order. This only shows a deliberate attempt OR the part of the bureaucracy to circumvent the order of the court and stick to their stand. This is ciear violation of court's order and appellant is guiity of flouting the court's Order,

(17) In the facts and circumstances of the case, the view taken by the High Court does not call for interference.

(18) While coming to the question of sentence, learned counsel for the appellant submitted that the incumbent is on the verge of retirement and he has suffered a lot and he has an unblemished career of 30 years of service. More so now order dated 25.2.1997 has been revoked though belated therefore a mercy be shown to him and his apology may be accepted. But if the court's orders are flouted like this, then people will loose faith in the courts. Therefore, it is necessary to deal with such type of violation of court's order with strong hands and to convey to the authorities that the courts are not going to take things lightly. However, looking to the long career of this Officer and now order has been revoked, we do not propose to punish him with imprisonment but we propose to impose a fine of Rs. 5,000/- (Rupees five thousand) only and in default of payment of fine, to undergo a simple imprisonment for one month. The incumbent shall deposit the amount in the State Treasury within one month from today.

(19) Hence, as a result we affirm the order of the High Court and punish the respondent no. 1 for committing contempt of court's order and impose a fine of Rs. 5.000/- (Rupees five thousand) only, in default of payment of fine, sentence him simple imprisonment for one month. The impugned order is modified to this extant. The civil appeal is disposed of accordingly.

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Cross Citation :A. I. R. 1926 Allahabad 719

HON'BLE JUDGE : WALSH, J.

Sukhnandan Lal – Accused – Applicant…Vs…King – Emperor – Non Applicant.

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I.P.C. Sec. 167 – Officer tampering with official records and issuing false copies is liable to be punished severely – Not merely for his own conduct but as a deterrent to others,

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Kumuda Prasad—for Applicant, *Assistant Government Advocate*—for the Crown,

Walsh, J.—I am surprised at the judgment which the learned Sessions Judge has permitted himself to deliver in this case. In the first place, it is not disputed that the applicant before me is a public official charged by Government in the public interest to preserve permanent records of the rights, and positions of parties and interest in land, in order that people may not be injured by false claims, and that there always may be a reliable record available for Courts of justice; and whether or not he had any ulterior motive, nobody in this world can say, he did what he Show was wrong, and a breach of his duty to the Governments-conduct which is constantly complained of in the case of patwaris, and which causes untold trouble to poor people who, are compelled to lose their rights because of the "uncertainty and difficulty of establishing clear evidence. To my mind any of &ciai| however humble, who deliberately tampers with official records and issues false copies, (whatever his motives, deserves; severe punishment, not merely for --his own '[conduct, but as a deterrent to others who .may be tempted to follow his- example. In this case the Magistrate convicted Jihe Patwari, and according to the view of the Sessions Judge rightly convicted him, and sentenced him to twdv-terms of one year each to run concurrently, In addition to a small fine, with two months additional imprisonment in lieu of the fine.

In my opinion, and I am always ready .to overlook offences committed by persons who yield to sudden temptation for the first time and to take a lenient view of their conduct, in the case of found guilty of such conduct as this, a year's imprisonment is quite a reasonable sentence which no Court ought to interfere with. The learned Judge has reduced it to three months. He has written a labored judgement in potion of which I regret to find that the has rather gone out of his way to minimize the conduct of the patwari in issuing false copies. I do not stop to consider whether the Sessions Judge is right in that view or not, but I-take the opinion which he has formed and has expressed in other parts of his judgment. He finds that when the Munsif's attention was called to discrepancy, and he, the Munsif, in the pursuance of his duty,. rightly examined the Patwari and his papers and reported the matter to the Collector, the patwari in the meantime interpolated another year in his copy of the khasra, and made a note that the khasra had ' been taken by the Munsif, and imported that the Government work of preparing annual records was suffering in consequence of the conduct of the Munsif. The learned Sessions Judge says:

I am of opinion that in order to save himself he kept back the khasra of 1332 "Fasli and has not produced it,

In other words the Sessions Judge is of opinion that in order to create greater difficulty, when his original conduct was complained of, this man was degraded enough to alter his official documents and make an improper complaint against the Munsif, which 'he knew to be unfounded. To my mind that is a grave.....and gross aggravation of his offence, and compels me to reconsider the whole matter, which I do, and in the interests of justice I restore the original sentence passed by the Magistrate, and set aside the reduction of the Sessions Judge,, which held no business to make. If the appellant has any objection .to raise-to my order, he can appeal to the Local Government. He must surrender to his bail and serve out his sentence.....'

It is objected that I cannot restored the sentence. I am satisfied that I have power to restore the original sentence and even TO enhance id when an accused applies under S. 439. The section clearly provides it. The rule about a two-Judge Bench only applies where the Court issues notice, of its own motion, or on an application % someone else, to show cause why the sentence should not be enhanced. In this case the whole matter has been brought before me for revision by the accused himself, and I hold that I have power to restore the original sentence.

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MISCELLENEOUS

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-:CHAPTER = 12:-

MODEL DRAFT OF COMPLAINT AGAINST JUDGES FOR CRIMINAL PROSECUTION AND OTHER ACTION

(ENGLISH AND MARATHI)

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MODEL DRAFT OF COMPAINT FOR CRIMINAL PROSECUTION AGAINST HIGH COURT JUDGE

Date : 9/04/2012

To,

1) Hon'ble Chief Justice

Hon'ble Bombay High Court,

Fort, Mumbai-400032.

R&O 11/04/12

CHAMBER NO. 51 (C.J. OFFICE)
HIGH COURT, BOMBAY

2) Director, C.B.I,

Room No. 114, North Block,

New Delhi - 110001.

3) Director, Central Vigilance Commission,

Satarkta Bhawan, G.P.O. Complex, Block-A, INA,

New Delhi – 110023.

4) Joint Director,

Central Bureau of Investigation,

(Anti Corruption Branch),

Tanna House, Colaba,

MUMBAI – 01.

5) S. P. , C.B.I.,

A.C.B., Nagpur.

Central Bureau Of Investigation
Special Police Establishment
Nagpur
7.4.12

Applicant : **Rashid Khan Pathan,**
National Secretary,
Human Rights Security Council (NGO)
8, Santaji Colony, Hulke Niwas,
Devnagar, Nagpur.

SUB. : 1) IMMEDIATE REGISTRATION OF CRIMINAL CASE BEFORE C. B. I. AGAINST SHRI JUSTICE XYZ.
2) IMMEDIATE TRANSFER OF SHRI. JUSTICE A. P.XYZ OUT OF STATE DURING PENDENCY OF ENQUIRY.

3) FORWARDING REFERENCE TO HON'BLE SUPREME COURT FOR TAKING ACTION AGAINST SHRI JUSTICE XYZ FOR THEIR WILLFUL DISREGARD AND DISOBEDIENCE OF LAW LAID DOWN BY 3-JUDGE BENCH OF HON'BLE SUPREME COURT.

4) FORWARDING REFERENCE FOR IMPEACHMENT PROCEEDING AGAINST SHRI JUSTICE A.P. XYZ FOR THEIR PROVED MISBEHAVOUR, INCAPACITY AND BIASED TREATMENT TO PETITIONER BELONGING TO MINORITY COMMUNITY AND ALSO VIOLATING THE MANDATE OF ARTICLE 14 OF THE CONSTITUTION ABOUT EQUALITY BEFORE LAW AND EQUAL PROTECTION OF THE LAW.

Ref : Letter forwarded to PPS to the Chief Justice, Bombay, High Court, Mumbai from Ministry of Law & Justice Govt. of India on the directions given by His Excellency Hon'ble President of India.
Date : 25th Nov. 2011, No. K-14012/3/2011-US-1

Hon'ble Sir,

1) The petitioner is a Citizen of India and a law abiding Citizen.
2) The petitioner is a National. Secretary of Human Rights Security Council (NGO). The NGO is working for the awareness of the Fundamental Rights as guaranteed by our Constitution and thereby to serve the Nation.

3) The NGO has defaced the various crimes committed by corrupt Government Officials and prosecuted them. Most of the action was taken against the criminal Police Officers, who violates the fundamental rights of the citizens.

4) Therefore some accused Police Officer hatched the conspiracy to falsely implicate the applicant and other members of the NGO. Many of the cases and proceedings against applicant are proved to be false in the police investigation itself but no action is taken against the guilty police officers. Therefore the applicant has filed a petition- for transferring the investigation to C.B.I. vide Writ Petition No. 328/2011 before Hon'ble Bombay High Court, Nagpur Bench, Nagpur.

5) In the meantime one accused police Inspector posted at Police Station Pusad 'City Mr. Dnyaneshwar Kadu, who was prosecuted by our NGO U/S 194 of I.P.C. for falsely implicating 8 Muslim boys, hatched conspiracy

against the applicant and registered a false F.I.R. against the applicant and one.

6) As the F.I.R. was false and illegal and without having, time, Date, place of offence, name of victim etc and also the investigation was illegal in view of the law laid down by the Hon'ble Supreme Court therefore the applicant filed petition before Hon'ble High Court, Nagpur being Cri. Application No. 1254/2010.

7) In reply to the petition as the Investigation Officer Mr. Dnyaneshwar Kadu and complainant filed false and misleading affidavit before Hon'ble High Court therefore the applicant filed application under Section 340of Cr. P.C. for taking action against them under Section 191, 192, 199, 200, 465, 466, 471, 474 etc. of I.P.C. and also against the Adv. Subodh Dharmadhikari and Adv. N.S. Deshpande who conspired and helped in creating such a false evidences. Also the entire falsity of the reply is cleared by rejoinder affidavit.

8) The matter came up before Justice Shri A.P. Xyz for final hearing on 07-07-2011 and without giving opportunity to applicant's Counsel to argue his case and with a ulterior purpose to save the accused from serious charges the learned Judge Shri A.P. Xyz dismissed the petition of Applicant being Cri. Application No.1264/2010.

9) In order to prosecute the said Judge Shri A.P. Xyz and to save the pure fountain of justice from further pollution and also with a view to put lid on arbitrary exercise of power by corrupt Judges of Higher Judiciary I send complaint as my National duty and pious obligation as enshrined in Article 51 (A) (h) of the Constitution of India.

10) The petitioner filed an petition before His Excellency Hon'ble President of India on 23/07/2011 for initiating criminal prosecution against Shri Justice A.P. Xyz.

11) The above said complaint was referred to Dept. of Justice from the office of Rashtrapati Bhavan on 9th Sept. 2011 Sr.No.l P1/E/0809110009.

12) The Ministry of Law and Justice (Dept. of Justice) after verifying the legality of the facts decided to forward it to the PPS to the Chief Justice of

Bombay High Court, Mumbai through outward No. K-1402/3/2011-US-1 dated the 21st November, 2011.

13) Hence It is clear that there is deemed sanction on the part of the His Excellency Hon'ble President for initiation of Criminal prosecution against Shri. Justice A.P. Xyz.

Moreover in view of the law laid down in **Ramlal –vs- State 2001 Cri.L.J. 800** for registration of Criminal case against a High Court Judge sanction is not necessary. In another case of **Shri. Shameet Mukharjee –Vs- C.B.I. 2003 DRJ (70) 327** the corrupt High Court Judge was arrested and detained to PCR for 12 days.

14) Moreover the serious allegation of the complaint of the petitioner is that it require thorough investigation at the hands of C.B.I. for disclosing the complete conspiracy in the matter.

15) It is worth to mention here that the one of the co-conspirator Shri A.S. Kale, District & Sessions Judge, Pusad is recently terminated from service by the order of Hon'ble High Court.

16) Apart from the details of allegations given in the complaint the petitioner would like to bring to the notice of Hon'ble Chief Justice & C.B.I., the malafides, clear illegalities and clear biasness on the part of Shri. Justice A.P. Xyz which are essential for the charges under Section 217, 218, 219, 465, 466, 471, 474 etc. of I.P.C.

THE CRIMINAL MISCONDUCT & INCAPACITY OF SHRI JUSTICE A.P. XYZ

17) **CHARGE NO. 1 #**
I.P.C. 217, 201, 218, 219 ETC. MISUSE OF POWER TO SAVE THE ACCUSED.

The applicant filed application under section 340 of the Cri. P.C. for taking action against I.O. & Complainant for filling false and misleading affidavit before Hon'ble High Court. The application being no. 1063/2011 in Cri.- Application No. 1254/2010 was neither allowed nor rejected. This was an act done to save the accused.

Hon'ble Bombay High Court in the case of AIR 1921, Bom. 115 held that,

AIR 1921 Bom. 115

"IPC 218:- *The gist of the section is stifling of truth and the perversion of the course of justice in case where an offence has been committed, to screen any particular person. It is sufficient that he knows it to be likely that justice will not be executed and that someone will escape from punishment"*

'The Apex Court in a decision in the case of **Smt. S.R. Venkataraman Vs. Union of India and another reported in (1979) 2 Supreme Court cases 491** wherein while considering the question of malice in law by quoting the observations of Viscount Haldane in the decision in the case of **Shearer .vs. Shields** reported in **(1914) AC 808,** it has been observed by Apex Court in paragraph no.5 of the said decision:

"5..... Malice in law is, however, quite different Viscount Haldane described it as follows in Shearer V. Shields:

A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned; he acts ignorantly and in that sense innocently.

Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause."

18) **CHARGE NO. 2 #**

VIOLATION OF OATH TAKEN AS HIGH COURT JUDGE AND VIOLATION OF ARTICLE 14 OF THE CONSTITUTION OF INDIA.

The constitution of India Schedule III Articles 75 (4), 99, 124 (6) 148 (2) 164 (3), 188 and 219 provides that forms of oaths or Affirmation No. VIII is as follows.

" *Form of oath or a affirmation to be made by the Judges of a High Court."*

I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of) ---------- do

Swear in the name of God / Solemnly affirm *that I will bear true faith and allegiance to the Constitution of India as by law established, [that I will uphold the sovereignty and integrity of India] that, I will duly and faithfully and to the best of my ability, Knowledge and judgement perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws.*

Article 14 of the constitution of India makes it mandatory to give equal treatment to all citizens **(1956 Cri. L.J. (Bom.)** Hon'ble Bombay High Court in the case of ***Amnachalam Swami -Vs- State AIR 1956 Bombay 695*** held that,

> "(Para 4) Mr. Kavelkar is right when he urges that Article 14 assures to the citizen equality not only in respect of a 0substantive law but also procedural law, and if any procedure is set up which deprives a citizen of substantive rights of relief and defence the citizen is entitled to complain of this procedure if two persons equally situated the older procedure is still available where these substantive rights of relief and defence were secured."

In the judgment of Cri. Application No. 1254/2010 dated 07/07/2011 while refusing to go through the various (around 30) case Laws Justice Shri A.P. Xyz passed a one line order that there is no need to go through that authority.

In the order dated 07/07/2011 Shri Justice A. P. Xyz passed the order **that the accused has no right to apply for quashing the F.I.R.**

The malafides on the part of the Shri. A. P. Xyz are writ large as can be seen from the fact that in another various cases he allowed the petition of accused for quashing the F.I.R. one of that judgment is reported in ***2011 (4) AIR Bom. R. 597*** decided on 13/06/2011.

This is a clear case of personal bias and violation of mandate of Art. 14 of the Constitution.

(B) The 3rd example of biasness on the part of Shri Justice A. P. Xyz is can be seen in the another petition being filed by one accused being Criminal Application No. 1005/2010 where the National President of petitioner NGO Adv. Nilesh Ojha was complainant and respondent in petition. The petition being No. 1005/2010 was filed by accused to challenge the order passed by the J.M.F.C. Pusad u/s. 156 (3) of Cr. P.C.

The counsel for Shri. Nilesh Ojha, Adv. Onkar Kakade specifically argued the case on the ground that in view of alternate remedy petition u/s. 482 of Cr. P. C. was not maintainable but Shri Justice A. P. Xyz refuse to dismiss the said

petition. It is worth to mention here that Shri Justice A.P. Xyz himself was a Judge of Division Bench in the case of **2008 ALL MR (Cri.) 2737**, where such law is laid down. Moreover, the similar petition of another petitioner was dismissed with costs on 11/08/2011 in the case of **2011 ALL MR (Cri.) 3107**, by Shri A. P. Xyz on the same ground that the petition u/s. 482 of Cr. P. C. is not maintainable. This is a clear violation of Art. 14 of the Constitutions of India.

Hence it is clear that Shri Justice A. P. Xyz is acting with personal bias and malafidely in the cases relating to the petitioner.

(C) The another example of clear bias and malafides of Shri A. P. Xyz is that he passed one order in ***2011 ALL MR (Cri.) 3248*** where it has been observed that,

> ***"Applicant earlier to the report of respondent field report to police and expressed apprehension that respondent may implicate him falsely – In such cases chances of conviction are remote – If prosecution is allowed to continue it may result in to harassment to the accused applicant – F.I.R. quashed.***

The same ground was specifically raised by the petitioner in his petition being Criminal Application No. 1254/2010, but the contention of the petitioner was not considered by Shri Justice A. P. Xyz and a different treatment was given to the different petitioner.

This is also against the Judicial propriety as has been laid down by Hon'ble Supreme Court in **Hari Singh** case and followed by Hon'ble Bombay High Court in the case of **Shri. Srinivas cut pieces cloth shop Vs. State 2004 ALL MR (Cri) 1802 (Bom).**

Where it has been held that the Courts of Co-ordinate jurisdiction should have consistent opinions in respect of identical set of facts or on a question of law. If this rule is not followed then instead of achieving harmony in the judicial system it will lead to judicial anarchy. Like questions should be decided alike. Hence it is clear that as the applicant belongs to minority Muslim community therefore his case was not heard and the case of a Non-Muslim is allowed. Hence the constitutional mandate under Article 15 (2), 17 and 21 which guarantees freedom from discrimination and right to live with dignity are offended, by the learned Judge Shri. A.P. Xyz.

19) **CHARGE NO. 3 #**
CONTEMPT OF ORDER OF SUPREME COURT

It is worth to mention here that Hon'ble Supreme Court in the case of **Bharat A. Kothari Vs. Dosukhan S. Sindhi 2010 Cri. L.J. 379** specifically laid down that only the accused can apply for quashing of F.I.R. and not the third person is having right to challenge the same. But Justice Shri. Xyz passed the order that accuse can not challenge the F.I.R.

Hence the observations of Shri. Justice A.P. Xyz are not only biased but against the law laid down by Hon'ble Supreme Court and are per incuriam.

Hon'ble Supreme Court in the case of **Rabindra Nath Singh Vs. Raiesh R. Yadav 2010 (3) SCC, (Cri) 165.** Held that the conduct of High Court in passing order against the direction of Supreme Court amounts to contempt of order of Supreme Court.

Hon'ble Supreme Court in the case of **SPENCER & COMPANY LTD –Vs-VISHWADARSHAN DISTRIBUTORS PVT. LTD (1995) 1 SCC 259** it is held that the Supreme Court's order even if is only in the form of a request instead of explicit command or direction it is a judicial order and is binding and enforceable throughout the territory of India – In case of flouting of the order by High Court, it is open to Supereme Court to initiate Contempt proceedings against the erring Judges of High Court.

20) **CHARGE NO. 4 #**

CLEAR VIOLATION OF DIRECTION OF HON'BLE SUPREME COURT 3 – JUDGE BENCH.

The various judgments of Hon'ble Supreme Court along with notes of arguments were given on record were neither discussed nor even the citations were referred in the judgment and by way of cryptic order he dismissed the petition. In his judgment Shri Xyz J, observed as follows:

> *"The learned Advocate appearing for the petitioners made a reference to plethora of rulings in support of the petition in order to argue that the FIR ought not to have been registered against the petitioners and it is their second submission that the FIR shall be quashed as also the proceedings, on the ground that the FIR do not spell off necessary ingredients of the offences alleged against the accused.--------"*
>
> *I need not refer to all the rulings cited before me since the legal position in this regard is crystal clear. U/s. 154 of the code of Criminal Procedure every information*

related to commission of cognizable offence is required to be reduced into writing.

Moreover refusing to explain the authorities /case laws in the judgment is clear violation of law laid down by **3-Judge Bench of Hon'ble Supreme Court in Dwarkesh Industries –vs- Prem Heavy Engineering 1997 S.C.C. (6) 450 where it has been laid down that,**

"Judicial Adventurism – High Court ignoring various laws settled by Supreme Court – Held – When a position in law is well settled as a result of pronouncement by Supreme Court then it will be judicial impropriety for the sub-ordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position – The observation of High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it to avoid to follow the law laid down by the Supreme Court – Such judicial adventurism cannot be permitted – The tendency of the subordinate courts in not applying the settled principles and passing whimsical order granting wrongful and unwarranted relief to one of the parties is strongly deprecated – It is the time that such tendency should be stopped.

It is unfortunate that in spite of authoritative pronouncements by Supreme Court, the High Courts and Subordinate Courts, still seem intent on affording opportunities for dealing with this area of law which was brought to be well settled by the Supreme Court – Order of High Court set aside – The appellant granted to costs quantified at Rs. 20,000/-.

Hon'ble Supreme Court in the case of **Sundarjas Kanyalal Bhathija and others –Vs- The Collector, Thane, Maharashtra AIR 1990 SUPREME COURT 261** held that,

Constitution of India, Art.141- PRECEDENTS - Judges are bound by precedents and procedure - They could use their discretion only when there is no declared principle to be found, no rule and no authority - where a single judge or a Division Bench does not agree with the decision of a Bench of co-

ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure - it is the duty of judges of superior courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Sub-ordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute- One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. (Paras 17, 20)

Moreover the another judgment of binding nature of the same High Court was in the case of ***The Bank of Rajasthan Ltd., Vs. SiyamSunder Tavaria 2006 ALL MR (Cri) 2269,*** **(Bom),** where it has been held that

"The courts are not expected to pass such cryptic orders. The learned Judge, in the present case, ought to have recorded short reasons demonstrating as to how the case in hand was covered by the judgment of the Apex Court in ***S.M.S.*** *Pharmaceuticals Pvt. Ltd., Vs. Neeta Bhalla and Anr. AIR 2005 S.C. 3512 [2005(5) ALL MR (S. C.)lll 8J. The learned Judge even did not feel it necessary to mention full title of the judgment of the Apex Court and the citation thereof while dismissing all the complaints relying upon the said judgment. His approach while passing drastic orders, dismissing the complainants under section 138 of the Negotiable Instruments act, 1881 filed by the Bank*

involving huge amounts, was absolutely casual. The courts should exhibit from their conduct and their orders, concern for the justice to be done in the cases and not casualness, as seen from the impugned order in the present case. The learned counsel for the parties have fairly agreed that need not examine the merits of the case and record reasons for setting aside the impugned order and that all the matters be remanded to the Sessions Court for deciding the same on merits in accordance with law. In the circumstances I am satisfied that the following order shall meet the ends of justice. "

Hence the learned Judge himself is giving orders acting against his own judgement proves the malafides and biasness on the part of the concerned Judge.

Hon'ble Supreme Court in the case of **SPENCER & COMPANY LTD –Vs- VISHWADARSHAN DISTRIBUTORS PVT. LTD (1995) 1 SCC 259** it is held that the Supreme Court's order even if is only in the form of a request instead of explicit command or direction it is a judicial order and is binding and enforceable throughout the territory of India – In case of flouting of the order by High Court, it is open to Supereme Court to initiate Contempt proceedings against the erring Judges of High Court.

The complaint given against the petitioner No. 2. does not contain the date, time, place of offence and even name of victims. Therefore the applicant relied on the case Laws of Hon'ble Supreme Court and Hon'ble Bombay High Court to buttress his contention that the police is justified in registering the F.I.R. only when the complaint disclose a cognizable offence at prima facie stage unless it has to be quashed. **[2004 AIR SCW 4329] [Nitin P. Jondhale Vs. State 2006 ALL MR (Cri) 2469] [Man Mohan Thapar Vs. State 2009 AIR Bom R. (3) 429]**

And in overall the counsel for another petitioner relied on 64 case Laws but the learned Judge did not consider the case laws nor even quoted the full title of the Judgments.

On the other hand the learned Judge in his Judgment written his view as follows.

"----------Although a number of rulings have been cited before me, it has to be stated that each case is required to be examined and decided in the light of its peculiar facts and circumstances. There

can be no hard and fast rule to invoke inherent powers of this Court to quash the F.I.R. and investigation which is in progress."

The learned Judge lost the sight that he is bound by the ratio decided by the Hon'ble Supreme Court

21) **CHARGE NO. 4 #**

SHRI JUSTICE A.P. XYZ BOUND TO RESIGN FROM POST OF HIGH COURT JUDGE BUT HE DID NOT RESIGN.

But from the above documentary proofs it is clear that Shri. Justice A.P. Xyz acted against the oath and thereby ceased his right to continue as a Judge of Hon'ble High Court.

As per law laid down by 5-Judge Bench of Hon'ble Supreme Court in the case of **K. Veerswami Vs. Union of India 1991 (3) SCC 655** it is obligatory on the part of Shri. Justice A. P. Xyz to resign from his post but he is still working. It is surprising to mention here that even after lapse of 8 months from lodging of the complaint Shri. Xyz is still working as High Court Judge.

It has been laid down by Hon'ble Supreme Court in K. Veerswami's case (Supra) that,

(53) …… The judiciary has no power of the purse or the sword. It survives only by public confidence and it is important to the stability of the society that the confidence of the public is not shaken. The Judge whose character is clouded and whose standards of morality and rectitude are in doubt may not have the judicial independence and may not command confidence of the public. He must voluntarily withdraw from the judicial work and administration.

(54) …….. The emphasis on this point should not appear superfluous. Prof. Jackson says "Misbehavior by a Judge, whether it takes place on the bench or off the bench, undermines public confidence in the administration of justice, and also damages public respect for the law of the land; if nothing is seen to be done about it, the damage goes unrepaired. This a must be so when the judge commits a serious criminal offence and remains in

office". (Jackson's Machinery of Justice by J.R. Spencer, 8th Edn. pp. 369-70.

(55) The proved "misbehaviour" which is the basis for removal of a Judge under clause (4) of Article 124 of the Constitution may also in certain cases involve an offence of criminal misconduct under Section 5(1) of the Act. But that is no ground for withholding criminal prosecution till the Judge is removed by Parliament as suggested by counsel for the appellant. One is the power of Parliament and the other is the jurisdiction of a criminal court. Both are mutually exclusive. Even a government servant who is answerable for his misconduct which may also constitute an offence under the Indian Penal Code or under S. 5 of the Act is liable to be prosecuted in addition to a departmental enquiry. If prosecuted in a criminal court he may be punished by way of imprisonment or fine or with both but in departmental enquiry, the highest penalty that could be imposed on him is dismissal. The competent authority may either allow the prosecution to go on in a court of law or subject him to a departmental enquiry or subject him to both concurrently or consecutively. It is not objectionable to initiate criminal proceedings against public servant before exhausting the disciplinary proceedings, and a fortiori, the *prosecution of a Judge for criminal misconduct before his removal bu Parliament for proved misbehaviour is unobjectionable.*

".....But we know of no law providing protection for Judges from criminal prosecution. Article 361(2) confers immunity from criminal prosecution only to the President and Governors of States and to no others. Even that immunity has been limited during their term of office. ***The Judges are liable to be dealt with just the same way as any other person in respect of criminal offence. It is only in taking of bribes or with regard to the offence of corruption the sanction for criminal prosecution is required.***

(61) For the reasons which we have endeavored to outline and subject to the directions issued, we hold that for the purpose of clause (c) of S. 6(1 of the Act the President of India is the authority competent to give previous sanction for the prosecution of a Judge of the Supreme court and of the High court.

(79) Before parting with the case, we may say a word more. This case has given us much concern. We gave our fullest consideration to the questions raised. We have examined and re-examined the questions before reaching the conclusion. We consider that the society's demand for honesty in a judge is exacting and absolute. ***The standards of judicial behaviour, both, on and off the bench, are normally extremely high. For a Judge to deviate from such standards of honesty and impartiality is to betray the trust reposed in him. No excuse or no legal relativity can condone such betrayal.*** *From the standpoint of justice the size of the bribe or scope of corruption cannot be the scale for measuring a Judge's dishonour.* ***A single dishonest Judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system.***

(80) A judicial scandal has always been regarded as far more deplorable than a scandal involving either the executive or a member of the legislature. The slightest hint of irregularity or impropriety in the court is a cause for great anxiety and alarm. "A legislator or an administrator may be found guilty of corruption without apparently endangering the foundation of the State. But a Judge must keep himself absolutely above suspicion" to preserve the impartiality and independence of the judiciary and to have the public confidence thereof.

Let us take a case where there is a positive finding recorded in such a proceeding that the Judge was habitually accepting bribe, and on that ground

he is removed from his office. On the argument of Mr Sibal, the matter will have to be closed with his removal and he will escape the criminal liability and even the ill-gotten money would not be confiscated. Let us consider another situation where an abettor is found guilty under S. 165-A of the Indian Penal Code and is convicted. The main culprit, the Judge, shall escape on the argument of the appellant. In a civilized society the law cannot be assumed to be leading to such disturbing results.

The communication from Ministry of Law & Justice is dated 21st November, 2011 addressed to PPS to The Chief Justice, Bombay High Court.

But till today no communication is made from the office of Chief Justice to the petitioner. Neither the petitioner was called to given proof, evidence and produce witnesses nor it has been conveyed that his case being enquired or not. Nor the Justice A. P. Xyz was transferred. This creates a doubt in the mind of the petitioner.

22) **CHARGE NO. 5 #**

PERMITTING THE ACCUSED ADVOCATE SUBODH DHARMADHIKARI TO ARGUE HIS OWN CASE BY WEARING ADVOCATE ROBES AND VIOLATION OF LAW LAID DOWN BY DIVISION BENCH OF BOMBAY HIGH COURT.

The Letter No. 28593/2010 is a complaint of 38 pages explaining the malafides of advocate Subodh Dharmadhikari and others. But no issues in the complaint were discussed nor the counsel for complainant Adv. Vivek Ramteke was given any permission to put forth his case and straightway the observation were made that due conduct of a applicant for making complaint against Mr. Dharmadhikari complaint against applicant be investigated and petition is dismissed.

The argument advanced by Adv. Subodh Dharmadhikari on the issues related to Letter No. 28593/2010 is itself illegal and contemptuous as he himself being accused in that Letter complaint he could not argue his own case by wearing Advocate robes as has been laid down by Full Bench of Hon'ble Bombay High Court in the case of High ***Court on its own Motion -Vs- Mr. N.B. Deshmukh 2011 ALL MR (Cri.) 381*** and also in the case of ***M.C.S. Barna Vs. State 2002 Cri.L.J. 2852.*** Moreover the lerned Judge by allowing the Adv.

Subodh Dharmadhikari to argue his own cause by wearing advocate robes also committed contempt of his own Court.

Hon'ble Supreme Court in the case of ***Nirankar Nath Wahi Vs. Fifth Addl. District Judge, AIR 1984 SC 1268*** where it has been held that the misuse of power by a Judge to favour a leading influential member of Bar is highly illegal and such judgment is vitiated.

23) **CHARGE NO. 6 #**

FRAUD ON POWER PASSING THE ORDER BY IGNORING MATERIAL ON RECORD AND TAKING EXTRANED FACTORS IN TO CONSIDERATION.

The complainant filed a application u/s 91 of Cr. P.C. being Criminal application NO. 612/2011 for directing the respondents to produce the copy of First F.I.R. and if that copy is produced then it will make clear that the F.I.R. No. 191/2010 which is prayed to be quashed is second F.I.R. of same transaction or not. It is clearly mentioned in the said application that the investigation in second F.I.R. is illegal and violative of Hon'ble Supreme Court's direction in the case of **T.T. Antony 2001 Cri. L.J. 3329 and in the case of Babubhai Vs. State 2011 (1) SCC (CriO 336** but that application was neither allowed not rejected nor this issue is discussed in the judgement and straightway the impugned order is passed this clearly shows the misuse of power by learned Judge to satisfy the accused Adv. Subodh Dharmadhikari.

Hon"ble Supreme Court (3-Judge Bench) in the case of ***Vijay Shekhar Vs. Union of India 2004 (3) Crimes (SC) 33*** held that

> *"Fraud on power voids the order if it is not exercised bonafide for end design. There is a distinction between exercise of power in good faith and misuse in bad faith . The former arises **when on authority misuses its power in breach of law ,** by taking in to account bonafide, end with best intentions, some extraneous matters or by ignoring relevant matter that would render the impugned act or order powers.*
>
> *The misuse in bad faith arises when the power is exercised for an improper motive, say, to*

satisfy a private or personal grudge or for wreaking vengenence of a minister as in S. Pratap Singh - Vs *- State* ***(AIR 1964 SC 733)***

A power is exercised maliciously if its repository is motived by personal animosity towards those who are directly affected by its exercise Use of power for on alien purpose other than the one for which the power is conferred is malafide use of power. Same is the position when an order is made for a purpose other than that which finds place in the order. The ulterior or alien purpose clearly speaks of the misuse of the power.

It was said by Warangton C. J. in Short - Vs - Poole corporation (1926) 1 ch 66 that:

No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives would certainly be held to be inoperative.

In Lazarus Estates Ltd - Vs *- Beasely (1956) 2 QB 702 at Pp 712-13 Lord Denning L.J. Said*

"No judgment of a court no order of Minister can be allowed to stand if it has been obtained by fraud , fraud unravels everything ".(emphasis supplied

See also in Lazarus case at p.722 per Lord Parker C.J.

"Fraud" Vitiates all transactions know to the law of however high a degree of solemnity.

(Para 10) Similar is the view taken by this court in the case of ***Ram Chandra Singh - Vs - Savitridevi and ors. (2003 (8)) SCC 319****) Wherein this court speaking through one of us (Sinha J.) Held thus:*

"Fraud as is well known vitates every soleman act .Fraud and justice never dwell together. Fraud is a conduct either by letter or words which induces the other person or authority to take a definite determinative stand as a response to the

conduct of the former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent representation may also give reason to claim relief against fraud. A fraudlent misrepresentation is called deceit and in leading a man into damage by willfully or recklessy causing him to believe an act on falsehood.

It is a fraud in law if a party makes representation which he knows to be false and injury ensues there from. Although the motive from which the representation proceeded may not have been had. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void - ab -intio Fraud and deception is synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any o flair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata.

2004 (3)crimes (SC) 33

24) **CHARGE NO. 7 #**

NOT FOLLOWING THE GUIDELINES OF HON'BLE SUPREME COURT TO SAVE THE ACCUSED.

The rejoinder affidavit filed by the applicant was neither disputed nor denied by the respondent by filling any counter affidavit and hence the learned Judge Shri. A.P. Xyz was duty bound to accept our contention as final in view of law laid down by Hon'ble Supreme Court (3-Judge Bench) in the case of ***Express Newspaper Pvt. Ltd. Vs. Union of India 2009 All SCR O.C.C. 193*** where it has been laid down that,

"(Para 115) Where mala fides are alleged it is necessary that the person against whom such allegations are made should come forward with an answer refuting or denying such allegations. For otherwise such allegations remain unrehutted and the Court would in such a case he constrained to accept the allegations so remaining unrebutted and

unanswered on the test of probability. That precisely is the position in the present case, in the absence of any counter-affidavit by any of the respondents. One should have thought that the Minister for Works and Housing should have sworn an affidavit accepting or denying the allegations made by the petitioners. At our instance, M. K. Mukherjee, Secretary, Ministry of Works and Housing has filed a supplementary affidavit ……."

This case law is clearly mentioned in rejoinder. But in the Judgement even the fact of rejoinder affidavit is also not mentioned nor discussed. This ex-facie proves malafides of Shri. A.P. Xyz.

The contention raised by the petitioner that the impugned F.I.R. being second F.I.R. was not disputed by the A.P.P./I.O. in his say and on this ground the F.I.R. against the petitioners was liable to be quashed.

On the same ground another Hon'ble Judge Shri. A. H. Joshi in Cri. Application No. -1876-/2011 quashed the second F.I.R. A copy of that Judgement was filed on the record but the learned Judge Shri. A.P. Xyz did not mention this fact in the Judgement. It is settled law that the court of Co-ordinate jurisdiction should have consistent opinion on same set of facts and points of law and if this procedure is not followed then instead of achieving judicial harmony it will lead to a judicial anarchy, **[2004 ALL MR (Cri) 1802.]**

25) **CHARGE NO. 8 #**
INCAPACITY/LACK OF KNOWLEDGE TO ACT AS AN HIGH COURT JUDGE.

Shri Justice A.P Xyz is not having the sufficient and basic knowledge to act as a High Court Judge.

He passed the order stating that the accused is not having locus standi to file petition for quashing the F.I.R. In fact only accused can apply for the quashing of F.I.R. **[2010 Cri. L.J. 379 (SC)]**

The learned Judge in his Judgement held as follows.

"It appears that, on 16-7-2010 Mr. Meghraj Dhule President of Bar Association lodged report at Police Station, Pusad, District Yavatmal which was registered as F.I.R. No. 191/2010 on 17-07-2010 "

Hence it is clear that the written complaint was given on 16/07/2010 and it was not registered on that day but it was registered on next day i.e. on 17/07/2010 and it is treated as F.I.R.

This shows that the learned Judge does not know the provision of section 154 of code of criminal procedure and law laid doen by Hon'ble Supreme Court in the case of **State of A.P. Vs. Punati Ramalu AIR 1993 SC 2644.** In this Judgement Hon'ble Supreme court clearly laid down the law that whenever the police station officer did not register the F.I.R. on the same day when complaint was given but register it after due deliberation and consultation then such F.I.R. is illegal and it cannot be treated as F.I.R. and no reliance can be placed on such a tainted investigation.

Hence the document which is not a F.I.R. and bears the stamp of illegality in view of the law laid down by Hon'ble Supreme Court. Then passing order of further investigation to continue that too against the law of Supreme Court makes it clear that either the Judge Shri. A.P. Xyz does not know the law or he passed the order for extraneous considerations and in both cases his continuance as Judge of High Court is highly dangerous as the fate of thousands and Lakhs of Citizen are put to jeopardy.

The appropriate order which could have been passed in the case of such a tainted investigation is already been decided by Hon'ble Supreme Court in the case of **Babubhai Vs. State 2011 (1)** SCC (Cri) **336** where it has been specifically laid down that the investigation agency cannot be permitted to conduct an investigation in a tainted and biased manner. It has further been made clear that any action taken by police pursuant to such tainted investigation is vitiated and liable to be quashed.

In another landmark judgement in the case of **'Dr. 'X' Vs. Hospital 'Z' 1991 (1) ALL MR 469 (SC)** Hon'ble Supreme Court observed that,

> *"(para 43)* .....
>
> *Moreover, where there is a clash of two Fundamental Rights, ….which is her Fundamental Right under Article 21, the RIGHT which would advance the public morality or public interest, would alone be enforced through the process of Court,* ***for the reason that moral consideration's cannot be kept at bay and the Judges are not***

expected to sit as mute structures of clay, in the Hall, Known as Court Room, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day "

(See : Legal Duties : Allen)

The totality of above settled law makes it clear that the learned Judge Shri. A. P. Xyz is unable to perform his duty of Judge and to do the justice and therefore he is liable to be removed from his post and he is also liable for strict punishment which will be deterrent to others also.

26) **CHARGE NO. 9 #**
INCAPACITY TO INTERPRET THE CASE LAWS OF SUPREME COURT.

Justice A.P. Xyz does not have the caliber even to interpret the case laws of Hon'ble Supreme Court.

Hon'ble Supreme Court in the case of promote Telecom Engineers Forum – Vs- D.S. Mathur 2008 ALL SCR 2320 loid down that,

"……. Wrong interpretation of Supreme Court's order is contempt of Court.
2008 ALL SCR 2320.

The main contention of the applicant was that the complaint does not contain the date, time, place of offence, name of victims and exact role played by each accused and it only contains the sections and language of those sections. Such complaints are called as highly illegal by Hon'ble Supreme Court in the case of **Neelu Chopra Vs. Bharati 2010 (1) SCC (Cri) 286.** This case law was also referred in the judgement by learned Judge Shri. A.P. Xyz but whether it is applicable or not and why it is not applicable to the case in hand is not mentioned in the Judgement, only because, if discussed then the result must have gone in favour of the applicant. Even otherwise it is out of logic of any prudent man that if any person relied on a case law of Hon'ble Supreme Court then without discussing its applicability how a High Court Judge can pass the order that too against the law laid down by Hon'ble Supreme Court.

It is worth to mention here that even if this case law was discussed in the Judgement the learned Judge wrote a sentence which is clear contempt of Hon'ble

Supreme Court. The observations against the above case Law of Hon'ble Supreme Court in Neelu Chopra's case made by the learned Judge Shri Xyz are as follows :

> *"Therefore, non-mention of some facts or vague reference to some facts cannot be considered as fatal. In present case looking in to the contents of F.I. R. which appears to have been signed by the President of Pusad Bar Associations against the accused, it appears that the first informant has listed various acts as also penal sections under which such acts are punishable with a request to take action against the accused for the offences allegedly committed. Therefore it cannot be said that the allegations contained in the F.I.R. in this case do not constitute any cognizable offence. Furthermore, one cannot say that no any case is made out against the accused in respect of the alleged commission of cognizable offence"*

This is exact contrary to the ratio laid down by Hon'ble Supreme Court in Neelu Chopra's Case (Supra). Moreover the learned Judge himself is unable to point out that which cognizable offence is disclosed from the complaint but by a cryptic sentence he only said that cognizable offence is made out from the complaint. Passing of such order is arbitrary and amounts to colorable exercise of power by the judge as has been held by Hon'ble Bombay High Court in the landmark Judgements in the case of **Vaidya Vs. State 2002 *(2)* Mh. L.J. 830 (Bom)**

It has been held that,

> *(para 7) - ..What was expected of the learned magistrate was to find out that whether any offence is made out in the complaint.* ***The entire order of learned magistrate does not even remotely indicate how he came to the conclusion that offence is disclosed.*** *He has observed that at this stage main allegation is that documents produced before the selection committee of the M.P.S.C. were false and matter was decided only after a trial, this reasoning of the learned magistrate in his order simply stated that it is a fit*

case for full fledged trial which reasoning is incomprehensible and it appears that for some reasons not on record the learned magistrate took cognizance of offence without having been himself satisfied that an offence was in fact committed.

The order of learned magistrate if read in its entirety clearly shows that the magistrate was aware that complaint discloses no offence and inspite of having become aware he issued the process for reasons which can only be extraneous.

The order not only suffers from non - application of mind but clearly show that it is passed for some extraneous considerations. As a senior additional chief metropolitan magistrate he is expected to know what is the effect of summoning a person as accused to criminal court - To cause harassment to the petitioner recourse taken to criminal court and the court lend necessary assistance to the complainant to abuse the process of law by passing a vague order consciously . It is not a case of some order passed hurriedly due to pressure of work the learned magistrate had passed an order running in seven pages which does not speak of a single sentence as to how and what offence is committed . ***I am convinced that the learned Magistrate also found that no o ffence is disclosed even thereafter*** *going* ***out of the way he wanted to help the complainant. The process of law was misused not only by the complainant but also by the learned magistrate . It is a clear case of misuse*** *of* ***judicial power by the court.***

In another case of similar nature it has been observed by Hon'ble High Court in the case of **Brajo Sunder K. Banerjee Vs. State of Maharashtra 2008 ALL MR (Cri) 2773** Where it has been held that

"*The averments in the F.I.R. are not germane to constitution of any Criminal offence nor the*

learned Judicial Magistrate ascribed any valid reasons to proceed against the applicant. His simple disagreement with the Police report cannot be foundation to proceed against the applicant without there being any tangible reason recorded by him. ***The impugned order is arbitrary and amounts to colourable exercise of the judicial power. Under these circumstances, I have no hesitation in holding that the impugned order and the Criminal proceedings amount to abuse of the process of the Court.***

It is also settled law that mis-interpretation of Hon'ble Supreme Court's order is also contempt. ***(Promote Telecom Engineers Forum Vs. D.S. Mathur 2008 ALL SCR 23201***

The malafides of the learned Judge Shri. A.P.Xyz is writ at large that he not only dismissed the petition but also with costs. If the record of orders passed by him in all other cases is checked then it will disclose the malafides and pecuniary interest of the learned Judge. Because as per my knowledge the learned Judge Shri. Xyz did not dismissed the petition with costs.

27) **CHARGE NO. 10 #**

INABILITY TO PERFORM THE DUTY EVEN WHEN VIOLATION OF CONSTITUTION IS BROUGHT TO THE NOTICE BY FILING WRITTEN APPLICATION.

The applicant clearly point out the illegality committed by the complainant and it was brought to the notice of learned Judge that the complaint is based on the resolution of Bar Association Pusad which is declared null and void by the Hon'ble Supreme Court in the case of ***A.S. Mohd. Rafi's Vs. State 2011 AIR SC (Cri) 193*** as there was a order to advocates at Pusad to not to accept the Vakalatnama of the applicants and not to defend their cases. Considering this fact Hon'ble Supreme Court Quashed the F.I.R. against the accused. The same relief was prayed by the applicant in view of Article 14 of the constitution. Moreover the resolution which is itself declared null and void then the proceeding based on such unconstitutional resolution is vitiated. This thing was clearly mention in the application U/s. 91 of Cr. P.C. being Cri. Application No. 612/2011. Which is neither allowed nor rejected and even not discussed in the Judgement.

This raises a question that whether a person which can not perform his duty as a Judge can be allowed to continue as a Judge of the High Court and the fundamental legal rights of the citizens be put in to jeopardy.

In another landmark judgement in the case of **'Dr. 'X' Vs. Hospital 'Z' 1991 (1) ALL MR 469 (SC)** Hon'ble Supreme Court observed that,

> *"(para 43) .....*
>
> *Moreover, where there is a clash of two Fundamental Rights, .. Fundamental Right under Article 21, the RIGHT which would advance the public morality or public interest, would alone be enforced through the process of Court, for the reason that moral consideration's cannot be kept at bay and the Judges are not expected to sit as mute structures of clay, in the Hall, Known as Court Room, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day "*
>
> *(See : Legal Duties : Allen)*

The totality of above settled law makes it clear that the learned Judge Shri. A. P. Xyz is unable to perform his duty of Judge and to do the justice and therefore he is liable to be removed from his post and he is also liable for strict punishment which will be deterrent to others also.

28) CHARGE NO. 11
INCAPACITY TO UNDERSTAND BASIC PROVISIONS OF THE LAW.

Apart from all other ground the specific ground taken by the applicant was that the complaint is filed for the defamation of unknown citizens by the complainant who is not the person defamed and therefore the cognizance is barred as per the section 199 of Cr. P.C. but the learned Judge did not consider this ground. The applicant relied on the case Law of Hon'ble Supreme Court in the **Khushboo's case 2010 (2) SCC (Cri) 1299** and on the case of **Swamy Apporvananda 2000 Cri. L.J. 4296.**

In Apporvananda's case (Supra) it has been specifically been laid down that the complaint of defamation by an advocate for defamation of a third party is

barred. Even regarding the lack of knowledge of Judge regarding the provisions of section 199 of Cri. P.C. are also discussed as follows.,

> *"(6) ……. It shocked my conscience, that a Magistrate having been empowered to take cognizance of the offence is in dark about the statutory provision. In my opinion them pugned order taking cognizance nothing but an abuse of the process of the Court – Quashed"*

Hence it shows the incapacity of Shri. Justice A. P. Xyz.

29) **CHARGE NO. 12 #**

MISUSE OF POWER FOR SAVING THE ACCUSED FROM PROVED CHARGES OF CONTEMPT OF COURT AND U.S. 191, 192, 193, 199, 200, 201, 217, 218, 219, 166, 119, 465, 466, 471, 474, R/W 120 (B) OF I.P.C.

The application given under section 340 of Cr. P.C. has to registered separately and decided separately irrespective of the main proceedings in relation to which such offences are committed. This is made clear by the catena of decisions of Hon'ble Bombay High Court and Hon'ble Supreme Court.

i) *Kenneth Desa Vs. Gopal Narang 2007 ALL MR (Cri) 2281 (Bom) (Nagpur Bench)*
ii) *Pritish Vs. State 2002 Cri. L.J. 540.*
iii) *Afzal Vs. State AIR 1996 SC 2326 etc.*

But this procedure is not followed by the learned Judge in this case.

The False affidavit filed by P.S.O. Mr. Dnyaneshwar Kadu, Adv. Meghraj Dhule, Adv. N.S. Deshpande and Adv. Subodh Dharmadhikari was ex- facilely proved. This fact was neither disputed nor denied by the persons filing false affedevit before Hon'ble High Court. The accused did not file their apology. The learned Judge was bound to punish them in view of specific law laid down by Hon'ble Supreme court in the case of **U.P. Resident Employeed Co-Op. House Building Society and others Vs. New Okhla Industrial Development Authority 2010 (3) SCC (Cri) 586. Also in view of law laid down by Division Bench of Hon'ble Bombay High Court in the case of B.A. Shelar Vs. M.S. Menon 2002 Cri. L.J. 788 & Manlavak Singh Vs. Rmakirit AIR 1940 Pat 631 etc.**

But he did not pass any order on that application with ulterior motive to help the accused.

The above application was neither allowed nor rejected.

It is settled principle of to law that the discretion given to Judge are not unfettered discretion but it has to be guided by sound principles of law.

The Judge/Magistrate who exercise discretion are expected to bear in mind that:

> *"Discretion when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor, it must not be arbitrary, vague and fanciful, but legal and regular"*
>
> ***[Tingley-vs- Dalby, 14 NW 1461***
>
> *"An appeal to a Judge]s discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with established principles of law."*
>
> ***Gudianti Narsimha -Vs- Public Prosecutor. High Court 1978 Cri. L.J. 502.***
>
> *"The Judge, even when he is free, is stili not wholly free. He is not to innovate at pleasure He is not a Knight - errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity or order in the social life.*
>
> ***The Nature of the Judicial Process - Benjamin Cardozo, Yale University press (1921)]***

But the learned Judge Shri. A.P. Xyz misused his discretion to satisfy the accused Adv. Subodh Dharmadhikari.

In another similar case it has been observed by Hon'ble High Court in the case of **N. Balaji Vs. Smt. Savitri 2004 Cri. L.J. 2818** that,

> "-------- *Whereas in the case in hand the Magistrate has only acted against the warranting procedures established by Law in one sided manner absolutely without giving any opportunity for the girl to speak out her mind and as though treating her dumb founded animal, the Magistrate, had acted in a biased manner absolutely bereft of any reason of legal consideration but only as an instrument of the first respondent for reasons known to himself"*
>
> **N. Balaji Vs. Smt Savitri 2004 Cri. L.J. 2818**

The same is the Position in the case of applicant.

30) **CHARGE NO. 13 #**

NOT PERMITTING THE COUNSEL FOR PETITIONER TO ARGUE THE CASE BECAUSE THE PETITIONER MADE COMPLAINT AGAINST ADV. SUBODH DHARMADHIKARI.

The petitioner No. 2 was represented by Adv. O.D. Kakade and Adv. S.R. Narnaware their arguments were heard but the Counsel for petitioner NO. 1 Mr. Vivek Ramteke was not allowed to argue the case. The counsel for applicant Mr. Vivek Ramteke belongs to minority Christian Community. This is clear violation of principles of natural justice and it is also against the law laid down by Hon'ble Supreme Court in the case of ***Himanshu Singh Sabharwal* -Vs-** ***State*** ***2008 ALL SCR 1252*** where it has been held that,

> **"***(para 12) Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should he rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.*

(para 13) The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. ”

Also in the case of ***W.B.E.R.C. Vs. CESC Ltd 2002 (8) SCC 715*** it has been held that,

(para 100) The High Court by its order dated 7-5-2002 has declined to hear the arguments of the appellants in CA No. 4048 of 2002, on the ground that they had alleged bias against the Judges. In case where an allegation of bias made against the Judges is found to be not proved, it is open to the court to initiate such action against the person who made the allegation of bias, as is permissible in law. That in our opinion would not empower the court to deny a right of hearing, if the person alleging they said bias is otherwise entitled to. We think denial of hearing which is reasonably due to a party cannot be made on the ground of the conduct of the party attributing bias.'

(para 101) The right of audi alteram partem is a valuable right recognised even under the Indian Constitution (see Maneka Gandhi v. Union of India[21]) wherein it is held, the principle of the maxim which mandates that no one should be condemned unheard, is a part of the rule of natural justice. We have already held that such right of hearing conferred by a statute cannot be taken away even by courts. While reckless and motivated allegations against the court should be severely dealt with by appropriate proceedings, in our opinion, imposition of the punishment of denying a right of hearing would amount to a violation of the principles of natural justice and, hence, should not be resorted to. However, in the instant case since we have heard these appellants on the merits of the case, the said prejudice, if any, caused to them stands obliterated and requires no further consideration.

31) **CHARGE NO. 14 #**

PASSING THE ORDER BY TAKING EXTRANEOUS FACTORS WHICH WERE NOT RAISED BY THE PROSECUTION OR PETITIONER.

It has been observed by Justice Shri. A.P. Xyz in the judgment that the accused have no right to apply for quashing the F.I.R. It is shocking that the person acting as High Court Judge does not know the basic principles of law.

Needless to mention here that the above issue was never raised by the prosecution nor the learned Judge had given any opportunity to the counsel for applicant to put their stand on this issue. This is also violation of various orders passed by Hon'ble Supreme Court.

> *"[It is not possible for the court to decide an issue, not raised/agitated by the authority for the reason that other party did not have opportunity to meet it and such a course would violate the Principles of natural justice (Vide Delhi Municipal Council Vs. state of Punjab AIR 1997 SC 2841.)] Similarly in Majotra Vs. Union of India and Ors 2003 (8) SCC 40 the Apex Court held as under –*
>
> *"The Courts would be well advised to decide the petitions on the points raised in the petition and if in a rare case keeping in view the facts and circumstances of the case any additional points are to be raised then the concerned and affected parties should be put to notice on the additional points to satisfy the principles of natural justice. Parties cannot be taken by surprise."*

The same principles is reiterated by Hon'ble Supreme Court in the case of ***2008 ALL MR (Cri) 1151 (SC)***

> *"where it has been laid down that, the Court cannot travel beyond observation alien to case. Even if it becomes necessary to do so, it may do so only after notifying parties concerned so that they can put forth their view on such issue.*

32) **CHARGE NO. 15 #**

PASSING THE ORDER IN VIOLATION OF ORDER OF HON'BLE SUPREME COURT IN THE CASE OF 2009 ALL SCR 2575.

The petition of the applicant was filed on various grounds and main ground was about the present F.I.R. being Second F.I.R. and therefore investigation is illegal and liable to be quashed as per the law laid down by Hon'ble Supreme Court in the case of ***T. T. Antony Vs. State 2001 Cri. L.J. 3329.***

But while passing the order no other grounds were discussed in the judgment and not decided. And the petition was dismissed without examining any of the issues raised. It is a clear violation of Hon'ble Supreme Court's directions in the case of ***Ram Phal Vs. State 2009 ALL SCR 2575.*** It has been laid down by Hon'ble Supreme Court that

> "7. *Having gone through the impugned order, in our considered view, we cannot sustain the same for the reasons, that, in the writ petition filed, the appellant had raised several issues in support of the relief sought in the writ petition. The High Court without examining any one of the issues raised and canvassed, by cryptic and non-reasoned order, has dismissed the writ petition. In our view, this is not the way a petition filed under Article 226 or 227 of the Constitution of India is to be disposed of. The duty to give reasons for coming to a decision is of decisive importance which cannot be lawfully disregarded. The giving of the satisfactory reasons is required by the ordinary man's sense of justice and also a healthy discipline for all those who exercise power over others. This Court in the case of* ***Raj Kishore Jha Vs. State of Bihar and Or*** *s.,* ***(2003)11 SCC 519 : [2003 ALL MR (Cri) 2339 (S.C.)]*** *has stated:*
>
> *"Reason is the heartbeat of every conclusion. Without the same, it becomes lifeless ".*

In another judgment Hon'ble Supreme Court in the case of ***Suga Ram - Vs- State 2007 ALL MR (Cri) 546 (SC)*** held that,

> "[para 7] *Leave much to be desired Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of*

its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court order not sustainable. Similar view was expressed in ***State of U.P. Vs. Battan and Ors. (2001(10) SCC 607).*** *About two decades back in* ***State of Maharashtra Vs. Vithal Rao Pritirao Chawan (AIR 1982 SC1215)*** *the desirability of a speaking order while dealing with an application for grant of leave was highlighted. The requirement of indicating reasons in such cases has been judicially recognized as imperative. The view was reiterated in* ***Jawahar Lai Singh Vs. Naresh Singh and Ors.***

(1987(2) ***SCC 222).*** *Judicial discipline to abide by declaration of law by this Court, cannot be forsaken, under any pretext by any authority or Court, be it even the highest Court in n State, oblivious to Article 141 of the Constitution of India, 1950 (in short the 'Constitution').*

7. Even in respect of administrative orders Lord Denning M. R. in Breen ***Vs. Amalgamated Engineering Union (1971(1) A11E.R.*** *1148) observed "The giving of reasons is one of the fundamentals of good administration". In* ***Alexander Machinery (Dudley) Ltd. Vs. Crabtree (1974 LCR120)*** *it was observed: "Failure to give reasons amounts to denial of justice". Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at". Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out.*

The "inscrutable face of a sphirvc" is ordinarily incongruous with a judicial or quasi- judicial performance.

The conduct of Judge in not following the directions of Hon'ble Supreme Court amounts to contempt of Supreme Court as has been held by Apex Court in the case of ***Robindra Nath Singh -Vs- Rajesh Ranjan 2010 (3) SCC Cri. 165.***

In fact whenever any offence pertaining to administration of justice is committed and more particularly when it is regarding interpolation of orders by the Judge then in fact is duty of the Government pleader to take effective steps for prosecution of guilty Judge. As every citizen belongs to state and even the permission to end his own life is not granted to any citizen.

In this regard it must be noted that in an identical case in --------**AIR 1971 SC 1708** it has been held that,

if the Judge made some interpolation in his order then he is liable to be prosecuted under section 167, 465, 471 etc of I.P.C. and the complaint was in fact filed by the Govt. pleader.

However no such steps were taken by the Govt. pleaders office of High Court, Nagpur. This fact requires a thorough investigation because copy of the petition was also sent to G.P. office at High Court Nagpur but no steps were taken which the law makes obligatory for the Govt. Pleader.

33) **CHARGE NO. 15 #**

JOINING CONSPIRACY OF CORRUPTION AND OTHERS CRIMNAL OFFENCES AND THEREBY COMMITING OFFENCE UNDER SECTION 120-B OF I.P.C.

In the case of **Ramanlal –Vs- State 2001 Cri. L. J. 800**, it has been held that, the High Court Judge is liable to be prosecuted in view of Sec. 120 (B) of I.P.C. if he supports the conspirators. It has been held that,

Conspiracy – I.P.C . Sec. 120 (B) --Apex Court made it clear that inference of conspiracy has to be

drawn on the basis of circumstantial evidence only because it become difficult to get direct evidence on such issue – The offence can only be proved largely from the inference drawn from act or illegal omission committed by them in furtherance of a common design – Once such a conspiracy is proved, act of one conspirator become the act of the other – A conspirator who joins subsequently and commits overt acts in furtherance of the conspiracy must also be held liable – proceeding against accused can not be quashed.

In present case Shri. A. P. Xyz misused his power to help the accused and tried to harass the complainant hence, he is co-conspirator in the main crimes and therefore, liable to be punished as per Section 120-B of Indian Penal Code.

34) The law regarding prosecution of Judges are summarized below.

"However, apart from the absence_ of jurisdiction the learned Chief Judicial Magistrate released the accused persons on bail on the face of verdicts successively given by me Higher COLITIS. He had a conscience Knowledge of those orders. This venture of the Chief Judicial Magistrate is certainly derogatory to well defined judicial responsibility. It lacks both good faith and bona fide. It is well intended deliberate and tainted with suspicion also. It tends to exhibit utter disregard to the judicial authority of the Courts in high rank. From the narration of events in the reference which are not controverted the act of the respondent is explicitly well calculated with a design to undermine the authority of the Higher Court. We, therefore, hold the contemnor Shri R.A. Khan guilty of having committed the contempt.

***1993 Cri. L.J.* 816**

(1) 2003 (1) B.Cr.C.268 (Bom (DB)

"Cr.P.C. S.344 on Scrutiny High Court found that accused tried to escape on basis of forged dying declaration - High Court issued show cause notice to advocate for accused, Special Judicial Magistrate etc. calling explanation as to why they should not be tried summarily for giving false

evidence or fabricating false evidence (I.P.C. 466,193, 471, 109)

(2) AIR 1971 SC 1708

"I.P.C. 167, **465,466 ,471 - *A*** *first class Magistrate was alleged to have made some interpolation in the order sheet of a case in after sanction under section 197 by the state Govt. a complaint was filed in a competent court of Magistrate against the said first class Magistrate. Action is legal".*

(4) LL.R. 1928 (52) Mad 347

"I.P.O. 466 - A Judge fabricating any record in a pending case commits an offence a under this section.

(5) Wrong interpretation of Supreme court's order is contempt of court.

2008 ALL SCR 2320

(6) Civil Judge Sessions Division acted in violation of Supreme Court order Supreme Court issued severe reprimand - copy of order forward to disciplinary authority for further action.

***AIR 2001* S.C. 197.**

(7) *Serious doubt if procedure required under Cr. P.C. was followed by magistrate while taking cognizance - Fradulent act even injudicial proceeding could not be allowed to stand - All actions taken in complaint including issuance of bailable warrant was liable to declared* ***void ab initio.***

2004 Crimes 33 SC

(8) *Contemnor not only violated Supreme Court's order but also Air Act -Sentence of one week simple imprisonment and Rs. 1 Lac as cost imposed on contemnor.*

Sessions Judge acted in violation of Supreme Court order -Supreme Court issued Severe Reprimand - Copy of order forwarded to disciplinary committee for further action against said Judge.

AIR 2001 SC 1975

M.C. Mohata - Vs - Union of India

(9) *No complaint form that court is necessary where it is alleged that the subordinate Judge before whom a suit was proceeding has himself abated an offence under section 193*

- And has also committed offence under section 465 and 466"

35) The all other illegalities and malafides are given in detail in the petition attached herewith.

36) Since the matter is relating to serious criminal charges of misuse of power by Judge to save the accused therefore the all responsible persons including Shri. Justice A. P. Xyz, A.P.P., Adv. Subodh Dharmadhikari are liable to be dealt under Section 340, 344 of Cr. P. C. as per ratio laid down by division Bench of Hon'ble Bombay High Court in the case of ***State –vs- Kamlakar N. Bhavsar 2002 ALL MR (Cri.) 2640.***

37) As per ratio laid down by Hon'ble Supreme Court in the case of ***Subramanyan Swami –Vs- Manmohan Singh 2012 (Vol. 1) SCC (Cri.) 1041*** if after receipt of complaint sanction u/s. 197 of Cr. P. C. is not granted with 4 months then it may amount to deemed sanction.

In present case the complaint was lodged on 23/07/2011 and even after lapse of 8 months no communication regarding sanction to prosecute Shri A. P. Xyz was given therefore, it is a deemed sanction. Moreover sanction is required for taking cognizance and no question of sanction for the investigation. Apart from this the petitioner complaint is forwarded from the office of Hon'ble President therefore it is clear that no question remain for sanctioned to investigate the case against Shri Justice A.P. Xyz.

38) The applicant requests the C.B.I. to initiate appropriate Criminal prosecution against Shri. Justice A. P. Xyz.

39) The main allegations in Letter No. 28593/2010 are that the petitioners are falsely implicated by P.S.O. Dnyaneshwar Kadu and he paid a bribe of Rs. 15 Lakh to session Judge Pusad Shri. A. S. Kale. Also the same sessions Judge A.S. Kale who is involved in the conspiracy have intimated to Adv. Subodh Dharmadhikari to manage the High Court and this fact was admitted by Adv. Subodh Dharmadhikari openly before various persons and advocates. Hence it is a clear case of corruption and the act of Justice A.P. Xyz to help these accused makes them liable for prosecution in view of section 201 & 120 (B) of I.P.C. The conspiracy is hatched in secrecy but the chain of circumstantial evidence is sufficient to prosecute all the accused. The fact that the accused advocate Mr. Subodh Dharmadhikari was avoiding to argue the case before other judges un-of-sudden was in hurry to decide the case before Shri. A.P. Xyz is

sufficient ground to complete the chain of conspiracy. In the this regard law is settled by Hon'ble Supreme Court and various Hon'ble High Courts of India.

40) The applicant sent complaint to Hon'ble Chief Justice of Hon'ble Supreme Court of India for initiating contempt proceeding against Shri Justice A.P. Xyz on 23/7/2011.

By Letter dated 27th Sept. 2011 (Dy. No. 306/N-RTI/11-12/SCI). It has been informed that the matter is under consideration. Copy of Complaint and all communication are attached herewith.

41) <u>PRAYER</u> : It is therefore, humbly prayed that,

i] S.P., C.B.I, A.C.B., Nagpur be directed to register F.I.R. against Shri A. P. Xyz, Judge, Bombay High Court u/s. 217, 218, 219, 191, 192, 193, 199, 200, 201, 465, 466, 471, 474 r/w. Sec. 120-B of Indian Penal Code along with provisions of Prevention of Corruption of Act.

ii] till the enquiry/investigation of the matter Shri A. P. Xyz be transferred out of the State of Maharashtra.

iii] Since the misbehavior, Criminal offences, incapacity, illegality, malafides and biasness of Shri. Justice A. P. Xyz are ex-facially proved therefore, he be directed to resign from his post in view of law laid down by 5-Judge Bench of Hon'ble Supreme Court in the case of ***<u>K. Veerswami –vs- Union of India 1991 (3) S.C.C. 655</u>***.

iv] Register General be directed to seize the records of the case.

v] The C.B.I. will be directed to collect the mobile phone details of all the accused involved in the conspiracy.

FOR THIS ACT OF KINDNESS AND JUSTICE THE APPLICANT WILL ALWAYS REMAIN GRATEFUL.

Signature

_____

Rashid Khan Pathan

egkjk"Vª jkT; ekuoh gDd vk;ksx] eqacbZ-

Division Bench Case No. _____/2014

fiVh'kuj %& vWM- ''kkarh d`".kk rsyh
jk- 702] jkes'oj VkWoj] U;w xksYMu usLV]
HkkbZanj ¼iwoZ½] Bk.ks-

-----fo#/n-----

mRrjoknh %& 1 -Jh- xyz
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2- iz/kku ftYgk U;k;k/kh'k] Bk.ks
3- jftLVªkj] ,l-vk;-Mh-
eaqcbZ mPp U;k;ky;] eqacbZ&4000032
4- jftLVªkj] bULisD'ku]
eaqcbZ mPp U;k;ky;]eaqcbZ & 4000032
5- egkizca/kd]
eaqcbZ mPp U;k;ky;]eaqcbZ-

fo"k;%& 1½ mRrjoknh dz- 1 Xyz ;kauk dsl ykW pk dlk okij djkok ;kckcr dk;|kps Kku ulwu R;kauh ek-eaqcbZ mPp U;k;ky;kps vkns'kkph

voekuuk d#u vtZnkjkl =kl ns.;kP;k okbZV gsrwus vtZnkjkus fnysys dsl yWk o eqn~ns fopkjkr u ?ksrk xSjdk;ns'khj vkns'k ikjhr dsY;keqGs R;kaP;kfo#/n Hkknfo 193]191] 217] 218] 219] 466]471]474 vknh dyekvarxZr ;ksX; rh dk;ns'khj dkjokbZ dj.ksckcr-

2½ mRrjoknh dz- 1 fo#/n ek-eqacbZ mPp U;k;ky;kps vkns'kkph voekuuk dsY;keqGs dksVZ voekuuk dk;|kvarxZr dkjokbZpk izLrko ek-eqacbZ mPp U;k;ky;kdMs ikBfo.;kps funsZ'k mRrjoknh dz- 2 iz/kku ftYgk U;k;k/kh'k o/kkZ ;kauk ns.ksckcr-

3½ mRRkjoknh dz- 1 ps ;kapk xSjdk;ns'khji.kk izFken'kZuh fl/n gksr vlY;keqGs R;kauk Rojhr fuyachr dj.ksckcr-

4½ lnj xSjizdkjkeqGs >kysY;k =klkiksVh uqdlku HkjikbZ Eg.kwu #- 20 yk[k ns.;kps vkns'k ekuoh gDd laj{k.k vf/kfu;e ps dye 18 ¼3½ uqlkj ns.ksckcr-

ek- egksn;]

1½ vtZnkj gh odhy vlwu eqacbZ mPp U;k;ky;kr odhyh O;olk; djr vkgs-

2½ mRrjoknh dz- 1 **Mxyz** olbZ] ft- Bk.ks ;sFks l= U;k;k/kh'k inkoj dk;Zjr vkgs-

3½ vtZnkjkus mRrjoknh dz- 1 P;k U;k;ky;kr vkjksih ukes le'ksj [kku ;kaP;k orhus tkehu lkBh vtZ **Misc Cri. Appn. No. 741/2013** orhus gk fnukad 17@12@2012 jksth nk[ky dsyk gksrk- vtZnkjkus R;kP;k vtkZoj ;qDrhokn djrkauk iq<hy dsl ykW nk[ky dsys gksrs-

1. **2002 BCR 689 Khemlo sawant – vs- state**
2. **1997 CR Cr.L.J. 3124**
3. **2013 ALL MR (Cri) 2112**
4. **2000 (1) RCR (Cri) 399**
5. **2005 ALL MR (Cri) (J) 12**
6. **2009 Cr. L.J. 1031**
7. **2013 ALL MR (Cri) 2273**
8. **1997 AIR SC 2477**
9. **Cri. Application No. 514/2013 (Bombay) Lalit Soni – vs- State (Bombay High Court order dated 11th July 2013.**
10. **2012 (1) SCC (Cri) 26/Sanjay Chandra – vs- C.B.C**

4½ ojhyiSdh dkgh dsl ykW gs ek- eaqcbZ mPp U;k;ky; vlwu dkgh brj ek- mPp U;k;ky;kps vlY;kps mRrjoknhus dz- 1 us EgVY;keqGs vtZnkjkus vk.k[kh ,d dsl ykW nk[ky dsyk **¼2011 ¼4½ ,vk;vkj ckWe-vkj- 238½** R;ke/;s ek- eqacbZ mPp U;k;ky;kus Li"V

dk;nk Bjowu fnyk vkgs dh] brj mPp U;k;ky;kps dsl ykW lq/nk egkjk"Vªkrhy dfu"B U;k;k/kh'kkauk ca/kudkjd vkgsr- vkf.k rs ekuU;kl udkj ns.ks gs U;kf;d f'k"VkpkjkP;k fo#/n vlwu laca/khr U;k;k/kh'k gk dkjokbZl ik= vkgs-

Judicial Discipline observation of trial Magistrate that the Judgement of Kerala High court is not binding on him is against judicial discipline and propriety – Registrar General directed to take suitable action against concerned Judge.

2011(4) AIR Bom R 238

5½ ojhy vtkZoj vkns'k ikjhr djrkauk **Jh- Mxyz]** [kkyhyizek.ks xSjdk;ns'khji.ks dsyk vkgs-

6½ ijarw mRrjoknh U;k;k/kh'kkus laca/khr dks.kR;kgh dsl ykW e/khy ek- loksZPp U;k;ky; vkf.k ek- eaqcbZ mPp U;k;ky;kus Bjowu fnysyk dk;nk dlk ykxw iMrks fdaok dk ykxw iMr ukgh ;kps dk.skrsgh Li"Vhdj.ks vkiY;k vkns'kkr uewn u djrk vtZnkjkpk vtZ ukeatwj dsyk- mRrjoknhus vtZnkjkP;k U;k;fuokM;klanHkkZr QDr iq<hy okD; fyghys- v'kkizdkjs mRrjoknh dz- 1 ;kus vtZnkjkrQsZ nk[ky dsl ykW ph voekuuk d#u csdk;ns'khji.ks vtZnkjkpk vtZ [kkjht dsyk-

7½ vkjksi dz- 1- # ofdykus fnysys dsl YkkW dls ykxw iMr ukgh

;kps Li"Vhdj.k vkns'kkr uewn dj.ks vko';d vlrkauk rs u d#u

csdk;ns'khj vkns'k ikjhr dj.ks- ¼Hkknafo 219] Cri. Contempt½ :-

;kfpdkdR;kZps odhy ;kauh nk[ky dsysds dsl ykW- e/;s dk; dk;nk Bjowu fnyk vkgs- o rs lnj izdj.kkr

dls ykxw iMr ukgh ;kps Li"Vhdj. vkiY;k vkns'kkr uewn dj.ks mRrjoknh l= U;k;k/kh'k **Mxyz Z** ;kauk ca/kudkjd vlrkauk R;kauh tk.kwu cwtwu rs dsl ykW fopkjkr u ?ksrk o R;kapk mYys[k vkns'kkr u djrk xSjdk;ns'khj vkns'k ikjhr dssys-

dsl ykW P;k okijklaca/kh ek- eaqcbZ mPPk U;k;ky; o loksZPp U;k;ky;kus Li"V dk;nk Bjowu fnyk vkgs-

Whenever any authority is relied by the counsel then it is bounded duty of the judge to meticulously examine the issues and rulings in support thereof. Simply listing the rulings in the Judgement without going in to the ratio decidendi of the same is illegal (**Adarsh Graming Sahakari patsanstha – Vs- Dattu R. Paithankar 2010 (1) Crimes 714 (Bom))**

Also in the case of the **Bank of Rajasthan Ltd. – Vs- Shyam Sunder Tapariya 2006 ALL MR (Cri) 2269** It has been laid down that the judge Should recorded short reasons demonstrating how the case law is applicable to the case. The conduct of judge about passing of cryptic orders even without mentioning full title of the judgement and citation thereof is illegal courts are expected to exhibit from their conduct and their orders concern for justice and not casualness.

In **Dwarikesh Suger Industries – Vs- Prem Heavy Industries AIR 1997 SC 2477** Hon'ble Supreme Court laid down that.

Judicial Adverturism – High Court ignoring various laws settled by Supreme Court - - When a position in law is well settled as a result of pronouncement of Supreme Court then it would be judicial impropriety for the sub ordinate Courts including the High Court to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position- The observation of High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by the Supreme Court – Such judicial adventurism cannot be permitted –

The tendency of the subordinate courts in not applying the settled principles and unwarranted relief to one of the parties is strongly deprecated – It is the time that such tendency should be stopped (para 32)

ijarw Xyz;kauh ojhy loZ fu;ekaps mYya?ku d#u ,dne xSjdk;ns'khj vkns'k ikjhr d#u xaHkhj xSjorZu dsys vkgs- vkf.k Xyz;kauh U;kf;d nq%Llkgl **(Judicial Adverturism)** pk xqUgk dsyk vkgs- lokZr xaHkhj ckc Eg.kts ek- loksZPp U;k;ky;kpk ojhy dsl ykW **(AIR 1997 SC 2477)** gk vtZnkjkP;k odhykus ;qDrhoknknjE;ku fnyk gksrk- o R;kph uksan vkns'kkr vkgs- ijarw R;kps ikyu >kys ukgh-

7½ vkjksihpk vVdiwoZ tkehu jn~n >kyk ;kpk vFkZ vkjksihyk vVdp djkoh vlk ukgh ;kckcr Li"V dk;nk ek- loksZPPk U;k;ky;kus **M.C Abraham – Vs- State (2003) 2 SCC 649** uqlkj Bjowu fnyk vkgs-

Parameters of judicial interference in such matters. In the first place, arrest of an accused is a part of the investigation and is within the discretion of the investigating officer. Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. (Para 13)

In such a case there was no justification for the High Court to direct the State to arrest the appellants against whom the first information report was lodged, as it amounted to unjustified interference in the investigation of the case. The mere fact that the bail applications of some of the appellants had been rejected is no ground for directing their immediate arrest. In the very nature of things, a person may move the Court on mere apprehension that he may be arrested. The Court may or may not grant anticipatory bail depending upon the facts and circumstances of the case and he material placed before the Court. There may, however, be cases where the application for grant of anticipatory bail may be rejected and ultimately, after investigation, the said person may not be put up for trial as no

material is disclosed against him in the course of investigation. The High Court proceeded on the assumption that since petitions for anticipatory bail had been rejected, there was no option open for the State but to arrest those persons. This assumption, to our mind, is erroneous. A person whose petition for grant of anticipatory bail has been rejected may or may not be arrested by the investigating officer depending upon the facts and circumstance of the case, nature of the offence, the background of the accused, the facts disclosed in the course of investigation and other relevant considerations. (Para 14)

8½ vkjksi dz- 2- # ek- loksZPp U;k;ky; o ek- eqacbZ mPp U;k;ky;kus Bjowu fnysY;k dk;|kuqlkj vkjksih gk tkehu feG.;kl ik= vlrk R;kl tkehu ukdkj.ks%&

lnj izdj.kkr ek- eqacbZ mPp U;k;ky;kps nksu vkns'k ¼dsl ykW½ nk[ky dj.;kr vkys gksrs-

1. 2013 ALL MR (Cri) 2113
2.Cri-Application No. 514/2013
Lalit Soni – VS- State of Union Territory.

;k dsl ykW e/;s Li"V dk;nk Bjowu ns.;kr vkyk vkgs dh] tj izFken'kZuh xqUgk tjh fnlr vlsy rjh vkjksihl tkehu ukdk# u;s- rlsp vkjksihph iksfyl dksBMh laiY;kuarj vkjskihyk dksBMhr Bso.ks ;ksX; gks.kkj ukgh- v';kp Lo#ikpk dk;nk ek-loksZPPk U;k;ky;**kus** **Sanjay Chandra – Vs- C.B.I. 2012 (1) SCC (Cri) 26** uqlkj Bjowu ns.;kr vkyk vkgs-

In **Sanjay Chandra – Vs- C.B.I. 2012 (1) SCC (Cri) 26** Hon'ble Supreme Court held, that

Cri. P.c. 439, 437, Bail – Bail is the Rule and Jail an exception – Accused entitled for presumption of innocence till he is convicted – constitutionally protected liberty of accused must be respected unless detention becomes necessary – If any accused is detained before conviction

then it will put unnecessary burden on state to keep a person who is not proved guilty – Normally bail should be granted to accused – Apprehension of tampering of evidence without sound proof could not be accepted and this ground could not be considered in each case to deny the bail.

Discretion while granting bail - The Jurisdiction to grant bail has to be exercised on the basis of well settled principles and not in arbitrary manner – The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken.

Criminal procedure Code, 1973 – Ss. 437 and 439 – prejudices which may be avoided in deciding bail matters – public scams, scandal and heinous offences – public sentiments and disapproval of alleged misconduct – Bail, held, ought not be denied to teach lesson to a person whose offence is yet to be proved – Conditional bail, is a solution in such types of cases.

The approach adopted by the trial court and affirmed by the High court, is a denial of the whole basis of the Indian system of law and normal rule of bail system. It transcends respect for the requirement until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. Bail is the rule and committal to jail an exception. Refuse of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the, bail should be granted to the accused.

Hon'ble Bombay High Court in **CRIMINAL APPLICATION NO. 514 OF 2013 Lalita Soni.. Vs. .. Union** held that;

Index Note – Bail – Sections 406 and 420 of the Indian penal Code (IPC) read with Section 34 – The learned Magistrate directed the applicants to be released on bail – The Sessions Judge canceled the bail granted order of Magistrate granting Bail- Held, Bail is not to be refused merely because a prime facie case exists – It is not possible to accept the reasoning of the learned Sessions Judge – The principals governing grant of bail is discretionary. The law does not favour pretrial detention for an unduly long period. It is also well settled that the power to refuse bail is not to be exercised, as if punishment before the trial, is being imposed – All said and done, the elementary principle that 'pretrial detention can never be punitive in nature, has not undergone any change over the years – Bail is not to be refused merely because a prime facie case exists (except in cases of statutory prohibition, as imposed by some special statutes) Bail is not to be refused merely because a prima facie case exists (except in cases of statutory prohibition, as imposed by some special statutes)- The learned Sessions

Judge overlooked the learned Magistrate – The orders passed by the learned Sessions Judge, cancelling the bail granted to the applicants, are set aside – The applicants shall remain on bail. (para 8,9,13,14)

Moreover Hon'ble Supreme Court (3-Judge Bench) in the case of **Chandraswami – Vs- C.B.I. 1997 Cri. L.J. 3124** laid down that whenever accused appears or bough before the court and if the offences are not covered by c/s (i) and (ii) of Sec. 437 (i) of Cri. P. C. then the accused would be released on bail. (e.g. in cases of I.P.C. 420,471 etc.) Hon'ble Bombay High Court in the case of Khemlo Sawant-Vs- State 2002 BCR (1) 689 also held that in all cases except punishable with death or for life the bail is rule and jail is an exception. (Head Note and para 13)

lkjarw **Mxyz z**;kauh ojhy dsl ykW e/;s fnysys ekxZn'kZd RkRokP;k fojks/kh tkowu tkehu ukeatwj dsyk-

xyz z;kauh R;kaP;k vkns'kkP;k iWjk dz-e/;s vls EgVys dh] vkjksihyk tkehu fnY;kl iqjkO;k'kh NsMNkM djsy- o rikl izHkkfor gksbZy- ijarw R;kauk vls dk okVrs ;kps dks.krsgh lcG dkj.k vkns'kkr uewn ukgh fdaok jsdkWMZoj miyC/k ukgh- R;keqGs **Xyz**;kaP;k vkns'kkrhy ojhy er gs Ekk- loksZPp U;k;ky;kps vkns'kkph voekuuk dj.kkjs vkgs- ek-loksZPp U;k;ky;kus **2012(1)SCC (Cri) 26** ;k dsl ykW e/;s Li"V dk;nk Bjowu fnyk vkgs dh]

"Apprehension of tampering of evidence without sound proof could not be accepted and this ground could not be considered in each case to deny the bail.

rlsp **Mxyz z**;kauh vkiY;k vkns'kkr vls EgVys vkgs dh] **Investigation is still in progress** lkjarw vkjksihP;k lanHkkZrhy rikl gk v/khp iw.kZ >kyk vlwu R;kpk ihlhvkj laiwu rks U;k;ky;hu dksBMhr vkgs- ;k lanHkkZr Li"V dk;nk ek- eaqcbZ mPp U;k;ky;kus **2013 ALL MR (Cri) 2112** eaqcbZ uqlkj Bjowu fnyk vkgs- rjhlq/nk Jh- **Mxyz**

;kauh v'kk csdk;ns'khj rRaokpk vk/kkj ?ksr tkehu vtZ ukeatwj d#u csdk;ns'khji.kk dsyk vkgs- o dksVZ voekuuk varxZr xqUgk dsyk vkgs-

9½ vkjksi dz-3- # riklklaca/kh ek- eaqcbZ mPp U;k;ky; o ek- loksZPp U;k;ky;kus fnysY;k funsZ'kkaps mYya?ku gksr vlY;kps izFken'kZuh fl/n gksr vlrkuk R;kckcr dks.krhgh n[ky u ?ks.ks ¼ ¼AIR 1996 SC 2299) uqlkj dksVZ voekuuk varxZr f'k{ksl ik=½%&

ek- loksZPp U;k;ky;kus iz- Js- U;k;k/kh'k Jh- fude ;kauk dksVZ voekuuk dk;|kvarxZr nks"kh ekurkuk Li"V dsys gksrs dh] vkjksihP;k ekuoh gDdkaps j{k.k dj.kkjs ojh"B U;k;ky;kps vkns'kkaps mYya?ku iksfylkarQsZ gksr vlsy rj rs jks[k.;klkBh Rojhr dkjokbZ o ;ksX; rs vkns'k ikjhr dj.ks laca/khr U;k;k/kh'kkl ca/kudkjd vkgs- rlsp loksZPp U;k;ky;kpk dsl ykW fdaok vkns'k eyk ekghr uOgrk gk cpko ßU;k;k/kh'kklÞ ?ksrk ;s.kkj ukgh-

QkStnkjh izdj.kkae/;s vkjksihl vVd u djrk uksVhl nsowu rikl djkok vls Li"V vkns'k ek- eaqcbZ mPPk U;k;ky;kus fnys vkgsr- **Dinkar Pole Vs State 2004 (1) Criminal (Bom) 1 (DB). 2008 ALL MR (Cri) 2432 2012 ALL MR (Cri.) 3942** rlsp v'kk izdj.kkr vkjksihl vVd dsY;keqGs ek-eqacbZ mPp U;k;ky;kus laca/khr iksfyl vf/kdk&;koj #**-25** gtkj naM BksBkoyk vkgs-

rlsp ek- loksZPp U;k;ky;kus uqdrsp **Siddaram Mehetre Vs. State of Maharashtra 2011 (1) SCC (Cri) 514** ;k izdj.kkr Li"V vkns'khr dssys vkgs dh] [kqukpk xqUgk tjh vlsy rjh vkjksihl vVd dj.;kr ;sow u;s rj uksVhl nsowu izdj.kkpk rikl >kyk ikfgts vkf.k tj vkjksih uksVhl nsowugh

izdj.kkP;k riklkr enr djhr ulsy rjp vkjksihl vVd dsyh ikfgts vU;Fkk vkjksihl vVdiwoZ tkehu fnyk xsyk ikfgts-

Hon'ble Supreme Court in **Siddharam's (Supra) 2011 FIL SCC (Cri) 514** laid down following guidelines of investigation.

"(Para 107) In case, the State considers the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive:

(1) Direct the accused to join the investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.

(2) Seize either the passport or such other related documents, such as, the title deeds of properties or the fixed deposit receipts/share certificates of the accused.

(3) Direct the accused to execute bonds.

(4) The accused may be directed to furnish sureties of a number of persons which according to the prosecution are necessary in view of the facts of the particular case.

(5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice be avoided.

(ek- lokZZsPPk U;k;ky;kps lk/ks er lq/nk Hkkkjrkrhy loZ U;k;ky;kauk ca/kdkjd vkgsr)

Obiter Dicta of Supreme Court is binding all Court's in India-In absence of direct Judgement of Supreme Court Contrary to that subject.

ijarw **Mxyz z**;kauh gsrwiqjLdkji.ks ojhy vkns'kkph voekuuk >kyh vkgs gs ekghr vlwu lq/nk nqyZ{k d#u tk.kwucwtwu ;kfpdkR;kZpk tkehu vtZ csdkns'khji.ks ukeatwj dsyk-

10½ vkjksi dz- 4- # ,[kk|k lgvkjksihpk vVdiwoZ tkehu jn~n dsyk ;k vk/kkjkoj vkjksihpk fu;ehr

tkehu jn~n djrk ;s.kkj ukgh vlk Li"V dk;nk o dsl ykW fjdkWMZoj miyC/k vlrkauk R;k vkns'kkfo#/n tkowu rls csdk;ns'khj okD; vkns'kkr uewn d#u vtZ ukeatwj d#u U;kf;d nqLlkgl (Judicial Adventurism) pk xqUgk (AIR 1997 SC 2477 – order passed by ignoring Case law is Judicial Adventurism):-

lnj izdj.kkr lg vkjksih panu rkjk ;kapk vVdiwoZ tkehu **(Anticipatory Bail)** gk ek- mPp U;k;ky;kus QsVkGyk gksrk- vkf.k vtZnkjkpk tkehu gk fu;fer **(Regular)** tkehu **Cr.P.C. Sec. 439** izek.ks gksrk- rlsp ,[kk|k vkjksihpk tkehu QsVkGY;keqGs nql&;k vkjksihpk tkehu ukdkjrk ;sr ukgh vlk Li"V dk;nk vkgs-

There is no parity in the matter of rejection of bail.
2010 Cr.L.J. (NOC) 304

rlsp vVdiwoZ tkehu ukdkjyk ;k dkj.kko#u fu;fer tkehu **(Cr.P.C. Sec. 439)** gk ukdkjrk ;sr ukgh vlkgh Li"V dk;nk vkgs-

Cr.P.C. Sec. 439,437,438 – Refusal of anticipatory bail is no ground to refuse regular bail.
2009 Cri.L.J.1031

lnjhy dsl ykW vtZnkjkus ;qDrhoknke/;s nsÅugh Xyz;kauh R;k dsl ykW P;k fo#/n tkÅu vkns'kkr vls uewn dsys dh] lg vkjksihpk vVdiwoZ tkehu ukdkjY;keqGs vtZnkjkl tkehu nsrk ;s.kkj ukgh- vls [kksVs okD; Li"V uewn d#u vtZnkjkpk tkehu vtZ ukeatwj d#u **Mxyz Z**;kauh xaHkhj QkStnkjh vijk/k dsyk vkgs-

v’kkizdkjs fiMhr O;Drh gk tkehu feG.;kl ik= vlrkauk **Xyz**;kauh R;kpk vtZ QsVkGwu R;kP;k ewyHkwr ekuoh gDdkps mYy?ku dssys vkgs-

11½ vkjksi dz- 5- # tkehu vtZ ukeatwj dsY;kuarj vkns’kkph izr Rojhr vkjksihl foukeqY; ns.ks ca/kudkjd vlrkauk rh ns.;kl VkGkVkG dj.ks%&

rlsp T;kosGsl vkjksihpk tkehu vtZ gk ukeatwj dsyk tkrks rsOgk vkjksihyk fdaok R;kP;k odhykl R;k vtkZoj ikjhr dsysY;k vkns’kkph izr foukewY; ns.ks laca/khr U;k;k/kh’kkl ca/kudkjd vkgs- ;k ckcr ek- mPp U;k;ky;kus **2003 Cri.L.J.3928** uqlkj Li"V vkns’k ikjhr dsysys vkgsr- ijarw Xyz;kauh dks.kR;kp izdj.kkr dks.kR;kp vkjksihyk tkehu vtkZoj ikjhr vkns’kkph izr fnysyh ukgh-

> Copies of orders in every bail application should be furnished to accused/counsel free of cost immediately after pronouncement of orders on same day.

R;klanHkkZr vtZnkjkus ys[kh vtZ fnuakd **15@01@2014** jksth nk[ky dsY;kuarj vtZnkjkl izr ns.;kr vkyh-

12½ vkjksi dz- 6- # vkjksih rq#axkr vlrkauk tkehu vtZ Rojhr fudkykr dk<.ks fdaok iksfyl ls ns.;kl VkGkVkG djr vlrhy rj varjhe tkehu ns.;klaca/kh Li"V fn’kkfunsZ’k vlrkauk ek- eqacbZ mPp U;k;ky;kps vkns’k 2002 (1) BCR 689 pk pqdhpk vFkZ dk<wu vtZnkjkP;k eqyHkwr ekuoh gDdakps

mYya?ku dj.;kP;k gsrwus varjhe vkns'kkoj vkns'k ns.;kps VkG.ks- (IPC 220, Contempt of Court) HksnHkkoiw.kZ okx.kwd-

ek- loksZPPk U;k;ky;kus **2009 ALL MR (Cri.) 2156** vkf.k ek- eqacbZ mPp U;k;ky;kps iw.kZ [kaMihB ;kauh **2009 ALL MR (Cri.) 1351** uqlkj Li"V dsys vkgs dh] QkStnkjh izdj.kkr vkjksihl f'k{kk fnyh tkrs Eg.kwu vkjksihP;k fgrkps j{k.k dj.kk&;k dk;|kpk vaeyctko.kh dMdi.ks >kyh ikfgts R;ke/;s U;k;ky;kus dsoG vkjksihyk Qk;nk gksr vkgs Eg.kwu rs u ikG.ks fdaok dkghgh vFkZ yko.ks vlys xSjizdkj d# u;s-

> Precedent –Interpretation of statute – penal statute requires strict construction – Wider connotation will give disadvantage to the accused.

rlsp lnj izdj.k gs fn- **17@12@2012** jksth nk[ky >kY;kuarj vusd rkj[kk nsowugh iksfyl tckc@mRrj@**say** nk[ky djhr ulY;keqGs vtZnkjkl varjhe tkehu **Interim Bail** |kok v'kh ekx.kh vtZnkjkus fn- 08@01@2014 jksth dsyh o R;k lkscr ek- eqacbZ mPp U;k;ky;kps vkns'k **2002 (1) BCR 689 Khemlo Sawant – Vs- State** ;kpk vk/kkj ?ks.;kr vkyk- ijarw R;k vkns'kkpk pqdhpk vUo;kFkZ dk<wu Xyz;kauh vtZnkjkl Interim Bail ns.;klkBh lq/nk iksfylkapk **say** (mRrj) ekxfo.ks vko';d vlY;kus fn- 08@01@2014 P;k fu'kk.kh 4 oj P;k vkns'kkr uewn dsys- ojhy er gs csdkns'khj vlwu **Interim Bail** ps vkns'k nsrkuk iksfylakpk **say** mRrj vko';d ulY;kpk Li"V dk;nk osGksosGh Bjowu ns.;kr vkyk vlwu ek-loksZPp U;k;ky;kus **Siddharam Mehetre 2011(1) SCC (Cri) 514** ;k izdj.kkr lq/nk gs Li"V dsys vkgs-

v'kkizdkjs Mxyz;kauh ek- eqacbZ mPp U;k;ky;kP;k vkns'kkpk pqdhpk vUo;kFkZ dk<wu csdk;ns'khj vkns'k ikjhr d#u vtZnkjkP;k eqyHkwr ekuoh gDdkaps mYya?ku dssys vkgs-

Wrong interpretation of Higher Court Judgement is Contempt

Promote Telecom Engineers Forum Vs. D.S. Mathur

2008 ALL SCR 2320

13½ vkjksi dz 7- # Hkkjrh; lafo/kku ?kVusps dye 14 ps mYya?ku d#u dk;|kph vaeyctko.kh lokZlkBh leku ;k rRokps mYya?ku d#u vtZnkjkP;k varjhe tkehu vtkZoj iksfylkaps Eg.k.ks u ekxork varjhe tkehu ns.;kps vf/kdkj vlrkauk nql&;k vkjksihpk vtZ ,sdwu ?ks.ks o vtZnkjkpk vtZ izyafcr Bsowu HksnHkko okx.kwd nsowu Hkkjrh; jkT;?kVusps dye 14 ps mYya?ku dj.ks ¼Hkknafo-219½%&

fo'ks"k ckc Eg.kts [kqn~n Xyz;kauh dkgh vkjksihuk varjhe tkehu gk iksfylkapk ^ls* ekxfo.;kvk/khp fnysyk vkgs- rlsp A B C No. 5/2014 e/;s fn-07@01@14 jksth iksfylkapk ^ls* vkyk ulrkuk lq/nk rks ,dwu ?ksowu fudkyh dk<yk ijarw vtZnkjkpk vtZ iksfylkaP;k ^ls* lkBh Bsoyk- v'kkizdkjs Jh- vkj- ,e-tks'kh ;kauh vtZnkjkl HksnHkkoiw.kZ okx.kwd nsowu Hkkjrh; jkT;?kVusps dye 14 ps mYy?ku d#u Hkknafo-219 varxZr xqUgk dsyk vkgs- ek- eaqcbZ mPPk U;k;ky;kus ;k lanHkkZr Li"V dk;nk Bjowu fnyk vkgs-

This is a clear violation of Article 14 of the constitution (1956 Cri.L.J. (Bom.) Hon'ble Bombay High Court in the case of

Amnachalam Swami – Vs- State AIR 1956 Bombay 695 held that, A B C No. 5/2014

(Para 4) Mr. Kavelkar is right when he urges that Article 14 assures to the citizen equality not only in respect of a substantive law but also procedural law, and if any procedure is set up which deprives a citizen of substantive rights of relief and defense the citizen is entitled to complain of this procedure if two persons equally situated the older procedure is still available where these substantive rights of relief and defense were secured."

14½ vkjksi dz- 8- # ek- loksZPp U;k;ky;kps parity rRokps mYya?ku d#u lgvkjksihl tkehu feGkyk vlrkuk vtZnkjkP;k tkehu ojhy vkns'kkr loksZPp U;k;ky;kpk dsl ykW fopkjkr u ?ksrk eks?ke Lo#ikps csdk;ns'khj vkns'k ikjhr dj.ks%& **[Fraud on power – 2004 (3) Crimes SC 33 order passed by ignoring relevant materials and extraneous factors is fraud on power – order of court vitiated as void ab initio] -**

lnj izdj.kkr vkjksih dz- 2]3]4 o 7 ;kauk vVdiwoZ tkehu eatwj >kyk vlwu vkjksih dz- 8 eaMG vf/kdkjh ekaMoh ;kauk vVd d#u uarj fu;fer tkehuoj eqDr dj.;kr vkys vkgs- R;keqGs parity RkRokoj vkjksih le'ksj [kku ;kykgh tkehuoj eqDr djkos ;kdjhrk vtZnkjkP;k ofdykus R;kP;k tkehu vtkZrp iWjk dz- 11 e/;s uewn dsys gksrs- rlsp ek- loksZPp U;k;ky;kps **Cri Appeal No. 953 of 2011 Sumeet Saluja – Vs- State of U.P.** ;k vkns'kkph izr fnyh- ijarw l= U;k;k/kh'k Xyz;kauh lnj eq|kpk mYys[k R;akP;k vkns'kkr ?ksryk ukgh-

Ekk- loksZPp U;k;ky;kus **2009 (2) SCC (Cri) 72** uqlkj Li"V dk;nk Bjowu fnyk vkgs dh ;kfpdsr fnysY;k loZ eq|kaoj

vkiys Li"V er izn'khZr d#up fudky fnyk ikfgts vU;Fkk rks fudky csdk;ns'khj Bjrks-

Writ petition- Dismissal of it by a cryptic and non reasoned order-Various issues raised by the petitioner were not considered by the High Court – Held – The approach of High Court is Highly illegal – it is bounded duty of the court to examine the issues raised in petition and to give reasons to that issue – it is not the proper way to dispose of the petition without giving proper reasons – The duty to give reasons for coming to a decision is of decisive importance which cannot be lawfully disregarded – The giving of the satisfactory reason is required by the ordinary man's sense of justice and also a healthy discipline who exercise power over other-Reason is the heartbeat of every conclusion. Without the same, it becomes lifeless. (2003 (11) SCC 519).

15½ vkjksi dz- 9- # fojks/kkHkklh fu"d"kZ dk<wu csdk;ns'khj vkns'k ikjhr dj.ks%&

lnj izdj.kkr Xyz;kauh vkiY;k vkns'kkr dk<ysys fu"d"kZ gs fojks/kkHkklh vkgsr-

R;kaP;k vkns'kkrhy iWjk dz- 16 e/;s R;kauh vls uewn dsys dh R;kauh nql&;k vkjksihpk vVdiwoZ tkehu jn~n >kyk gk eqn~nk fopkjkr ?ksrysyk ukgh Eg.kwu **Cr. L.J. 1031** vkf.k **2002 AIR MR 565 (Bom)** gk dsl ykW fopkjkr ?ksryk ukgh- R;kmyV R;kauh iWjk dz- 17 e/;s vls uewn dsys dh] lgvkjksih panu rkjk ;kapk tkehu vtZ ukeatwj >kyk vlwu gh ckc xzkg; ekuwu tkehu ukeatwj dj.;kr ;sr vkgs- v'kkizdkjs Jh- **Mxyz**] ;kaps vkns'k csdk;ns'khj vlY;kps fl/n gksrs-

16½ vkjksi dz- 10- # vkjksihpk cpko dks.krsgh dkj.k u nsrk xzkg; u djrk tkehu vtZ ukeatwj dj.ks ¼ek- loksZPp U;k;ky;kP;k vkns'kkph voekuuk d#u½%&

Ekk- loksZPp U;k;ky;kus vusd izdj.kkr vkf.k fo'ks"k d#u **2010 (1) SCC (Cri. 884** pk izdj.kkr Li"V dj.;kr vkys vkgs dh] tkehu vtkZoj vkns'k ikjhr djrkauk cpko i{kkpk cpko **(Defence)** dk; vkgs rks fopkjkr ?ksryk ikghts rlsp ek- eaqcbZ mPp U;k;ky; o ek- loksZPp U;k;ky;kus [kkyhy izdj.kkr Li"V dk;nk Bjowu fnyk vkgs dh] tj vkjksih vkf.k vfHk;kstu **(Prosecution)** ;kaps nksu osxosxGs fo/kku vlrhy rj ts er vkjksihP;k cpkokP;k cktwus vlrhy liksVZ djrs rsp fopkjkr ?ksrys ikfgts-

1) **2010 (1) SCC (Cri.) 884**
The defence put forward by accused cannot be ignored.

2) **2008 (4) B.Cr. C. 716 (SC)** Shamiullah – Vs-Supt. Narcotic Art. 21-Bail – When two views are possible in respect of commission of crime, justifying or not justifying the grant of bail then the view which leans in farour of accused must be faroured.

3) **2002 ALL MR (Cri) 573**
Bail – Two Set of evidences inconsistent with each other – one incriminating the accused while other indicating his absence at relevant time on the spot –Accused deserves to be granted bail.

4) **2009 ALL MR (Cri)433**
Bail - Conflicting version of the accused and prosecution – case made out for bail

lnj izdj.kkr vkjksihpk cpko vlk gksrk dh] R;kus 'kklu ijokuxh vk.k.;kps dke Jh- ns'keq[k ukokP;k ,tasVyk fnys gksrs R;keqGs fooknhr vkns'k [kksVs

vlY;kps R;kyk ekfgr ukgh- rlsp R;kpk laca/khr xqUg;k'kh laca/k ukgh- rlsp vkjksihus lnj tehu ?ksrkuk psd}kjs jDDe fnyh vlY;keqGs R;kpk Qlo.kwdhpk mn~ns'k vlY;kps Eg.krk ;s.kkj ukgh-

lnj eqn~n;koj pkSd'kh vf/kdkjh o ljdkjh odhy ;kauh dks.krkgh vk{ksi ?ksryk ukgh R;keqGs lnj eqn~nk xzkg; /k#u vkjksihl tkehu ns.ks U;k;k/kh'k Xyz;kauk ca/kudkjd gksrs ijarw R;kauh vkjksihl {krh iksgpfo.;kP;k n`"V gsrwus lnj eqn~nk vkns'kkr u ?ksrk csdk;ns'khj vkns'k ikjhr d#u vtZnkjkP;k eqyHkwr ekuoh gDdkaps mYaYk?ku dssys vkgs- o Hkknafo 191] 193] 219] 220] 465] 466] 471] 474 ;k dyekvarxZr xqUgk dsyk vkgs-

rlsp lnjhy d`R; gs ek- eaqcbZ mPp U;k;ky; o ek- loksZPp U;k;ky; ;kaP;k vkns'kkfo#/n vlY;keqGs Jh- tks'kh ;kauh dksVZ voekuuk dk;|kvarxZr lq/nk xqUgk dsyk vkgs-

17½ vkjksi dz- 11- # pkSd'kh vf/kdkjh ;kauh R;akP;k ls e/;s u fnysys eqn~ns [kksVsi.ks vkns'kkr uewn d#u csdk;ns'khj vkns'k ikjhr d#u U;k;izfdz;sfo#/n xqUgk dj.ks%&

lnj izdj.kkr Xyz;kauh R;kaP;k vkns'kkrhy iWjk dz- 10 e/;s vls uewn dsys dh] T;k vkjksihph vVdiwoZ tkehu >kysyh vkgs R;kaph dsl vkf.k vtZnkjkph dsl fHkUu vkgsr- lokZr egRRoiw.kZ ckc Eg.kts ,Q-vk;-vkj-vkf.k iksfylkaP;k ^ls* e/;s loZ vkjksihauh laxuerkus xqUgk dsY;kps uewn vkgs- rlsp Hkknafo ps dye] 34 lq/nk yko.;kr vkys vkgs- R;keqGs ojhy fu"d"kZ gs csdk;ns'khj o rRokyk lksMwu vkgsr-

19½ ek- eaqcbZ mPp U;k;ky;kps vkns'k **2006 ALL Mr (Cri.) 2269** ph voekuuk vkns'kkr dsl ykW lk;Vs'ku v/kZoV fygh.ks%&

ek- eaqcbZ mPp U;k;ky;kus ;k **Bank of Rajthan 2006 ALL MR (Cri) 2269** izdj.kkr loZ U;k;k/kh'kkauk funsZ'k fnys vkgsr dh] tj dsl ykW fnys vlrhy rs laiw.kZ citation uewn d#u rs dls ykxw iMrkr fdaok iMr ukghr ;kckcr U;kf;d er oki#u fu.kZ; |kok-

1) **2006 ALL MR (Cri) 2269** "The learned Judge even did not feel it necessary to mention full title of the judgement and citation thereof while dismissing the complaint – His approach was absolutely casual – The courts are not expected to pass such cryptic orders – The courts should exhibit from their conduct and their orders concerned for the justice to be done and not casualness. – Impugned order set aside.

vls vlrkuk Jh- **Mxyz**] ;kauh ek- eaqcbZ mPp U;k;ky;kP;k ojhy vkns'kkph voekuuk d#u vtZnkjkus fnysY;k dsl ykW ps Citation viw.kZ fygwu o nqyZ{khr d#u csdk;ns'khj vkns'k ikjhr d#u Hkknafo 219 vkf.k dksVZ voekuuk dk;|kvaxZr xqUgk dsyk vkgs-

Jh- **Mxyz**] ;kauh R;akP;k vkns'kkr dsl ykW [kkyhyizek.ks fyfgys vkgsr-

1) ALL MR (Cri) 1208
¼o"kZ ukgh½ (Para 4)
2) 201 Cr. L.J

(Para 5) ¼o"kZ ukgh] iku dz- ukgh½

3) Sanjay Chandra – Vs- CBI ¼o"kZ] fjiksVZ 2012 SCC ukgh] iku dz- ukgh½ (Para 5)

4) Cr. L.J. 1031 ¼o"kZ ukgh½ (Para 16)

;ko#u Jh- **Mxyz**] gs l= U;k;k/kh'k ;k inkoj dk;Z ikg.;kl ik= ulY;kps Li"V gksrs djhrk R;kauk Rojhr cMrQZ dj.ks vko';d vkgs- dkj.k vik= O;fDrl l= U;k;k/kh'k lkj[;k vR;ar egRokP;k inkoj Bsowu 70 gtkjki;Zr njegk ixkj ns.ks Eg.kts tursP;k esgurhP;k iS'kkrwu VWDl Hk#u fnysY;k jdespk nq#i;ksx vkgs-

20½ vkjksi dz- 13- # pqdk y{kkr vk.kwu fnY;kuarjgh R;k nq#Lr u djrk csdk;ns'khj vkns'k ikjhr dj.ks %&

ek- loksZPp U;kU;ky;kus **AIR 1996 SC 2326** ;k izdj.kkr pqdhps vkns'k ikjhr dsys gksrs o rh pqd **2000 Cri. L.J. 388** ;k izdj.kkr nq#Lr dsyh o vkns'kkr uewn dsyh dh] tj U;k;fuokM;kr pqd >kyh vlsy rj rh nq#Lr dj.ks gs U;kf;d ca/ku vkgs-

> To perpetuate error is no virtue but to correct is compulsion of judicial conscience.
>
> **2000 Cri. L.J. 388**

lnj izdj.kkr l= U;k;k/kh'k Jh- **Mxyz**] gs ek- loksZPp U;k;ky; o ek- eaqcbZ mPp U;k;ky;kps vkns'kkauk nqyZ{khr d#u csdk;ns'khj vkns'k ikjhr djhr vlY;kps vtZnkjkP;k ofdykauh vkns'k ikjhr gksr vlrkauk

fun'kZukl vk.kwu fnys- Ekk- loksZPp U;k;ky;kps vkns'k **AIR 2000 SC 1729** uqlkj vls vkns'k jn~nckny Bjrkr o ca/kudkjd ulrkr-

> Judgement per incurian Rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue .- such judgement or order looses its efficacy as binding precedent.
>
> **AIR 2000 SC 1729**

djhrk vkns'k ikjhr dsY;kuarjgh rks vkns'k csdk;n'khj vlY;kpk fun'kZukl vk.kwu fnY;kuarj r'kh jhrlj uksan ?ksowu Change in Circumstances pk vk/kkj ?ksr rksaMh fouarhoj lq/nk vkjksihl tkehu nsrk vkyk vlrk ijarw Jh- **Mxyz**] ;kauh vls u djrk vkMeqBh /kksj.k Lohdk#u U;k;O;OkLFksfo#/n xqUgk dsyk vkgs o rs U;k;k/kh'k Eg.kwu dke dj.;kl ik= ukghr-

rlsp ek- loksZPp U;k;ky;kps iw.kZ [kaMihBkps vkns'k **2004 (3) Crimes (SC) 33** uqlkj Li"V dj.;kr vkysys vkgs dh] fjdkWMZojhy eqn~ns lksMwu ikjhr dsysys vkns'k gs **Fraud on power (inkpk nq#i;ksx)** ;k Js.khr ;srkr] vkf.k vls vkns'k jn~nckny let.;kr ;kosr-

Fraud on power order passed by ignoring relevant materials and considering extraneous factors is fraud on power-order vitiated as void ab initio-

A) **FRAUD ON POWER VOIDS THE ORDER** if it is not exercised bond fide for the end design. – there is a distinction between exercise of power in good faith and misuse in bad faith. – when an authority misuses its power in breach of law, say, by taking into account, some extraneous matters or by ignoring relevant matters. That would render the impugned act or order ultra vires when the power is exercised for an improper motive, say, to satisfy a private or personal grudge or for wreaking vengeance of a party – a power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by

its exercise . – use of a power for an 'alien' purpose other than the one for which the power is conferred is mala fide use of that power. Same is the position when an order is made for a purpose other than that which finds place in the order. –and any action proved to be committed in bad faith for from corrupt motives, would certainly be held to be inoperative."- "no judgment of a court, no order of minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." (emphasis supplied) see also, in Lazarus case at p. 722 per lord parker, c.j. : "fraud vitiates all transactions known to the law of however high a degree of solemnity."

B) **"FRAUD AS IS WELL KNOWN VITIATES EVERY SOLEMN ACT. – Fraud and justice never dwell together**. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response the conduct of the former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe an act on falsehood. It is fraud in law if a party makes representations which he known to be false and injury ensues there from although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicate."

21½ vkjksi dz- 14- # U;k;nkukrhy nqoZrZu Malice in law :-v'kkizdkjs Xyz;kapk vtZnkjkl =kl ns.;kpk nq"V gsrw fl/n >kyk vlwu R;kaP;kfo#/n dBksj

dkjokbZ vko';d vkgs- ek- loksZPp U;k;ky;kus Li"V dk;nk Bjowu fnyk vkgs dh] U;kf;d dk;Zokghr inkpk nq#i;ksx (Malice in law)dsOgk eku.;kr ;sbZy-

The Apex Court in a decision in the case of **Smt. S.R.Venkataraman .vs. Union of India and another reported in (1979) 2 Supreme Court cases 491** wherein while considering the question of malice in law by quoting the observations of Viscount Haldane in the decision in the case of **Shearer .vs. Shields** reported in **(1914) AC 808,** it has been observed by Apex Court in paragraph no. 5 of the said decision:

> "5..... Malice in law is, however, quite different Viscount Haldane described it as follows in Shearer V. Shields:
>
> A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; law, and he must act with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned; he acts ignorantly and in that sense innocently.
>
> Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse or for want of reasonable or probable cause.

22½ ek- lkokZsPp U;k;ky;kus ßfl/njke esg=sÞ izdj.kkr loZ vkjksihauk tkehu ns.;klaca/kh Li"V funsZ'k fnys vlwu R;k vkns'kkph vaeyctko.kh gksr vkgs fdaok ukgh gs ikg.;kph tckcnkjh iz/kku ftYgk U;k;k/kh'k ;kaph vkgs-

Ek- loksZPp U;k;ky;kus vkns'kkP;k iWjk dz- **191 rs 121** e/;s Li"V funsZ'k fnys vkgsr dh]

> "(Para 191 to 121)....

(191) Exercise of jurisdiction under Section 438 Cr. P.C. is an extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both the individual and society have vital interest in orders passed by the courts in anticipatory bail application.

(120) It is imperative for the High Court's through its judicial academies to periodically organize workshops, symposiums, seminars and lectures by the experts to sensitive judicial officers police officers and investigating officers so that they part properly comprehend the importance of personal liberty vis-à-vis social interests. They must learn to maintain fine balance between the personal liberty and the social interests.

(121) The performance of the judicial officers must be periodically evaluated on the basis of the cases- they have not been able to maintain balance between personal liberty and societal interests, the lacunae must be pointed out to them and they may be asked to take corrective measures in future. Ultimately, the entire discretion of grant or refusal of bail has to be left to the judicial officers and all concerned must ensure that grant or refusal of bail is considered basically on the facts and circumstances of each case.

ojhy funsZ'k ns.;kekxs ek- loksZPp U;k;ky;kpk gk gsrw gksrk dh] loZ ukxjhdkauk leku U;k; feGkyk ikfgts-

lkjarw okLrfod ikgrk QDr izHkko'kkyh o eksB;k yksdkaukp dk;|kpk Qk;nk gksr vlwu xjhckauk tkehu feGkY;kps izek.k Qkj deh vkgs- dkj.k xjhckauk odhy ykowu vVdiwoZ tkehu nk[ky dj.;kdjhrk lq/nk iSls ulrkr- tj Xyz;kaP;k l= U;k;k/kh'k inkP;k loZ vVdiwoZ tkehu vkns'kkaph pkSd'kh dsyh rj loZ lR; ckgsj ;sbZy-

nqljh egRroiw.kZ ckc Eg.kts ek- loksZPp U;k;ky;kus **2000 ALL MR (Cri) 1898** ;k vkns'kkuqlkj Li"V funsZ'k fnys vkgsr dh] tkehu nsrkauk tkehunkjkph jDde gh vkjksihph ,sir ikgwu R;kph pkSd'kh d#u Bjfoyh xsyh ikfgts-

Court should examine capacity of prisoner before fixing amount of bail bond.

2000 ALL MR (Cri) 1898

ijarw Jh- vkj- ,e- tks'kh] ;kauk vkjksihyk gs d/khp fopkjys ukgh dh] R;kph tkehu ns.;kckcr dk; {kerk fdaok ,sir vkgs o r'kh jhrlj ys[kh uksan vkns'kkr ?ks.;kr vkysyh ukgh- vlk vuqHko vtZnkjkus frFks mifLFkr brj izdj.kkr ?ksryk vkgs-

23½ v'kk izdkjs Jh- vkj- ,e- tks'kh] ;kaP;k xSjdk;ns'khj cstckcnkji.kkeqGs vusd xjhc ukxjhdkauk rq#axkr tkos ykxys vlwu v'kk ifjfLFkrhe/;s ek- jkT; ekuoh gDd vk;ksxkus gLr{ksi dj.ks vko';d vkgs-

Bail can be granted to the accused when presiding officer have completely forgotten their duties towards the poor accused who is in jail.

Jai Singh Vs. State 1992 Cri. L.J. 2873

24½ v'kkizdkjs l= U;k;k/kh'k Xyz;kauh ek- loksZPp U;k;ky; ek- eaqcbZ mPPk U;k;ky; ;kaP;k vkns'kkph gsrw iqjLiji.ks voekuuk d#u vkf.k Hkkjrh; jkT;?kVusps dye 14 ps mYya?ku d#u fiMhr O;Drhyk tkehu ns.ks ca/kudkjd vlrkauk R;kyk tkehu u nsÅu R;kP;k ewyHkwr ekuoh gDdkaps mYya?ku dsys vkgs- djhrk R;kaP;koj dBksj dkjokbZ vko';d vkgs-

25½ ek- eqacbZ mPp U;k;ky;kus **2000 (1) Bom. C.R. 689 Khemlo Sawant Vs. State** ;k izdj.kkr Li"V funsZ'k fnys vkgsr dh tsOgk vkjksih rqjaxkr vlrks rsOgk tkehu vtkZoj vkns'kklkBh fu.kZ; jk[kwu Bso.ks o uarj fu.kZ; ns.ks gs xSjdk;ns'khj vkgs-

"Sessions Judge hearing argument and adjoining it for order after four days – Order actually pronounced a day thereafter – Such approach is inappropriate particularly

when matter concerned liberty of any person must less a citizen – Held, it would be wholly in appropriate for session judge to reserve orders on bail application and thereafter again adjourn matter to another date (para – 13)

2002 (1) Bom C.R. 689.

26½ ek- loksZPp U;k;ky;kus **Re M.P. Dwivedi AIR 1996 SC 2299** ;k izdj.kkr Li"V dsys vkgs dh] U;k;k/kh'kkaleksj tsOgk vkjksihyk vk.kys tkrs rsOgk vkjksihP;k ewyHkwr fgrkaps j{k.k dj.kkjs loksZPp U;k;ky;kps dsl ykW U;k;k/kh'kkyk ekfgr vl.ks visf{kr o ca/kudkjd vlwu gk vkns'k eyk ekfgr uOgrk vlyk cpko U;k;k/kh'kkyk ?ksrk ;s.kkj ukgh rj R;koj dBksj dkjokbZ dj.ks vko';d vkgs-

Contempt by Magistrate – Contemnor B.K. Nigam was J.M.F.C. – When prisoners were produced before him Magistrate was completely insensitive about the serious violation of the human rights he did not take any action against handcuffing by police – The magistrate simply passed order calling explanation by police – Held, the Magistrate was bound to take immediate actions for removal of handcuffs – Magistrate was completely insensitive about the serious violation of the human rights – This is a serious lapse on the part of judicial officer – The Magistrate was expected to ensure that the basic human rights of the citizens are not violated – The Magistrate should also expected to take action against police officer for bringing the accused to the court in handcuffs and taking them away in the handcuffs without his authorization – Keeping in view that contemnor Magistrate is a young judicial officer Supreme court did not imposed punishment on him – However recorded strong disapproval of his conduct and directed that

a note of this disapproval shall be kept in his personal file.

27½ lnj izdkj.kkr Jh- tks'kh] ;kaP;k pqdheqGs lnj fiMhr O;Drhyk xSjdk;ns'khj i.ks rq#axkr Bso.;kps iz;Ru >kys vlwu R;k djhrk Xyz;kaP;koj Hkka-n-fo- 220 uqlkj dkjokbZ vko';d vkgs&

28½ ek- mPp U;k;ky;kus **AIR 1969 Pat 194** izdj.kkr Li"V dsys vkgs dh] xSjdk;ns'khj dksBMh lanHkkZr tj U;k;k/kh'kkpk fu"dkGthi.kk vkf.k xSjgsrw vlsy rj v'kk U;k;k/kh'kkyk dks.krsgh laj{k.k fnys tkow u;s- rj dBksj dkjokbZ djkoh-

"Where the Magistrate acts illegally, malafidely and without jurisdiction in the matter of arrest he is not protected"
AIR 1969 Pat 194.

29½ rlsp ;qDrhoknke/;s Li"Vi.ks tkehu ns.;klanHkkZr pk dsl ykW nk[ky d#ugh rs ;k LVstyk ykxw iMr ukgh vls vkns'kkr [kksVs uewn d#u mRrjoknh dz- 1 ;kauh Hkknafo 465] 466] 471] 474] 191] 193] 217] 218] 219 vknh dyekvarxZr f'k{kkik= vijk/k dsyk vkgs- eq[; ckc Eg.kts ljdkjh ofdykusgh R;k dsl ykWP;k fojks/kkr dks.krhgh dsl ykW nk[ky dsyh ulY;kl Li"V iqjkok jsdkWMZoj miyC/k vkgs-

30½ **vkjksi dz- 15- # ek- mPp U;k;ky;kP;k vkns'kkph voekuuk o brj xSjdk;ns'khj i.kk dj.kkjs iz- Js- U;k;k/kh'k vkf.k brj ;kaP;kfo#/n dksVZ voekuuk dk;nk vkf.k brj QkStnkjh dkjokbZph izfØ;k dj.ks ca/kudkjd vlrkauk dkjokbZ u d#u vkjksihl okpfo.;kpk iz;Ru dsY;keqGs Hkknafo ps dye 218 uqlkj xqUgk %&**

lnj izdj.kkr vkjksihpk fu;fer tkehu vTkZ gk iz-Js- U;k;k/kh'k Jh- ,-,- ds- 'ks[k ;kauh fn- 6@12@2013] jksthps vkns'kkuqlkj jn~n dsyk gksrk- rlsp fn- 6@12@2013 jksthps vkns'kkr iz-Js- U;k;k/kh'k Jh- 'ks[k ;kauh vVdiwoZ tkehu vkns'k Ø- 978@2012 e/;s ek- mPp U;k;ky;kus fnysY;k vkns'kkpk vk/kkj ?ksryk gksrk- vkns'k vVdiwoZ tkehu jn~n >kyk ;keqGs fu;fer tkehu jn~n dj.ks gs csd;ns'khj vlY;kpk Li"V dk;nk ek- mPp U;k;ky;kus **2009 Cri. L.J. 1031** uqlkj Bjowu fnysyk vkgs- v'kkizdkjs iz- Js- U;k;naMkf/kdkjh Jh- ,-,-ds- 'ks[k] ;kauh vVdiwoZ tkehu jn~n djrkauk fnysY;k vkns'kkpk vk/kkj ?ksowu fu;fer tkehu vtZ jn~n d#u dk;|kP;k funsZ'kkph voekuuk d#u Hkknafo 219 varxZr vkf.k dksVZ voekuuk dk;|kvarxZr xqUgk dsyk vlwu R;kaP;kfo#/n ;ksX; rh dk;ns'khj dkjokbZ lq# dj.ks Xyz;kauk ca/kudkjd gksrs ijarw R;akuh laca/khr U;k;k/kh'k o R;kaP;k xSjd`R;kl leFkZu dj.kkjs ljdkjh ofdy o brj ;kauk enr dj.;kP;k okbZV gsrwus ;k eqn~n;kaoj dks.krsgh er u nsrk csdk;ns'khj vkns'k ikjhr dsY;keqGs Xyz;kaP;kfo#/n Hkknafo 218 varxZr dkjokbZ vko';d vkgs-

lnj izdj.kkr tj Jh- vkj- ,e- tks'kh] ;kauh dk;|kps ikyu dsys vlrs rj laca/khr nks"kh pkSd'kh vf/kdkjh ;kaP;kfo#/n QkStnkjh dkjokbZ >kyh vlrh rlsp lnjps izdj.kkr ek- eaqcbZ mPp U;k;ky;kP;k vkns'kkph voekuuk d#u XkSjdk;ns'khji.ks vkjksihl vVd d#u dksBMhr BsoY;keqGs lacaf/kr pkSd'kh vf/kdkjh vkf.k R;kauk leFkZu dj.kkjs ljdkjh ofdy ;kaP;kfo#/n daVsEIV vkWQ dksVZ varxZr dkjokbZpk izLrko eqacbZ mPp U;k;ky;kdMs ikBfo.ks Xyz;kauk ca/kudkjd gksrs ijarw

vkjksih iksfyl vf/kdk&;kyk xaHkhj f'k{ksiklwu okpfo.;klkBh Xyz;kauh xSjdk;ns'khj vkns'k ikjhr d#u Hkknafo 217] 218] 219 vknh dyekvarxZr xqUgk dsyk vkgs-

;k lanHkkZr brjgh dsl ykW iq<hyizek.ks vkgsr-

AIR 1921 Bom 115

"**I.P.C. 218-** The gist of the section is stifling of truth and the perversion of the course of justice in case where an offence has been committed, to screen any particular person. It is sufficient that he knows it to be likely that justice will not be executed and that someone will escape from punishment."

v';kp ,dk izdj.kkr mPp U;k;ky;kps ,d U;k;k/kh'kkafo#/n Hkknafo- 120¼**B**½ varxZr xqUgk uksan gksowu dkjokbZ >kyh vkgs- [2001 Cri. L.J.800]

R;k izdj.kkr ek- mPp U;k;ky;kus vkjksih U;k;k/kh'kkph ;kfpdk [kkjht d#u R;kP;kfo#/nph iksfyl dkjokbZ ;ksX; Bjforkauk iq<hyizek.ks er ekaMys vkgsr-

2001 Cri. L.J. 800

A] Cri. P.C. Sec. 197 – Sanction for prosecution – Accused are Additional High Court Judge, Suprintendant of Police Sanjeev Bhatt and others – The accused hatched conspiracy to falsely implicate a shop owner in a case under N.D.P.S. Act and when shop owner submitted to their demands he was discharged – Complaint u.s. 120-B, 195, 196, 342, 347, 357, 368, 388, 458, 482, I.P.c. and Sec. 17, 58 (1), (2) of NDPS Act – Held – there is no connection between official duty and offence – No sanction is required for prosecution – Registration of F.I.R. and investigation legal and proper.

B] Cri. P.C. Sec. 156 – Investigation against accused Addl. High Court Judge – Whether prior consultation with Chief Justice is necessary prior filling of F.I.R. against a High Court Judge as has been laid down by Supreme Court in K. Veerswami's case (1991) (3) SCC 655) – Held – In K. Veerswami's case Supreme Court observed that the Judges are liable to be

dealt with just the same as any other person in respect of criminal offence and only in offence regarding corruption the sanction for criminal prosecution is required – the directions issued by Hon'ble Supreme Court are not applicable in instant case.

C] The applicant – Ram Lal Addl. High Court Judge hatched criminal conspiracy – The Bar Association submitted a representation to Hon'ble Chief Justice of India on 11-09-1997 requesting to not to confirm Raman Lal as Judge of the High Court – Later on he was transferred to Principal Judge of city Civil and Sessions Court at Ahmedabad – S.P. (C.I.D.) Jaipur sent a questionnaire through the registrar, Gujrat High Court to accused Addl. High Court Judge – Chief Justice granted permission to I.O. to interrogate – Later on I.O. sent letter to applicant to remain present before Chief Judicial Magistrate at the time of filing the charge-sheet – Applicant filed petition before High Court challenging it – Petition of applicant was rejected by High Court and Supreme Court in limine – No relief is required to be granted to petitioner in view of the facts of the case.

D] **Conspiracy – I.P.C. Sec. 120 (B) –** Apex court made it clear that an inference of conspiracy has to be drawn on the basis of circumstantial evidence only because it becomes difficult to get direct evidence on such issue – The offence can only be proved largely from the inference drawn from acts or illegal ommission committed by them in furtherance of a common design – Once such a conspiracy is proved, act of one conspirator becomes the act of the others – A Co-conspirator who joins subsequently and commits overt acts in furtherance of the conspiracy must also be held liable – Proceeding against accused cannot be quashed.

31½ vlk xSjizdkj dj.kk&;k U;k;kf/k'kakfo#/n dksVZ voekuuk dk;|kvarxZr dkjokbZ dj.;kpk izLrko eqacbZ mPp U;k;ky;kdMs ikBfo.;kph tkckcnkjh iz/kku fTkYgk U;k;k/kh'k **¼mRrjoknh dz- 2½** ;kaph vkgs- v'kkp izdj.klanHkkZrhy ,d dsl ykW iq<hyizek.ks vkgs- **Cri L. J. 816 (Bom) (DB)** R;k dsl ykW e/;s ek- eaqcbZ mPp U;k;ky;kP;k vkns'kkph voekuuk d#u xSjdk;ns'khj vkns'kikjhr dj.kkjs o/kkZ ;sFkhy iz- {ks- U;k;naMkf/kdkjh Jh- vkj- ,- [kku ;kaP;kfo#/n dksVZ

voekuuk dk;|kvarxZrpk izLrko o/kkZ ;sFkhy iz/kku ftYgk U;k;k/kh'k;kauh ikBfoyk gksrk o R;k vk/kkjkoj mPp U;k;ky;kus laca/khr iz- Js- U;k;k/kh'k ;kauk nks"kh Bjowu f'k{kk fnyh gksrh-

;kO;frfjDr ek- loksZPPk U;k;ky;kus vlsgh Li"V dsys vkgs] dsl ykW pk pqdhpk vFkZ dk<.ks gk dksVZ voekuuk dk;|kvarxZr xqUgk vkgs-

(a) A Wrong interpretation of Supreme Court's order is contempt of Court. **Promote Telecom Engineers Forum Vs. D.S. Mathur**
2008 ALL SCR 2320.

(b) Sessions Judge acted in violation of Supreme Court order-Supreme Court issued Sever Reprimand – Copy of order forwarded to disciplinary committee for further action against said Judge.

AIR 2001 SC 1975

32- mRrjoknh dz- 1 f'kok; vls xSjizdkj brjgh U;k;k/kh'kkdMwu lq# vlwu R;akP;kfo#/n oj funsZ'khr dsl ykW P;k vk/kkjkoj Hkk-na-fo 217] 218] 219] 465] 466] 191] 192] 193] 471] 474 vkfn dyekvarxZr QkStnkjh dkjokbZ dj.ks vko';d vlrkauk vkti;Zr dz- 2] 3] o 4 ;kauh QkStnkjh dj.;kps fun'kZukl vkysys ukgh- QDr ek- mPp U;k;ky;kus **(2003 (1) B Cr.C.268)** deykdj Hkkolkj izdj.kkr iksyhl] ljdkjh odhy] U;k;naMkf/kdkjh vknhfo#/n Hkk-n-fo- 193] 196] 466] 471] 474 R/w 109 varxZr dkjokbZ dsyh vkgs-

(1) **2003 (1) B.Cr. C. 268 (Bom(DB)**

"Cr. P.C. S. 344 on Scrutiny High Court found that accused tried to escape on basis of forged dying declaration – High Court issued show cause notice to advocate for accused, Special Judicial Magstrate etc. calling explanation as to why they should not be tried summarily for giving false evidence or fabricating false evidence (I.P.C. 466, 193, 471, 109)

2) **AIR 1971 SC 1708**

"I.P.C. 167, 465, 466, 471 – A first class Magistrate was alleged to have made some interpolation in the order sheet of a case in after sanction under section 197 by the state Govt. a complaint was filed in a competent court of Magistrate against the said first class Magistrate. Action is legal"

3) ***AIR 1921 Bom 115***

"I.P.C. 218 - The gist of the section is stifling of truth and the perversion of the course of justice in case where an offence has been committed, to screen any particular person. It is sufficient that he knows it to be likely that justice will not be executed and that someone will escape from punishment."

4) **I.L.R. 1928 (52) Mad 347**

"I.P.C. 466 - A Judge fabricating any record in a pending case commits an offence a under this section.

5) Wrong interpretation of Supreme court's order is contempt of court.

6) **2002 ALL SCR 2320**

Civil Judge Sessions Division acted in violation of Supreme Court order Supreme Court issued severe reprimand - copy of order forward to disciplinary authority for further action.

7) **AIR 2001 S.C. 197.**
Serious doubt if procedure required under Cr. P.C. was followed by magistrate while taking cognizance- Fradulent act even injudicial proceeding could not be allowed to stand - All actions taken in complaint including issuance of bailable warrant was liable to declared void ab initio.

8) **2004 Crimes 33 SC**
Contemnor not only violated Supreme Courts order but also Air Act - Sentence of one week simple imprisonment and Rs. 1 Lac as cost imposed on contemnor.

9) **M.C. Mohata - Vs - Union of India**
No complaint form that court is necessary where it is alleged that the subordinate Judge before whom a suit was proceeding has himself abated an offence under section 193 - And has also committed offence under section 465 and 466"

vls xSjdk;ns'khj vkns'k ikjhr dj.kk&;k U;k;kf/k'kkafo#/n dkjokbZlkBh Hkk-na-fo- ps dye 219 gs iw.kZi.ks ykxw iMrs-

dye 219% U;kf;d dk;Zokghr yksdlsodkus Hkz"VrkiwoZd csdk;nk vgoky ns.ksbR;knh-
"PUBLIC SERVANT IN JUDICIAL PROCEEDING CORRUPTLY MAKING REPRT ETC. CONTRARY TO LAW)"

ßyksd lsod vlwu tks dks.kh U;kf;d dk;ZokghP;k dks.kR;kgh VII;kyk csdk;nk vlY;kps Lor%l ekghr vkgs vlk dks.krkgh vgoky] vkns'k vf/kfu.kZ; fdaok fu.kZ; Hkz"VrkiwoZd fdaok nqHkkZoiqoZd djhy fdaok vf/k?kksf"kr djhy R;kyk] lkr o"ksZi;Zr

vlw ’kdsy brD;k eqnrhph dks.kR;krjh ,dk o.kZukP;k dkjkoklkph fdaok nzO;naMkph fdaok nksUgh f’k{kk gksrhy-Þ

dye 220 % izkf/kdkj vlysyk O;fDrus vki.k csdk;nk okxr vlY;kps ekghr vlrkauk laijh{kslkBh lqiqnZ dj.ks fdaok canhoklkr ikBo.ks-

"COMMITMENT FOR TRIAL OR CONFINEMENT BY PERSON HAVING AUTHORITY WHO KNOW THAT HE IS ACTING CONTRARY TO LAW"

T;keqGs O;fDruk laijh{kslkBh fdaok canhoklkr ikBo.;kpk vxj O;Drhauk canhoklkr Bso.;kpk oS/k izkf/kdkj Lor%yk feGrks R;k inkoj vlrkauk tks dks.kh R;k izkf/kdkjkpk okij d#u Hkz"VrkiwoZd fdaok nqHkkZoiwoZd ,[kk|k O;fDryk laijh{kslkBh fdaok canhoklkr ikBohy] fdaok ,[kk|k O;fDryk canhoklkr Bsohy] vkf.k vls djrkauk vki.k csdk;nk okxr vkgksr ;kph R;kl tk.kho vlsy rj] R;kyk lkr o"ksZi;Zr vlw ’kdsy brD;k eqnrhph dks.kR;krjh ,dk o.kZukP;k dkjkoklkph fdaok nzO;naMkph fdaok nksUgh f’k{kk gksrhy-

jkT; ekuoh gDd vk;ksxkl U;k;ky;kP;k xSjizdkjph pkSd’kh dj.;kps vf/kdkj vkgsr&

eqn~nk dz- 1 %& U;k;kf/k’kkfo#/n jkT; ekuoh gDd vk;ksxkdMs ;kfpdk nk[ky djrk ;srs dk\

mRRkj %& gks;] ek- loksZPPk U;k;ky;kus uqdrsp Li"V vkns’k fnys vkgsr dh] U;k;k/kh’kk fo#/ngh ekuoh gDd vk;ksXkdMs rdzkj nk[ky djrk ;srs-

C) Protection of Human Rights Act (10 of 1994), Ss. 2 (d), 12 (j) — 'Human rights' — Broad vision of definition cannot be straitjacketed within narrow confines — Person entitled to benefit under a particular

law, and benefits under that law have been denied to him — It will amount to a violation of his human rights — Jurisdiction of NHRC under S. 12 (j) enlarged to include enquiry in such cases where party is denied protection of any law to which he is entitled — Whether denial is by private party, a public institution, the government or even Courts of law notwithstanding. (Paras 46, 47, 52) **Ramdev Chauhan –Vs- Bani Kant AIR 2011 SC (Criminal) 31.**

33½ ;k O;frjDr ek- loksZPp U;k;ky;kus uqdrsp lat; panz fo- lh-ch-vk;- **2012 ¼1½ ,llhlh- ¼fdz-½ 26** ;k izdkj.kkr Li"V dsys vkgs dh] vkjksihyk tkehu ns.ks gk fu;e vkgs- **(Bail is Rule Jail is Exception)** vkf.k tkehu vtkZoj fopkj djrkauk vkjksih gk funksZ"k ekuus U;k;ky;kl ca/kudkjd vkgs- ijarw Xyz;kaps vkns'k okpys rj R;kauh ek- loksZPp U;k;ky;kP;k vkns'kkph voekuuk dsY;kps Li"V gksrs- rlsp R;kauk dk;|kps ;ksX; Kku ulY;kps Li"V gksrs- ek- loksZPPk U;k;ky;kus iq<hy dk;nk Bjowu fnyk vkgs-

" A) Criminal Procedure Code, 1973 – Ss. 437 and 439 – Bail – Conditional bail to balance competing consideration – Relevant considerations in granting such conditional bail – Gravity of alleged offence – Severity of punishment prescribed in law – Both parameters, held, ought to be taken into consideration simultaneously – Gravity alone cannot be decisive ground to deny bail – Competing factors to be balanced by court while exercising its discretion – Protection of personal liberty against securing attendance of accused at trial –

account of detention before conviction – Unnecessary burden on state to keep a person who is yet to be proved guilty – Constitutionally protected liberty, held must be respected unless detention becomes a necessity – Bail is the rule and jail an exception – Each case however to be decided on its own merits – Apprehended tampering of evidence – Denial of bail on this count – Held, to be resorted to in most extra ordinary circumstances only – Lengthy trial which may prolong beyond maximum sentence awardable under relevant law – Relevance of – Trial court and High Court, further held, erred in denying bail solely by taking into account seriousness of offences, deep-rooted conspiracy involved and loss of public money, overlooking other relevant aspects.

B) Criminal Procedure Code, 1973 – Ss. 437 and 439 – Prejudices which may be avoided in deciding bail matters – Public scams, scandal and heinous offences – Public sentiments and disapproval of alleged misconduct – Bail, held, ought not be denied to teach lesson to a person whose offence is yet to be proved – Conditional bail, as a solution."

34½ rlsp vVdiwoZ tkehu vkf.k fu;fer tkehu dsl ykW ,d nql&;kyk ykxw iMrkr ;kckcr Li"V dk;nk ek- eqacbZ mPPk U;k;ky;kus **1989 Cri. L. J. 252 2013 Cri. L. J.** uqlkj Bjowu fnyk vkgs-

35- tj ,[kk|k U;k;k/kh'kkus ek- loksZPPk U;k;ky;] ek- eqacbZ mPPk U;k;ky; vkfnaP;k funsZ'kkph voekuuk d#u vkjksihl tkehu ns.;kl udkj fnyk rj v'kk U;k;k/kh'kakfo#/n foHkkxh; pkSd'kh vkf.k dkjokbZ dj.;kr ;sbZy rlsp lacaf/kr l= U;k;k/kh'k gk daVsEIV vkWQ dksVZ varxZr dkjokbZlkBh lq/nk ik= jkghy vls

Li"V vkns'k ek- eqacbZ mPp U;k;ky;kus fnys vkgsr- (2012 ALL MR (Cri.) 271).

"Arrest of accused – Non compliance of direction by High Court and Apex Court – Non granting bail to accused – The Session Judge was shown with the order passed by the Supreme Court and Bombay High Court but the Sessions Judge did not follow the guidelines without justifiable reasons or recording any reason in writing - Held, if any Sessions Judge is found not to follow the directions besides taking administrative action against such learned Sessions Judge, he shall be liable for contempt of this Court.

1) **2012 ALL MR (Cri) 271 (Bom.) (D.B).**
Farooq –Vs- State.

2) **2010 ALL MR (Cri) 120**

36½ tsOgk ,[kk|k fo"k;koj ek- loksZPPk U;k;ky;] ek- eaqcbZ mPPk U;k;ky;] fdaok brj mPp U;k;ky;kpk dk;nk Li"V vlrks rsOgk tkehu n;kok fdaok ukgh ;kckcr fu.kZ; ?ks.;kps csNwV LosPNkf/kdkj U;k;k/kh'kkyk ulrkr rj R;kyk miyC/k dsl ykW v/khu jkgqup vkns'k n;kok ykxrks ;kckcr dkgh egRRoiw.kZ dsl ykW iq<hyizek.ks vkgsr-

1) **Cri. P.C. Sec. 437 and 439 – Bail – Discretion** - The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of case and not in arbitrary manner – (para 37)**2012 (1) SCC (Cri) 26 Sanjay Chandra –Vs- C.B.I.**

2) "Discretion when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor, it must not be arbitrary, vague and fanciful, but legal and regular"**[Tinqley -Vs- Dalby, 14 NW 1461**

3) "An appeal to a Judge]s discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with established principles of law."

Gudianti Narsimha -Vs- Public Prosecutor.

High Court 1978 Cri. L.J. 502.

4) "The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure He is not a Knight - errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity or order in the social life.

The Nature of the Judicial Process - Benjamin Cardozo, Yale University press *(1921)*]

5) AIR 1990 SC 261

37½Hkkjrh; lafo/kku dye 51(A)(h) uqlkj U;k;O;oLFksrhy xSjdk;ns'khji.kk m?kMdhl vk.k.ks izR;sd ukxfjdkps drZO; vkgs- [(2010) 3 SCC (Cri) 841] :-

tsOgk U;k;ikfydsr fdaok ns'kkP;k brj dks.kR;kgh laLFksr Hkz"Vkpkj] vfu;feRkrk gksr vlsy rj R;kckcr rdzkj dj.ks fdaok brj ekxkZus R;k xSjdkjHkkjkfo"k;h er ekaM.ks gs Hkkjrh; jkT;?kVusps dye 51(A)(h) uqlkj izR;sd Hkkjrh; ukxfjdkps jk"Vªh; drZO; vkgs vls Li"V er ek-loksZPp U;k;ky;kus [(2010) 3 SCC (Cri) 841 Indirect Tax Pratitioners Association – Vs- R. K. Jain];k izdj.kkr uksanfoys vkgs-

Constitution of India Arts 19 (1) (a), 51 –A (h), 129 and 215 – Highlighting irregularities in wrong orders passed by a Bench and frunctioning of CESTAT –

Respondent fulfilled his duty as a citizen under Art. 51-A (h)- fair Criticism of a judicial functioning is not a Contempt –
(2010) 3 SCC (Cri) 841

38½fouarh %& rjh vki.kkal fouarh dh]

1½ mRrjoknh dz- 1 ;kauk dsl ykW pk dlk okij djkok ;kckcr dk;|kps Kku ulwu R;kauh ek- eqacbZ mPPk U;k;ky;kps vkns'kkph voekuuk d#u xSjdk;ns'khji.ks vtZnkjkpk vtZ jn~n dsY;keqGs R;kaP;kfo#/n ;ksX; rh QkStnkjh o brj dk;ns'khj dj.;kr ;koh-

2½ mRrjoknh dz- 1 fo#/n ek- eqacbZ mPPk U;k;ky;kps vkns'k izek.ks dksVZ voekuuk dk;|kvarxZr dkjokbZpk izLrko ek- eqacbZ mPPk U;k;ky;kdMs ikBfo.;kps funsZ'k mRrjoknh dz- 2 ;kauk ns.;kr ;kos-

3½ mRrjoknh dz- 1 fo#/n Hkknafo 217] 218] 219] 465] 466] 474 vkfn dyekvarxZr QkStnkjh dkjokbZ dj.;kps vkns'k mRrjoknh dz- 2 ;kauk ns.;kr ;kos-

4½ mRRkjoknh dz- 1 ps ;kapk xSjdk;ns'khji.kk izFken'kZuh fl/n gksr vlY;keqGs R;kauk Rojhr fuyachr dj.;kph dkjokbZ dj.;kps funsZ'k mRrjoknh Ø- 5] egkizca/kd] eaqcbZ mPp U;k;ky; ;kauk ns.;kr ;kos-

5½ dsl ykW pk okij ;ksX; jhrhus dlk djkok ;kps ;ksX; ekxZn'kZu egkjk"Va jkT;krhy U;k;k/kh'kakuk ns.;kdjhrk dk;kZ'kkGkaps vk;kstu dj.;kps funsZ'k mRrjoknh dz- 3] 4 o 5 ;kauk ns.;kr ;kos-

6½ lnj xSj izdkjkeqGs >kysY;k =klkiksVh uqdlku HkjikbZ Eg.kwu #- 20 yk[k ns.;kps vkns'k ekuoh gDd laj{k.k vf/kfu;e ps dye 18 ¼3½ uqlkj ns.;kr ;kos-

lgh

****

****

-: CHAPTER = 13 :-

MODEL DRAFT OF BAIL APPLICATION

****

SUSPENSION OF SENTENCE PENDING THE APPEAL; RELEASE OF APPELLANT ON BAIL

Code of Criminal Procedure – Section - 389

Suspension of sentence pending the appeal; release of appellant on bail—

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he *be* released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,—

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years', or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail,

Order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is *so* released shall be excluded in computing the term for which he is so sentenced.

MODEL FORMS

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MODEL DRAFT - 1

IN THE COURT OF.....NAGPUR

Crime No...../2011

City Police Station, Nagpur

State..... .....**Applicant**

Versus

(Name & Full address)..... .....0.P.

APPLICATION UNDER SECTIONS 389(1) **AND** 424 **OF**

THE CRIMINAL PROCEDURE CODE

The petitioners/appellants named above humbly submit as follows:

1. That they have been convicted for an offence punishable under Section 326, 294, 506 of the Indian Penal Code read with Section 34 of IPC and have been sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs...../- each in default to undergo simple imprisonment for a period of two months as per Judgment dated..... in C.C. No. .....of.....on the file of the I Additional Chief Judicial Magistrate,.....

2. That the petitioners/appellants being highly aggrieved by the conviction and sentence above mentioned preferred an appeal before this Hon'ble Court. The same is pending disposal.

3. That the petitioners / appellants are advised that they have got fair chance of success in the above appeal.

4. That the trial Court was pleased to suspend the execution of sentence and granted time till.....

5. The petitioners/appellants are very poor persons and hence they are unable to pay the fine amount in a lumpsum. Further, the petitioners are sole bread winner of their respective families. In case the petitioners are detained, they will be seriously prejudiced and the above appeal preferred by them will become in fructuous.

PRAYER

THEREFORE, it is prayed that this Hon'ble Court may be pleased to suspend the execution of the sentence in C.C. No.....of.....on the file of the I Additional Civil Judge, ... pending disposal of the above appeal on such terms and conditions as this Hon'ble Court may deem fit to impose under the circumstances of the case in the interest of justice.

Place: NAGPUR

Sd/-

Date :.....

Advocate for Petitioners/Appellants

****

MODEL DRAFT - 2

IN THE COURT OF.....NAGPUR

Crime No...../2011
City Police Station,
Nagpur

State.....
.....Applicant
Versus

(Name & Full address)……..
....0.P.

APPLICATION UNDER SECTION 389(1) CrPC

For the reasons stated in the accompanying memorandum of facts the appellant prays that pending disposal of this appeal the order of conviction and sentence dated.....passed in Cri. Case No.....of.....on the file of Principal Sessions Judge....., South.....be suspended
and the appellant may be released on bail in the interest of justice and equity.
Place: NAGPUR

Sd/-

Date :.....
Advocate for Appellant

1. That the appellant was in judicial custody during the entire period of trial right from his arrest on..... and he is in custody even as on this day.
2. That the appellant is informed that he has got good and valid-grounds for his success in this appeal and in such an event he need not undergo the sentence now imposed upon him.
3. That the appellant is ready and willing to offer substantial security for his release on bail and for his proper appearance before the Court if this appeal fails ultimately.
4. That the appellant undertakes to surrender before the Sessions Court in the event of this Hon'ble High Court dismissing the appeal and confirming the sentence.
5. That there are no earning family members in the family of the appellant and ever since this appellant was taken to custody the family of the appellant has been suffering for living.
6. Hence an application has been made seeking to suspend the sentence imposed on the appellant and to release him on bail and the same may be allowed in the interest of justice and equity.

Place:NAGPUR

Sd/-

Date:.....

Advocate for Appellant

****

WHEN BAIL MAY BE TAKEN IN

CASE OF NON-BAILABLE OFFENCE

Code of Criminal Procedure: section 437 when ball may be taken in case of non-bailable offence—

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but—

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence:

Provided that the Court may direct that a person referred to in clause

(i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm :

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason :

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he had comply with such directions as may be given by the Court.)

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, the there are not reasonable grounds for

believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, [the accused shall, subject to the provisions of Section 446-A and pending such inquiry, be released on bail] or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1). the Court may impose any condition which the Court considers necessary—

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice.

(4) An officer or a Court releasing any person on bail under subsection (1) or sub-section (2), shall record in writing his or its '[reasons or special reasons) for so doing.

(5) Any Court which has released a person on bail under sub-section (1) or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within *a* period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

.....

.....

CHARGE OF POLICE STATION OR COURT

[See Sections 436, 437, 438(3) and 411]

I,
(name,.....o
f.....*(place),* having been arrested or detained without , warrant by the Officer in charge of .....police station *(or* having been brought before the Court of.....), charged with the offence of....., and required to give security for my attendance before such Officer of Court on condition that I shall attend such Officer or Court on every day on which any investigation or trial is held with regard to such charge, and in case of rny making default herein, I bind myself to forfeit to Government the sum of rupees.....
Dated, this.....day of.....19.....

(Signature)

I hereby declare myself *(or* we jointly and severally declare ourselves and each of us) surety for sureties) for the above said *(name)*.....that he shall attend the Officer in charge of.....police station or the Court of.....*on* every day on which any investigation into the charge is made or any trial on such charge is held, that he shall be, and appear, before such Officer or Court for the purpose of such investigation or to answer the charge against him *(as the case may be),* and, in case of his making default herein, I hereby bind myself *(or* we, hereby bind ourselves) to forfeit to Government the sum of rupees.....
Dated, this.....day of..... 19.....

(Signature)

****

MODEL FORMS

IN THE COURT OF.....NAGPUR

Crime No...../2011

City Police Station, Nagpur

State.....
.....Applicant
Versus
(Name & Full address).....0.P.

APPLICATION UNDER SECTION 437 OF CrPC

The accused submits as follows :

1. That the accused has been produced before this Hon'ble Court on an allegation of having committed an offence under Sections A, B, C, IPC stating that this accused on..... obstructed the complainant at about..... p.m. and assaulted him with a knife and also threatened to commit his murder.

2. That while the offences under Sections A and B of IPC are bailable, offence under Section 506-B is non-bailable in nature.

3. That the accused is innocent of the offences alleged against him and the case has been instituted by the complainant due to the enmity arising out of property dispute between complainant and this accused.

4. That there are no allegations against this accused for having committed any offence punishable with death or imprisonment for life.

5. That the accused is a permanent resident of.....and is owning immovable properties. The family of the accused comprising of his parents, wife and children reside in Talapadi within the jurisdiction of this Hon'ble Court.

6. That the offences are not exclusively triable by the court of sessions.

7. That the accused is ready and willing to offer surety for his release on bail and for his proper abiding by the conditions that may be imposed by this Hon'ble Court.

8. It is therefore prayed that this Hon'ble Court may be pleased to enlarge the accused on bail today on such terms and conditions as *deemed* fit in the interest of justice and equity.

Place: NAGPUR

Sd/-

Date :.....

Advocate for Accused

****

N THE COURT OF....., NAGPUR

Crime No...../2011

City Police Station, Nagpur

State.....
.....Applicant

Versus

(Name & Full address)…….....
0.P.

UNDER SECTION 437 OF THE CODE OF CRIMINAL PROCEDURE

The accused above named submit as follows :

1. That the complainant police have-registered the above case against the accused for the alleged offence punishable under Sections of IPC.
2. That the accused are innocent of the alleged offence and have got a valid and tenable defence on their behalf.
3. That the alleged offence is neither punishable with death nor for imprisonment for life. Hence, there is no legal embargo for this Hon'ble Court to enlarge the accused on bail.
4. That the accused are the permanent resident of..... City and they are law abiding and peace loving citizens.
5. That the accused are ready and willing to abide by all the terms and conditions that may be imposed upon them in the event of their release on bail in the above case by this Hon'ble Court.
6. That the accused are ready to furnish solvent surety before this Hon'ble Court to ensure their regular appearance on all the future dates of hearing.
7. That the accused would not abscond nor delay the proceedings of this Hon'ble Court and that they will not tamper with the prosecution witnesses in the above case.
8. That the accused may be permitted to urge any other additional ground / s at the time of arguments before this Hon'ble Court.
9. **PRAYER :**

WHEREFORE, it is prayed that this Hon'ble Court may be pleased to enlarge the accused on bail, in the interest of justice.

Place: NAGPUR

Sd/-

Date :.....

Advocate for Accused

****

ANTICIPATORY BAIL

DIRECTION FOR GRANT OF BALL TO PERSON APPREHENDING ARREST

Code of Criminal Procedure : - Section 438 :- Direction for grant of ball to person apprehending arrest—

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non- bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—

(i) a condition that the person shall make himself available for interrogation by a Police Officer as and when required ;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an of-ficer-in-charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

STATE AMENDMENT

Uttar Pradesh – Section 438 shall be omitted/vide Uttar Pradesh Act sec.9(w.e.f, 28.11.1975).]

PRESCRIBED FORMS

BOND AND BAIL-BOND FOR ATTENDANCE BEFORE OFFICER IN CHARGE OF POLICE STATION OR COURT

[See Sections 436, 437, 438(3) and 411]

I, *(name,*.....of..... ..... *(place),* having been arrested or detained without warrant by the Officer in charge of.....police station *(or* having been brought before the Court of.....), charged with the offence of....., and required to give security for my attendance before such

Officer of Court on condition that I shall attend such Officer or Court on every day on which any investigation or trial is held with regard to such charge, and in case of rny making default herein, I bind myself to forfeit to Government the sum of rupees.....

Dated, this.....day of..... 19.....
(Signature)

I hereby declare myself *(or* we jointly and severally declare ourselves and each of us) surety *(or* sureties) for the above said *(name)*.....that he shall attend the Officer in charge of.....police station or the Court of.....*on* every day on which any investigation into the charge is made or any trial on such charge is held, that he shall be, and appear, before such Officer or Court for the purpose of such investigation or to answer the charge against him *(as the case may be),* and, in case of his making default herein, I hereby bind myself *(or* we, hereby bind ourselves) to forfeit to Government the sum of rupees.....

Dated, this.....day of.....19.....
(Signature)

MODEL FORMS

IN THE COURT OF.....NAGPUR

Crime No...../2011

City Police Station,

Nagpur

(Name).....
.....Applicant

Versus

State
.....
.0.P.

APPLICATION UNDER SECTION 438 Cr PC

The petitioner named above submits as follows :

1. That the petitioner is a housewife and her address is shown in the cause title. She is represented in the proceedings through her Counsel, Sri .... (Address).

2. That the address of respondent is as shown in the cause title.

3 . That being apprehensive of arrest and ill-treatment by the ..... Police ..... , in their Crime No ..... of ..... the petitioner files this petition seeking anticipatory bail with a direction to the police to release this petitioner on bail in the event of her arrest in the above Crime No. on the following, facts and grounds :

FACTS OF THE CASE

4. That during the second week of ..... the police of ..... Police came to the house of this petitioner along with one Sri..... and informed the house people that this petitioner is required to come to the police station in their Crime No, ……..... of ……..

   The petitioner thereafter made enquiries and found that the police have registered a case in the above crime for offences under Sections 471, 468 and 420 IPC and are looking out for a woman in the said case as the one who has gone to the bank and signed a document and that' this petitioner is that woman.

5. The petitioner, thus being apprehensive of arrest files this petition seeking a direction to release her in the event of her arrest in Crime No ..... of ..... of ..... Police Station on the following grounds:

GROUNDS OF PETITION

1. ……That the petitioner is innocent of the offences alleged against her in the **above** Crime No.....and she has been falsely implicated in the case at the instance of her enemies.

2. ……That the petitioner apprehends ill-treatment and detention by Police in non-bailable case.

3. ……That there are no reasonable grounds on record to hold that the^ petitioner is guilty of an offence punishable with death Or imprisonment for life.

4. ……That the offences alleged are not exclusively triable by the Court of sessions nor heinous onces.

5. ……That the petitioner is a housewife, who has a large family and also residential house in.....She is prepared to offer solvent surety and also to abide by any conditions that may be imposed on her for her release.

6. ……That the accused who have been arrested, have been released by the Magistrate on bail.

PRAYER

THEREFORE, the petitioner prays that this Hon'ble Court may be pleased to direct the.....Police to release her on bail in the event of her

arrest in Crime No.....of.....of the said police station in the interest of justice and equity.

Place : NAGPUR

Date: ..

Advocates for Petitioner

****

IN THE COURT OF.....NAGPUR

Crime No...../2011

City Police Station,

Nagpur

(Name).....Applicant

Versus

State

.....0.P.

APPLICATION FOR INTERIM ANTICIPATORY BAIL

The petitioner named above submits as follows :

1. That the petitioner has filed an application for anticipatory bail in Crime No..... of..... of..... Police Station in the above petition. The said application may be taken as part of this petition also.

2. That the police are trying to take custody of this petitioner and in view of the vacation of the Courts, in the event of his arrest, the petitioner will have to suffer hardship.

3. That the complainant in this case is bent upon harassing this petitioner and humiliating him.

4. That the petitioner is a businessman and he is not in a position to carry on his profession under the threat of arrest.

5. **PRAYER :-**

THEREFORE, pending disposal of this petition, the petitioner prays that this Hon'ble Court may be pleased to grant interim bail directing the police that in the event of his arrest the petitioner may be released in Crime No.....of.....of Sitabuldi Police, in the interest justice and equity.

Place : NAGPUR

Sd/-

Date :.....

Advocate for Petitioner

****

.APPENDIX - 1

BAIL APPLICATION FORMS

APPLICATION FOR BAIL

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, ……..
Crime No: -……/2011
State …
Vs
…. ……..
R/o. ……. Th. ……Dt. ……..

AN APPLICATION FOR REALISING THE ACCUSED ON CASH SECURITY US. 445 OF CRI. PRO. CODE
Accused humbly submits as under: -

1. The accused is innocent law abiding person, having no criminal antecedent .
2. That …….. Police, charge sheeted / arrested, the accused for the offence punishable u/s ……. Of……..
3. The accused has not committed any alleged offence he is falsely involved in the alleged crime.

4. The accused is unable to furnish the surety due to some unavoidable circumstances but she is ready to deposit the cash security for his appearance.
5. He shall remain present on each date.
6. The accused is the respectable person, having the deep root in the society, and there is no chance of absconding.
7. The accused is ready to abide any condition if imposed by the Hon'ble Court.

PRAYER: - It, is therefore prayed the Hon'ble Court may kindly be pleased to release the accused on cash security, in the interest of the justice.

Place:

DATE: ……/……/2011 ACCUSED

C. F. ACCUSED

****

APPLICATION NO. 2

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, ……..

Crime No: -……../200 P. F. : -

Cr. C. No.:……/200

STATE …

VS …

CASH SECURITY BOND RUPPEES……

I ……..r/o…… Dist……. ,having been arrested or detained without warrant by the Officer-in -charge of ……Police station (or having been brought before the Court of J.M.F.C. ……..) charged with the offence of …… vide crime no. ……. /… and required to give security for my attendance before such officer or court on condition that I shall attend such officer or Court on every day on which any investigation or trial is held with regard to such charge, and in case of my making default herein, I bind myself to forfeit to Government the sum of Rupees. …… (Rs…… only).

Dated, this..... day of.....200...

PLACE: Signature of accused.

****

APPLICATION NO. 3
IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, NAGPUR

Crime. No.: -……/11 P.F.:-……
State …
Vs
…. ……..
R/o. ……. Th. ……Dt. …….
APPLICATION FOR REALISING THE ACCUSED ON BAIL
Accused humbly submitsas under: -

1. The accused is innocent law abiding person respectable person.
2. That …….. Police has arrested the accused for the offence punishable u/s 324 of IPC without any direct and circumstantial evidence.
3. The accused person has not committed any alleged offence he is falsely involved in the alleged crime.
4. The accused is ready to furnish the surety for his appearance and he shall remain present on each and every date.
5. It is submitted that the accused is respectable person, having the deep root in the society, and there is no chance of absconding.
6. That the accused is ready to abide the any condition if imposed.

PRAYER: - It, is therefore prayed the Hon'ble Court may kindly be pleased to release the accused on bail, in the interest of the justice.

Place:
DATE: ……
ACCUSED
C. F. ACCUSED
****

APPLICATION NO. 4
In The Court Of Hon'ble Sessions Judge, ……
Misc. Cri. Application No……/2010

Applicant: - ……..
Aged ……years, Occupation -…….
r/o ……, Th. …… Dt. ……
Versus
Non -Applicant: - The State Of Maharashtra through P. S. O. ……, Dist. …….

Application for Grant of Bail under Sec. 439 of Cr. P. C. for the offence punishable u/s 326 of I. P. C. vide crime No. ……/10 registered at ……., Police Station.
The applicant humbly submits as under: -

1. That the applicant is innocent law abiding young citizen having no criminal antecedent.

2. That the applicant is arrested on dated ……., by the NAGPUR Police for the offence punishable u/s 326 + 34 I. P. C. vide crime No. ……./10, without any direct and circumstantial evidence.
3. It is the story of the prosecution and oral report it is the alleged that that on …….. at about …….. pm that the reporter ……
……
……
…….untimely report lodged to the P.S. ……..i.
4. It is submitted that the applicant never assaulted by means of sword at any time as alleged, it is further submitted that the reporter ……
……..
concocted and false report has been lodged to save themselves.
5. It is submitted that from the perusal of FIR as well as the story put forth by the prosecution case itself the alleged Sec. 326 of IPC is not attracted form any stretch of imagination.
6. It is most respectfully submitted that it may be the case of causing simple hurt but not the case of Sec. 326.
7. It is most respectfully submitted that the victim is discharged immediately and he is not the indoor patient. The alleged injury does not come under the definition of grievous injury according to Sec. 326.
8. It is most respectfully submitted that the ……. police have colored the simple matter into the serious criminal nature;
9. It is submitted that the applicant has not committed any alleged offence he is falsely involved in the alleged crime.
10. That the investigation in this matter is almost complete.
11. The applicant filed the bail application before the learned Judicial Magistrate First Class …….on dated …….. and Hon'ble Lower Court pleased to decline on the same day, to release him on bail as the punishment is life imprisonment. Hence the instant application is filed before this Hon'ble Court
12. The accused/applicant is young belonging to poor family and he is having old sick parents in absence of the applicant their health become very much critical.
13. The accused/applicant is in custody since ……., the whole family is facing very much hardship.
14. The accused is ready to furnish the surety for his appearance and he shall remain present on each and every date. The accused/applicant belonging the respectable family, having the deep root in the society, and he is permanent residence of …….. having immovable property, within the jurisdiction of the Honorable Court and there is no chance of absconding.
15. The accused/applicant is ready to abide any condition if imposed by the Hon'ble Court.

PRAYER: - It, is therefore prayed the Hon'ble Court may Kindly be pleased to order to release the accused/applicant on bail, for the offence punishable u/s 326 +34 of I. P. C. vide crime No. ……,, in the interest of the justice.

Place:
DATE: …… C. F. APPLICANT

NOTE:
1. No any bail application of present nature is pending or decided by any Competent Court of Law i.e. Sessions Court or High Court.
2. The applicant is in custody hence no Court fee stamp is affixed thereon.

Place:
DATE: C. F. APPLICANT
-**********

APPLICATION NO. 5

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, ……..

Crime No: -……./2011
State …
Vs
…. ……..
R/o. ……. Th. ……Dt. ……..

AN APPLICATION FOR REALISING THE ACCUSED ON BAIL
Accused humbly submitsas under: -

7. The accused is innocent law abiding person he is retired from military force, having no criminal antecedent.
8. That ……..Police arrested the accused person for the offence punishable u/s ……. of IPC without any direct and circumstantial evidence.
9. It is submitted that ……. Police sought the PCR and now the accused in MCR.
10. The accused has not committed any alleged offence he is falsely involved in the alleged crime.
11. The accused is ready to furnish the surety for his appearance and he shall remain present on each and every date.
12. It is submitted that the accused is respectable person, having the deep root in the society, and there is no chance of absconding.
13. The investigation in this matter is completed.
14. That the accused is ready to abide the any condition if imposed.
15. The alleged offence is triable by this Hon'ble Court and Hon'ble Court is empowered to grant the bail in this matter.

PRAYER: - It, is therefore prayed the Hon'ble Court may kindly be pleased to release the accused on bail, in the interest of the justice.
Place:

DATE: C. F. APPLICANT/ACCUSED
****

APPLICATION NO. 6
IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, ...
Crime No: -……./2011
State …
Vs …. ……..
R/o. ……. Th. ……Dt. ……..

AN APPLICATION FOR REALISING THE ACCUSED ON BAIL
Accused humbly submitsas under: -

1. The accused is innocent law abiding person, having no criminal antecedent.
2. The NAGPUR Police arrested the accused for the offence punishable 279, 304-A of IPC without any direct and circumstantial evidence.
3. It is submitted that the accused has not committed any alleged offence he is falsely involved in the alleged crime.
4. It is submitted that the deceased himself responsible for unfortunately incident as he was under influence of liquor.
5. The accused is ready to furnish the surety, for his appearance and he shall remain present on each and every date.
6. The accused is the respectable person, having the deep root in the society, He is the sole bread earner of his family and there is no chance of absconding.
7. The investigation in this matter is almost completed in respect of the present accused.
8. The accused is ready to abide any condition if imposed.
9. It is submitted that the alleged crime is bail able offence.

PRAYER: - It, is, therefore, prayed the Hon'ble Court may kindly be pleased to release the accused on Bail, in the interest of the justice.
Place:
DATE:
****

APPLICATION NO. 7
IN THE COURT OF SUB-DIVISIONAL MAGISTRATE/ EXECUTIVE MAGISTRATE .....

Istegasha No. : - ……/ 08 P. F. :

Proceeding u/s.:- of Cri. P. C.
State Vs. _____
R/o. _____ Dt. ……..

APPLICATION FOR RELEASING THE NON-APPLICANT ON P. R. BOND

Non-applicant humbly submitsas under: -

1. The Non-applicant is innocent law abiding person.
2. That …….. police have falsely implicated the non-applicant in the in the instant proceeding without any direct and circumstantial evidence, any justified grounds.
3. The instant proceeding is not tenable in Law and on facts of the case, which is against the settled provision of the Law.
4. The accused is unable to furnish the surety today itself but on next day he is ready to furnish the surety for his appearance.
5. There are no requisite ingredients of Sec. 110 of Cr. p. c.
6. It is well settled that prior to initiating the proceeding u/s Sec. 110 of Cr. p. c. "Show Cause" ought to have issued against the person to whom the proceeding is to be started and without any inquiry and satisfaction, the non-applicant has to compel to face proceeding.
7. It is further submitted that the non applicant do not come within the definition of "Habitual Offender " and more over he is not having desperate and dangerous personality.
8. The instant proceeding is filed against the non-applicant without any just and legal grounds by flouting the principle of Law. Hence, it is just legal and necessary to drop the instant proceeding

Prayer: - It, is, therefore prayed that the Honb'le Court may kindly pleased to released the Non-applicant, on P.R. Bond, till next date, the inters the justice;
And
Hence, it is just legal and necessary to drop the instant proceeding.

Place Non-applicant

Date: …./…./200…

C.F. Non-applicant

****

APPLICATION NO. 8

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, NAGPUR

C ri. C. No / C rime. No. : - ……/ 08 P. F.:

State …
VS
R/o. ……. Th ……. Dt. …….

APPLICATION FOR RELEASING THE ACCUSED ON P. R. BOND

Accused humbly submits as under: -

1. The accused is innocent law abiding person.
2. That ……. police, charge sheeted / arrested accused for the offence punishable u/s 65 kha of Bombay Prohibition Act without any direct and circumstantial evidence.
3. The accused has not committed any alleged offence he is falsely involved in the alleged crime.

4. The accused is unable to furnish the surety due to some unavoidable circumstances today itself i.e. the surety has gone out of station for his personal and essential work but on next date he shall furnish surety for his appearance.
5. He shall remain present on each and every date.
6. The accused is the respectable person, having the deep root in the society, residing within the jurisdiction of the Hon'ble Court, and there is no chance of absconding.
7. The accused is ready to abide any condition if imposed by the Hon'ble Court.

PRAYER: - It, is therefore, prayed the Hon'ble Court may kindly be pleased to release the accused on P.R Bond, in the interest of the justice.

Place

DATE: ……. …… ACCUSED

C. F. ACCUSED

****

APPLICATION NO. 9

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, NAGPUR

Misc. Cri. Application No. …… /2011, Filed on: 02/09/2011

[Crime No. 177/2011]

State….. Vs. A.B.C.

Applicant/accused: A.B.C.
R/o …….. Th. NAGPUR, Dist -NAGPUR

VS.

Non-applicant: The State of Maharashtra through P.S.O. NAGPUR

APPLICATION FOR GRANT OF PERMISSSION TO SURENDER

Accused/ Applicant humbly submits as under: -

1. The accused/applicant is innocent law abiding person, having no criminal antecedent.
2. That NAGPUR police have registered the offence punishable u/s 448,323, 504, 506 +34 of IPC on dated 27.07.2010 vide crime no. 177/2010, against the accused, without any direct and circumstantial evidence.
3. It is submitted that the alleged offence is bailable offence and voluntarily appearing before the Hon'ble Court and wants the permission to surrender them in the alleged crime.
4. It is submitted that the Accused/ Applicant have not committed any alleged offence and absolutely no connection with the alleged offence and he is falsely involved in the alleged crime due to dirty village politics rivalry group and enmity.
5. It is submitted that the alleged offence is bail able offence and Hon'ble Court is empowered to release the accused/applicant on bail as he surrender himself.

6. The accused is ready to furnish the surety for his appearance and they shall remain present on each date.
7. The accused are the respectable person, having the deep root in the society, and there is no chance of absconding.

Hence the instant application is filed.

PRAYER: -

It, is therefore prayed the Hon'ble Court may kindly be pleased to grant permission to surrender himself before Hon'ble Court.

NAGPUR
DATE: 02/09/2011 ACCUSED

C. F. ACCUSED

****

APPLICATION NO. 10

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
MUMBAI BENCH, MUMBAI.

CRIMINAL APPLICATION NO. OF 2011.

APPLICANT :- A.B.C.
..Versus. .
RESPONDENTS:- C.B.I., ACB
Tanna House, A-11 Nathalal Parekh Marg, Colaba,
Mumbai – 4400039.

APPLICATION UNDER SECTION 438 OF Cr. P.C. FOR ANTICIPATORY BAIL.

MAY IT PLEASE YOUR HONOUR:

Most respectfully submitted on behalf of Applicant as under:

1] The applicant above named is permanent resident of Navi Mumbai and residing along with her family members at the above-mentioned address.

2] That the Applicant is the proprietor of 'X' Group and the Chief Promotor of Co.Op. Housing Society.

3] The Applicant submits that it has come to her knowledge that C.B.I. has registered a case vide R.C.No.197(A)/2010 against the (Commissioner of Income Tax and XYZ (Assistant Commissioner of Income Tax) for alleged offences punishable under section 120-B of I.P.C. R/W. 7 & 13(1) (d) of P.C. Act 1988 alleging that they have compelled to the Complainant to pay a bribe amount. A copy of FIR is marked at **Annexure –A.**

4] The brief facts of the prosecution story are as under:-

It is alleged that XYZ Additional C.I.T. Thane and Mr. PQR Assistant CIT demanded a bribe of Rs.2 Crores from the complainant Mr. TRS. It is alleged by the complainant that the complainant had been compelled to pay bribe amount of

Rs.20 Lakhs under duress on 25th March 2011 and on 29th March 2011. It is further alleged by the complainant that during verification conducted on 15th April 2011 the demand for the bribe was confirmed and the remaining bribe amount was reduced from 5 Crores to 3 Crores.

It is alleged that after verification the said case came to be registered on 15.01.2011 and it is further alleged that the trap was laid on 16.04.2011 to apprehend Mr. XYZ. It is also alleged that as per the instructions of Mr. XYZ his agent was apprehended red handed while accepting the cash of Rs. 1.50 Crores on the Eastern Express Highway on 16.04.2011.

It is further alleged that XYZ during the investigation, admitted having received bribe amount of from the said complainant and asked him to deliver the same to Mr. PQR Asstt. CIT. It is therefore alleged that the Mr. PQR Asstt. CIT criminally conspired with Mr. XYZ and in pursuance of the criminal conspiracy Mr. XYZ demanded a bribe amount of Rs.2 Crores and accepted a bribe amount of Rs.20 Lakhs in two installments.

That, the C.B.I. officers visited the residential premises of present applicant, at that time he was not found at her residential premises. The residential premises of Applicant was sealed on 22.04.2011 and unsealed by C.B.I. officers on 16.09.2011.

6] The applicant submits that he was in the flying club at MUMBAI in the year 1990 for Pilot Training and MR. PQR was also a member of flying club and being members they came in contact with each other and their relations developed into friendship.

7] The applicant submits that 6 months back the applicant had entered into an Agreement of Sale with said MR. PQR in connection with Plot no.5, 'B' Nagar Co-op. Housing Society.

8] The applicant submits that it was agreed by him to purchase the said property from Mr. PQR for a consideration of Rs.19,00,000/- and so far paid an amount of Rs.1,29,000/- to Mr. PQR and except this transaction there is no any other transaction between Mr. PQR and the Applicant.

10] The applicant submits that on 16.09.2011 the applicant had himself went to the office of C.B.I. Colaba Mumbai and on the very day the Investigating officer and two other officer unsealed the said flat of the applicant in her presence and on the same date the search operation was taken by the C.B.I.

12] The applicant above named in apprehending arrest at the hands of the Respondents filed Anticipatory Bail Application before Sessions Judge, Mumbai under Section 438 of Cr. P.C. to secure his liberty, being Bail Application No. 189/2011

13] As the respondent failed to file any reply the application therefore on _____ the learned Spl. Judge granted, a-interim anticipatory bail to the present applicant. A copy of the order dated _____ granting anticipatory bail to the applicant is marked at **Anexure –B.**

14] Thereafter the applicant approached the respondent and co-operated them time to time. On _____ the respondent arrested the applicant and released her

on the bail. A copy of bail bond executed by the applicant is marked at **Annexure –C.**

15] In meantime the respondent filed a false and misleading reply on _____ before Special Court, Mumbai and raised the issue of jurisdiction of the court to entertain the application. A copy of say filed by the respondent is marked at **Annexure –D.**

16] The applicant filed all documentary proofs proving falsity of the contention of the respondent. But by order dated _____ the learned Special Judge dispose off the application of the applicant directing the applicant to approach the court at Mumbai and accepted the contention of the respondent that the Court at Mumbai is not having the jurisdiction.

17] Being aggrieved by the said order the applicant approaches the Hon'ble High Court under Section 438 of Cr. P.C. on following grounds which are stated without prejudice to others.

G R O U N D S

a) That the applicant is falsely implicated in this case and has no connection with the said offence.

b) The applicant is not named in the F.I.R. nor he is a Government Officer.

c) The learned Special Judge failed to give proper appreciation to the provisions of Section 157 of Cr. P.C. which provides the procedure to be followed by the Police Oficer, and makes it mandatory that the copy of the F.I.R. is to be send to the Court having jurisdiction. In present case the S.P., C.B.I. , A.C.B., Mumbai vide its letter dated 2005-2010 send the copy of the F.I.R. to the Special Judge, Mumbai. Copy of Letter sent by SP, CBI, ACB is marked at **Annexure –F.** Further more the order passed by the Spl. Judge, Gr. Bombay in M.A. No. 291/2011 where on the basis of submission given by the Spl. P.P. 'XTR', the counsel for respondent and on perusing the record Ld. Spl. Judge had given cler finding that the copy of F.I.R. was not filed in the court at Gr. Bombay and the Court at Thane is the concerned court.

A copy of order passed by Spl. Judge, Gr. Bombay in M.A. No. 291/2011 is annexed herewith and marked at **Annexure –G** to the present application. Moreover another co-accused Mrs. MAR and Mr. BSR filed bail application before the same Court i.e. Special Judge, Thane vide Baill Application No. 683/2010 and while giving say in that matter the respondent did not raise any ground of jurisdiction. A copy of the said Bail application along with roznama and orders thereon is marked herewith at **Annexure –H**. And copy of say filed by respondent in that bail application is marked at **Annexure –I.**

This makes it clear that the Special Court at Thane is having jurisdiction in the case, but with malafide intention to harass the applicant the ground of jurisdiction is raised.

d) That, as per the provisions of 157 of Cr. P.C. the copy of F.I.R. was sent by the S.P., CBI, ACB to deciding the jurisdiction at the Court of Special Judge, Mumbai. But the Officer subordinate and in lower rank i.e. Dy. S.P. Mr. 'B' had given the submission against the same. This is not permissible in the procedure established by the law.

e) The malafides on the part of I.O. can easily be seen from his say filed before Special Judge, Thane where he made various false and contradictory statements, which itself make it clear that the I.O. is interested in falsely implicating the applicant.

f) That, the respondents are trying to falsely implicate the applicant by creating false evidence against him. This is ex-faciely proved from prosecutions own documents.

In the Search List prepared by the Respondent I.O. dated 16-09-2011 it has been stated that:

"*.. Accused PQR during Police custody remand made a statement to the effect that she had given Rs. 22,00,000/- approax. In cash to ABC for developing a plot in Mumbai out of the bribe amount collected by her."*

On the contrary the same I.O. in his written statement before Spl. Judge, Mumbai in bail application No. 191/2010 had given another version about the statement made by said accused PQR. In para (5) of the say **(Annexure –C)** the Respondent NO. 4 had submitted as follows.

"(5)…. That during investigation accused PQR was arrested. During interrogation she was questioned about the bribe amount collected by him. To which she stated that she had given Rs. 22 Lakhs to present applicant Mr. ABC for safe custody. "

Hence it is clear that the I.O. had prepared a false evidence only with a view to harass the applicant only because the present petitioner raised voice against the illegalities committed by Respondent I.O.

g) It is settled principle of law andmore particularly as has been laid down by Hon'ble Supreme Court in the case *B. Suresh Yadva –Vs- Sharifa Bee 2008 Cri.L.J. 431 (SC),* it is the basic principle of criminal jurisprudence that whenever the prosecution takes inconsistent or self contradictory stand then no case is made out for proceeding with criminal case. Hence on this ground alone the proceedings against the petitioner is liable to be quashed forthwith.

h) No case is made out: For the sake of arguments and without prejudice to the rights of the applicant even if the version given by the prosecution about giving rupees to applicant for the construction work is taken on their

face value and accepted in its entirety then also no offence is made out against the petitioner. This fact also gets support from the prosecutions own documents, because, when applicant's house at Mumbai was searched by I.O. on 16-09-2011 and the applicant was present with the I.O. for more than 14 hours then the I.O. did not think it proper to arrest the applicant.

More over in the say filed by the I.O. before Ld. Spl. Judge, Mumbai in Bail application No. 191/2011 the I.O. nowhere stated that they are having any new material which was not present on search dated 16-09-2011. As such it is clear that the present act of the I.O. is nothing but the means of harassment to the applicant.

i) Even otherwise as per law laid down by 3- Judge Bench of Hon'ble Supreme Court in the case of *Central Bureau of Investigation A.H.D. Patna –Vs- Braj Bhushan Prasad 2001 SCC (9) 432* it has been held in para (45) that the place of jurisdiction would be determined by reference to the place where the main offence was committed. The fact that other allied acts were committed at different places would be hardly sufficient to change the venue of the trial to other places. Hon'ble High Court in the case of 1986(3) Crimes 305 laid down the ratio that the place of office assumes importance, and it would determine the jurisdiction in which the offence is triable.

Apart from that if the allegations in the F.I.R. are taken on face value then they indicate the demand and first acceptance at Thane under these circumstances the Court at Thane is only the Court having jurisdiction. Hon'ble Supreme Court in the case of *Vishnu Kondaji Jadhao –Vs- State of Maharashtra 1994 AIR (SC) 167* specifically laid down that the each demand of bribe is a separate offence. Hence as the demand was allegedly to be made at Thane therefore the Spl. Judge, Mumbai is the Court having the jurisdiction. The more specific view is taken by Hon'ble High Court in the case of *1997 Cri.L.J. 4485.*

j) Already the applicant was on interim Anticipatory bail for more than 6 months. The applicant fully co-operated the investigating agency and joined the investigation many times therefore the applicant deserve to be granted anticipatory bail in view of the law laid down by Hon"ble Supreme Court in the case of *Siddharam Mehtre –Vs- State of Maharashtra 2011 (1) SCC.(Cri) 514.*

k) That the respondent never denied the version put up by the applicant.

l) That, considering the entire nature of the case and the allegations leveled therein no offence under the Prevention of Corruption Act is made out against the present applicant in the absence of any prima-facie material against the applicant. That the applicant cannot be indicted in any offence under the Prevention of Corruption Act.

m) That during the entire course of investigation which the respondents office has been apprising of before the various courts it is stated that, there is not a singular whisper about the present applicant being involved in the alleged conspiracy carried out by the other accused. Moreover, to the farthest stretch of imagination, the applicant cannot be alleged to have in any manner involved to the alleged offence or has been beneficiary of any kind as the present applicant is in not a public servant and is in no manner contributor to the alleged favour of which illegal gratification was demanded.

n) That the applicant hails from a respectable family and any such overt act on her part is completely imaginary in nature, in any event the applicant is ready and willing to co-operate with the investigating agency as and when called upon to do so.

o) That the applicant is a law abiding and has never come to adverse notice of any investigation agency.

p) The applicant respectfully submits that as far as she is concerned there is no involvement of the applicant with other accused.

q) That prima facie the allegations leveled against the present applicant no where connects him with the alleged offence and the allegations are made by the respondents with a sole motive to shield their own guilt.

r) That, the applicant denies committing any offence alleged against him moreover nature of allegations is such that custodial interrogation of the applicant in this case is unwarranted.

s) It is learnt that the investigation in the case is already completed.

t) That, the applicant hails from respectable family having deep roots in the society and any such overtact by her is beyond imagination.

u) That in any event the applicant is ready and willing to co-operate with the investigating agency as and when required.

v) That the applicant submits that they have not filed any other application for similar relief's before this Hon'ble Court or any other courts in India.

P R A Y E R:- It is therefore prayed that, this Hon'ble Court be pleased to :-

a) direct the respondents to release the present applicant on bail in connection with R.C.No.197(A)/2010 under section 120-B of I.P.C. r/w. 7 & 13(1) (d) of P.C. Act 1988 in the event of his arrest, on any terms and

conditions as this Hon'ble Court may deem fit to impose in the circumstances of the case.

b) That, interim and ad-interim relief's may be granted in terms of prayer clause (a) to the applicant.

c) For such other and further relief's as this Hon'ble Court may deem fit to grant in the circumstances of the case.

FOR THIS ACT OF KINDNESS THE APPLICANT/ACCUSED AS IN DUTY BOUND SHALL EVER PRAY:
THANE
DATED:

VERIFICATION

I, A.B.C. R/o Flat No.B-1401, 14th Floor, Sai Pride, Plot No.5 Mumbai, the applicant above named do hereby state and declare on solemn affirmation that whatever stated in the foregoing paragraphs of the application are true and correct to the best of my knowledge and belief.
Solemnly affirmed at Mumbai
On this … day of April 2011
Identified and Explained by me.

Deponent.

Before me.
Advocate for the Applicant.
****

APPLICATION NO. 11

IN THE COURT OF SESSIONS JUDGE, NAGPUR

Misc. Cri. Application No...../06

Applicant :- A.B.C.

All R/o NAGPUR, Dist:- NAGPUR
Versus
Non -Applicant :- The State Of Mahrastra
through P. S. O. NAGPUR, Dist. NAGPUR

An application for Grant of anticipatory Bail Under Sec. 438 of Cr. P. C. for the offence punishable u/s 409, 504,420,467 +34 of I. P. C. and section 3 of MPID Act vide crime No. 124/05 registerd by NAGPUR Police.

The applicants humbly submits as under: -

1. That the applicants are innocent law abiding citizen having no criminal antecedent.
2. That the applicant's are the pigmy agent (Daily Collector) of Jeevan Vikas Sahakari Pat Sanstha, NAGPUR registered under the Co-operative Societies Act. It was formed in 1994. (Here in after called as ' Credit Society'). The applicant no. 2 & 3 Libraray Attendant at Arts, Commerce & Science College NAGPUR, Teacher at Z. P. Samity.
4. That the applicants were appointed on commission basis by the aforesaid Credit Society for collecting the amount from its customer and deposit the amount collected by them with the Bank office. The President, And Office Bearer the said Credit Society operated the entire financial transactions. The President, Secretary, and vice president were signatory authority of the said Credit Society. That the applicants were not engaged in internal affairs of the said Credit Society. Thus it is crystal clear that the applicants have no dominion over the funds of the bank and its financial affairs i.e. how to manage the amount raised and make the profits for bank by giving the loan to its member and to invest, as per the constitution of the Bank.
5. In the month of December 2010, the vested interest against the Bank spread bad rumors in the vicinity of Taluka-NAGPUR, regarding insolvency of the Bank, Therefore the investors of the Credit Society started to withdraw their amount from the Credit Society within the periods of 2-3 months entirely by virtue of this near about Rs. 74 Lacks fixed in Deposits were withdraws from the Bank within the 30 to 40 days.
6. It is submitted that the Credit Society has disbursed the Loan of worth Rs. 3.30 Crroers and it had fixed deposit of amount Rs. 2.40 Crroers But due to ineffective and negligent recovery of the Credit Society the same could no be refunded the amount of investor.
7. This act on the part of Credit Society and the person who were managing the financial affairs of the Credit Society and they are actual responsible for it.
8. The applicants could not be held responsible for any alleged act from any stretch of imagination.
9. It is further submitted that there is no allegation of any investor or complainant regarding any thing is committed or alleged act against any daily collector from the applicant. There is absolutely no complaint against the applicant. I f they found guilty for any thing regarding any alleged act the office bearer could have lodged the report against the applicant.
10. That the investor of the said Credit Society lodged the report-dated 13.4.2010 against the Bank, its President Secretary and Vice-President, falsely alleging that their amount has been mis-appropriated and NAGPUR police registered crime no. 111/2010 for the offence punishable u/s 409,506,504,34 of IPC and u/s 3 of MPID Act against President, Vice-President and its secretary. The same report further lodged by them to the Registrar of Co-Op. Society who appointed Shri B. W. Advocate an " Inquiry Officer " under Sec. of 83 of Maharastra Co-Op.Society Act 1960. The Inquiry Officer inquired in to the matter and opined that there is no

misappropriation of the amount of the investor vide its report dated 1.8. 2010.

11. President, Vice-President and its Honorary secretary of the Credit Society applied for Anticipatory Bail before the Honb'le Court and same came to be rejected and against this order these three person approached before Honb'le High Court for Anticipatory Bail vide Criminal Application no……/2010, and Honb'le High Court pleased to released them on anticipatory Bail vide order dated 30.9.2010, after hearing the prosecution. The Honb'le Court also pleased to release the some Director and one daily Collector named Sham Gahlot by common order dated 27.04.06 in misc. Cri. Application no.306 /10 and 309/10 on the principle of parity.
12. That the NAGPUR Police has recently prior couple of days added near about 40 persons as accused in the said crime including the collector under Political pressure, by adding the other sections 420, 467 of IPC.
13. It is submitted that the applicant have not committed any alleged offence and they are not directly and indirectly involved in the alleged crime from any stretch of imagination.
14. As the applicant are innocent, honest and respectable person, NAGPUR Police falsely involved in the alleged crime under Political pressure without any direct and circumstantial evidence with malafide intention to defame them before society at large
15. It is further submitted that due to insolvency of the Bank the applicant suffer huge financial loses and they have lost their jobs.
16. That the applicant is innocent and they are ready to furnish the solvent surety for their appearance.
17. That all applicants are permanent residence of NAGPUR, living with their family, having the deep roots in the society with the jurisdiction of the Honb'le Court and there is no chance of absconding. That applicant No. 1 & 4 is the heart patient
18. That there is no prima facie case against the applicants.
19. The entire investigation is completed in the alleged crime and investigation in the alleged crime is going on since last one year.
20. The applicant are ready to cooperate investigating agency if whenever required, and custody of the applicant are absolutely not essential in this matter.
21. The applicants are ready to abide any condition if imposed by the Honb'le Court.
22. That the applicant shall not hamper or temper to any witness.

Prayer:-

It, is therefore prayed that Honb'le Court may kindly pleased to order to release the all applicant on Anticipatory Bail, in the event of their arrest by NAGPUR police in Crime No. 111/10 for the offence punishable u/s 409, 504,420,467 +34 of I. P. C., r.w. U/s 3 of MPID Act registered by NAGPUR Police.

Applicant no. 1

Applicant no. 2

Applicant no. 3

Wardha

Date: -.28/4/06 Counsel For Applicant

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APPLICATION NO. 12

In the court of.....(Metropolitan Magistrate/Judicial Magistrate/ Chief Judicial Magistrate/ Sessions Judge, etc.)

Criminal Case No.....of 20.....
State.....v.....(Accused)
Offence under section.....of I.P.C.
Police Station... .....

Sir,

It is most respectfully submitted as under:—

1. That the accused/applicant was arrested by Police/ Customs Officers (in case of economic offence) on .....for an alleged offence.
2. That the accused has been falsely implicated in this case and nothing incriminating has been recovered from him.
3. That the accused is innocent and has not committed any offence whatsoever.
4. That the accused/applicant was induced/threatened to make involuntary statement by police/customs officers.
5. That the accused/applicant is permanent resident of .....with his family and there is no chance of his absconding.
6. That there is no likelihood of applicant tampering with the prosecution evidence since the challan has already been filed.
7. That no useful purpose would be served, if the accused/ applicant is denied bail, since the complaint has already been filed and no investigation is said to be pending in this particular case.
8. That the accused/applicant is ready to abide by any condition that may be imposed by the Hon'ble court while granting the bail.
9. That the last bail application was moved before this Hon'ble Court on.....which has been dismissed on

PRAYER

In view of the foregoing it is most respectfully prayed that this Hon'ble Court may kindly admit the accused/applicant to bail on such terms and conditions as this Hon'ble Court may deem fit and proper in the interest of justice.

Prayed accordingly.

Dated:

ACCUSED/APPLICANT
through
(Advocate)

****

ADDITIONAL BOND

Under section 438 of the Code of Criminal Procedure, 1973

1. I undertake to make myself available for interrogation by the police officer whenever asked to do so.
2. I undertake not to induce or influence or threaten any of the persons acquainted with the facts of the case so as to prevent him from disclosing any fact to any of the courts or police officer.
3. I undertake not to leave India without prior permission of the court.
4. I undertake to abide by the terms and conditions of the bail order.
5. I undertake to present myself before the court whenever asked to do so.

Dated:

APPLICANT/ACCUSED

****

APPLICATION FOR BAIL UNDER SECTION 167(2) OF THE CRIMINAL PROCEDURE CODE, 1973

In the Court of.....Metropolitan Magistrate/ Judicial Magistrate (First Class),.....(place)

Bail Application No.....of.....
In re: State v. ....., (accused's name)
FIR No.....date....., PS
offences under sections....., IPC
Accused/applicant vs. State Accuser/respondent

Application for bail under section 167(2)(i) or (ii) of the Code of Criminal Procedure, 1973.

Sir/Madam,

The accused/applicant (hereinafter to be referred to as "the applicant") respectfully states:

1. The police arrested the applicant in connection with the FIR (supra) on.....
2. The court remanded the applicant to "judicial custody" on.....
3. The respondent (state) has not filed the challan against the applicant till today in the court.

4. A statutory period of NINETY DAYS or SIXTY DAYS expired on.....
5. The applicant is now entitled to an indefeasible right to bail.
6. The applicant is not only prepared to furnish but also does furnish bail forthwith.
7. The applicant undertakes to abide himself by any terms and conditions of the order bail.

In circumstances the applicant prays to the court to allow his application for bail and to release him on bail in interest of "right to liberty".

Place ----------

Dated

(Name)
APPLICANT
ThroughCOUNSEL.

****

ANTICIPATORY BAIL APPLICATION

Under section 438 of the Code of Criminal Procedure, 1973
In the Court of Sessions Judge,.....
Criminal Case No.....of 20.....
State.....v.....(Accused)
Under Section.....of I.P.C.
Police Station.....
(Application under section 438)

MOST RESPECTFULLY SHOWETH:

1. That the applicant (particulars about him, his respectability and credibility, status in life and reasons as to why and whose instance he is required by the police).
2. Narrate the humiliation to be caused showing that applicant is innocent and is falsely implicated due to.....
3. That applicant is not named in FIR.
4. That no incriminating articles have been recovered from the house of the applicant and the applicant has been implicated on mere suspicion.
5. That the applicant does not have any past criminal record, the applicant is not a previous convict.
6. That the applicant apprehends that he might be arrested.

7. That the offence is bailable/non-bailable. That the applicant has no desire to evade the due process of law and shall face the trial to vindicate their innocence.
8. That the applicant undertakes not to misuse the bail and he also undertakes to abide by the terms of the bail orders.
9. That the applicant has not filed any other bail application under section 438 of the Code of Criminal Procedure in this Hon'ble Court.

PRAYER

It is, therefore, most respectfully prayed to this Hon'ble Court that this Hon'ble Court may be pleased 'to direct to release the applicant on bail in the event of his arrest directing the CJM/ M.M/ Police Official of the concerned Police Station ..... for such amount of money as this Hon'ble Court deems fit to fix.

Prayed accordingly.

Dated:

APPLICANT

through

COUNSEL FOR APPLICANT.

****

APPLICATION UNDER SECTION 444 OF THE CODE OF CRIMINAL PROCEDURE, 1973

(Discharge of sureties)

In the Court of.....

Criminal Case No.....of 20.....
State.....v.....(Accused)
Under Section.....of I.P.C.
Police Station.....
(Application under section 444)

The humble application on behalf of the applicant. MOST RESPECTFULLY SHOWETH:

1. That the applicant is one of the sureties for the accused .....in the above case.
2. That the accused.....is present in the court today.
3. That the applicant is leaving.....and is not likely to return before the expiry of a couple of years within which he will not be able to exercise proper control over the accused and discharge the responsibility that he has undertaken.

PRAYER

The applicant, therefore, prays that the Hon'ble Court be pleased to allow the applicant to withdraw as a surety and take action as provided by law for the discharge of the applicant from, the responsibilities.

Place:

APPLICANT

****

APPLICATION UNDER SECTION 437 OF THE CODE OF CRIMINAL PROCEDURE, 1973

IN THE COURT OF CHIEF JUDICIAL MGISTRATE...

State.....v..... Accused
Under section.....of I.P.C.
Police Station.....

(Application under section 437)

The humble application on behalf of the applicant:

MOST RESPECTFULLY SHOWETH:

1. That the applicant was arrested by the Police of .....Police Station and he has been in detention since then.
2. That the applicant is innocent.
3. That the police have not completed their investigation and no charge sheet has been received though more than 60 days have expired since the detention of the applicant in custody.
4. That the detention of the applicant is under the circumstances illegal and contrary to the provisions of section 167 of the Code of Criminal Procedure, 1973.

PRAYER

It is, therefore, respectfully prayed that the Hon'ble Court may be pleased to order the applicant to be released on bail.

Dated:

COUNSEL FOR THE APPLICANT

****

APPLICATION UNDER SECTION 436 OF THE CODE OF CRIMINAL PROCEDURE, 1973

IN THE COURT OF CHIEF JUDICIAL MGISTRATE...

State.....v.....Accused
Under section 60 of the UP Excise Act.
Police Station.....
(Application under section 436)

The accused/applicant most respectfully showeth:—

1. That the applicant was arrested on.....
2. That the offence is bailable.
3. That the applicant is ready to furnish such bail as the Court may require for the applicant's release pending the decision of the above case.

PRAYER

It is, therefore, respectfully prayed that the Hon'ble Court be pleased to order the applicant's release on bail.

Dated: COUNSEL FOR THE APPLICANT

****

BAIL APPLICATION UNDER SECTION 439 OF THE CODE OF CRIMINAL PROCEDURE, 1973

IN THE HIGH COURT OF.BOMBAY, BENCH .AT NAGPUR

Criminal Misc.....(M).....No.....of 20.....

\ In the matter of:

Petitioner/accused.....

(Presently lodged in Central Jail Tihar)

vs.

Collector of Customs.....

(Application under section 439 (praying for releasing of the petitioner/accused on bail)

To

The Hon'ble Chief Justice and his Companion Justices of the said High Court.....

The humble petition of the petitioner above-named: MOST RESPECTFULLY SHOWETH:

1. That the petitioner/accused was apprehended by the Customs Officers of ..... on ..... in connection with an alleged offence punishable under section 135 of the Customs Act, 1962 in connection with recovery of 20 gold biscuits weighing .....gms valued at Rs..... and currency worth Rs.....from the luggage which does not belong to the petitioner.
2. BRIEF FACTS OF THE CASE.
3. That the petitioner/accused informed the officers that he had no connection with the seized goods, the petitioner was forced, induced and threatened to make involuntary statement by the Customs Officers under section 108 of the Customs Act, 1962.

4. That the petitioner/accused is innocent and has not committed any offence whatsoever.
5. That the petitioner/accused was produced in the court of Ld. Session Judge on.....and bail application moved by him was rejected on.....
6. That the petitioner/accused is a respectable man of the society and he has never come to the adverse notice of any law enforcing authority.
7. That the petitioner/accused is not a previous convict.
8. That the petitioner/accused is a permanent resident of..... living with the family members and as such there is no chance of his absconding from trial.
9. That the investigations of the case qua the petitioner/ accused is over and no useful purpose would be served if the accused/petitioner is denied bail.
10. That the bail application moved before the Sessions Court was dismissed on.....
11. That the petitioner/accused is ready to abide by any condition imposed by this Hon'ble Court.
12. That no similar Bail application has been filed on behalf of the petitioner/accused in this Hon'ble Court or in any other High Court.

PRAYER

In view of the foregoing it is most respectfully prayed that:

(a) the petitioner/accused may kindly be admitted to bail on such terms and conditions as this Hon'ble Court may deem fit and proper in the interest of justice and/or;

(b) pass any further order or orders as this Hon'ble Court may deem fit and proper in the interest of justice.

Prayed accordingly.

PETITIONER/ACCUSED

Dated:

Through COUNSEL

****

APPLICATION UNDER SECTION 439(1)(b) OF THE CODE OF CRIMINAL PROCEDURE, 1973

[Special Powers of High Court or Court of Session to grant bail-
Under section 439(l)(b) Condition imposed by Magistrate to be modified or set aside.]

In the Court of the Sessions Judge at.....Criminal
Misc. No.....of.....
In re:
State.....v.....
Under section.....of I.P.C.
Police Station.....
[Application under section 439(l)(b)]

The humble application on behalf of the applicant most respectfully showeth:

1. That the applicant is innocent and has been falsely implicated in the case due to enmity.
2. That the applicant's name is not mentioned in the F.I.R.
3. That there was no recovery of any incriminating articles from the possession of the applicant.
4. That the learned Judicial Magistrate 1st Class was pleased to release the applicant on bail on the executing of bond with two sureties of Rs..... each but imposed condition on the applicant, such as:
   (i) the applicant shall leave the town of ..... and.....must not enter into the town until the disposal of the case,
   (ii) the applicant should report to the Officer-in-Charge of the.....Police Station twice in a week.
5. That the applicant has been living in the said town with his family for about 10 years and has been earning his livelihood by working in a.....
6. That the applicant will be put to immense difficulties if he were to leave the town so much so that he will be out of work and the members of his family including the applicant shall have to face starvation.

PRAYER

The applicant, therefore, prays that this Hon'ble Court be pleased to set aside the said conditions imposed by the learned Judicial Magistrate and/or to modify them.

Dated:

APPLICANT

****

BAIL APPLICATION UNDER SECTION 389(3) OF THE CODE OF CRIMINAL PROCEDURE, 1973

(Suspension of sentence pending the appeal, release of appellant on bail)

IN THE COURT OF SHRI.....JUDICIAL MAGISTRATE (FIRST CLASS)

State.....v.....Appellant
U/s.....IPC
Police Station.....
[Application under section 389(3)]

The humble application of the applicant respectfully showeth:

1. That the applicant has been convicted and sentenced by the court in the above case to ..... month's rigorous imprisonment.
2. That the applicant was on bail during the trial by this Hon'ble Court and never abused the privilege of bail given to him.
3. That the case is of minor nature and the applicant is entitled to be given the benefit of doubt.
4. That the filing of appeal/revision shall take some time, and convict applicant shall suffer irreparable loss till he is heard by the appellate court.
5. That the applicant is the sole earning member in his family and he is the only person who can arrange for a proper conduct of the appeal against his conviction above mentioned.
6. That the applicant contested the case during the appeal/ trial and intends now to go up in the appeal to file which the applicant requires time during which it is necessary for him to be on bail.

PRAYER

It is, therefore, respectfully prayed that this Hon'ble Court may be pleased to grant bail for the applicant to enable him to file the appeal and get orders for bail from the appellate court.

Dated: COUNSEL FOR THE APPLICANT

****

APPENDIX -2
RELEVANT FORMS UNDER THE SECOND SCHEDULE OF THE CODE OF CRIMINAL PROCEDURE, 1973

FORM NO. 3

Bond and Bail-Bond after Arrest under a Warrant
(See section 81)

I,.....(name), of....., being brought before the District Magistrate of..... (or as the case may be) under a warrant issued to compel my appearance to answer to the charge of....., do hereby bind myself to attend in the Court" of..... on the

day of..... next, to answer to the said charge, and to continue so to attend until otherwise directed by the Court, and in case of my making default herein, I bind myself to forfeit, to Government, the sum of rupees.....

Dated, this..... day of ....., 20.....

(Seal of the Court)
(Signature)

I do hereby declare myself surety for the above-named..... of....., that he shall attend before..... in the Court of..... on the day of..... next, to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court; and, in case of his making default therein, I bind myself to forfeit, to Government, the sum of rupees

Dated, this..... day of....., 20.....

(Signature)

****

FORM NO. 12

Bond to keep the peace
(See sections 106 and 107)

WHEREAS I, ... (name) inhabitant of .....(place), have been called upon to enter into a bond to keep the peace for the term of.....or until the completion of the inquiry in the matter of.....now pending in the Court of.....I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term or until the completion of the said inquiry and, in case of my making default therein, I hereby bind myself to forfeit to Government the sum of rupees.....

Dated, this..... day of....., 20.....

(Signature)

****

FORM NO. 13

Bond for good behaviour
(See sections 108, 109 and 110)

WHEREAS I, ... (name), inhabitant of (place)....., have been called upon to enter into a bond to be of good behaviour to Government and all the citizens of India for the term of.....(state the period) or until the completion of the inquiry in the matter of.....now pending in the Court of....., I hereby bind myself to be of good behaviour to Government and all the citizens of India during the

said term or until the completion of the said inquiry; and, in case of my making default therein, I hereby myself to forfeit to Government the sum of rupees.....

Dated, this..... day of....., 20.....

(Seal of the Court)

(Signature)

(Where a bond with sureties is to be executed, add...)

We do hereby declare ourselves sureties for the above-named.....that he will be of good behaviour to Government and all the citizens of India during the said term or until the completion of the said inquiry; and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to Government the sum of rupees.....

Dated, this..... day of....., 20.....

(Seal of the Court)

(Signature)

****

FORM NO. 28

Bond and Bail-Bond on a preliminary inquiry before a Police Officer

(See section 169)

I, ... (name), of....., being charged with the offence of..... and after inquiry required to appear before the Magistrate of..... or and after inquiry called upon to enter into my own recognizance to appear when required, do hereby bind myself to appear at....., in the Court of....., on the.....day of..... next (or on such day as I may hereafter be required to attend) to answer further to the said charge, and in case of my making default therein, I bind myself to forfeit to Government, the sum of rupees.....

Dated, this.....day of....., 20.....

(Seal of the Court)

(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the above said .....(name) that he shall attend at.....in the Court of....., on the..... day of..... next (or on such day as he may hereafter be required to attend), further to answer to the charge pending against him, and, in case of his making default therein, I hereby bind myself (or we hereby bind ourselves) to forfeit to Government, the sum of rupees.....

Dated, this..... day of....., 20.....

(Seal of the Court)

(Signature)

****

FORM NO. 29

Bond to prosecute or give Evidence

(See section 170)

I, ... (name), of ....., (place) do hereby bind myself to attend at..... in the Court of..... at.....o'clock on the.....day of.....next and then and there to prosecute (or to prosecute and give evidence) (or to give evidence in the matter of a charge of..... against one A.B. and, in case of making default herein I bind myself to forfeit to Government the sum of rupees.....

Dated, this..... day of....:....., 20.....

(Seal of the Court)

(Signature)

****

FORM NO. 44A

Bond for appearance of offender released pending realisation of fine

[See section 424(l)(b)]

WHEREAS 1..... (name), inhabitant of..... (place) have been sentenced to pay a fine of rupees.....and in default of payment thereof to undergo imprisonment for....., and whereas the Court has been pleased to order my release on condition of my executing a bond for my appearance on the following date (or dates), namely:—

I hereby bind myself to appear before the Court of..... at..... O'clock on the following date (or dates) namely:— and in case of making default therein, I bind myself to forfeit to Government the sum of rupees.....

Dated, this.....day of....., 20.....

(Signature)

WHERE A BOND WITH SURETIES IS TO BE EXECUTED, ADD—

We do hereby declare ourselves sureties for the above-named that he will appear before the Court of.....on the following date (or dates) namely:— and, in case of his making default therein, we bind ourselves jointly and severally to forefeit to Government the sum of rupees.....

(Signature)

****

FORM NO. 45

Bond and bail-bond for attendance before officer in charge of police station or Court

[See sections 436, 437, 438 (3) and 441]

I..... (name), of..... (place) having been arrested or detained without warrant by the officer in charge of.....police station (or having been brought before the Court of.....) charged with the offence of....., and required to give security for my attendance before such Officer or Court on condition that I shall attend such officer or Court on every day on which any investigation or trial is held with regard to such charge, and in case of my making default herein, I bind myself to forfeit to Government the sum of rupees.....

Dated, this.....day of....., 20.....

(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the above said..... (name) that he shall attend the officer in charge of..... police station or the Court of..... on every day on which any investigation into the charge is made or any trial (on such charge is held that he shall be, and appear, before such Officer or Court for the purpose of such investigation or to answer the charge against him (as the case may be), and, in case of his making default herein, I hereby bind myself (or we hereby bind ourselves) to forfeit to Government the sum of rupees.....

Dated, this.....day of....., 20.....

(Seal of the Court)

(Signature)

****

FORM NO. 46

Warrant to discharge a person imprisoned on failure to give security

(See section 442)

To the Officer in charge of the Jail at.....

(or other officer in whose custody the person is)

WHEREAS ..... (name and description of prisoner) was committed to your custody under warrant of this Court, dated, the....., day of.....and has since with his surety (or sureties) duly executed a bond under section 441 of the Code of Criminal Procedure.

This is to authorize and require you forthwith to discharge the said..... (name) from your custody, unless he is liable to be detained for some other matter.

Dated, this .....day of ....., 20.....

(Seal of the Court)

(Signature)

****

APPENDIX-3
ARREST OF PERSONS

THE CODE OF CRIMINAL PROCEDURE, 1973 Chapter V (Sections 41 to 60)

41. When police may arrest without warrant.—(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 365; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110.

42. Arrest on refusal to give name and residence.—(1) When any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required:
Provided that, if such person is not resident in India, the bond shall be secured by a surety or sureties resident in India.

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

43. Arrest by private person and procedure on such arrest.—(1) Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of section 41, a police officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 42; but if there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

44. Arrest by Magistrate.—(1) When any offence is committed in the presence of a Magistrate, whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

(2) Any Magistrate, whether Executive or Judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person

for whose arrest he is competent at the time and in the circumstances to issue a warrant.

45. Protection of members of the Armed Forces from arrest.—(1) Notwithstanding anything contained in sections 41 to 44 (both inclusive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.

(2) The State Government may, by notification, direct that the provisions of sub-section (1) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section shall apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

46. Arrest how made.—(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

47. Search of place entered by person sought to be arrested.—

(1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, any person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him such free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress to such place cannot be obtained under sub-section (1), it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purposes, and demand of admittance duly made, he cannot otherwise obtain admittance:

Provided that, if any such place is an apartment in the actual occupancy of a female (not being the person to be arrested) who, according to custom, does not appear in public, such person or police officer shall, before entering such apartment, give notice to such female that she is at liberty to withdraw and shall afford her every reasonable facility .for withdrawing, and may then break open the apartment and enter it.

(3) Any police officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

48. Pursuit of offenders into other jurisdictions.—A police officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest, pursue such person into any place in India.

49. No unnecessary restraint.—The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

50. Person arrested to be informed of grounds of arrest and of right to bail.—(1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

51. Search of arrested persons.—(1) Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, and whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail.

The officer making the arrests or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing-apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.

(2) Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.

52. Power to seize offensive weapons.—The officer or other person making any arrest under this Code may take away from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

53. Examination of accused by medical practitioner at the request of police officer.—(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order

to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person is a female to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation.—In this section and in section 54, "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), and whose name has been entered in a State Medical Register.

54. Examination of arrested person by medical practitioner at the request of the arrested person.—When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.

55. Procedure when police officer deputes subordinate to arrest without warrant.—(1) When any officer in charge of a police station or any police officer making an investigation under Chapter XII requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.

(2) Nothing in sub-section (1) shall affect the power of a police officer to arrest a person under section 41.

56. Person arrested to be taken before Magistrate or officer in charge of police station.—A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

57. Person arrested not to be detained more than twenty-four hours.—No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

58. Police to report apprehensions.—Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

59. Discharge of person apprehended.—No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

60. Powers, on escape, to pursue and retake.—(1) If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in India.

(2) The provisions of section 47 shall apply to arrests under subsection (1) although the person making any such arrest is not acting under a warrant and is not a police officer having authority to arrest.

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APPENDIX -4

SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR THE CODE OF CRIMINAL PROCEDURE, 1973 Chapter VIII (Sections 106 to 124)

106. Security for keeping the peace on conviction.—(1) When a Court of Session or Court of a Magistrate of the first class convicts a person of any of the offences specified in sub-section (2) or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding three years, as it thinks fit.

(2) The offences referred to in sub-section (1) are—

(a) any offence punishable under Chapter VIII of the Indian Penal Code (45 of 1860), other than an offence, punishable under section 153A or section 153B or section 154 thereof;

(b) any offence which consists of, or includes, assault or using criminal force or committing mischief;

(c) any offence of criminal intimidation;

d) any other offence which caused, or was intended or known to be likely to cause, a breach of the peace.

(3) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(4) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.

107. **Security for keeping the peace in other cases.**—(1) When an Executive Magistrate receives information that any person is likely to

commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility and is of the opinion that there is sufficient ground for proceeding, he may in the manner hereinafter

Security for Keeping the provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.

(2) Proceeding under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.

108. Security for good behaviour from persons disseminating seditious matters.—(1) When an Executive Magistrate of the first class receives information that there is within his local jurisdiction any person who, within or without such jurisdiction,—

(i) either orally or in writing or in any other manner, intentionally disseminates or attempts to disseminate or abets the dissemination of,—

(a) any matter the publication of which is punishable under section 124A or section 153A or section 153B or section 295A of the Indian Penal Code (45 of 1860), or

(b) any matter concerning a Judge acting or purporting to act in the discharge of his official duties which amounts to criminal intimidation or defamation under the Indian Penal Code.

(ii) makes, produces, publishes or keeps for sale, imports, exports, conveys, sells, lets to hire, distributes, publicly exhibits or in any other manner puts into circulation any obscene matter such as is referred to in section 292 of the Indian Penal Code (45 of 1860), and the Magistrate is of opinion that there is sufficient ground for proceeding, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

(2) No proceeding shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity with, the rules laid down in the Press and Registration of Books Act, 1867 (25 of 1867), with reference to any matter contained in such publication except by the order or under the authority of the State Government or some officer empowered by the State Government in this behalf.

109. Security for good behaviour from suspected persons.—When an Executive Magistrate receives information that there is within his local jurisdiction a person taking precautions to conceal his presence and that there is reason to believe that he is doing so with a view to committing a

cognizable offence, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

110. Security for good behaviour from habitual offenders.—
When an Executive Magistrate receives information that there is within his local jurisdiction a person who—

a) is by habit a robber, house-breaker, thief, or forger, or
b) is by habit a receiver of stolen property knowing the same to have been stolen, or
c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or
d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code (45 of 1860), or under section 489A, section 489B, section 489C or section 489D of that Code, or
e) habitually commits, or attempts to commit, or abets the commission of, offences, involving a breach of the peace, or
f) habitually commits, or attempts to commit, or abets the commission of—
g) any offence under one or more of the following Acts, namely:—
h) the Drugs and Cosmetics Act, 1940 (23 of 1940);
i) the Foreign Exchange Regulation Act, 1973 (46 of 1973);
j) the Employees' Provident Funds and Family Pension Fund Act, 1952 (19 of 1952);
k) the Prevention of Food Adulteration Act, 1954 (37 of 1954);
l) the Essential Commodities Act, 1955 (10 of 1955);
m) the Untouchability (Offences) Act, 1955 (22 of 1955);
n) the Customs Act, 1962 (52 of 1962); or

(ii) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or

(g) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

111. Order to be made.—When a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

112. Procedure in respect of person present in Court.—If the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him.

113. Summons or warrant in case of person not so present.—If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is to bring him before the Court:
Provided that whenever it appears to such Magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

114. Copy of order to accompany summons or warrant.—Every summons or warrant issued under section 113 shall be accompanied by a copy of the order made under section 111, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

115. Power to dispense with personal attendance.—The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace or for good behaviour and may permit him to appear by a pleader.

116. Inquiry as to truth of information.—(1) When an order under section 111 has been read or explained under section 112 to a person in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons-cases.

(3) After the commencement, and before the completion, of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety, may, for reason to be recorded in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded:
Provided that—

(a) no person against whom proceedings are not being taken over under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour;

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111.

(4) For the purposes of this section the fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt within the same or separate inquiries as the Magistrate shall think just.

(6) The inquiry under this section shall be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry of the said period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs :

Provided that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.

(7) Where any direction is made under sub-section (6) permitting the continuance of proceedings, the Sessions Judge may, on an application made to him by the aggrieved party, vacate such direction if he is satisfied that it was not based on any special reason or was perverse.

117. Order to give security.—If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly:

Provided that—

(a) no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 111;

(b) the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive;

(c) when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

118. Discharge of person informed against.—If, on an inquiry under section 116, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

119. Commencement of period for which security is required.—

(1) If any person, in respect of whom an order requiring security is made under section 106 or section 117, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date.

120. Contents of bond.—The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

121. Power to reject sureties.—(1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond:

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an enquiry on oath into the fitness of the surety, or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) Such Magistrate shall, before holding the inquiry, give reasonable notice to the surety and to the person by whom the surety was offered and shall, in making the inquiry, record the substance of | the evidence adduced before him.

(3) If the Magistrate is satisfied, after considering the evidence so adduced either before him or before, a Magistrate deputed under subsection (1), and the report of such Magistrate (if any), that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing:

Provided that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.

122. Imprisonment in default of security.—(1) (a) If any person ordered to give security under section 106 or section 117 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if, he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

(b) If any person after having executed a bond without sureties for keeping the peace in pursuance of an order of a Magistrate under section 117, is proved, to the satisfaction of such Magistrate or his successor-in-office, to have committed breach of the bond, such

Magistrate or successor-in-office may, after recording the grounds of such proof, order that the person be arrested and detained in prison until the expiry of the period of the bond and such order shall be without prejudice to any other punishment or forfeiture to which the said person may be liable in accordance with law.

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge and the proceedings shall be laid, as soon as conveniently may be, before such Court.

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, and after giving the concerned person a reasonable opportunity of being heard, may pass such order on the case as it thinks fit:
Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

(4) If security has been required in the course of the same proceeding from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge under sub-section (2), such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of subsections (2) and (3) shall, in that event, apply to the case of such other person also except that the period (if any) for which he may be imprisoned, shall not exceed the period for which he was ordered to give security.

(5) A Sessions Judge may in his discretion transfer any proceeding laid before him under sub-section (2) or sub-section (4) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.

(6) If the security is tendered to the officer-in-charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

(7) Imprisonment for failure to give security for keeping the peace shall be simple.

(8) Imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under section 108, be simple and, where the proceedings have been taken under section 109 or section 110, be rigorous or simple as the Court or Magistrate in each case directs.

123. Power to release persons imprisoned for failing to give security.—(1) Whenever the District Magistrate in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case is of opinion that any person imprisoned for failing to give security under this Chapter may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the High Court or Court of Session, or, where the order was made by any other Court, the District Magistrate, in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case, may make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3) An order under sub-section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts:

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.

(4) The State Government may prescribe the conditions upon which a conditional discharge may be made.

(5) If any condition upon which any person has been discharged is, in the opinion of the District Magistrate, in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.

(6) When a conditional order of discharge has been cancelled under sub-section (5), such person may be arrested by any police officer without warrant, and shall thereupon be produced before the District Magistrate, in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case.

(7) Unless such person gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the District Magistrate, in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case may remand such person to prison to undergo such unexpired portion.

(8) A person remanded to prison under sub-section (7) shall, subject to the provisions of section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.

(9) The High Court or Court of Sessions may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by any order made by it, and the District Magistrate, in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case may make such cancellation where such bond was executed under his order or under the order of any other Court in his district.

(10) Any surety for the peaceable conduct or good behaviour of another person, ordered to execute a bond under this Chapter may at any time apply to the Court making such order to cancel the bond and on such application being made, the Court shall issue a summons or warrant, as it thinks fit, requiring the person for whom such surety is bound to appear or to be brought before it.

124. Security for unexpired period of bond.—(1) When a person for whose appearance a summons or warrant has been issued under the proviso to sub-section (3) of section 121 or under sub-section (10) of section 123, appears or is brought before the Magistrate or Court, the Magistrate or Court shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same person description as the original security.

(2) Every such order shall, for the purposes of sections 120 to 123 (both inclusive) be deemed to be an order made under section 106 or section 117, as the case may be.

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APPENDIX - 5

PROVISIONS AS TO BAIL AND BONDS
THE CODE OF CRIMINAL PROCEDURE,1973
Chapter XXXIII (Sections 436 to 450)

436. In what cases bail to be taken.—(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 or section 446A.

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446.

437. When bail may be taken in case of non-bailable offence.—

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained- without warrant by an officer in

charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but—

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that the shall comply with such directions as may be given by the Court.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail], or, at the discretion of such officer or Court on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1) the Court may impose any condition which the Court considers necessary—

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice.

(4) An officer or a Court releasing any person on bail under subsection (1), or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under subsection (1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case tribal by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

438. Direction for grant of bail to person apprehending arrest.—

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including—

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under subsection (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

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439. Special powers of High Court or Court, of Session regarding bail.— **(**1) A High Court or Court of Session may direct—

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

440. Amount of bond and reduction thereof.—(1) The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(2) The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced.

441. Bond of accused and sureties.—(1) Before any released on bail or released on his own bond, a bond for such StU| money as the police officer or Court, as the case may sufficient shall be executed by such person, and, when he is released i bail, by one or more sufficient sureties conditioned that such t shall attend at the time and place mentioned in the bond, continue so to attend until otherwise directed by the police' Court, as the case may be.

(2) Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.

(3) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court, of Session or other Court to answer the charge.

(4) For the purpose of determining whether the sureties are fit or sufficient, the Court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties or, if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the Court, as to such sufficiency or fitness.

442. Discharge from custody.—(1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and when he is in jail the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the orders shall release him.

(2) Nothing in this section, section 436 or section 437 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

443. Power to order sufficient bail when that first taken is insufficient.—If, through mistake, fraud, or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and on his failing so to do, may commit him to jail.

444. Discharge of sureties.—(1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to jail.

445. Deposit instead of recognizance.—When any person is required by any Court or officer to execute a bond with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court of officer may if in lieu of executing such bond.

446. Procedure when bond has been forfeited.—(1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court or of any Court to which the case has subsequently been transferred, that the bond has been forfeited, or where in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.

Explanation.—A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property before any Court to which the case may subsequently be transferred.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code:

Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by

order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.

(3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.

446A. Cancellation of bond and bail bond.—Without prejudice to the provisions of section 446, where a bond under this Code is for appearance of a person in a case and it is forfeited for breach of a condition—

(a) the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled; and

(b) thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition:

Provided that subject to any other provision of this Code he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the Police Officer or the Court, as the case may be, thinks sufficient.

447. Procedure in case of insolvency or death of surety or when ; a bond is forfeited.—When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of section 446, the Court by whose order such bond was taken, or a Magistrate of the first class may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.

448. Bond required from minor.—When the person required by any Court, or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.

449. Appeal from orders under section 446.—All orders passed under section 446 shall be appealable,—

(i) in the case of an order made by a Magistrate, to the Sessions Judge;

(ii) in the case of an order made by a Court of Sessions, to the Court to which an appeal lies from an order made by such Court.

450. Power to direct levy of amount due on certain recognizance's.—The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond for appearance or attendance at such High Court or Court of Session.

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FROM CRIMINAL MANUAL

REMAND

1) It is observed that Magistrates allow remand of the accused to custody under Section 167 of the Code of Criminal procedure. 1973. Or allow remand under Section 309 of the Code of Criminal Procedure. 1973. Without satisfying themselves that there are reasonable grounds for such remand. The law requires that Magistrates should not allow remand in such cases without being satisfied that there are really good grounds for it Magistrates should not, therefore, allow remand applications as a matter of course, but only after being satisfied that further time is really necessary for the purpose of investigation. In this connection, the attention of all the Courts is invited to the rulings reported in **A.I.R 1975 SC 1465 Natabar Parida V. State of Orissa, and 78 B.L.R. 411 State of Maharashtra v. Tukaram Shiva Patil**.

2) In this connection attention of the Magistrates is drawn to the provisions of Section 167 (1) of the Code of Criminal Procedure. 1973 which makes it obligatory on the police to send copies of entries in the diary relating to the case when forwarding the accused for the purposes of remand. Magistrates should invariably insist upon copies of such entries and material should be carefully examined by the Magistrates in order to satisfy themselves that there are good grounds for remand.

3) While it is not intended to fetter the discretion of the Magistrates in matters of remand, the following general principles are stated for their guidance:-

i) A ramand to police custody of an accused person should not ordinarily be granted unless there is reason to believe that material

and valuable information would thereby be obtained, which cannot be obtained except by his remand to police custody.

ii) Where a remand is required merely for the purpose of verifying a statement made by the accused, the Magistrate should ordinarily remand the accused person to Magisterial custody.

iii) If the Magistrate thinks that it is not necessary for purposes of investigation to remand the accused to police custody, he should place the accused person in Magisterial custody : and in case he has no jurisdiction to try the offence charged, he should issue orders for forwarding the accused person to a Magistrate having jurisdiction.

iv) If the Magistrate thinks that the police not only require more time for their investigation but that for some good reason they require the accused person to be present with them in that investigation the Magistrate may remand him to police custody, but while doing so, he must record the reasons for his order.

Remand execution:- State must show that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters. Madhu Limaye v. State of Bihar. AIR 1969 SC 1014: 1969 Cri. L.J. 1440 : (1969) 1 SCC 292: (19669) 1 SCWR 470.

Remand of accused to police custody: Proviso of S. 162 (2) of Cr. P. C. which is relating to criminal justice involving personal liberty, must be construed strictly in favour of individual liberty. The delay in completion of the investigation can be on pain of the accused being released on bail Therefore cancellation on the ground that charge-sheet was filed subsequently is not permissible. After arrest of accused. Initial custody cannot exceed fifteen days as a whole. It may be police or judicial custody. Any further extension will be for judicial custody only. C. R. I.v. Anupam J. Kullkarni, 1992 AIR S.C.W. 1976 AIR 1992 S.C. (1992) 3 SCC 141 : 1768: 1992 Cr.L.J.2768.

After expiry of period of fifteen days of police remand, order for police remand for a further period of 7 days was held to be violative of section 167 of Cr.P.C. Budh Singh v. State of Punjab (2000) 9 SCC 266, CBI v. Anupam Kulkarni, (1992) 3 SCC 141 followed.

"Accused if in custody: Distinction between section 167 & Section 309(2), Cr. P.C. : Even after taking cognizance of an offence the Court can authorise detention in police custody of a person arrested during further investigation Words accused if in custody" in section 309(2) does not refer to a person who is arrested in course of further investigation.

Remand and custody referred to in first proviso to Section 309 relates to post-cognizance stage and can only be to judicial custody.

The remand and the custody referred to in the first proviso to Section 309 are different from detention to custody under S. 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody.

Detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody. Since, however even after cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, there is no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested.

Under-trials for longer period:- When certain under trial prisoners remained in jail without trial for periods longer than the maximum term for which they could have been sentenced if convicted and such person had been in detention for periods longer than the maximum terms (as prescribed in proviso to Seetion 167(2) Cr. P.C.) without their trial having been commenced, their continued detention was clearly illegal and in violation of their fundamental right under Art. 21 of the Constitution. As such they must be released forthwith . Hussainara Khatoon v. State of Bithar, A.I.R. 1979, SC 1377: 1979 Cr. L.J. 1052 : (1980) 1 SCC 108 : (1979) 2 S.C. J. 536.

Invalid remand followed in valid orders:- In view of the earlier conflicting decisions of the Single Judge, as the single judge hearing the petition referred to the Division Bench the following two questions for decision.

i) Whether any illegality in the detention arising out of an invalid order of remand, can be cured by a subsequent valid order of remand:

ii) What is the date with reference to which the illegality of the detention should be considered in a bail application.

The Division Bench accordingly answered the two questions as below:

i) The accused will not be entitled to be released on bail even though at some anterior period his detention was illegal. In such a case if there is a last valid order of remand the application of grant of bail under Section 437(1) and 439 (1) of the Code. The question is not whether a later order of remand validates the earlier order of remand, but

the question is whether in the face of a later valid order of remand ,the Court can direct the release of the accused. In other words, there is no question of curing an illegality in the earlier invalid order of remand.

ii) The date of illegality of the detention of the accused is the date when the bail application is finally disposed of Taju Khan v. State of Rajasthan . 1983 Cri. L.J. 1518 (Raj).

Mischievous and Malicious Arrest:- J & K.M.L.A. was arrested while enroute to seat of Assembly by the police, obtained remand but not produced him before Magistrate within requisite period. Held that his fundamental right was infringed and the arrest was malicious and mischievous. Therefore Rs. 50,000/- was awarded by way of compensation. **Bhim Singh v. State of J & K, 1968 Cri. L.J. 192**.

4. When the accused person is remanded either to police custody or to some safe custody for the purpose of further investigation by the police it must be borne in mind that. However incomplete an investigation may be an accused person in every case must be produced before a Magistrate having jurisdiction within a maximum period of 16 days (1 day allowed by the a Magistrate on proper cause shown).

Rights of suspects /accused person/prisoners in custody:- Law in India provides certain rights to above referred category of persons. The rights are fundamental. If they are violated, it is illegal. Though Indian constitution does not specifically provide any right against custodial torture there are various judgments of Supreme Court upholding various rights of suspects/accused/prisoners in custody. These rights are contained in Articles. 19, 20, 21, 22, 32 and 226 of the Constitution.

Beside these rights there are other legal rights provided under the Indian penal Code (S.330 & 331). The Bombay police Act. 1951 Ss. 66(b) & (c) Cr. P. Code (S. 57 r/w S. 167) for persons detained, arrested or imprisoned in the custody. Also police Manual and Jail Manual provide various facilities to the persons in police custody and jail custody.

Under Indian Law following are fundamental rights of the persons custody or imprisoned.

i) **Right to Life** :- The Supreme Court held that the procedure for deprivation of life and personal liberty could no longer be any procedure. It held that the procedure contemplated in Art. 21 must be "right just and fair" and not arbitrary, fanciful or oppressive". Otherwise it would be no procedure at all and the requirement of Art. 21 would not be satisfied Maneka Ghandhi v. Union of India A.I.R. 1978 S.C. 659.

In Kharak Singh v. State of U.P. A. I. R. 1978 S.C.659 the Supreme Court held that the term life in Art. 21 meant not merely the continuance of one's animal existence but right to the possession of each organ of the body. **The every limb or faculty through which life is enjoyed is protected under Art. 21 and includes the faculties of thinking and feeling also.**

The scope of expression life was further extended which means something much more than just physical survival. It means right to live with human dignity and all that goes with it viz. the basic necessities of the life such as adequate nutrition. Clothing shelter and facilities for reading writing and expressing oneself. Francis Corlie Mullin v. the Administrator Union Territory of Delhi, A.I.R. 1981 S.C. 1973; BLF v. Union of India A.I.R. 1984 S. C. 802.

ii) Right against self incrimination: The suspect/accused has right to refuse to answer all the self-incriminatory questions. The presumption of innocence until proved guilty according to law is the right of the suspect/accused person. The Constitution of India. Art 20(3) confers this right to these categories of person (See also S. 24.26 and 27 of the Court. In Nandini Satpati v. P. I. Dani A.I.R. 1978 S.C. 1075.

iii) **Right to be informed of ground for arrest** See. Art. 22 (1) of the Constitution of India.

iv) **Right to consult a legal practitioner**: The Supreme Court held in Nandini Satpati case that an accused person under circumstances of near custodial interrogation has right to have his lawyer by his side. But the directive principle of State policy provided.

Completion of Part-Heard Cases by Magistrates under Orders of Transfer

1) Whenever an order of transfer or an advance intimation of the transfer is received by a Judge or Magistrate he should endeavour to dispose of all part-heard cases before handing over charge.

Vakalatnnama

2) (a) Vakalatnama shall be filed by all pleaders as defined in the Code of Criminal Procedure appearing on behalf of any part in all classes of cases including appeals and revisional or miscellaneous applications in all criminal Courts in the State of Maharashtra provided that no Vakalatnama shall be necessary in the cases of.

i) a public Prosecutor appearing on behalf of Government.

ii) a pleader appointed by the Court in any case to defend persons who are too poor to engage counsel for themselves;

iii) a pleader appearing as amicus curiae

iv) a pleader engaged to plead on behalf of any pleader who has been duly appointed to act as a pleader on behalf of such party.

b) When a pleader who has filed a Vakalatnama for a party wishes to withdraw his appearance, he shall serve a written notice of his intention to do so on his client at least seven days in advance of the case coming up for hearing before the Court. Leave of the Court to withdraw appearance may also be applied for if the client has instructed the pleader to that effect. The Pleader shall file a note in writing requesting the Court for permission to withdraw appearance and shall also file along with the Note the letter of the client instructing him to withdraw his appearance or a copy of the intimation given to the client as above together with his written acknowledgment by the client. The Court if it is satisfied that no inconvenience is likely to be caused to the Court or the client may permit the pleader to withdraw his appearance and while permitting the pleader to do so may also impose such terms and conditions as it may deem proper either in public interest or in the interest of the parties.

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-: CHAPTER = 16 :-

LIST OF BAILABLE AND NON BAILABLE OFFENCES

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THE FIRST SCHEDULE

CLASSIFICATION OF OFFENCES

Explanatory Note:

1) In regard to offences under the Indian penal Code, the entries in the second and third columns against a section the number of which is given in the first column are not intended as the definition of, and the punishment prescribed for, the offence in the Indian Penal Code, but merely as indication of the substance of the section.

2) In this Schedule, (i) the expression "Magistrate of the first class" and Any Magistrate" include Metropolitan Magistrates but not Executive Magistrate; (ii) the word "cognizable" stands for" a police officer may arrest without warrant"; and (iii) the word "non-cognizable stands for" a police officer shall not arrest without warrant".

I-OFFENCES UNDER THE INDIAN PENAL CODE

Section	Offence	Punishment	Cognizable or non-cognizable	Bailable or Non-bailable	By what Court triable
1	2	3	4	5	6
CHAPTER V – ABETMENT					
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	Same as for offence abetted.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non-bailable.	Court by which offence abetted is triable.
110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor.	Ditto	Ditto	Ditto	Ditto

111	Abetment of any offence, when one act is abetted and a different act is done; subject to the proviso.	Same for offence intended to be abetted.	Ditto	Ditto	Ditto
113	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor.	Same as for offence committed.	Ditto	Ditto	Ditto
114	Abetment of any offence, if abettor is present when offence is committed.	Ditto	Ditto	Ditto	Ditto
115	Abetment of an offence, punishable with death or imprisonment for life, if the offence be not committed in consequence of the abetment.	Imprisonment for 7 years and fine.	Ditto	Non-bailable	Ditto
	If an act which causes harm to be done in consequence of the abetment.	Imprisonment for 14 years and fine.	Ditto	Ditto	Ditto
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Imprisonment extending to a quarter part of the longest term provided for the offence, or fine, or both.	Ditto	According as offence abetted is bailable or non-bailable.	Ditto
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.	Imprisonment extending to half of the longest term provided for the offence, or fine, or both.	Ditto	Ditto	Ditto

117	Abetting the commission of an offence by the public, or by more than ten persons.	Imprisonment for 3 years, or fine, or both.	According as offence abetted is cognizable or non-cognizable.	According as offence abetted is bailable or non-bailable	Court by which offence abetted is triable.
118	Concealing a design to commit an offence punishable with death or imprisonment for life, if the offence be committed.	Imprisonment for 7 years and fine.	Ditto	Non-bailable.	Ditto
	If the offence be not committed.	Imprisonment for 3 years and fine.	Ditto	Bailable	Ditto
119	A public servant concealing a design to commit an offence which it is his duty to prevent, if the offence be committed.	Imprisonment extending to half of the longest term provided for the offence, or fine, or both	Ditto	According as offence abetted is bailable or non-bailable.	Ditto
	If the offence be punishable with death or imprisonment for life.	Imprisonment for 10 years	Ditto	Non-bailable	Ditto
	If the offence be not committed	Imprisonment extending to a quarter part of the longest term provided for the offence, or fine, or both.	Ditto	Bailable	Ditto

120	Concealing a design to commit an offence punishable with imprisonment, if offence be committed.	Ditto	Ditto	According as offence abetted is bailable or non bailable.	Ditto
	If the offence be not committed	Imprisonment extending to one-eighth part of the longest term provided for the offence, or fine, or both.	Ditto	Bailable	Ditto
CHAPTER VA- CRIMINAL CONSPIRACY					
120B	Criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of 2 years or upwards.	Same as for abetment of the offence which is the object of the conspiracy.	According as the offence which is the object of conspiracy is cognizable or non-cognizable.	According as offence which is object of conspiracy is bailable or non-bailable.	Court by which abetment of the offence which is the object of conspiracy is triable.
	Any other criminal conspiracy.	Imprisonment for 6 months, or fine, or both.	Non-cognizable.	Bailable.	Magistrate of the first class.

CHAPTER VI-OFFENCES AGAINST THE STATE					
121	Waging or attempting to wage war, or abetting the waging of war, against the Government of India.	Death, or imprisonment for life and fine.	Cognizable	Non-bailable	Court of Session.
121A	Conspiring to commit certain offences against the State.	Imprisonment for life, or imprisonment for 10 years and fine.	Ditto	Ditto	Ditto
122	Collecting arms, etc., with the intention of waging war against the Government of India.	Imprisonment for life, or imprisonment for 10 years and fine	Ditto	Ditto	Ditto
123	Concealing with intent to facilitate a design to wage war.	Imprisonment for 10 years and fine.	Ditto	Ditto	Ditto
124	Assaulting President, Governor, etc., with intent to compel or restrain the exercise of any lawful power.	Imprisonment for 7 years and fine.	Ditto	Ditto	Ditto
124A	Sedition.	Imprisonment for life and fine, or imprisonment for 3 years and fine, or fine.	Cognizable	Non-bailable	Court of Session.
125	Waging war against any Asiatic power in alliance or at peace with the Government of India, or abetting the waging of such war.	Imprisonment for life and fine, or imprisonment for 7 years and fine, or fine.	Ditto	Ditto	Ditto

126	Committing depredation on the territories of any power in alliance or at peace with the Government of India	Imprisonment for 7 years and fine, and forfeiture of certain property.	Ditto	Ditto	Ditto
127	Receiving property taken by war or depredation mentioned in sections 125 and 126.	Ditto	Ditto	Ditto	Ditto
128	Public servant voluntarily allowing prisoner of State or war in his custody to escape.	Imprisonment for life, or imprisonment for 10 years and fine.	Ditto	Ditto	Ditto
129	Public servant negligently suffering prisoner of Stare or war in his custody to escape.	Simple imprisonment for 3 years and fine.	Ditto	Bailable	Magistrate of the first class
130	Aiding escape of, rescuing or harbouring, such prisoner, or offering any resistance to the recapture of such prisoner.	Imprisonment for life, or imprisonment for 10 years and fine.	Ditto	Non-bailable	Court of Session
CHAPTER VII-OFFENCES RELATING TO THE ARMY, NAVY AND AIR FORCE					
131	Abetting mutiny, or attempting to seduce an officer, soldier, sailor or airman form his allegiance or duty.	Imprisonment for life, or imprisonment for 10 years and fine	Cognizable	Non-bailable	Court of Session
132	Abetment of mutiny, if mutiny is committed in consequence thereof.	Death, or imprisonment for life, or imprisonment for 10	Ditto	Ditto	Ditto

		years and fine.			
133	Abetment of an assault by an officer, soldier, sailor or airman on his superior officer, when in the execution of his office.	Imprisonment for 3 years and fine.	Ditto	Ditto	Magistrate of the first class
134	Abetment of such assault, if the assault is committed.	Imprisonment for 7 years and fine.	Ditto	Ditto	Ditto
135	Abetment of the desertion of an officer, soldier, sailor or airman.	Imprisonment for 2 years, or fine, or both.	Ditto	Bailable	Any Magistrate.
136	Harbouring such an officer, soldier, sailor or airman who has deserted.	Ditto	Ditto	Ditto	Ditto
137	Deserter concealed on board merchant vessel, through negligence of master or person in charge thereof.	Fine of 500 rupees.	Non-cognizable	Ditto	Ditto
138	Abetment of act of insubordination by an officer, soldier, sailor or airman, if the offence be committed in consequence.	Imprisonment for 6 months, or fine, or both.	Cognizable	Ditto	Ditto
140	Wearing the dress or carrying any token used by a soldier, sailor or airman with intent that it may be believed that he is such a soldier, sailor or airman.	Imprisonment for 3 months, or fine of 500 rupees, or both.	Cognizable	Bailable	Any Magistrate.
CHAPTER VII-OFFENCES AGAINST THE PUBLIC TRANQUILLITY					
143	Being member of an unlawful assembly.	Imprisonment for 6 months, or fine, or both	Cognizable	Bailable	Any Magistrate.

144	Joining an unlawful assembly armed with any deadly weapon.	Imprisonment for 2 years, or fine, or both.	Ditto	Ditto	Ditto
145	Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.	Ditto	Ditto	Ditto	Ditto
147	Rioting	Ditto	Ditto	Ditto	Ditto
148	Rioting, armed with a deadly weapon.	Imprisonment for 3 years or fine, or both.	Ditto	Ditto	Magistrate of the first class.
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence.	The same as for the offence	According as offence is cognizable or non-cognizable.	According as offence is bailable or non-bailable.	The Court by which the offence is triable.
150	Hiring, engaging or employing persons to take part in an unlawful assembly.	The same as for a member of such assembly, and for any offence committed by any member of such assembly.	Cognizable	Ditto	Ditto
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.	Imprisonment for 6 months, or fine, or both.	Ditto	Bailable	Any Magistrate
152	Assaulting or obstructing public servant when	Imprisonment for 3	Ditto	Ditto	Magistrate of the

	suppressing riot, etc.	years, or fine, or both.			first class.
153	Wantonly giving provocation with intent to cause riot, if rioting be committed.	Imprisonment for 1 year, or fine, or both.	Ditto	Ditto	Any Magistrate
	If not committed.	Imprisonment for 6 months, or fine, or both.	Ditto	Ditto	Magistrate of the first class.
153A	Promoting enmity between classes.	Imprisonment for 3 years, or fine, or both.	Ditto	Non-bailable	Ditto
	Promoting enmity between classes in place of worship, etc.	Imprisonment for 5 years and fine.	Ditto	Ditto	Ditto
153B	Imputations, assertions prejudicial to national integration.	Imprisonment for 3 years, or fine, or both.	Ditto	Ditto	Ditto
	If committed in a place of public worship, etc.	Imprisonment for 5 years and fine.	Ditto	Ditto	Ditto
154	Owner or occupier of land not giving information of riot, etc.	Fine of 1,000 rupees.	Non-cognizable	Bailable	Any Magistrate
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it.	Fine	Non-cognizable	Bailable	Any Magistrate
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it.	Ditto	Ditto	Ditto	Ditto

157	Harboring persons hired for an unlawful assembly.	Imprisonment for 6 months, or fine, or both.	Cognizable	Ditto	Ditto
158	Being hired to take part in an unlawful assembly or riot.	Ditto	Ditto	Ditto	Ditto
	Or to go armed.	Imprisonment for 2 years, or fine, or both.	Ditto	Ditto	Ditto
160	Committing affray.	Imprisonment for 1 month, or fine of 100 rupees, or both.	Ditto	Ditto	Ditto
CHAPTER IX-OFFENCES BY OR RELATING TO PUBLIC SERVANTS					
161	Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-bailable.	Magistrate of the first class.
162	Taking a gratification in order, by corrupt of illegal means, to influence a public servant.	Ditto	Ditto	Ditto	Ditto
163	Taking a gratification for the exercise of personal influence with a public servant.	Simple imprisonment for 1 years, or fine, or both.	Ditto	Ditto	Ditto
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself.	Imprisonment for 3 years, or fine, or both.	Ditto	Ditto	Ditto
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding	Ditto	Ditto	Ditto	Ditto

	or business transacted by such public servant.				
165A	Punishment for abetment of offences punishable under section 161 or section 165.	Ditto	Ditto	Ditto	Ditto
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Simple imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Ditto
167	Public servant framing an incorrect document with intent to cause injury.	Imprisonment for 3 years, or fine, or both.	Cognizable	Ditto	Ditto
168	Public servant unlawfully engaging in trade.	Simple imprisonment for 1 year, or fine, or both.	Non-cognizable	Ditto	Ditto
169	Public servant unlawfully buying or bidding for property.	Simple imprisonment for 2 years, or fine, or both and confiscation of property, if purchased.	Ditto	Ditto	Ditto
170	Personating a public servant.	Imprisonment for 2 year, or fine, or both.	Cognizable	Non-bailable	Any Magistrate
171	Wearing garb or carrying token used by public servant with fraudulent intent.	Imprisonment for 3 months, or fine of 200 rupees, or both/	Ditto	Bailable	Ditto

CHAPTER IXA : OFFENCES RELATING TO ELECTIONS					
171E	Bribery.	Imprisonment for 1 year, or fine, or both, or if treating only, fine only.	Non-cognizable	Bailable	Magistrate of the first class.
171F	Undue influence at an election.	Imprisonment for one year, or fine, or both.	Ditto	Ditto	Ditto
	Personation at an election.	Ditto	Cognizable	Ditto	Ditto
171G	False Statement in connection with an election.	Fine	Non-cognizable	Ditto	Ditto
171H	Illegal payments in connection with elections.	Fine of 500 rupees.	Ditto	Ditto	Ditto
171I	Failure to keep election accounts.	Ditto	Ditto	Ditto	Ditto
CHAPTER X : CONTEMPT S OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS					
172	Absconding to avoid service of summons or other proceeding from a public servant.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Non-cognizable	Bailable	Any Magistrate
	If summons or notice require attendance in person, etc., in a Court of Justice.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto	Ditto	Ditto
173	Preventing the service or the affixing of any summons of notice, or the removal of it when it has	Simple imprisonment for 1 month, or fine of 500	Ditto	Ditto	Ditto

	been affixed, or preventing a proclamation;	rupees, or both.			
	If summons, etc., require attendance in person, etc., in a Court of Justice.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto	Ditto	Ditto
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Ditto	Ditto	Ditto
	If the order requires personal attendance, etc., in a Court of Justice.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto	Ditto	Ditto
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Ditto	Ditto	The Court in which the offence is committed, subject to the provisions of Chapter XXVI; or, it not committed in a Court, any Magistrate.
	If the document is required to be produced in or delivered to a Court of Justice.	Simple imprisonment for 6 months, or	Ditto	Ditto	Ditto

		fine of 1,000 rupees, or both.			
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Ditto	Ditto	Any Magistrate
	If the notice or information required respects the commission of an offence, etc.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto	Ditto	
	If the notice or information is required by an order passed under sub-section (1) of section 356 of this Code.	Imprisonment for 6 months, or fine of 1,000 rupees, or both	Non-cognizable	Bailable	Any Magistrate
177	Knowingly furnishing false information to a public servant.	Ditto	Ditto	Ditto	Ditto
	If the information required respects the commission of an offence, etc.	Imprisonment for 2 years, or fine, or both.	Ditto	Ditto	Ditto
178	Refusing oath when duly required to take oath by a public servant.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto	Ditto	The Court in which the offence is committed, subject to the provisions of Chapter XXVI; or, if not committed in a

					Court, any Magistrate
179	Being legally bound to state truth, and refusing to answer questions.	Ditto	Ditto	Ditto	Ditto
180	Refusing to sign statement made to a public servant when legally required to do so.	Simple imprisonment for 3 months, or fine of 500 rupees, or both.	Ditto	Ditto	Ditto
181	Knowingly stating to a public servant on oath as true that which is false	Imprisonment for 3 years and fine	Ditto	Ditto	Magistrate of the first class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto	Ditto	Any Magistrate
183	Resistance to the taking of property by the lawful authority of a public servant.	Ditto	Ditto	Ditto	Ditto
184	Obstructing sale of property offered for sale by authority of a public servant.	Imprisonment for 1 month, or fine of 500 rupees, or both	Ditto	Ditto	Ditto
185	Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorised sale, or bidding without intending to perform the obligations incurred thereby.	Imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto	Ditto	Ditto
186	Obstructing public servant in discharge of his public	Imprisonment for 3	Ditto	Ditto	Ditto

	functions.	months, or fine of 500 rupees, or both.			
187	Omission to assist public servant when bound by law to give such assistance.	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto	Ditto	Ditto
	Wilfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, etc.	Simple imprisonment for 6 months, or fine of 500 rupees, or both.	Ditto	Ditto	Ditto
188	Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed.	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Cognizable	Bailable	Any Magistrate
	If such disobedience causes danger to human life, health or safety, etc.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto	Ditto	Ditto
189	Threatening a public servant with injury to him or one in whom he is interested, to induce him to do or forbear to do any official act.	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Ditto	Ditto
190	Threatening any person to induce him to refrain from making a legal application for protection from injury.	Imprisonment for 1 year, or fine, or both.	Ditto	Ditto	Ditto
CHAPTER XI- FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE					
193	Giving or fabricating false evidence in a judicial	Imprisonment for 7 years	Non-cogni	Bailable	Magistrate of first

	proceeding.	and fine.	zable		class.
	Giving or fabricating false evidence in any other case.	Imprisonment for 3 years, and fine.	Ditto	Ditto	Any Magistrate
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence	Imprisonment for life, or rigorous imprisonment for 10 years and fine.	Ditto	Non-bailable	Court of Session.
	If innocent person be thereby convicted and executed.	Death, or as above	Ditto	Ditto	Ditto
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with imprisonment for life or with imprisonment for 7 years, or upwards.	The same as for the offence.	Ditto	Ditto	Ditto
196	Using in a judicial proceeding evidence known to be false or fabricated.	The same as for giving or fabricating false evidence.	Ditto	According as offence of giving such evidence is bailable or non-bailable.	Court by which offence of giving or fabricating false evidence is triable.
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Ditto	Ditto	Bailable	Court by which offence of giving false evidence is triable.
198	Using as a true certificate one known to be false in a material point.	Ditto	Ditto	Ditto	Ditto

199	False statement made in any declaration which is by law receivable as evidence	Ditto	Ditto	Ditto	Ditto
200	Using as true any such declaration known to be false.	Ditto	Ditto	Ditto	Ditto
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Imprisonment for 7 years and fine.	According as the offence in relation to which disappearance of evidence is caused is cognizable or non-cognizable.	Bailable	Court of Session.
	If punishable with imprisonment for life or imprisonment for 10 years.	Imprisonment for 3 years and fine	Non-cognizable	Ditto	Magistrate of the first class.
	If punishable with less than 10 years imprisonment.	Imprisonment for a quarter of the longest term provided for the offence, or fine, or both.	Ditto	Ditto	Court by which the offence is triable.
202	Intentional omission to give information of an offence by a person legally bound to inform.	Imprisonment for 6 months, or fine, or both	Ditto	Ditto	Any Magistrate

203	Giving false information respecting an offence committed.	Imprisonment for 2 years, or fine, or both.	Ditto	Ditto	Ditto
204	Secreting or destroying any document to prevent its production as evidence.	Ditto	Ditto	Ditto	Magistrate of the first class.
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security.	Imprisonment for 3 year, or fine, or both.	Ditto	Ditto	Ditto
206	Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture or in satisfaction of a fine under sentence, or in execution of a decree.	Imprisonment for 2 years, or fine, or both.	Ditto	Ditto	Any Magistrate
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Ditto	Ditto	Ditto	Ditto
208	Fraudulently suffering a decree to pass for a sum not due, or suffering decree to be executed after it has been satisfied.	Ditto	Ditto	Ditto	Magistrate of the first class.
209	False claim in a Court of Justice.	Imprisonment for 2 years and fine.	Ditto	Ditto	Ditto
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied.	Imprisonment for 2 years, or fine, or both.	Ditto	Ditto	Ditto
211	False charge of offence made with intent to injure.	Ditto	Ditto	Ditto	Ditto
	If offence charged be punishable with imprisonment	Imprisonment for 7 years	Ditto	Ditto	Ditto

	for 7 years or upwards.	and fine.			
	If offence charged be capital or punishable with imprisonment for life.	Ditto	Ditto	Ditto	Court of Session.
212	Harbouring an offender, if the offence be capital.	Imprisonment for 5 years and fine.	Cognizable	Bailable	Magistrate of the first class.
	If punishable with imprisonment for life or with imprisonment for 10 years.	Imprisonment for 3 years and fine.	Ditto	Ditto	Ditto
	If punishable with imprisonment for 1 year and not for 10 years	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both.	Ditto	Ditto	Ditto
213	Taking gift, etc., to screen an offender from punishment if the offence be capital.	Imprisonment for 7 years and fine.	Ditto	Ditto	Ditto
	If punishable with imprisonment for life or with imprisonment for 10 years.	Imprisonment for 3 years and fine.	Ditto	Ditto	Ditto
	If punishable with imprisonment for less than 10 years.	Imprisonment for a quarter of the longest term provided for the offence, or fine, or both.	Ditto	Ditto	Ditto
214	Offering gift or restoration of property in consideration of screening offender if the offence be capital.	Imprisonment for 7 years and fine	Non-cognizable	Ditto	Ditto
	If punishable with imprisonment for life or with imprisonment for life or with	Imprisonment for 3 years and fine	Ditto	Ditto	Ditto

	imprisonment for 10 years.				
	If punishable with imprisonment for less than 10 years.	Imprisonment for a quarter of the longest term provided for the offence, or fine, or both.	Ditto	Ditto	Ditto
215	Taking gift to help to recover movable property of which a person has been deprived by an offence without causing apprehension of offender.	Imprisonment for 2 years, or fine, or both.	Cogni zable	Ditto	Ditto
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital.	Imprisonment for 7 years and fine.	Ditto	Ditto	Ditto
	If punishable with imprisonment for life or with imprisonment for 10 years.	Imprisonment for 3 years, with or without fine.	Ditto	Ditto	Ditto
	If punishable with imprisonment for 1 year and not for 10 years.	Imprisonment for a quarter of the longest term provided for the offence, or fine, or both	Ditto	Ditto	Ditto
216A	Harbouring robbers or dacoits	Rigorous imprisonment for 7 years and fine.	Ditto	Ditto	Ditto
217	Public servant disobeying a direction of law with intent to save person from punishment, or property from forfeiture.	Imprisonment for 2 years, or fine or both.	Non-cogni zable	Ditto	Any Magistrat e
218	Public servant framing an incorrect record or writing with intent to save person from punishment, or property	Imprisonment for 3 years, or fine, or both.	Cogni zable	Ditto	Magistrat e of the first class.

	from forfeiture.				
219	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict, or decision which he knows to be contrary to law	Imprisonment for 7 years, or fine, or both	Non-cognizable	Bailable	Magistrate of the first class
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law.	Ditto	Ditto	Ditto	Ditto
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital.	Imprisonment for 7 years, with or without fine.	According as the offence in relation to which such omission has been made is cognizable or non-cognizable.	Ditto	Ditto
	If punishable with imprisonment for life or imprisonment for 10 years.	Imprisonment for 3 years, with or without fine.	Cognizable	Ditto	Ditto
	If punishable with imprisonment for less than 10 years.	Imprisonment for 2 years, with or without fine.	Ditto	Ditto	Ditto

222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice if under sentence of death.	Imprisonment for life, or imprisonment for 14 years, with or without fine.	Ditto	Non-bailable	Court of Session
	If under sentence of imprisonment for life or imprisonment for 10 years, or upwards.	Imprisonment for 7 years, with or without fine.	Ditto	Ditto	Magistrate of the first class.
	If under sentence of imprisonment for less than 10 years or lawfully committed to custody.	Imprisonment for 3 years, or fine, or both.	Ditto	Bailable	Ditto
223	Escape from confinement negligently suffered by a public servant.	Simple imprisonment for 2 years, or fine, or both.	Non-cognizable	Ditto	Any Magistrate
224	Resistance or obstruction by a person to his lawful apprehension	Imprisonment for 2 years, or fine, or both.	Cognizable	Ditto	Ditto
225	Resistance or obstruction to the lawful apprehension of any person, or, rescuing him from lawful custody.	Ditto	Ditto	Ditto	Ditto
	If charged with an offence punishable with imprisonment for life or imprisonment for 10 years.	Imprisonment for 3 years and fine.	Ditto	Non-bailable	Magistrate of the first class.
	If charged with a capital offence	Imprisonment for 7 years and fine.	Ditto	Ditto	Ditto
	If the person is sentenced to imprisonment for life, or imprisonment for 10 years, or upwards.	Ditto	Ditto	Ditto	Ditto
	If under sentence of death.	Imprisonment for life, or imprisonment for 10 years and fine.	Ditto	Ditto	Court of Session.

225A	Omission to apprehend, or sufferance of escape on part of public servant, in cases not otherwise provided for :-				
	(a) in case of intentional omission or sufferance.	Imprisonment for 3 years, or fine, or both.	Non-cognizable	Bailable	Magistrate of the first class.
	(b) in case of negligence omission or sufferance.	Simple imprisonment for 2 years, or fine, or both.	Ditto	Ditto	Any Magistrate
225B	Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for.	Imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Any Magistrate
227	Violation or condition of remission of punishment.	Punishment of original sentence, or if part of the punishment has been undergone, the residue.	Ditto	Non-bailable	The Court by which the original offence was triable.
228	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Non-cognizable	Bailable	The Court in which the offence is committed subject to the provisions of Chapter XXVI.
[12][228A	Disclosure of identity of the victim of certain offences, etc.	Imprisonment for two years and fine.	Cognizable	Ditto	Any Magistrate
	Printing or publication of a proceeding without prior permission of court.	Ditto	Ditto	Ditto	Ditto]

229	Personation of a juror or assessor.	Imprisonment for 2 years, or fine, or both.	Ditto	Ditto	Magistrate of the first class.
CHAPTER XII- OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS					
231	Counterfeiting, or performing any part of the process of counterfeiting coin.	Imprisonment for 7 years and fine.	Cognizable	Non-bailable	Magistrate of the first class.
232	Counterfeiting, or performing any part of the process of counterfeiting Indian coin.	Imprisonment for life, or imprisonment for 10 years and fine.	Ditto	Ditto	Court of Session.
233	Making, buying or selling instrument for the purpose of counterfeiting coin.	Imprisonment for 3 years and fine.	Ditto	Ditto	Magistrate of first class.
234	Making, buying or selling instrument for the purpose of counterfeiting Indian coin.	Imprisonment for 7 years and fine.	Ditto	Ditto	Court of Session.
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin.	Imprisonment for 3 years and fine.	Ditto	Ditto	Magistrate of the first class
	If Indian coin	Imprisonment for 10 years and fine.	Ditto	Ditto	Court of Session.
236	Abetting, in India, the counterfeiting, out of India, of coin.	The punishment provided for abetting the counterfeiting of such coin within India.	Ditto	Ditto	Ditto
237	Import or export of counterfeit coin, knowing the same to be counterfeit.	Imprisonment for 3 years and fine.	Ditto	Ditto	Magistrate of the first class
238	Import or export of counterfeit of Indian coin, knowing the same to be counterfeit.	Imprisonment for life, or imprisonment for 10 years and fine.	Ditto	Ditto	Court of Session

239	Having any counterfeit coin known to be such when it came into possession, and delivering, etc., the same to any person.	Imprisonment for 5 years and fine.	Ditto	Ditto	Magistrate of the first class
240	Same with respect to Indian coin.	Imprisonment for 10 years and fine.	Ditto	Ditto	Court of session
241	Knowingly delivering to another any counterfeit coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.	Imprisonment for 2 years, or fine, or 10 times the value of the coin counterfeited, or both.	Ditto	Ditto	Any Magistrate.
242	Possession of counterfeit coin by a person who knew it to be counterfeit when he become possessed thereof.	Imprisonment for 3 years and fine.	Cognizable	Non-bailable	Magistrate of the first class
243	Possession of Indian coin by a person who knew it to be counterfeit when he became possessed thereof.	Imprisonment for 7 years and fine.	Ditto	Ditto	Ditto
244	Person employed in a Mint causing coin to be of a different weight or composition from that fixed by law.	Ditto	Ditto	Ditto	Ditto
245	Unlawfully taking from a Mint any coining instrument	Ditto	Ditto	Ditto	Ditto
246	Fraudulently diminishing the weight or altering the composition of any coin.	Imprisonment for 3 years and fine.	Ditto	Ditto	Ditto
247	Fraudulently diminishing the weight or altering the composition of Indian coin.	Imprisonment for 7 years and fine.	Ditto	Ditto	Ditto
248	Altering appearance of any coin with intent that it shall pass as a coin of a different description.	Imprisonment for 3 years and fine.	Ditto	Ditto	Ditto

249	Altering appearance of Indian coin with intent that it shall pass as a coin of a different description.	Imprisonment for 7 years and fine.	Ditto	Ditto	Ditto
250	Delivery to another of coin possessed with the knowledge that it is altered.	Imprisonment for 5 years and fine.	Ditto	Ditto	Ditto
251	Delivery of Indian coin possessed with the knowledge that it is altered.	Imprisonment for 10 years and fine.	Ditto	Ditto	Court of Session
252	Possession of altered coin by a person who know it to be altered when he became possessed thereof.	Imprisonment for 3 years and fine.	Ditto	Ditto	Magistrate of the first class
253	Possession of Indian coin by a person who knew it to be altered when he became possessed thereof.	Imprisonment for 5 years and fine.	Ditto	Ditto	Ditto
254	Delivery to another of coin as genuine which, when first possessed, the deliverer did not know to be altered.	Imprisonment for 2 years, or fine, or 10 times the value of the coin.	Ditto	Ditto	Any magistrate
255	Counterfeiting a Government stamp.	Imprisonment for life, or imprisonment for 10 years and fine.	Ditto	Ditto	Court of Session.
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.	Imprisonment for 7 years and fine.	Ditto	Ditto	Magistrate of the first class
257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp.	Ditto	Ditto	Ditto	Ditto
258	Sale of counterfeit Government stamp.	Ditto	Ditto	Ditto	Ditto
259	Having possession of a counterfeit Government	Ditto	Ditto	Bailable	Ditto

	stamp				
260	Using as genuine a Government stamp known to be counterfeit	Imprisonment for 7 years, or fine, or both	Ditto	Ditto	Ditto
261	Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it, with intent to cause a loss to Government.	Imprisonment for 3 years, or fine, or both.	Cognizable	Non-bailable	Magistrate of the first class.
262	Using a Government stamp known to have been before used.	Imprisonment for 2 years, or fine, or both.	Ditto	Ditto	Any Magistrate
263	Erasure of mark denoting that stamps have been used.	Imprisonment for 3 years, or fine, or both.	Ditto	Ditto	Magistrate of the first class
263A	Fictitious stamps	Fine of 200 rupees	Ditto	Ditto	Any Magistrate
CHAPTER XII- OFFENCES RELATING TO WEIGHTS AND MEASURES					
264	Fraudulent use of false instrument for weighting.	Imprisonment for 1 year, or fine, or both.	Non-cognizable	Bailable	Any Magistrate
265	Fraudulent use of false weight or measure	Ditto	Ditto	Ditto	Ditto
266	Being in possession of false weights or measures for fraudulent use.	Ditto	Ditto	Ditto	Ditto
267	Making or selling false weights or measures for fraudulent use.	Ditto	Cognizable	Non-bailable	Ditto
CHAPTER XIV- OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS					
269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life.	Imprisonment for 6 months, or fine, or both.	Cognizable	Bailable	Any Magistrate

270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life.	Imprisonment for 2 years, or fine, or both.	Ditto	Ditto	Ditto
271	Knowingly disobeying any quarantine rule.	Imprisonment for 6 months, or fine, or both.	Non-cognizable	Ditto	Ditto
272	Adulterating food or drink intended for sale, so as to make the same noxious.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto	Ditto	Ditto
273	Selling any food or drink as food and drink, knowing the same to be noxious.	Ditto	Ditto	Ditto	Ditto
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.	Ditto	Ditto	Ditto	Ditto
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.	Ditto	Ditto	Ditto	Ditto
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation.	Ditto	Ditto	Ditto	Ditto

STATE AMENDMENTS (Section 272 TO 276)

[In Uttar Pradesh]-For the existing entries against sections 272, 273, 274, 275 and 276 in the First Schedule, the following shall be substituted:-

"272	Adulterating food or drink intended for sale, so as to make the same noxious.	Imprisonment for life, with or without fine	Cognizable	Non-bailable	Court of Session
273	Selling any food or drink as food and drink, knowing the same to be noxious.	Ditto	Ditto	Ditto	Ditto
274	Adulterating any drug or medical preparation intended for sale so	Ditto	Ditto	Ditto	Ditto

	as to lessen its efficacy, or to change its operation, or to make it noxious.				
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.	Ditto	Ditto	Ditto	Ditto
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation	Ditto	Ditto	Ditto	Ditto

IN WEST BENGAL

For the existing entries against sections 272, 273, 274, 275 and 276 in the First Schedule, the following shall be substituted:

"272	Adulterating food or drink intended for sale, so as to make the same noxious.	Imprisonment for life, with or without fine	Cognizable	Non-bailable	Court of Session
273	Selling any food or drink, as food and drink, knowing the same to be noxious.	Ditto	Ditto	Ditto	Ditto
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.	Ditto	Ditto	Ditto	Ditto
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.	Ditto	Ditto	Ditto	Ditto
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as different drug or medical preparation	Ditto	Ditto	Ditto	Ditto
277	Defiling the water of a public spring or reservoir.	Imprisonment for 3 months, or fine of 500 rupees, or both	Cognizable	Bailable	Any Magistrate
278	Making atmosphere noxious to health.	Fine of 500 rupees.	Non-cognizable	Ditto	Ditto

279	Driving or riding on a public way so rashly or negligently as to endanger human life, etc.	Imprisonment for 6 months, or fine of 1,000 rupees, or both	Cognizable	Bailable	Any Magistrate
280	Navigating any vessel so rashly or negligently	Ditto	Ditto	Ditto	Ditto

	as to endanger human life, etc.				
281	Exhibition of a false light, mark or buoy.	Imprisonment for 7 years, or fine, both.	Ditto	Ditto	Magistrate of the first class
282	Conveying for hire any person by water, in a vessel in such a state, or so loaded, as to endanger his life.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto	Ditto	Any Magistrate
283	Causing danger, obstruction or, injury in any public way or line of navigation.	Fine of 200 rupees	Ditto	Ditto	Ditto
284	Dealing with any poisonous substance so as to endanger human life, etc.	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto	Ditto	Ditto
285	Dealing with fire or any combustible matter so as to endanger human life, etc.	Ditto	Ditto	Ditto	Ditto
286	So dealing with any explosive substance.	Ditto	Ditto	Ditto	Ditto
287	So dealing with any machinery.	Ditto	Non-cognizable	Ditto	Ditto
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has a right entitling him to pull it down or repair it.	Ditto	Ditto	Ditto	Ditto
289	A person omitting to take order with any animal in his possession, so as to guard against danger to	Ditto	Cognizable	Ditto	Ditto

	human life, or of grievous hurt, from such animal.				
290	Committing a public nuisance.	Fine of 200 rupees.	Non-cognizable	Ditto	Ditto
291	Continuance of nuisance after injunction to discontinue.	Simple imprisonment for 6 months, or fine, or both.	Cognizable	Ditto	Ditto
292	Sale, etc., of obscene books, etc.	On first conviction, with imprisonment for 2 years, and with fine of 2,000 rupees, and, in the event of second or subsequent conviction, with imprisonment for five years and with fine of 5,000 rupees.	Ditto	Ditto	Ditto

STATE AMENDMENT

[Tamil Nadu]- In its application to the State of Tamil Nadu, in the First Schedule, for the entries relating sections 292-A and 293, substitute the following entries, namely:-

"292A	Printing etc. of grossly indecent or scurrilous matter or matter intended for blackmail	Imprisonment of either description for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate
293	Sale etc., of obscene objects to young persons	On first conviction with imprisonment for 3 years, and fine of 2,000 rupees and in the event of second or subsequent conviction, with imprisonment for	Cognizable	Ditto	Ditto"

		7 years, and with fine of 5,000 rupees.			
293	Sale, etc., of obscene objects to young persons.	On first conviction with imprisonment for 3 years, and with fine of 2,000 rupees, and in the event of second or subsequent conviction, with imprisonment for 7 years, and with fine of 5,000 rupees.	Ditto	Ditto	Ditto
294	Obscene songs	Imprisonment for 3 months, or fine, or both.	Ditto	Ditto	Ditto
294A	Keeping a lottery office	Imprisonment for 6 months, or fine, or both.	Non-cognizable	Ditto	Ditto
	Publishing proposals relating to lotteries .	Fine of 1,000 rupees	Ditto	Ditto	Ditto
CHAPTER XV OFFENCES RELATING TO RELIGION					
295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons.	Imprisonment for 2 years, or fine, or both	Cognizable	Non-Bailable	Any Magistrate
295-A	Maliciously insulting the religion or the religious beliefs of any class.	Imprisonment for 3 years, or fine, or both	Ditto	Ditto	Magistrate of the first class.
296	Causing a disturbance to	Imprisonment	Ditto	Bailable	Any

	an assembly engaged in religious in religious worship.	for 1 years, or fine, or both			Magistrate
297	Trespassing in place of worship or sepulcher, disturbing funeral with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse.	Ditto	Ditto	Non-bailable	Ditto
298	Uttering any word or making any sound in the hearing or making any gesture, or placing any object in the sight of any person, with intention to wound his religious feelings.	Ditto	Non-cognizable	Ditto	Ditto
STATE AMENDMENT Andhra Pradesh–In Andhra Pradesh the offence is Cognizable– A.P.G.O. Ms. No. 732, dated 5-12-1991					
CHAPTER XVI OFFENCES AFFECTING THE HUMAN BODY					
302	Murder	Death, or imprisonment for life, and fine	Cognizable	Non-bailable	Court of Session
303	Murder by a person under sentence of imprisonment for life	Death	Ditto	Ditto	Ditto
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, etc.	Imprisonment for life, or imprisonment for 10 Years and fine	Ditto	Ditto	Ditto
304-A	Causing death by rash or negligent act	Imprisonment for 2 Years, or fine, or both	Ditto	Bailable	Magistrate of the first class
304-B	Dowry Death	Imprisonment for not less than 7 years but which may extend to imprisonment for life	Ditto	Non-bailable	Court of Session
305	Abetment of suicide	Death, or	Cognizable	Non-	Cour

	committed by child or insane or delirious person or an idiot, or a person intoxicated.	imprisonment for life, or imprisonment for 10 years and fine.		bailable	t of Session
306	Abetting the commission of suicide	Imprisonment for 10 years and fine.	Ditto	Ditto	Ditto
307	Attempt to murder if such act causes hurt to any person	Imprisonment for life or imprisonment for 10 years and fine	Ditto	Ditto	Ditto
	Attempt by life-convict to murder, if hurt is caused	Death or imprisonment for 10 years and fine	Ditto	Ditto	Ditto
308	Attempt to commit culpable homicide	Imprisonment for 3 years, or fine or both	Ditto	Ditto	Ditto
	If Such act causes hurt to any person	Imprisonment for 7 years , or fine, or both	Ditto	Ditto	Ditto
309	Attempt to commit suicide	Simple imprisonment for 1 years, or fine, or both	Ditto	Bailable	Any Magistrate
311	Being a thug	Imprisonment for life and fine	Ditto	Non-Bailable	
312	Causing miscarriage	Imprisonment for 3 years, or fine, or both	Non-cognizable	Bailable	Magistrate of the first class
	If the woman be quick with a child	Imprisonment for 7 years and fine	Ditto	Ditto	Ditto
313	Causing miscarriage without woman's consent	Imprisonment for life, or imprisonment for 10 years and fine	Cognizable	Non-bailable	Court of Session
314	Death caused by an act done with intent to cause miscarriage	Imprisonment for 10 Years and fine	Ditto	Ditto	Ditto
315	Act done with intent to prevent a child being born alive, or to cause it to die	Imprisonment for 10 years, or fine, or	Ditto	Ditto	Ditto

	after its birth.	both			
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Imprisonment for 10 years and fine	Ditto	Ditto	Ditto
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it	Imprisonment for 7 years, or fine, or both	Ditto	Bailable	Magistrate of the first class
318	Concealment of birth by secret disposal of dead body.	Imprisonment for 2 years, or fine, or both	Ditto	Ditto	Ditto
STATE AMENDMENT Madhya Pradesh- In its application to the State of Madhya Pradesh, in the entries relating to sections 317 and 318, in column 6, for the words" Magistrate of the First Class", substitute "Court of Session"- Madhya Pradesh Act 2 of 2008, section 4.					
323	Voluntarily causing hurt.	Imprisonment for 1 year, or fine of 1,000 rupees, or both	Non-cognizable	Ditto	Any Magistrate
324	Voluntarily causing hurt by dangerous weapons or means.	Imprisonment for 3 years, or fine, or both	Cognizable	Non-bailable	Ditto
325	Voluntarily causing grievous hurt.	Imprisonment for 7 years and fine	Ditto	Bailable	Ditto
326	Voluntarily causing grievous hurt by dangerous weapons or means.	Imprisonment for life, or imprisonment for 10 years and fine.	Cognizable	Non-bailable	Magistrate fo the first class.
STATE AMENDMENT **[Madhya Pradesh]-** In its application to the state of Madhya Pradesh, in the entries relating to section 326, in column 6, for the words " Magistrate of the First Class", substitute " Court of "Sesstion"-Madhya Pradesh Act 2 of 2008, section 4.					
327	Voluntarily causing hurt to extort property or valuable security, or to constrain to do	Imprisonment for 10 years and fine.	Ditto	**Ditto**	**Ditto**

	anything which is illegal which may facilitate the commission of an offence.				
328	Administering stupefying drug with intent to cause hurt, etc	Ditto	Ditto	Ditto	Court of Session
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence.	Imprisonment for life, or imprisonment for 10 years and fine.	Ditto	Ditto	Ditto
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc.	Imprisonment for 7 years and fine.	Ditto	Bailable	Magistrate of the first class.
331	Voluntarily causing grievous hurt to deter public servant from his duty.	Imprisonment for 10 years and fine.	Ditto	Non-bailable	Court of Session
332	Voluntarily causing hurt to deter public servant from his duty.	Imprisonment for 10 years and fine.	Ditto	[94][Ditto]	Magistrate of the first class
333	Voluntarily causing grievous hurt to deter public servant from his duty	Imprisonment for 10 years and fine	Ditto	[95][Ditto]	Court of Session
334	Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other the person who gave the provocation.	Imprisonment for 1 month, or fine of 500 rupees, or both	Non-cognizable	Bailable	Any Magistrate
335	Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Imprisonment for 4 years, or fine of 2,000 rupees, or both.	Ditto	Ditto	Magistrate of the first class.
336	Doing any act which	Imprisonment	Ditto	Ditto	Any

	endangers human life or the personal safety of others.	for 3 months, or fine or 250 rupees, or both			Magistrate
337	Causing hurt by an act which endangers human life, etc.	Imprisonment for 6 months, or fine of 500 rupees, or both	Ditto	Ditto	Ditto
338	Causing grievous hurt by an act which endangers human life, etc.	Imprisonment for 2 years, or fine of 1,000 rupees, or both.	Ditto	Ditto	Ditto
341	Wrongfully confining any person	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Ditto	Ditto	Ditto
342	Wrongfully confining any person	Imprisonment for 1 month, or fine of 1000 rupees, or both.	Ditto	Ditto	Ditto
343	Wrongfully confining for 3 more days.	Imprisonment for 2 years or fine or both	Ditto	Ditto	Ditto
344	Wrongfully confining for 10 or more days.	Imprisonment for 3 years and fine	Ditto	Ditto	Ditto
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation.	Imprisonment for 2 years in addition to imprisonment under any other section	Cognizable	Bailable	Magistrate of the first class.
346	Wrongful confinement in secret	Ditto	Ditto	Ditto	Ditto
347	Wrongful confinement for the purpose of extorting property, or constraining to an illegal act, etc	Imprisonment for 3 years and fine	Ditto	Ditto	Ditto
348	Wrongful or use of criminal force otherwise than on grave provocation of property, etc	Ditto	Ditto	Ditto	Ditto
352	Assault or use of criminal force to deter a public servant from discharge of his duty.	Imprisonment for 3 months or fine of 500 rupees, or both	Non-cognizable	Ditto	Ditto
353	Assault or use of criminal force to deter a public servant from discharge of his duty	Imprisonment for 2 years, or fine or both	Cognizable	[96][Non-bailable]	Ditto

354	Assault or use of criminal force to a woman with intent to outrage her modesty.	Ditto	Ditto	[97][Non-bailable]	Ditto
355	Assault or use of criminal force with intent to dishonor a person, otherwise than on grave and sudden provocation.	Ditto	Non-cignizable	Ditto	Ditto

STATE AMENDMENTS

[Andhra Pradesh]- In its application to the State of Andhra Pradesh, for the existing entries against section 354 and 355, substitute the following entries, namely:-

354	Assault or use of criminal force to a woman with intent to outrage her modesty.	Imprisonment for 7 years, and fine	Cognizable	Non-Bailable	Court of Session
355	Assault or use of criminal force with intent to dishonor a person, otherwise than on grave and sudden provocation". Andhra Pradesh Act 3 of 1992, section 2 (w.e.f. 15-2-1992)	Imprisonment for 2 years, or fine, or both.	Non-cognizable	Bailable	Any Magistrate

[Madhya Pradesh]- In its application to the State of Madhya Pradesh, after entries relating to section 354, insert the following entries, namely:-

354-A	Assault or use of Criminal force to woman with intend to disrobe her.	Imprisonment of not less than one year but which may extend to ten years and fine." Madhya Pradesh Act 15 of 2004, section 5.			

[Orissa]- In its application to the State of Orissa, in the entries relating to section, 354, insert the following entries namely:-

356	Assault or criminal force in attempt to commit theft of property worn or carried by a person.	Imprisonment for 2 Years, or fine, or both.	Cognizable Bailable	Bailable	Any Magistrate
357	Assault or use of criminal	Imprisonment	Ditto	Ditto	Ditto

	force in attempt wrongfully to confine a person-	for 1 Year, or fine of 1,000 rupees, or both.			
358	Assault or use of Criminal force on grave and sudden provocation	Simple imprisonment for one month, or fine of 200 rupees, or both	Non-cognizable	Ditto	Ditto
363	Kidnapping	Imprisonment for 7 years and fine	Cognizable	Ditto	Magistrate of the first class
363-A	Kidnapping or obtaining the custody of a minor in order that such minor may be employed or used for purpose of begging.	Imprisonment for 10 years and fine	Ditto	Non-bailable	Ditto
STATE AMENDMENT **[Madhya Pradesh**] – In its application to the State of Madhya Pradesh, in the entries relating to sections 363 and 363-A] in column 6, for the words" Magistrate of the First Class", Substitute "Court of Session"- Madhya Pradesh Act 2 of 2008, Section 4.					
[Uttar Pradesh] – In its application to the State of Utter Pradesh, in the First Schedule, in the entreating relating to section 363, in column 5, for the words, "Bailable", Substitute" Non-bailable". – Utter Pradesh Act 1 of 1984, section 12 (w.e.f.1-5-1984)					
364	Kidnapping or abducting in order to murder	Imprisonment for life, or rigorous imprisonment for 10 Years and fine	Cognizable	Non-bailable	Court of session
[98]364-A	Kidnapping for reason, etc	Death, or imprisonment for life, and fine	Ditto	Ditto	Ditto
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person.	Imprisonment for	Ditto	Ditto	Magistrate of the first class
STATE AMENDMENT [**Madhya Pradesh]** – In its application to the State of Madhya Pradesh, in the entries to section 365, in column 6, for the words "Magistrate of the First Class", substitute "Court of Session"- Madhya Pradesh Act 2 of 2008, section 4.					
366	Kidnapping or abducting a woman to compel her marriage or to cause her	Imprisonment for 10 years and fine	Ditto	Ditto	Court of Sessio

	defilement, etc				n
336-A	Procuration of minor girl	Ditto	Ditto	Ditto	Ditto
366-B	Imprisonment of girl from foreign country	Ditto	Ditto	Ditto	Ditto
367	Kidnapping or abducting in order to subject a person	Ditto	Ditto	Ditto	Ditto
368	Concealing or keeping in confinement a kidnapped person	Punishment for kidnapping or abduction	Ditto	Ditto	Court by which the kidnapping or abducting is triable.
369	Kidnapping or abducting a child with intent to take property from the person of such child.	Imprisonment for 7 years and fine	Ditto	Ditto	Magistrate of the first class.
370	Buying or disposing of any person as a slave	Ditto	Non-Cognizable	Bailable	Ditto
371	Habitual dealing in slaves	Imprisonment for life, or imprisonment for 10 years and fine	Cognizable	Non-bailable	Court of Session
372	Selling or letting to hire a minor for purposes of prostitution, etc	Imprisonment for 10 years and fine	Ditto	Ditto	Ditto
373	Buying or obtaining possession of a minor for the same purposes.	Ditto	Ditto	Ditto	Ditto
374	Unlawful compulsory labour	Imprisonment for 1 Years, or fine or both	Ditto	Bailable	Any Magistrate
[99]376	Rape	Imprisonment for life or imprisonment for 10 years and fine	Ditto	Non-Bailable	Court of Session
	Intercourse by a man with his wife not being under twelve years of age	Imprisonment for 2 years or fine or both	Non-cognizable	Bailbale	Ditto
376-A	Intercourse by a man with his wife during separation	Imprisonment for 2 years and fine	Ditto	Ditto	Ditto
376-B	Intercourse by public servant with woman in his	Imprisonment for 5 years	Cognizable (but no	Bailable	Court of

	custody	and fine	arrest shall be made without a warrant or without an order of a Magistrate)		Session
376-C	Intercourse by superintendent of jail, remand home, etc	Ditto	Ditto	Ditto	Ditto
376-D	Intercourse by manager, etc of a hospital with any woman in that hospital	Ditto	Ditto	Ditto	Ditto
[1]377	Unnatural offences	Imprisonment for life, or imprisonment for 10 years and fine	Cognizable	Non-bailable	Magistrate of the first Class
STATE AMENDMENT **[Madhya Pradesh]**- In its application to the State of Madhya Pradesh, in the entries relating to section 377, in column 6, for the words “Magistrate of the First Class”, Substitute “Court of Session”- Madhya Pradesh Act 2 of 2008, section 4.					
CHAPTER XVII OFFENCES AGAINST PROPERTY					
379	Theft	Imprisonment for 3 years, or fine or both	Cognizable	Non-bailable	Any Magistrate
380	Theft in a building, tent or vessel	Imprisonment for 7 years and fine	Ditto	Ditto	Ditto
381	Theft by clerk or servant of property in possession of master or employer.	Ditto	Ditto	Ditto	Ditto
382	Theft, after preparation having been made for causing death, or hurt, or restrain, or fear of death, or of hurt or of restraint, in order to the committing of such theft, or to retiring after committing it, or to retaining property taken by it	Rigorous imprisonment for 10 years and fine	Ditto	Ditto	Magistrate of the first class
384	Extortion	Imprisonment for 3 years, or fine, or both	Ditto	Ditto	Any Magistrate
385	Putting or attempting to put in fear of injury, in order to commit extortion	Imprisonment for 2 years, or fine, or both	Ditto	Bailable	Ditto
386	Extortion by putting a	Imprisonment	Ditto	Non-	Magist

	person in fear of death or grievous hurt.	for 10 years and fine		bailable	rate of the first class
387	Putting or attempting to put a person in fear of death or grievours hurt in order to commit extortion	Imprisonment for 7 years and fine	Ditto	Ditto	Ditto
388	Extortion by threat of accusation of an offence punishable with death, imprisonment of life, or imprisonment for 10 years.	Imprisonment for 10 years and fine	Ditto	Bailable	Ditto
	If the offence threatened be an unnatural offence.	Imprisonment for life	Ditto	Ditto	Ditto
389	Putting a person in fear or accusation of an offence punishable with death, imprisonment for life, or imprisonment for 10 years in order to commit extortion.	Imprisonment for 10 years and fine	Ditto	Ditto	Ditto
	If the offence be an unnatural offence.	Imprisonment for life	Ditto	Ditto	Ditto
392	Robbery	Rigorous imprisonment for 10 years and fine	Ditto	Non-bailable	Ditto
	If committed on the highway between sunset and sunrise	Rigorous imprisonment for 14 years and fine	Ditto	Ditto	Ditto
393	Attempt to commit robbery	Rigorous imprisonment for 7 years and fine	Cognizable	Non-bailable	Magistrate of the first class
394	Person voluntarily causing hurt in committing or attempting to commit robbery, or any other person jointly concerned in such robbery	Imprisonment for life, or rigorous imprisonment for 10 years and fine.	Ditto	Ditto	Ditto
STATE AMENDMENT **[Madhya Pradesh]**- In its application to the State of Madhya Pradesh in the entries relating to sections 392, 393 and 394, in column 6, for the words “Magistrate of the First Class” , substitute “Court of Session “- Madhya Pradesh Act 2 of 2008, section 4.					
395	Dacoity	Ditto	Ditto	Ditto	Court of Session

396	Murder in dacoity	Death, imprisonment for life, or rigorous imprisonment for 10 years and fine.	Ditto	Ditto	Ditto
397	Robbery or dacoity, with attempt to cause death or grievous hurt.	Rigorous imprisonment for not less than 7 years	Ditto	Ditto	Ditto
398	Attempt to commit robbery or dacoity when armed with deadly weapon.	Ditto	Ditto	Ditto	Ditto
399	Making preparation to commit dacoity	Rigorous imprisonment for 10 years and fine	Ditto	Ditto	Ditto
400	Belonging to a gang of person associated for the purpose of habitually committing dacoity	Imprisonment for life, or rigorous imprisonment for 10 years and fine.	Ditto	Ditto	Ditto
401	Belonging to a wandering gang of person associated for the purpose of habitually committing thefts.	Rigorous imprisonment for 7 years and fine	Ditto	Ditto	Magist rate of the first class
402	Being one of five or more persons assembled for the purpose of committing dacoity	Ditto	Ditto	Ditto	Court of Sessio n
403	Dishonest misappropriation of movable property, or converting it to one's own use.	Imprisonment for 2 years, or fine, or both	Non-cognizable	Bailable	Any Magist rate
404	Dishonest misappropriation of property, knowing that it was in possession of a deceased person at his death and that it has not since been in the possession of any person legally entitled to it	Imprisonment for 3 years and fine	Ditto	Ditto	Magist rate of the first class
	If by clerk or person employed by deceased	Imprisonment for 7 years and fine	Ditto	Ditto	Ditto
406	Criminal breach of trust	Imprisonment	Cognizabl	Non-	Ditto

		for 3 years, or fine, or both	e	bailable	
407	Criminal breach of trust by a carrier, wharfinger, etc	Imprisonment for 7 years and fine	Ditto	Ditto	Ditto
408	Criminal breach of trust by a clerk or servant	Ditto	Ditto	Ditto	Ditto
409	Criminal breach of trust by public servant or by banker, merchant or agent, etc.	Imprisonment for life, or imprisonment for 10 years and fine	Ditto	Ditto	Ditto
STATE AMENDMENT [**Madhya Pradesh]-** In its application to the State of Madhya Pradesh , in the entries relating to section 409, in column 6, for the words “Magistrate of the First Class”, substitute” Court of Session” Madhya Pradesh Act 2 of 2008, section 4					
411	Dishonestly receiving stolen property, knowing it to be stolen	Imprisonment for 3 years, or fine, or both	Ditto	Ditto	Any Magistrate
412	Dishonestly receiving stolen property, knowing that it was obtained by dacoity	Imprisonment for life, or rigorous imprisonment for 10 years and fine	Ditto	Ditto	Court of Session
413	Habitually dealing in stolen property	Imprisonment for life, or imprisonment for 10 years and fine	Cognizable	Non-bailable	Court of Session
414	Assisting in concealment or disposal of stolen property, knowing it to be stolen	Imprisonment for 3 years or fine, or both	Ditto	Ditto	Any Magistrate
417	Cheating	Imprisonment for 1 years, or fine, or both	Non-cognizable	Bailable	Ditto
418	Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.	Imprisonment for 3 years or fine, or both	Ditto	Ditto	Ditto
419	Cheating by personation	Ditto	Cognizable	Ditto	Ditto
420	Cheating and thereby dishonestly inducing delivery of property, or the making, alteration or destruction of a valuable security	Imprisonment for 7 years and fine	Ditto	Non-Bailable	Magistrate

421	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	Imprisonment for 2 years, or fine, or both	Non-cognizable	Bailable	Any Magistrate
422	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender	Ditto	Ditto	Ditto	Ditto
423	Fraudulent execution of deed of transfer containing a false statement of consideration	Ditto	Ditto	Ditto	Ditto
424	Fraudulent removal or concealment of person or assisting in the doing thereof, or dishonestly releasing any demand or claim to which he is entitled	Ditto	Ditto	Ditto	Ditto
426	Mischief	Imprisonment for 3 months, or fine or both	Ditto	Ditto	Ditto
427	Mischief, and thereby causing damage to the amount of 50 rupees or up-wards	Imprisonment for 2 years, or fine, or both	Ditto	Ditto	Ditto
428	Mischief, and thereby causing damage to the amount of 50 rupees or upwards.	Ditto	Cognizable	Ditto	Ditto
429	Mischief by killing, poisoning, maiming or rendering useless any elephant, camel, horse, etc., whatever may by its value or any other animal of the value of 50 rupees or upwards.	Imprisonment for 5 years, or fine, or both	Ditto	Ditto	Magistrate of the first class
430	Mischief by causing diminution of supply of water for agricultural purposes, etc	Ditto	Ditto	Ditto	Ditto
431	Mischief by injury to public road, bridge, navigable river, or navigable channel, and rendering it impassable or less safe for travelling or conveying property.	Ditto	Ditto	Ditto	Ditto

432	Mischief by causing inundation or obstruction to public drainage attended with damage.	Ditto	Ditto	Ditto	Ditto
433	Mischief by destroying or moving or rendering less useful a lighthouse or sea-mark, or by exhibiting false lights.	Imprisonment for 5 years, or fine, or both	Cognizable	Bailable	Magistrate of the first class
434	Mischief by destroying or moving, etc, a landmark fixed by public authority.	Imprisonment for 1 years, or fine, or both	Non-cognizable	Bailable	Any Magistrate
435	Mischief by fire or explosive substance with intent to cause damage to an amount of 100 rupees or upwards, or in case of agricultural produce, 10 rupees or upwards.	Imprisonment for 7 years and fine	Cognizable	Ditto	Magistrate of the first class
STATE AMENDMENT [Madhya Pradesh]- In its application to the State of Madhya Pradesh, in the entries relation to section 435, in column 6, for the words "for the words " Magistrate of the Fist Class," Substitute "Court of Session "- Madhya Pradesh Act 2 of 2008, section 4					
436	Mischief by fire or explosive substance with intent to destroy a house, etc.	Imprisonment for life, or imprisonment for 10 years and fine.	Ditto	Non-bailable	Court of sesstion
437	Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tones burden.	Imprisonment for 10 years and fine	Ditto	Ditto	Ditto
438	The mischief described in the last section when committed by fire or any explosive substance	Imprisonment for life, or imprisonment for 10 years, and fine	Ditto	Ditto	Ditto
439	Running vessel ashore with intent to commit theft, etc	Imprisonment for 10 years and fine	Ditto	Ditto	Ditto
440	Mischief committed after preparation made for causing death, or hurt, etc	Imprisonment for 5 years and fine	Ditto	Bailable Magistrate of the first class	Magistrate of the first class
447	Criminal trespass	Imprisonment for 3 months, or fine of 500 rupees, or both	Ditto	Ditto	Any Magistrate
448	House-trespass	Imprisonment for one year,	Ditto	Ditto	Ditto

		or fine of 1,000 rupees, or both			
449	House-trespass in order to the commission of an offence punishable with death	Imprisonment for life, or rigorous imprisonment for 10 years and fine	Ditto	Non-bailable	Court of Session
450	House-trespass in order to the commission of an offence punishable with death.	Imprisonment for 10 years and fine	Ditto	Ditto	Ditto
451	House –trespass in order to the commission of n offence punishable with imprisonment	Imprisonment for 2 years and fine	Ditto	Bailable	Ditto
	If the offence is theft	Imprisonment for 7 years and fine	Ditto	Non-bailable	Ditto
452	House – trespass, having made preparation for causing hurt, assault, etc	Ditto	Ditto	Ditto	Ditto
453	Lurking house –trespass or house breaking	Imprisonment for 2 years and fine	Ditto	Ditto	Ditto
454	Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment	Imprisonment for 3 years and fine	Ditto	Ditto	Ditto
	If the offence be theft	Imprisonment for 10 years and fine Ditto	Ditto	Ditto	Ditto
455	Lurking house-trespass or house-breading after preparation made for causing hurt, etc	Ditto	Ditto	Ditto	Ditto
456	Lurking house –trespass or house-breaking by night	Imprisonment for 3 years and fine	Ditto	Ditto	Any Magistrate
457	Lurking house –trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment	Imprisonment for 5 years and fine	Cognizable	Non-bailable	Magistarate of the first class
	If the offence is theft	Imprisonment for 14 years and fine	Ditto	Ditto	Ditto
458	Lurking house-trespass or house-breaking by night,	Ditto	Ditto	Ditto	Ditto

	after preparation made for causing hurt,etc				
459	Grievous hort caused whilst committing lurking house-trespass or house-breaking	Imprisonment for life or imprisonment for 10 years and fine	Ditto	Ditto	Court to Session
460	Death or grievous hurt caused by one of several persons jointly concerned in house-breaking	Ditto	Ditto	Ditto	Ditto
461	Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property	Imprisonment for 2 years, or fine, or both	Ditto	Ditto	Any Magistrate
462	Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same	Imprisonment for 3 years, or fine, or both	Ditto	Bailable	Ditto
CHAPTER XVIII **OFFENCES RELATING TO DOCUMENTS AND TO PROPERTY MARKS**					
465	Forgery	Imprisonment for 2 years, or fine or both	Non-cognizable	Bailable	Ditto
466	Forgery of a record of a Court of justice or of a Registrar of Births, etc, kept by a public servant	Imprisonment for 7 years and fine	Ditto	Non-bailable	Ditto
467	Forgery of a valuable security will or authority to make or transfer any valuable security, or to receive any money,etc	Imprisonment for life, or imprisonment for 10 years and fine	Ditto	Ditto	Ditto
	When the valuable security is a promissory note of the Central Government	Ditto	Cognizable	Ditto	Ditto
468	Forgery for the purpose of cheating	Imprisonment for 7 years and fine	Ditto	Ditto	Ditto
STATE AMENDMENT [Madhya Pradesh]- In its application to the State of Madhya Pradesh, in the entries relation to sections 466,467 and 468, in column 6, for the word “Magistrate of the First Class”, substitute “Court of Session”, Madhya Pradesh Act 2 of 2008, section 4.					
469	Forgery for the purpose of harming the reputation of any person or knowing that it is likely to be used	Imprisonment for 3 years and fine	Ditto	Bailable	Ditto

	for that purpose				
471	Using as genuine a forged document which is known to be forged	Punishable for forgery of such document	Cognizable	Bailable	Magistrate of the first class
	When the forged document is a promissory note of the Central Government	Ditto	Ditto	Ditto	Ditto
472	Making or counterfeiting a seal, plate etc, with intent to commit a forgery punishable under section 467 of the Indian penal Code, or possessing with like intent any such seal plate, etc knowing the same to be counterfeit.	Imprisonment for life, or imprisonment for 7 years and fine	Ditto	Ditto	Ditto
473	Making or counterfeiting a seal, plate etc, with intent to commit a forgery punishable otherwise than under section 467 of the Indian penal Code, or possessing with like intent any such seal plate, etc knowing the same to be counterfeit.	Imprisonment for 7 years and fine	Ditto	Ditto	Ditto
474	Having possession of a document knowing it to be forged, with intent to use it as genuine; if the document is one of the description mentioned in section 466 of the Indian penal Code	Imprisonment for 7 years and fine	Cognizable	Bailable	Magistrate of the first class
	If the document is one of the description mentioned in section 467 of the Indian penal Code	Imprisonment for life, or imprisonment for 7 years and fine	Non-Cognizable	Ditto	Ditto
475	Counterfeiting a device or mark used for authenticating documents described in section 467 of the Indian Code, or possession counterfeit marked material.	Ditto	Ditto	Ditto	Ditto
476	Counterfeiting a device or mark used for	Imprisonment for 7	Ditto	Non-bailable	Ditto

	authenticating documents other than those described in section 467 of the Indian penal Code, or possessing counterfeit marked material.	years and fine			
477	Fraudulently destroying or defacing, or attempting to destroy or deface, or secreting, a will, etc	Imprisonment for life, or imprisonment for 7 years and fine	Ditto	Ditto	Ditto
477-A	Falsification of accounts	Imprisonment for 7 years fine, or both	Ditto	Bailable	Ditto
STATE AMENDMENT [Madhya Pradesh]- In its application to the State of Madhya Pradesh, the entries relating to section 471,472,473,474,475,476,477 and 477 – A, in column 6, for the words “Magistrate of the First Class,”, Substitute “Court of Session” – Madhya Pradesh Act 2 of 2008, section4.					
482	Using a false property mark with intent to deceive or injure any person.	Imprisonment for 1 years, or fine, or both	Ditto	Ditto	Any Magistrate
483	Counterfeiting a property mark used by another, with intent to cause damage or injury	Imprisonment for 2 years, or fine or both	Ditto	Ditto	Ditto
484	Counterfeiting a property mark used by a public servant or any mark used by him to denote the manufacture, quality, etc., of any property.	Imprisonment for 3 years and fine	Ditto	Bailable	Magistrate of the first class
485	Fraudulently making or having possession of any die, plate or other instrument for counterfeiting any public or private property mark.	Imprisonment for 3 years, or fine , or both	Ditto	Ditto	Ditto
486	Knowingly selling goods marked with a counterfeit property mark	Imprisonment for 1 years, or fine, or both	Ditto	Ditto	Any Magistrate
487	Fraudulently marking a false mark upon any package or receptacle containing goods, with intent to cause it to be believed that it contains goods which it does not	Imprisonment for 3 years, or fine, or both	Ditto	Ditto	Ditto

	contain, etc.				
488	Marking use of any such false mark	Ditto	Ditto	Ditto	Ditto
489	Removing, destroying or defacing property mark with intent to cause injury.	Imprisonment for 1 years, or fine, or both	Ditto	Ditto	Ditto
489-A	Counterfeiting currency-notes or bank-notes.	Imprisonment for life, or imprisonment for 10 years and fine	Cognizable	Non-bailable	Court of Session
489-A	Using as genuine forged or counterfeit-notes or bank-notes.	Ditto	Ditto	Ditto	Ditto
489-C	Possession of forged or counterfeit currency – notes or bank-notes.	Imprisonment for 7 years, or fine , or both	Cognizable	Bailable	Court of Session
489-D	Marking or possessing machinery, instrument or material for forging or counterfeiting currency-notes or bank-notes.	Imprisonment for life, or imprisonment for 10 years and fine	Ditto	Non-bailable	Ditto
489-E	Marking or using document resembling currency-notes or bank – notes	Fine of 100 rupees	Non-cognizable	Bailable	Any Magistrate
490	On refusal to disclose the name and address of the printer	Fine of 200 rupees	Ditto	Ditto	Ditto
CHAPTER XIX OFFENCES RELATING TO MARRIAGE					
491	Being bound to attend on or supply the wants of a person who is helpless from youth, unsoundness of mind or disease, and voluntarily omitting to do so.	Imprisonment for 3 month, or fine of 200 rupees, or both	Non-Cognizable	Balable	Any Magistrate
CHAPTER XX OFFENCES RELATING TO MARRIAGE					
493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief	Imprisonment for 10 years and fine	Non-Cognizable	Non-bailable	Magistrate of the first class
494	Marrying again during the lifetime of a husband or	Imprisonment for 7	Ditto	Bailable	Ditto

	wife	years and fine			
STATE AMENDMENT [Andhra Pradesh]- In its application to the State of Andhra Pradesh, for the existing entries against section 494, in column 4, for the word "Non-cognizable", the word "Cognizable" and in column 5, for the word "Bailable" , the words "Non-bailable" shall respectively be substituted – Andhra Pradesh Act 3 of 1992, section 2 (w.e.f. 15-2-1992)					
495	Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted	Imprisonment for 10 years and fine	Ditto	Ditto	Ditto
STATE AMENDMENT [Andhra Pradesh]- In its application to the State of Andhra Pradesh, for the existing entries against section 495, in column 4, for the word "Non-cognizable", the word "Cognizable" and in column 5, for the word "Bailable" , the words "Non-bailable" shall respectively be substituted – Andhra Pradesh Act 3 of 1992, section 2 (w.e.f. 15-2-1992)					
496	A person with fraudulent intention going through the ceremony of being married, knowing that he is not thereby lawfully married.	Imprisonment for 7 years and fine	Ditto	Ditto	Ditto
STATE AMENDMENT [Andhra Pradesh]- In its application to the State of Andhra Pradesh, for the existing entries against section 496, in column 4, for the word "Non-cognizable", the word "Cognizable" and in column 5, for the word "Bailable" , the words "Non-bailable" shall respectively be substituted – Andhra Pradesh Act 3 of 1992, section 2 (w.e.f. 15-2-1992)					
497	Adultery	Imprisonment for 5 years, or fine, or both	Ditto	Ditto	Ditto
498	Enticing or taking away or detaining with a criminal intent a married woman	Imprisonment for 2 years and fine	Ditto	Ditto	Any Magistrate
CHAPTER XX-A **OF CRUELTY BY HUSBAND OR RELATIVES OF HUSBAND**					
498-A	Punishment for subjecting a married woman to cruelty	Imprisonment for three years and fine	Cognizable if information relating to the commission of the offence is given to an officer in charge of a police station by the person aggrieved by	Non-Bailable	Magistrate of the first class

			the offence or by any person related to her by blood, marriage or adoption or if there is no such relative, by any public servant belonging to such class or category as may be notified by the state Government in this behalf.		
		CHAPTER XXI DEFAMATION			
500	Defamation against the President or the Vice-President or the Governor of a State or Administrator of a Union territory or a Minister in respect of his conduct in the discharge of his public function when instituted upon a complaint made by the Public Prosecutor .	Simple imprisonment for 2 years, or fine, or both	Non-cognizable	Bailable	Court of Session
501	(a) Printing or engraving matter knowing it to be defamatory against the President or the Vice-President or the Government of a State or Administrator of a Union territory or a Minister in respect of his conduct in the discharge of his public functions when instituted	Ditto	Ditto	Ditto	Court of Session

	upon a complaint made by the public Prosecutor.				
	(b) Printing or engraving matter knowing it to be defamatory, in any other case	Ditto	Ditto	Ditto	Magistrate of the first class
502	(a) Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter against the President or the Government of a State or Administrator of a Union territory or a Minister in respect of his public functions when instituted upon a complaint made by the public Prosecutor.	Ditto	Ditto	Ditto	Court of Session
	(b) Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter in any other case.	Simple imprisonment for 2 years, or fine, or both	Non-Cognizable	Bailable	Magistrate of the first class
CHAPTER XXII CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE					
504	Insult intended to provoke breach of the peace	Imprisonment for 2 years, or fine , or both	Non—cognizable	Bailable	Any Magistrate
505	False statement, rumour, etc, circulated with intent to cause mutiny or offence against the public peace.	Imprisonment for 3 years, or fine or both	Non-Cognizable	Non-bailable	Any Magistrate
	False statement, rumour , etc, with intent to create enmity, hatred or ill-will	Imprisonment for 5 years, or fine, or both	Ditto	Ditto	Ditto

506	Criminal intimidation	Imprisonment for 2 years, or fine, or both	Non-Cognizable	Bailable	Ditto
	If threat be to cause death or grievous hurt, etc	Imprisonment for 7 years, or fine, or both	Ditto	Ditto	Magistrate of the first class

STATE AMENDMENTS

[Andhra Pradesh]- In Andhra Pradesh the offences under section 506 are –bailable, shall be notwithstanding anything contained in the Code of Criminal Procedure, 1973, Cognizable and Non-bailable". Noti.No. 777/VIII 9-4(2)-87, dated 31-7-1989, published in U.P. Gazette, Ext. Pt. 4, section (kha), dated 2-8-1989.

507	Criminal intimidation by anonymous communication or having taken precaution to conceal whence the threat comes	Imprisonment for 2 years, in addition to the punishment under above section	Ditto	Ditto	Ditto

STATE AMENDMENTS

[Andhra Pradesh]- In Andhra Pradesh the offences under section 507 is Cognizable – A.P.G.O.Ms No. 732, dated 5-12-1991

508	Act caused by inducing a person to believe that he will be rendered an object of Divine displeasure	Imprisonment for 1 years, or fine, or both	Ditto	Ditto	Any Magistrate
509	Uttering any word or making any gesture intended to insult the modesty of a woman, etc.	Simple imprisonment for 1 year, or fine, or both	Cognizable	Ditto	Ditto
510	Appearing in a public place, etc., in a state of intoxication, and causing annoyance to any person	Simple imprisonment for 24, hours, or fine of 10 rupees, or both	Non-cognizable	Ditto	Ditto

CHAPTER XXIII
ATTEMPTS TO COMMIT OFFENCES

511	Attempting to commit offences punishable with imprisonment for life or imprisonment, and in such attempt doing any act toward the commission of the offence.	Imprisonment for life or imprisonment note exceeding half of the longest term provided for the offence, or fine, or both	According as the offence is cognizable or non-cognizable	According as the offence attempted by the offender is bailable or not	The Court by which the offence attempted is triable

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MISCELLENEOUS

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JUDGE FINE HIMSELF

Needless to mention here that conscientious Judges would blame themselves it something goes wrong in their Court due to their own act or omission to do an act in discharge of his or their duty. Please see page 429 of Contempt of court by **V.G. Ramchandran (Edition 1983). A Judge Ralph Kohn of Adrian (Michigan , U.S.A.) (Vide ` Judge Fine Himself' Hindu 9-3-1974, Page 7) fined himself dollar 50**. He came ten Minutes late for a case he was hearing. He expressed regret in open court and fined himself. The charge to which he pleaded guilty was contempt of court – his own court. Such Judge should adorn the Indian Courts.

The best thing for condemner Judge is to punish himself as he had offended the seat of justice by such behavior. This he should do by getting up from the Judges seat and address the seat , I am indeed sorry , I apologiese. This purges his contempt. For other criminal offence he may be proceeded.

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on 12 November, 2013

SUPREME COURT OF INDIA

P. SATHASIVAM, CJI,DR. B.S. CHAUHAN,RANJANA DESAI,RANJAN GOGOI, S.A. BOBDE ,JJ

(CONSTITUTION BENCH)

1 WRIT PETITION (CRIMINAL) NO. 68 OF 2008

Lalita Kumari .... Petitioner (s)

Versus

Govt. of U.P. & Ors. .... Respondent(s)

2 WITH S.L.P. (Crl.) No. 5986 of 2006, S.L.P. (Crl.) No. 5200 of 2009
3 CRIMINAL APPEAL No. 1410 OF 2011
4 CRIMINAL APPEAL No. 1267 OF 2007 AND
CONTEMPT PETITION (C) NO. D26722 OF 2008 IN
WRIT PETITION (CRIMINAL) NO. 68 OF 2008
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A) When complaint of commission of a cognizable offence given to Police registration of FIR is mandatory and no preliminary inquiry is permissible in such a situation .

In view of the aforesaid discussion, we hold:

i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends

in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/ family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry. viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in

registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above. (Para 111)

B) The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediatelyExcept in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do(Para 100)

It is also relevant to note that in Joginder Kumar vs. State of U.P. & Ors. (1994) 4 SCC 260, this Court has held that arrest cannot be made by police in a routine manner.

Some important observations are reproduced as under:-

"20…No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do." (Para 99)

LAWS(MAD)-1988-11-20= 1988 MAD LW(CRL.)503

HIGH COURT OF MADRAS

Coram :- S.R.Pandian , David Annoussamy , P.K.Sethuraman J.

(FULL BENCH)

Decided on November 16, 1988

Crl.R.C.No.821 of 1986 and Crl.M.P.Nos.6452 and 6900 of 1982, etc.

Selvanathan alias RaghavanAppellant

VERSUS

State by Inspector of Police, G-5 Police Station, MadrasRespondents

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A) Every person subjected to arrest is entitled to a copy of FIR free of cost at the time of arrest - No doubt, it is true that if a duty is cast on the arresting officer to comply with certain statutory formalities, there is a corresponding duty cast on the Magistrate who is called upon to pass remand orders to satisfy himself whether the statutory formalities have been strictly complied with or not. In case the Magistrate is not satisfied that the requirements of Sec.50 of the Code have not been complied with, he can limit the remand in the first instance to such period as would be necessary, thereby affording an opportunity to the police officer to communicate in writing the full particulars of the offence for which the accused is arrested or the other grounds of such arrest .

B) The Magistrates shall not grant remands to the police custody unless they are satisfied that there is good ground for doing so and shall not accept a general statement made by the investigating or other Police Officer to the effect that the accused may be liable to

give further information, that a request for remand to police custody shall be accompanied by an affidavit by setting out briefly the prior history of the investigation and the likelihood of further clues which the police expect to derive by having the accused in custody, sworn by the investigating or other police officer, not below the rank of a Sub Inspector of Police and that the Magistrate after perusing the affidavit and satisfying himself about the request of the police officer, shall entrust the accused to police custody and at the end of the police custody, the Magistrate shall question the accused whether he had in any way been interfered with during the period of custody.

The cherished legal right vested in the accused under Art.22(1) of the Constitution and Sec.50(1) of the Code to obtain full particulars of the offence or the grounds for his arrest, is based on well settled principles of law, as enunciated in a number of judicial pronouncements which we have already referred to. In this connection, it would be useful to bear in mind Arts.3 and 29 of the Universal Declaration of Human Rights, 1948 and Art.9(2) of the International Covenant of Civil and Political Rights, published by the United Nations (New York 1978) at page 24, reading: 'Any one who is arrested shall be informed at the time of arrest of the reasons for his arrest and shall be promptly informed of any charges against him.' Further, if the first information report is laid by the accused himself, he is entitled to get a copy of the information free of cost as per Sec.154(2) of the Code, since the expression 'informant' appearing in Sec.154(2) does not exclude the accused giving information about the crime. When it is so, we are unable to understand as to what would be the legal impediment to furnish a copy to the accused, who as per Sec.50(1) has to be informed of

the full particulars, of the offence for which he is arrested or other grounds for such arrest.

Though in the heading of Sec.50 of the Code, the word 'informed' is used, in the body of the section, the expression 'communicate' is found. In legal parlance, there is a lot of difference between the expression 'inform' and 'communicate'. As Patanjali Sastri, J., pointed out in his separate judgment in Income-tax Commissioner v. Ahmedbhai Umarbhai and Company, A.I.R. 1950 S.C. 134, 'marginal notes in an Indian Statute, as in an Act of Parliament cannot be referred to for the purpose of construing the statute. Nor can the title of a Chapter be legitimately used to restrict the plain terms of an enactment.' See also Balraj Kunwar v. Jagatpal Singh, 26 All. 393: 31 I.A. 132 (P.C.). Hence, in the light of the above decisions, we have to approach Sec.50(1) only with reference to the specific word used in that section, and not with reference to the word used in the heading of the section. This section requires the arresting person to communicate to the arrestee the full particulars of the offence for which he is arrested or the other grounds for such arrest. Though, the section does not mean that any technical or precise language need be used, it demands that all the particulars of the offence for which the accused is arrested should be communicated to him. If it is to be construed that the communication could be oral also, then it would lead to a dispute, when the accused denies that full particulars of the grounds have not been communicated to him. Even if any communication of the offence is orally made to the accused, the Court may not be in a position to come to a definite conclusion as to what kind of communication was made, whether communication of the mere particulars of the offences was made or whether mere section of the offence was told to the arrestee. THEREfore, in order to avoid any controversy or dispute, it will always be desirable to

give the particulars of the grounds in writing. We may point out at this juncture that the Supreme Court in Lallubhai Jagibhai v. Union of India, A.I.R. 1981 S.C. 728, while interpreting the word 'communicate', observed that if the 'grounds' are only verbally explained to the arrestee and nothing in writing is left with him, then the purpose of Sec.50 of the Code is not served and strictly complied with.

As repeatedly pointed out by the authoritative judicial pronouncements of the Supreme Court and the various High Courts, it is unconstitutional illegal, unjust and unfair not to let the arrestee know the accusation him or the full particulars of the offence or the grounds on the basis of which the arrest has been effected. To expect an arrestee to a blind and unquestioned obedience in ignorance of the particulars of the offence or the accusation made against him is only the law of the tyrants. After the advent of the Constitution of India, in our view, it should not be allowed to flourish or exist on our soil. Every person subjected to arrest is entitled to know why he is deprived of his freedom. It is only with this underlying principle, Sec.50 is now introduced in the Code.

We are of the firm view that it would be desirable that the particulars enumerated by us above be communicated to the arrestee in writing and free of cost, which would be in strict compliance of Art.22(1) of the Constitution of India and Sec.50 of the Code.

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Eq. Citation : 2013 CRI. L.J. 616

ORISSA HIGH COURT : CUTTACK

CORAM : MR. V.GOPALA GOWDA , CJ AND MR. JUSTICE S.K.MISHRA , J.

W.P.(Crl.) No. 1096 of 2011

on 5 October, 2012

Arun Kumar Budhia. ... Petitioner Versus

State of Orissa and another. ... Opposite parties For petitioner - M/s. Goutam K. Acharya, K.M.Patra, P.K.Das, S.K.Behera, K.G.Hadai,

J.K.Mohapatra and Miss R.Nayak.

For opposite parties - Government Advocate, (for opposite parties 1 and 2) and

Mr. S.D.Das, Asst. Solicitor General (for opposite party no.3).

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The accused is entitled to get a copy of the First Information Report Articles 21 and 22 provides that the liberty of a citizen cannot be interfered or curtailed lightly by the authorities. So it is to be determined, whether at the stage of initial investigation, the accused has a right of receiving information regarding the accusation or allegation made against - a person, who is in custody of the same, has the liability to give a copy thereof to the person who has interest in the same or whose interest is adversely affected by the same.

> Thus, we allow the writ application and direct that : (i) The accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C. (ii) An accused who has reason to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/ agent for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for 8
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> obtaining such a copy from the court. On such application being made, the copy shall be supplied within twenty-four hours. (iii) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special

Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Code.

(iv) The copies of the F.I.Rs., unless reasons recorded regard being had to the nature of the offence that the same is sensitive in nature, should be uploaded on the Odisha Police website or by the district police website, as the case may be, within twenty-four hours of lodging of the F.I.R. so that the accused or any person connected with the same can download the F.I.R and the appropriate application before the Court as per law for redressal of his grievances.

(v) The decision not to upload the copy of the F.I.R. on the website of Odisha police/District police office shall not be taken by an officer below the rank of Deputy Superintendent of Police or Assistant Commissioner of Police, as the case may be, and that too by way of a speaking order. A decision so taken by the DSP/ACP shall also be duly communicated to the Magistrate having jurisdiction.

(vi) The word 'sensitive' apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore 9

would also include concept of privacy regard being had to the nature of the F.I.R.

(vii) In case a copy of the F.I.R. is not provided on the ground of sensitive nature of the case, the person aggrieved by the said action, after disclosing his identity, can submit a representation with the Commissioner of Police/Superintendent of Police of the District, who shall constitute a committee of three high officers and the committee shall deal with the said grievance within three days from the date of receipt of the representation and communicate it to the aggrieved person.

(viii) The Superintendent of Police shall constitute the committee within eight weeks from today.

(ix) In cases wherein decisions have been taken not to give copies of the F.I.Rs. regard being had to the sensitive nature of the case, it will be open to the accused/his authorized representative to file an application for grant of certified copy before the court to which the F.I.R. has been sent and the same shall be provided in quite promptitude by the concerned court not beyond three days of the submission of the application.

(x) The directions for uploading the F.I.R. on the website of Odisha Police shall be given effect from 3Ist January, 2013.

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S.K.Mishra, J. - In this writ petition, the petitioner has prayed for issuance of a writ of mandamus to the State of Odisha to make provision for supply of copy of F.I.R. registered by the police to the accused persons and/or their relatives and to direct 2

the Odisha Police to upload the F.I.Rs. in their website within a reasonable time after registration.

2. The petitioner is an Advocate and has filed this writ petition in the nature of a public interest litigation to solve the difficulties faced by the accused persons, who were named in the F.I.R. registered against them in receiving copy of the F.I.R. for seeking appropriate relief for protecting their right to life and personal liberty. It is brought to the notice of the Court that most of the times the accused named in the F.I.R. is not aware of lodging an F.I.R. or contents thereof and, therefore, without an authenticated copy of the same, he faces handicap in moving appropriate applications before the Courts for protecting his liberty.

3. The State has filed a counter affidavit and in the said counter affidavit, the State has sought to bring to the notice of the Court that there is no provision in the Criminal Procedure Code or in the G.R. & C.O. (Crl.) to provide copies of the F.I.R. to the accused by the Police Officers.

4. In order to appreciate the contentions raised by the learned counsel for the petitioner, it is appropriate to take note of various provisions those are applicable. Section 154 of the Code of Criminal Procedure, 1973, hereinafter referred as the 'Code' for brevity, provides for information in cognizable cases. Section 154 of the Code is quoted below:

"154. Information in cognizable cases :- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such 3

officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant. (3) Any person aggrieved by a refusal on the part of the officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

5. Section 154 of the Code provides for information as to the cognizable cases and investigation of such cases, whereas Section 156 of the Code provides for police officer's

power to investigate cognizable cases. After investigation, final report is submitted by the police to the Magistrate having territorial jurisdiction.

6. After completion of investigation and submission of charge-sheet, before trial, the accused is entitled to copies of the police report as provided in Section 207 of the Code. The said Section reads as follows: "207. Supply to the accused of copy of police report and other documents.- In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154; (iii) the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been 4

made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173;

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused: Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

7. Section 207 of the Code therefore mandates that after completion of investigation and submission of final form before the learned Magistrate, it is the duty of the learned Magistrate to furnish the accused a free copy of the documents, which includes police report, F.I.R., statements recorded under Sections 161 and 164 of the Code etc. However, this provision comes into play only after the investigation is over and after submission of the final form. Prior to that, there is no provision under the Code for an accused to be supplied with a copy of the F.I.R. It is argued at length that in absence of the copy of the F.I.R., the very right of the accused to get himself defended cannot be fulfilled as he is not in a position to know the nature of the allegation, so that he will approach the appropriate forum for obtaining necessary relief for protecting his right and liberty. 5

8. Article 21 of the Constitution of India clearly provides for protection of life and personal liberty, which is quoted below:

"21. Protection of life and personal liberty.- No person shall be deprived of his life or personal liberty except according to procedure established by law."

Thus, it is luculent that Article 21 of the Constitution of India provides for protection of citizens' life and personal liberty and it can be only curtailed by due procedure established by law. Thus, if a person is accused of committing a crime and there is chance of being apprehended by the police, he has a right to have an information about the allegations against him even at the initial stage of investigation. The Constitution of India provides in Article 22 regarding protection against arrest and detention in certain cases, which is quoted below: "22. Protection against arrest and detention in certain cases.- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

4. No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of Clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

5. When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be,

communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

6. Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

7. Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4); (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

Bail During Police Custody(P.C.R)

BAIL APP. NO.185/BA/2014
RemandAppl. No.100/2014

THE ORDER BELOW BAIL APPLICATION FILED BY APPLICANT/ACCUSED BALKISHAN GANGAPRASAD SHARMA

1. This is an application under section 437 of the Cr. PC. for releasingthe accused on bail.

2. Perused the application and say filed by the Ld. APP Heard Ld.Counsel on behalf of the accused.

3. Acctised is arrested for the offences punishable under sections 381,406, 408, 420 of the I.PC. After hearing both sides, police custodyextended till 30.03.2014.

4. Counsel for the accused relied upon the following case laws -Antonio Sebastiao Mervyn Vs. State of Goa, reported in 2008 AllM.R. (Cri) - 0 - 2432, Harish Sawhney Vs. Union TerritoiyChandigarh reported in 1978 Cr. L.J. 744, Dwarikesh SugarIndustries Vs. Prem Heavy Engineering Works Private Limitedreported in 1997 AIR (SC) -)-2477, Farooq Abdul Gani Surve Vs.The State of Maharashtra, reported in 2012 All M.R. (Cri) 271, .Khemlo Sakharam Sawant Vs. State, reported in 2002 BCR-(I)-689 and Dinkarrao Rajarampant Pole Vs. State : of Maharashtra reported in 2003 All M.R. (Cri) -0-1096

5. I have gone through the above cited authorities. In the case ofHaresh Sawhney, the Hon'ble Apex Court states that, accused neednot be in custody for the purpose of search. It is further observedthat, appellant shall appear for investigation by the police wheneverreasonably required, subject to her right under Article 20 (3) of theConstitution.

6.In view of the clear guidance of the Apex Court and submission ofthe Ld. APP that presence of the accused can be secured by

imposing any conditions for the purpose of search and seizure the application needs to be allowed. Hence, following order.

ORDER

i) The accused BALKISHAN GANGAPRASAD SHARMA be released on furnishing EB. & S.B. Of Rs. 10,000/-(Rupees TenThousand/-)on condition thai", he shall attend policestation on 29.03.2014, 30.03.2014, 31,03.2014 in between10:00a.m. to 02:00p.m for the purpose of interrogation and investigation ii) Accused shall further attend the police station as and when called by the I.O. for investigation.

iii)Provisional cash bail of Rs.l0,000/-(Rs. Ten thousand only/-) is allowed

Dt. 28/03/2014.

(S.S Gulhane)
Addl. Chief Metropolitan Magistrate,
08th Court,Esplanade, Mumbai.

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AIR 1994 SUPREME COURT 787 = 1994 AIR SCW 97
SUPREME COURT OF INDIA

(From : National Commission, New Delhi)*

Coram : 2 KULDIP SINGH AND R. M. SAHAI, JJ.

Civil Appeal No. 6237 of 1990 (with S.L.P. (C) Nos. 659 of 1991 and 16842 of 1992; C. A. Nos 3963 of 1989, 5534, 6236 and 5257 of 1990 and 2954-59 of 1992), D/- 5 -11 -1993.

Lucknow Development Authority, Appellant v. M. K. Gupta, Respondent.

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Misconduct by Public Officer - Damages to be recovered from erring official -Misfeasance in public offices - Liability to pay damages - Can be fastened on erring official- Relief that can be granted - Not limited to award of value of goods or service - Compensation for harassment, mental agony or oppression suffered by consumer can also be awarded - Commission should direct recovery of the same from persons responsible for that.- When the Court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries. -

(Paras 8, 11)

In Lala Bishambar Nath v. Agra Nagar Mahapalika, Agra, AIR 1973 SC 1289. It was held that where the authorities could not have taken any action against the dealer and their order was invalid, 'it is immaterial that the respondents had acted bona fide and in the interest of preservation of public health. Their motive may be good but their orders are illegal. They would accordingly be liable for any loss caused to the appellants by their action.' The theoretical concept that King can do no wrong has been abandoned in England itself and the State is now held responsible for tortuous act of its servants. The first Law Commission constituted after coming into force of the Constitution on liability of the State in Tort, observed that the old distinction between

sovereign and non-sovereign functions should no longer be invoked to determine liability of the State. Friedmann observed,

"It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental function, but the nature and form of the activity in question."

Even M/s. Kasturi Lal Ralia Ram Jam v. State of Uttar Pradesh, AIR 1965 SC 1039 did not provide any immunity for tortuous acts of public servants committed in discharge of statutory function if it was not referable to sovereign power. Since house construction or for that matter any service hired by a consumer or facility availed by him is not a sovereign function of the State the ratio of Kasturi Lal (supra) could not stand in way of the Commission awarding compensation. We respectfully agree with Mathew, J., in Shyam Sunder v. State of Rajasthan, (1974) 1 SCC 690 : (AIR 1974 SC 890) that it is not necessary, 'to consider whether there is any rational dividing line between the so-called sovereign and proprietary and commercial functions for determining the liability of the State'. In any case the law has always maintained that the public authorities who are entrusted with statutory function cannot act negligently.

Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the Statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the Statute like the Commission or the Courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word 'compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating' or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and 'may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the forum in the Act is thus entitled to award

not only value of the goods or services but also to compensate a consumer for injustice suffered by him.

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Cases Referred : Chronological Paras
1991 AIR SCW 2821 : (1991) 3 SCC 617 : AIR 1992 SC 129 2
AIR 1990 SC 1849 : 1990 Cri LJ 1756 7
AIR 1975 SC 1843 : (1976) 2 SCC 917 7
AIR 1974 SC 890 : (1974) 1 SCC 690 : 1974 Lab IC 598 8
AIR 1973 SC 1289 8
AIR 1972 SC 168 : (1971) 3 SCC 550 : 1972 Tax LR 54 2
1972 AC 1027 : (1972) 2 WLR 645 : (1972) 1 All ER 801 (HL), Cassell and Co. Ltd. v. Broome 10
AIR 1967 SC 1885 8
AIR 1965 SC 1039 : 1965 (2) Cri LJ 144 8
1964 AC 1129 : (1964) 2 WLR 269 : (1964) 1 All ER 367, Rookes V. Barnard 10
AIR 1960 SC 610 2
(1959) 16 DLR (2d) 689, Roncarelli v. Duplessis 10
1959 VR 286 (Supreme Court of Victoria), Farrington v. Thomson10
1956 AC 736 : (1956) 2 WLR 888 : (1956) 1 All ER 855, Smith v. East Ellose Rural District Council 10
1899 AC 99 : 79 LT 473 : 15 TLR 61, Dilworth v. Commissioner of Stamps 2
(1891-94) All ER (Reprint) 831 : 70 LT 639 : 10 TLR 349 (CA), Re Pulborough School Board Election case 7
(1878) 3 App Cas 430 (HL), Geddis v. Proprietors of Bann Reservoir 8
(1703) 2 Ld Raym 938 : 87 ER 810 : 6 Mod Rep 45, Ashby v. White 10

M/s. Saharya and Co., Surya Kant, Anil Kumar Gupta, S. A. Syed, V. J. Francis, K. V. Mohan, A. K. Gupta, Naresh K. Sharma, Rahiv Gupta, Ms. Bina Gupta, S. K. Garg and R. K. Virmani, Advocates, for the appearing Parties.

* From judgment and order of National Consumer Disputes Redressal Commission, New Delhi, in First Appeal No. 25 of 1990, D/- 25-7-1990.

JUDGEMENT

R. M. SAHAI, J.:- The question of law that arises for consideration in these appeals, directed against orders passed by the National Consumer Disputes Redressal Commission (referred hereinafter as National Commission), New Delhi is if the statutory authorities such as Lucknow Development Authority or Delhi Development Authority or Bangalore Development Authority constituted under State Acts to carry on planned development of the cities in the State are amenable to Consumer Protection Act 1986 (hereinafter referred to as 'the Act') for any act or omission relating to housing activity such as delay in delivery of possession of the houses to the allottees, non-completion of the flat within the stipulated time, or defective and faulty construction etc. Another aspect of this issue is if the housing activity' carried on by the statutory authority or private builder or contractor came within the purview of the Act only after its amendment by the Ordinance No. 24 in 1993 or the Commission could entertain a complaint for such violations even before.

2. How the dispute arose in different appeals is not of any consequence except for two appeals which shall be adverted later, for determining right and power of the Commission to award exemplary damages and accountability of the statutory authorities. We therefore come straightway to the legal issue involved in these appeals. But before doing so and examining the question of jurisdiction of the District Forum or State or National

Commission to entertain a complaint under the Act, it appears appropriate to ascertain the purpose of the Act, the objective it seeks to achieve and the nature of social purpose it seeks to promote as it shall facilitate in comprehending the issue involved and assist in construing various provisions of the Act effectively. To begin, with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted. 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into store house of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting for it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot. A scrutiny of various definitions such as 'consumer', 'service', 'trader', 'unfair trade practice' indicates that legislature has attempted to widen the reach of the Act. Each of these definitions are in two parts, one, explanatory and the other expandatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep then its ambit is widened to such things which otherwise

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would have been beyond its natural import. Manner of construing an inclusive clause and its widening effect has been explained in Dilworth v. Commissioner of Stamps, 1899 AC 99 as under :

" 'include' is very generally used (in) interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural, import, but also those things which the definition clause declares that they shall include".

It has been approved by this Court in Regional Director, Employees' State Insurance Corporation v. Highland Coffee Works of P. F. X. Saldanha and Sons, (1991) 3 SCC 617: (1991 AIR SCW 2821); C. I. T., Andhra Pradesh v. M/s. Taj Mahal Hotel, Secunderabad (1971) 3 SCC 550 : (AIR 1972 SC 168) and State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610. The provisions of the Act thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the Court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to attempted objective of the enactment.

3. Although the legislation is a milestone in history of socio-economic legislation and is directed towards achieving public benefit we shall first examine if on a plain reading of the

provisions unaided by any external aid of interpretation it applies to building or construction activity carried on by the statutory authority or private builder or contractor and extends even to such bodies whose ancillary function is to allot a plot or construct a flat. In other words could the authorities constituted under the Act entertain a complaint by a consumer for any defect or deficiency in relation to construction activity against a private builder or statutory authority. That shall depend on ascertaining the jurisdiction of the Commission. How extensive it is? A National or a State Commission under Ss. 21 and 16 and a consumer forum under S. 11 of the Act is entitled to entertain a complaint depending on valuation of goods or services and compensation claimed. The nature of, 'complaint' which can be filed, according to clause (c) of S. 2 of the Act is for unfair trade practice or restrictive trade practice adopted by any trader or for the defects suffered for the goods bought or agreed to be bought and for deficiency in the service hired or availed of or agreed to be hired or availed of, by a 'complainant' who under clause (b) of the definition clause means a consumer or any voluntary consumer association registered under the Companies Act 1956 or under any law for the time being in force or the Central Government or any State Government or where there are one or more consumers having the same interest then a complaint by such consumers. The right thus to approach the Commission or the forum vests in consumer for unfair trade practice or defect in supply of goods or deficiency in service. The word 'consumer' is a comprehensive expression. It extends from a person who buys any commodity to consume either as eatable or otherwise from a shop, business house, corporation, store, fair price shop to use of private or public services. In Oxford Dictionary a consumer is defined as a, 'purchaser of goods or services'. In Black's Law Dictionary it is explained to mean, one who consumes. Individuals who purchase, use, maintain, and dispose of products and services. A member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which State and federal consumer protection laws are enacted.' The Act opts for no less wider definition. It reads as under :

" "Consumer" means any person who,-

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who (buy) such goods for consideration paid or

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promised or party paid or partly promised or under any system of deferred payment when such use is made with the approval of such person but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the service for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person:

[Explanation - For the purposes of sub-clause (i) "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;]"

It is in two parts. The first deals with goods and the other with services. Both parts first declare the meaning of goods and services by use of wide expressions. Their ambit is further enlarged by use of inclusive clause. For instance, it is not only purchaser of goods or hirer of services but even those who use the goods or who are beneficiaries of services with approval of the person who purchased the goods or who hired services are included

in it. The legislature has taken precaution not only to define 'complaint', 'complainant', 'consumer' but even to mention in detail what would amount to unfair trade practice by giving an elaborate definition in clause (r) and even to define 'defect' and 'deficiency' by clauses (f) and (g) for which a consumer can approach the Commission. The Act thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services. The common characteristics of goods and services are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. But the defect in one and deficiency in other may have to be removed and compensated differently. The former is, normally, capable of being replaced and repaired whereas the other may be required to be compensated by award of the just equivalent of the value or damages for loss. 'Goods' have been defined by Clause (i) and have been assigned the same meaning as in Sale of Goods Act, 1930 which reads as under :

'" "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".

It was therefore urged that the applicability of the Act having been confined to moveable goods only a complaint filed for any defect in relation to immovable goods such as a house or building or allotment of site could not have been entertained by the Commission. The submission does not appear to be well founded. The respondents were aggrieved either by delay in delivery of possession of house or use of sub-standard material etc. and therefore they claimed deficiency in service rendered by the appellants. Whether they were justified in their complaint and if such act or omission could be held to be denial of service in the Act shall be examined presently, but the jurisdiction of the Commission could not be ousted because even though it was service it related to immoveable property.

4. What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or fiat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be understood and what it means depends in the context in which it has been used in an enactment. Clause (o) of the

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definition section defines it as under:

" "Service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or loading or both (housing construction) entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service".

It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionarily means 'one or same or all'. In Black's Law Dictionary it is explained thus, 'word "any" has a diversity of meaning and may be employed to indicate 'all" or "every" as well as "same" or "one" and its meaning in a given statute depends upon the context and subject matter of the statute'. The use of the word 'any' in the context it has been used in clause (o) indicates that it has 'been used in wider sense extending from one to all. The other word 'potential' is again very wide. In oxford Dictionary it is defined

as 'capable of coming into being, possibility'. In Black's Law Dictionary it is defined as extending in possibility but not in act'. Naturally and probably expected to come 'into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future instalments or payments on a contract or engagement, already made.' In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these are wide ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A State Bank or nationalised bank renders as much service as private bank. No distinction can be drawn in private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made, mainly, by statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even by statutory bodies. The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even facility.

5. This takes us to the larger issue if the public authorities under different enactments are amenable to jurisdiction under the Act. It was vehemently argued that the local authorities or government bodies develop land and construct houses in discharge of their statutory function, therefore, they could not be subjected to provisions of the Act. The learned counsel urged that if the ambit of the Act would be widened to include even such authorities it would vitally affect functioning of official bodies. The learned counsel submitted that the entire objective of the Act is to protect a consumer against malpractices in business. The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. In fact the Act requires provider of service to be more objective and caretaking. It is still more in public services. When private undertakings are taken over by the government or corporations are created to discharge what is otherwise State's function, one of the inherent objectives of such social welfare measures is to .provide better, efficient and cheaper services to the people. Any attempt, therefore, to exclude services offered by statutory or official bodies to the common man would be against the provisions of the Act and spirit behind it. It is indeed unfortunate that since enforcement of the Act there is a demand and even politcal pressure is built up to exclude one or the other class from operation of the Act. How ironical it is that official or semi-official bodies which insist on numerous benefits, which are otherwise available in private sector, succeed in bargaining for it on threat of strike mainly because of larger income accruing due to rise in number of consumers and not due to better and efficient functioning claim exclusion when it comes to accountability from operation of the Act. The spirit of consumerism is so feeble and dormant that no association, public or private spirited, raises any finger on regular hike in prices not because it is necessary but either because it has not been done for sometime or because the operational cost has gone up irrespective of the efficiency without any regard to its impact on the common man. In our opinion, the entire argument found on being statutory bodies does not appear to have any substance. A government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service. Truly speaking it would be a service to the society if such bodies instead of claiming exclusion subject

themselves to the Act and let their acts and omissions scrutinised as public accountability is necessary for healthy growth of society.

6. What remains to be examined is if housing construction or building activity carried on by a private or statutory body was service within meaning of clause (o) of S. 2 of 'the Act as it stood prior to inclusion of the expression housing construction in the definition of "service" by Ordinance No. 24 of 1993. As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common mar but even to such activities which are otherwise not commercial in nature be in which some benefit is conferred on the consumer Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined n the Act. Similarly when a statutoty authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or contractor. The one is contractual service and their statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of immoveable property as argued but deficiency in rendering of service of particular standard. quality or grade. Such deficiencies or omissions are defined in sub-clause (ii) of' Clause (r) of S. 2 as unfair trade practice. If a builder of a house uses sub-standard material in construction of a building or makes false or misleading representation about the condition of the house then it is denial of the facility or benefit of which a consumer is entitled to claim value under the Act. When the contractor or builder undertakes to erect a house or fiat then it is inherent in it that he shall perform his obligation as agreed to. A flat with a leaking roof, or cracking wall or substandard floor is denial of service. Similarly when a statutory authority undertakes to develop land and frame housing scheme, it, while performing statutory duty renders service to the society in particular. The entire approach of the learned counsel for the development authority in emphasising that power exercised under a Statute could not be stretched to mean service proceeded on misconception. it is incorrect understanding of the statutory functions under a social legislation. A development authority while developing the land or framing a scheme or housing discharges statutory duty the purpose and objective of which is service to the citizens. As pointed out earlier the entire purpose of widening the definitions is to include in it not only day to day buying of goods by a common man but even to such activities which are otherwise not commercial but professional or service oriented in nature. The provisions inthe Acts, namely, Lucknow Development Act, Delhi Development Act or Bangalore Development Act clearly provide for preparing plan, development of land, and framing of scheme etc. Therefore if such authority undertakes to construct building or allot houses or building sites to citizens of the State either as amenity or as benefit then it amounts to rendering of service and will be covered in the expression service made available to potential users'. A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive. The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993.

7. In Appeal No. 2954 filed by a builder it was urged that the inclusion of 'housing construction, in clause(o) and 'avail, in clause (d) in 1993 would indicate that the Act as it

stood prior to the amendment do not apply to hiring of services in reamendment retrospective it should be held to be prospective as it is settled that any law including amendments which materially affect the vested rights or duties or obligations in respect of past transactions should remain untouched. Reliance was placed on Jose Da Costa v. Bascora Sadasiva Sinai Narcornim (1976) 2 SCC 917: (AIR 1975 SC 1843), State of Madhya Pradesh v. Rameshwar Rathod, AIR 1990 SC 1849 and Re Pulborough School Board Election Case (1891-94) All ER Rep 831 (834). It was also argued that when definition of 'service' in Monopolies and Restrictive Trade Practices Act was amended in 1991 it was made retrospective. Therefore, in absence of use of similar expression in this Act it should be deemed to be prospective. True, the ordinance does not make the definition retrospective in operation. But it was not necessary. In fact it appears to have been added by way of abundant caution as housing construction being service was included even earlier. Apart from that what was the vested right of the contractor under the agreement to construct the defective house or to render deficient service? A legislation which is enacted to protect public interest from undesirable activities cannot be construed in such narrow manner as to frustrate its objective. Nor is there any merit in the submission that in absence of the word 'avail of in the definition 'consumer' such activity could not be included in service. A perusal of the definition of 'service' as it stood prior to 1993 would indicate that the word 'facility' was already there. Therefore, the legislature while amending the law in 1993 added the word in clause (d) to dispel any doubt that consumer in the Act would mean a person who not only vires but avails of any facility for consideration. It in fact indicates that these words were added more to clarify than to add something new.

8. Having examined wide reach of the Act and jurisdiction of the Commission to entertain complaint riot only against business or trading activity but even to service rendered by statutory and public authorities the stage is now set for determining if the Commission in exercise of its jurisdiction under the Act could award compensation and if such compensation could be for harassment and agony to a consumer. Both these aspects specially the latter are of vital significance in the present day context. Still more important issue is the liability of payment. **That is should the society or the tax payer be burdened for oppressive and capricious act of the public officers or it be paid by those responsible for it. The administrative law of accountability of public authorities for their arbitrary and even ultra vires actions has taken many strides. It is now accepted both by this Court and English Courts that the State is liable to compensate for loss or injury suffered by a citizen due to arbitrary actions of its employees.** In State of Gujarat v. Memon Mahomed Haji Hasam, A.I.R 1967 SC 1885, the order of the High Court directing payment of compensation for disposal of seized vehicles without waiting for the outcome of decision in appeal was upheld both on principle of bailee's, 'legal obligation to preserve the property intact and also the obligation to take reasonable care of it to return it in same condition in which it was seized' and also because the Government was, 'bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by act of its agents and servants'. It was extended further even to bona fide action of the authorities if it was contrary to law in Lala Bishambar Nath v. Agra Nagar Mahapalika, Agra, AIR 1973 SC 1289. It was held that where the authorities could not have taken any action against the dealer and their order was invalid, 'it is immaterial that the respondents had acted bona fide and in the interest of preservation of public health. Their motive may be good but their orders are illegal. They would accordingly be liable for any loss caused to the appellants by their action.' The theoretical concept that King can do no wrong has been abandoned in England itself and the State is now held responsible for

tortuous act of its servants. The first Law Commission constituted after coming into force of the Constitution on liability of the State in Tort, observed that the old distinction between sovereign and non-sovereign functions should no longer be invoked to determine liability of the State. Friedmann observed,

"It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental function, but the nature and form of the activity in question."

Even M/s. Kasturi Lal Ralia Ram Jam v. State of Uttar Pradesh, AIR 1965 SC 1039 did not provide any immunity for tortuous acts of public servants committed in discharge of statutory function if it was not referable to sovereign power. Since house construction or for that matter any service hired by a consumer or facility availed by him is not a sovereign function of the State the ratio of Kasturi Lal (supra) could not stand in way of the Commission awarding compensation. We respectfully agree with Mathew, J., in Shyam Sunder v. State of Rajasthan, (1974) 1 SCC 690 : (AIR 1974 SC 890) that it is not necessary, 'to consider whether there is any rational dividing line between the so-called sovereign and proprietary and commercial functions for determining the liability of the State'. In any case the law has always maintained that the public authorities who are entrusted with statutory function cannot act negligently. As far back as 1878 the law was succinctly explained in Geddis v. Proprietors of Bann Reservoir. (1878)3 App Gas 430 thus,

"I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing what the Legislature has authorised, if it be done negligently."

Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the Statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the Statute like the Commission or the Courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word 'compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating' or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and 'may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him.

9. Facts in Civil Appeal No. 6237 of 1990 may now he adverted as it is the only appeal in which the National Commission while exercising its appellate power under the Act not only affirmed the finding of State Commission directing the appellant to pay the value of deficiency in service but even directed to pay compensation for harassment and agony to the respondent. The Lucknow Development Authority with a view to ease the acute

housing problem in the city of Lucknow undertook development of land and formed plots of different categories / sizes and constructed dwelling units for people belonging to different income groups. After the construction was complete the authority invited applications from persons desirous of purchasing plots or dwelling house. The respondent applied on the prescribed form for registration for allotment of a flat in the category of Middle Income Group (M. I.G.) in Gomti Nagar Scheme in Lucknow on cash down basis. Since the number of applicants was more, the authority decided to draw lots in which flat No. II / 75 in Vinay Khand-II was allotted to the respondent on 26th April, 1988. He deposited a sum of Rs. 6132/- on July 2, 1988 and a sum of Rs. 1,09,975/- on July 29, 1988. Since the entire payment was made in July, 1988 the fiat was registered on 18th August, 1988. Thereafter the appellant by a letter dated 23rd August, 1988 directed Executive Engineer-VII to hand over the possession of the flat to the respondent. This information was given to him on 30th November, 1988, yet the flat was not delivered as the construction work was not complete. The respondent approached the authority but no steps were taken nor possession was handed over. Consequently he filed a complaint before the District Forum that even after payment of entire amount in respect of cash down scheme the appellant was not handing over possession nor they were completing the formalities and the work was still incomplete. The State Commission by its order dated 15th February, 1990 directed the appellant to pay l2% annual simple interest upon the deposit made by the respondent for he period 1-1-89 to 15-2-90. The appellant was further directed to hand over possession of the flat without delay after completing construction work up to June. 1990. The Commission further directed that if it was not possible for the appellant to complete the construction then it should hand over possession of the flat to the respondent by 5th April, 1990 after determining the deficiencies and the estimated cost of such deficient construction shall be refunded to the respondent latest 20th April, 1990. The appellant instead of complying with the order approached the National Commission and raised the question of jurisdiction. It was overruled. And the appeal was dismissed. But the cross appeal of the respondent was allowed and it was directed that since the architect of the appellant had estimated in October, 1989 the cost of completing construction at Rs. 44615 the appellant shall pay the same to the respondent. The Commission further held that the action of he appellant amounted to harassment, mental torture and agony of the respondent, therefore, it directed the appellant to pay a Sum of Rs. 10,000/- as compensation.

10. Who should pay the amount determined by the Commission for harassment and agony, the statutory authority or it should be realised from those who were responsible for it. Compensation as explained includes both the just equivalent for loss of goods or services and also for sufferance of injustice. For instance in Civil Appeal No.....of 1993 arising out of S.L.P. (Civil) No. 659 of 1991 the Commission directed the Bangalore Development Authority to pay Rupees 2446/- to the consumer for the expenses incurred by him in getting the lease-cum-sale agreement registered as it was additional expenditure for alternative site allotted to him. No misfeasance was found. The moment the authority came to know of the mistake committed by it took immediate action by allotting alternative site to the respondent. It was compensation for exact loss suffered by the respondent. It arose in due discharge of duties. **For such acts or omissions the loss suffered has to be made good by the authority itself. But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability changes**. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury to what is called misfeasance of the officers by the English Courts. **Even in England where award of exemplary or aggravated damages for insult etc. to a person has now been held to be punitive exception**

has carved out if the injury is due to, 'oppressive, arbitrary or unconstitutional action by servants of the government' (Salmnond and Heuston on the Law of Torts). Misfeasance in public office is explained by Wade in his book on Administrative Law thus,

"Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages to or malicious, deliberate or injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury."

The jurisdiction and power of the Courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in Cassell and Co. Ltd. v. Broome, 1972 AC 1027, on the principle that, 'an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An ordinary citizen or a common man is hardly equipped o match the might of the State or its instrumentalities. That is provided by the rule of law It acts as a check on arbitrary and capricious exercise of power. In Rookes v. Barnard, 1964 AC 1129 it was observed by Lord Devlin. 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to heir duty of service'. A public functionary if be acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but to abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and bona fide. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. Wade in his book 'Administrative Law' has observed that it is to the credit of public authorities that there are simply few reported English decisions on this form of malpractice, namely, misfeasance in public offices which includes malicious use of power, deliberate maladministration and perhaps also other unlawful acts causing injury. One of the reasons for this appears to be development of law which, apart, from other factors succeeded in keeping a salutary check on the functioning in the government or semi-government offices by holding the officers personally responsible for their capricious or even ultra vires action resulting in injury or loss to a citizen by awarded damages against them. Various decisions rendered from time to time have been referred by Wade on Misfeasance by Public Authorities. We shall refer to some of them to demonstrate how necessary it is for our society. In Ashby v. White, (1703) 2 Ld Raym 938, the House of Lords invoked the principle of ubi jus ibi remedium in favour of an elector who was wrongfully prevented from voting and decreed the claim of damages. The ratio

of this decision has been applied and extended by English courts in various situations. In Roncarelli v. Duplessis, (1959) 16 D.L.R (2d) 689, the Sureme Court of Canada awarded damages against the Prime Minister of Quebec personally for directing the cancellation of a restaurant-owner's liquor licence solely because the licensee provided bail on many occasions for fellow members of the sect of Jehovan's Witnesses, which was then unpopular with the authorities. It was observed that 'what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Alcoholic Liquor Act? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry. In Smith v. Fast Elloe Rural District Council, 1956 AC 736 the House of Lords held that an action for damages might proceed against the clerk of a local authority personally on the ground that he had procured the compulsory purchase of the plaintiffs property wrongfully and in bad faith. In Farrington v. Thomson, 1959 VR 286, the Supreme Court of Victoria awarded damages for exercising a power the authorities knew they did not possess. A licensing inspector and a police officer ordered the plaintiff to close his hotel and cease supplying liquor. He obeyed and filed a suit for the resultant loss. The Court observed, 'Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer'. In Wood v. Blair (The Times 3, 4, 5 July 1957) a dairy farmer's manageress contracted typhoid fever and the local authority served notices forbidding him to sell milk, except under certain conditions. These notices were void, and the farmer was awarded damages on the ground that the notices were invalid and that the plaintiff was entitled to damages for misfeasance.' This was done even though the finding was that the officers had acted from the best motives.

11. Today the issue thus is not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socio-economic outlook. The authority empowered to function under a Statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the (street is) made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative *9discretion which shields the action of administrative authority. **But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover**. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of

power and the National Commission finds it duly proved then it has a statutory obligation to award the same? It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant are over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the Court directs payment of damages or compensation against the State the ultimate-sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund 'immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries.

12. For these reasons all the appeals are dismissed. In Appeal No. 6237 of 1990 it is further directed that the Lucknow Development Authority shall fix the responsibility of the officers who were responsible for causing harassment and agony to the respondent within a period of six months from the copy of this order is produced or served on it. The amount of compensation of Rs. 10,000/- awarded by the Commission for mental harassment shall be recovered from such officers proportionately from their salary. Compliance of this order shall be reported to this Court within one month after expiry of the period granted for determining the responsibility. The Registrar General is directed to send a copy of this order to the Secretary, Lucknow Development Authority immediately.

13. In Appeal Nos. 6237 of 1900, 5257 of 1990, 3963 of 1989 and 2954-59 of 1992 the appellant shall pay costs to the contesting respondents which is assessed at Rs. 5,000/- in each case. Since the respondents have not put in appearance in other appeals there shall be no order as to costs.

Order accordingly.

in October 2009, one of the judges of Madras HC, Justice K Chandru had banned lawyers from addressing his court as 'My lord' and 'Your lordship'

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Call me Sir or Mr Judge, not My Lord: HC Justice

RAGHAV OHRI : Chandigarh, Wed May 15 2013, 00:21 hrs

In a first, a judge of Punjab and Haryana High Court has asked that he not be addressed as 'My Lord'.

"It is desired by Justice K Kannan that his Lordship should not be addressed as 'My Lord' in any official communication. His lordship be addressed as Sir or Mr Judge or Justice Kannan. This be circulated to all branches for compliance," says a letter issued by the registrar of the court. The letter has been circulated to all branches.

In an address to the high court bar a fortnight ago, Justice Kannan had urged lawyers to give up the "colonial" practice of addressing judges as 'My Lord'.

Senior judges and lawyers of the high court have appreciated Justice Kannan's step. The Bar Council of India had decided in April 2006 that lawyers could address the court as 'Your honour' and refer to it as 'honourable court' and, in the case of a subordinate court, use 'Sir' or an equivalent word.

The Bar Council agreed that 'My Lord' and 'Your Lordship' were "relics of the colonial past".

In April 2011, the Bar Association of Punjab and Haryana High Court passed a similar resolution; however, a majority of lawyers continued to address judges as 'My Lord'.

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CHANDIGARH: In a historical move to discard the colonial practice of addressing the judges of the high court as 'My Lord' or 'Your Lordship', the Punjab and Haryana High Court Bar Association on Thursday passed a resolution asking its members not to address the court using the traditional phrase 'My Lord'.

In its resolution passed unanimously by around 4500 members strong lawyers association has decided that in future the judges should be addressed as 'Sir' or 'Your Honour'. The decision was taken in the general house meeting of the bar held in the jam-packed bar room of the high court on Thursday afternoon. With this, the Punjab and Haryana high court has become second high court in

the country after Kerala high court advocates Association that had passed such resolution in June 2007 to take such step.

Talking to the development, President of the High Court Bar Association, Kulbir Singh Dhaliwal said that the bar body has unanimously resolved to stop addressing judges as 'My Lord' or 'Your Lordship' from Thursday.

Dhaliwal further stated, "We passed the resolution to endorse the already existing rules in this concerned framed by the Bar Council of India (BCI) in 2006 that had resolved that the form of address in the Supreme Court and high courts should be 'Your Honour' or 'Honourable Court'. About the forcibility of the resolution, Dhaliwal added that because of habit, some lawyers may continue to say 'My Lord', but gradually they will get used to the new phrase. He also said that bar has received positive response from the judges on this issue.

Background:

The BCI - apex body of the lawyers in country had adopted a resolution in April 2006 and added a new Rule 49(1)(j) in the Advocates Act. As per the rule, lawyers can address the court as 'Your Honour' and refer to it as 'Honourable Court'. If it is a subordinate court, lawyers can use terms such as 'Sir' or any equivalent phrase in the regional language concerned. Explaining the rationale behind the move, the Bar Council had held that the words such as 'My Lord' and 'Your Lordship' were "relics of the colonial past".

The resolution has since been circulated to all state councils and the Supreme Court for adoption but over five years now, the resolution largely remained on paper.

However, in an unprecedented move in October 2009, one of the judges of Madras HC, Justice K Chandru had banned lawyers from addressing his court as 'My lord' and 'Your lordship'

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P T I : 7th JAN 2014

New Delhi: Judges should be addressed in courts in a respectful and dignified manner and it is not compulsory to call them 'my lord', 'your lordship' or 'your honour', the Supreme Court today said.

"When did we say it is compulsory. You can only call us in a dignified manner," a bench comprising justices H.L. Dattu and S.A. Bobde observed during the hearing of a petition which said addressing judges as 'my lord or your lordship' in courts is a relic of colonial era and a sign of slavery.

"To address the court what do we want. Only a respectable way of addressing. You call (judges) sir, it is accepted. You call it your honour, it is accepted. You call lordship it is accepted. These are some of the appropriate way of expression which are accepted," it said while refusing to entertain the PIL filed by 75-year-old advocate Shiv Sagar Tiwari.

The bench said his plea for banning the use of such terms and directing the courts that the judges should not be addressed in such a traditional manner cannot be accepted.

"How can this negative prayer be accepted by us," the bench asked, adding "Don't address us as lordship. We don't say anything. We only say address us respectfully."

"Can we direct the high courts on your prayers? It is obnoxious," the bench further said while making it clear that "It is for you to say Sir, Your Lordship or Your Honour.

We can't direct how you have to address the court." "It is the choice of the lawyer to address the court. Why should we say that brother judges should not accept being addressed as lordship.

We have not taken exception when you call as sir," the bench said

The apex court did not accept the advocate's contention that when the rules of Bar Council of India making it mandatory to appear in courts in a particular dress code were followed, the BCI's resolution of 2006 saying that nobody will address the court in India as 'my lord' and 'your lordship' should also be accepted by courts across the country.

The advocate had sought the apex court's direction to strictly prohibit the use of 'my lord' and 'your lordship' in courts alleging that "it is against the dignity of the country."

"Using the words 'my lord' and 'your lordship' which are symbols of slavery should be strictly prohibited to be used in the courts throughout India as it is against the dignity of the country," he had submitted during the last hearing on November 11, 2013 before a bench of Chief Justice P Sathasivam and Justice Ranjan Gogoi.

However, after brief hearing, Justice Gogoi had recused himself from hearing the case and the matter was referred to the bench headed by Justice Dattu.

Tiwari had said that Justice S Muralidhar of Delhi High Court has acted on the resolution and he insists that no advocate address the court by 'my lord' and 'your lordship'.

"The petitioner submits that the same principle should be adopted by all the judges in the judiciary including the Supreme Court, high courts and subordinate courts," he said, adding "My Lords or Your Lordships are signs of relics of colonial posts which in other words are symbol of slavery".

"Unless this court issues a writ in the nature of mandamus, the judges in the courts and the advocates appearing in the courts will not follow the amended Bar Council of India Rules which are mandatory now," Tiwari had said in his petition.

2014 All MR (CRI) 1503 (S.C.)

(SUPREME COURT)

K.S.RADHAKRISHNAN & A.K.SIKRI,JJ.

Km. Hema Mishra
Vs.
State of U.P.& Ors
Criminal Appeal No. 146 of 2014

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(A) Criminal P.C. (1973), Ss. 41(1) (b), 41A- Penal Code (1860), Ss. 419, 420-Arrest-FIR lodged for offences under Ss. 419,420 IPC – Said offences punishable with maximum sentence of 3years and 7 years respectively – Benefit u/s. 41 A Cr. P.C. must be available – Accused shall not be arrested in–notice of appearance has to be issued to accused by the police officer– Various parameters laid by Legislature are check on arbitrary and unwarranted arrest and right to personal liberty guaranteed under Art.21 of the Constitution.

(B) Criminal P.C. (1973), S. 438 – Constitution of India, Art. 226 – Anticipatory bail –A party aggrieved can invoke jurisdiction of HC under Art.226 of Constitution to obtain the anticipatory bail.

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J U D G M E N T

K. S. RADHAKRISHNAN, J.

1. Leave granted.

2. Appellant herein had invoked the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India seeking the following reliefs:
i) Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned FIR dated 21.12.2011, contained in Annexure No. 1 to this writ petition, lodged at crime No. 97/11 under Sections 419/420 IPC, at Police Station Zaidpur, District Barabanki;
ii) Issue a writ, order or direction in the nature of Mandamus thereby directing the Superintendant of Police, Barabanki, the opposite Party No. 2, and the Investigating Officer, Case Crime No. 797/11, under Sections 419/420 IPC, Police Station, Zaidpur, District Barabanki, the opposite party No. 3, to defer the arrest of the petitioner until collection of the credible evidence sufficient for filing the charge-sheet by following the amended proviso to Sections 41(1)(b) read with Section 41A CrPC;

iii) Issue a writ, order or direction in the nature of Mandamus thereby directing the Superintendent of Police, Barabanki, the opposite party No. 2, for compliance of the provision of Sections 41(1)(b) and 41A CrPC in the investigation of the impugned FIR dated 21.12.2011 contained in Annexure No. 1 to this writ petition, lodged in crime No. 797/11, under Sections 419/420 IPC, Zaidpur, District Barabanki; and
iv) Allow this writ petition with costs.
3. The High Court, after hearing the parties as well as the State, dismissed the writ petition on 9.1.2012 and passed the following order:
"Heard learned counsel for the petitioner and learned Additional Government Advocate. Under challenge in the instant writ petition is FIR relating to Case Crime No. 797 of 2011, under Sections 419 & 420 IPC, police station Zaidpur, district Barabanki. We have gone through the FIR, which discloses commission of cognizable offence, as such, the same cannot be quashed. The writ petition lacks merit and is accordingly dismissed. However, the petitioner being lady, it is provided that if she surrenders and moves application for bail the same shall be considered and decided by the courts below expeditiously."
4. The appellant, complaining that she was falsely implicated in the case, has approached this Court contending that the High Court had failed to exercise its certiorari jurisdiction under Article 226 of the Constitution of India in not quashing the FIR dated 21.12.2011 and in refusing to grant anticipatory bail to the appellant. Appellant submitted that the High Court ought to have issued a writ of mandamus directing the Superintendent of Police, Barabanki to defer the arrest of the appellant until the collection of credible evidence sufficient for filing the charge-sheet, following the amended proviso to Section 41(1)(b) read with Section 41A Cr.P.C.
5. The Secretary, Up. Secondary Education Board, Allahabad and the District School Inspector vide their letter dated 8.12.2011 registered a complaint alleging that the appellant had committed fraud and forgery in the matter of preparation of documents of Government Office regarding selection for the post of Assistant Teacher and, consequently, got appointment as the Assistant Teacher in Janpad Inter-College at Harakh, District Barabanki, with payment of salary amounting to Rs. 1,10,000/- from the Government exchequer. On the basis of the FIR, Case Crime No. 797 of 2011 was registered under Sections 419/420 IPL before the police Station, Jaizpur, District Barabanki. After having come to know of the registration of the crime, the appellant filed a representation on 27/12/2011 before the Superintendent of police, District Barabanki and the investigating Officer making the following prayer.
"As such through this application/ representation the applicant prays that keeping in view the willingness of the applicant for cooperating in investigating officer upon being called in case crime no. 797/11 u/Ss 419/420 IPC, PS Jaipdur, District Barabanki, order for staying the arrest of applicant be passed so that compliance to the provision 41 (1) (B) Section 41 (A) amended to CrPC 1973 be made."
6. Since the appellant did not get any reply to the said representation, she invoked the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India by filing Writ Petition Misc. Bench No. 171 of 2012 which was dismissed, as already indicated, on 9.1.2012.
7. When the matter came up for hearing before this Court, it passed an interim order on 1.3.2013, the operative portion of which reads as under:
"Considering the facts and circumstances of the case, we are inclined to direct that in the event of arrest of the petitioner, she shall be released on bail on furnishing personal bond of Rs.50,000/- (Fifty Thousand only) with two solvent sureties for the like amount to the satisfaction of the Trial Court, subject to the condition that she will join investigation as and

when required and shall abide by the provisions of Section 438(2) of the Code of Criminal Procedure."

8. Shri Aseem Chandra, learned counsel appearing for the appellant, submitted that the High Court has committed an error in not quashing the FIR, since the registration of the crime was with mala fide intention to harass the appellant and in clear violation of the fundamental rights guaranteed to the appellant under Articles 14, 19 and 21 of the Constitution of India. Learned counsel submitted that the appellant was falsely implicated and that the ingredients of the offence under Sections 419/420 IPC were not prima facie made out for registering the crime. Learned counsel also pointed out that the High Court has not properly appreciated the scope of Sections 41(1)(b) and 41A CrPC, 1973 and that no attempt has been made to follow those statutory provisions by the State and its officials.

9. Shri Gaurav Bhatia, learned AAG, appearing for the State, submitted that the investigation was properly conducted and the crime was registered. Further, it was also pointed out that the President has also withheld the assent of the Code of Criminal Procedure (Uttar Pradesh Amendment) Bill, 2010, since the provisions of the Bill were found to be in contravention to Section 438 of the Cr.P.C. and hence the High Court rightly declined the stay sought for under Article 226 of the Constitution of India.

10. Shri Siddharth Luthra, Additional Solicitor General, who appeared on our request, submitted that the High Court can in only rarest of rare cases grant pre-arrest bail while exercising powers under Article 226 of the Constitution of India, since the provision for the grant of anticipatory bail under Section 438 Cr.P.C. was consciously omitted by the State Legislature. The legislative intention is, therefore, not to seek or provide pre-arrest bail when the FIR discloses a cognizable offence. Shri Luthra submitted that since there is a conscious withdrawal/deletion of Section 438 CrPC by the Legislature from the Code of Criminal Procedure, by Section 9 of the Criminal Procedure (Uttar Pradesh) Amendment Act, 1976, the relief which otherwise the appellant could not have obtained under the Code, is sought to be obtained indirectly by invoking the writ jurisdiction of the High Court, which is impermissible in law.

11. Shri Luthra also submitted that since the appellant has no legal right to move for anticipatory bail and that practice is not an integral part of Article 21 of the Constitution of India, the contention that the High Court has failed to examine the charges levelled against the appellant, was mala fide or violative of Articles 14 and 21 of the Constitution of India, does not arise. Shri Luthra also submitted that the High Court was not correct in granting further reliefs after having dismissed the writ petition and that, only in extraordinary cases, the High Court could exercise its jurisdiction under Article 226 of the Constitution of India and the case in hand does not fall in that category.

12. I may indicate that the legal issues raised in this case are no more res integra. All the same, it calls for a relook on certain aspects which I may deal with during the course of the judgment.

13. I am conscious of the fact that since the provisions similar to Section 438 Cr.P.C. being absent in the State of Uttar Pradesh, the High Court is burdened with large number of writ petitions filed under Article 226 of the Constitution of India seeking pre-arrest bail. Section 438 was added to the Code of Criminal Procedure in the year 1973, in pursuance to the recommendation made by the 41st Law Commission, but in the State of Uttar Pradesh by Section 9 Criminal Procedure (Uttar Pradesh) Amendment Act, 1976, Section 438 was specifically omitted, the legality of which came up for consideration before the Constitution Bench of this Court in Kartar Singh v. State of Punjab (1994) 3 SCC 569 and the Court held that the deletion of the application of Section 438 in the State of Uttar Pradesh by Section 9 of the above mentioned Amendment Act does not offend either

Article 14, Article 19 or Article 21 of the Constitution of India and the State Legislature is competent to delete that section, which is one of the matters enumerated in the concurrent list, and such a deletion is valid under Article 254(2) of the Constitution of India.

14. I notice, therefore, as per the Constitution Bench, a claim for pre-arrest protection is neither a statutory nor a right guaranteed under Article 14, Article 19 or Article 21 of the Constitution of India. All the same, in Karatar Singh's case (Supra), this Court in sub-para (17) of para 368, has also state as follows:

"368 xxx xxx xxx

(17) Though it cannot be said that the High Court has no jurisdiction to entertain an application for bail under Article 226 of the Constitution and pass orders either way, relating to the cases under the Act 1987, that power should be exercised sparingly, that too only in rare and appropriate cases in extreme circumstances. But the judicial discipline and comity of courts require that the High Courts should refrain from exercising the extraordinary jurisdiction in such matters;

xxx xxx xxx"

15. The High Court of Allahabad has also taken the same view in several judgments. Reference may be made to the judgments in Satya Pal v. State of U.P.(2000 Cri.L.J. 569), Ajeet Singh v. State of U.P.(2007 Cri.L.J. 170), LaljiYadav & Others v. State of U.P. & Another(1998 Cri.L.J. 2366), Kamlesh Singh v. State of U.P. & Another(1997 Cri.L.J. 2705) and Natho Mal v. State of U.P.(1994 Cri.L.J. 1919).

16. We have, therefore, no concept of "anticipatory bail" as understood in Section 438 of the Code in the State of Uttar Pradesh. In Balchand Jain v. State of M.P. (1976) 4 SCC 572, this Court observed that "anticipatory bail" is amisnomer. Bail, by itself, cannot be claimed as a matter of right under the Code of Criminal Procedure, 1973, except for bailable offences (Section 436 Cr.P.C., 1973). For non-bailable offences, conditions are prescribed under Sections 437 and 439 Cr.P.C. The discretion to grant bail in non-bailable offences remains with the Court and hence, it cannot be claimed as a matter of right, but the aggrieved party can only seek a remedy and it is on the discretion of the Court to grant it or not. In this connection reference may also be made to the Judgment of the seven-Judge Bench of the Allahabad High Court in Smt. Amarawati and Ors. V. State of U.P.(2005) Cri.L.J. 755, wherein the Court, while interpreting the provisions of Sections 41, 2(c) and 157(1) Cr PC as well as the scope of Sections 437 and 439, held as follows:

"47. In view of the above we answer the questions referred to the Full Bench as follows: (1) Even if cognizable offence is disclosed, in the FIR or complaint the arrest of the accused is not a must, rather the police officer should beguided by the decision of the Supreme Courtin Joginder Kumar v. State of U.P., 1994 Cr LJ 1981 before deciding whether to make an arrest or not.

(2) The High Court should ordinarily not direct any Subordinate Court to decide the bail application the same day, as that would beinterfering with the judicial discretion of the Court hearing the bail application. However,as stated above, when the bail application is under Section 437 Cr.P.C. ordinarily the Magistrate should himself decide the bail application the same day, and if he decides in a rare and exceptional case not to decide it on the same day, he must record his reasons in writing. As regards the application under Section 439 Cr.P.C. it is in the discretion of the learned Sessions Judge considering the facts and circumstances whether to decidethe bail application the same day or not, andit is also in his discretion to grant interim bail the same day subject to the final decision on the bail application later.

(3) The decision in Dr. Vinod Narain v. State of UPis incorrect and is substituted accordingly by this judgment."

17. This Court in Lal Kamlendra Pratap Singh v. State of Uttar Pradesh and Others(2009) 4 SCC 437, while affirming the judgment in Amarawati (supra), held as follows:
"6.Learned counsel for the appellant apprehends that the appellant will be arrested as there is no provision for anticipatory bail in the State of U.P. He placed reliance on a decision of the Allahabad High Court in Amarawativ. State of U.P.in which a seven-Judge Full Bench of the Allahabad High Court held that the court, if it deems fit in the facts and circumstances of the case, may grant interim bail pending final disposal of the bail application. The Full Bench also observed that arrest is not amust whenever an FIR of a cognizable offence islodged. The Full Bench placed reliance on the decision of this Court in Joginder Kumarv. State of U.P. (1994) 4 SCC 260.
7.We fully agree with the view of the High Court in Amarawati caseand we direct that the said decision be followed by all courts in U.P. in letter and spirit, particularly since the provision for anticipatory bail does not exist in U.P. 8.In appropriate cases interim bail should be granted pending disposal of the final bail application, since arrest and detention of a person can cause irreparable loss to a person's reputation, as held by this Court in Joginder Kumar case. Also, arrest is not a must in all cases of cognizable offences, and in deciding whether to arrest or not the police officer must be guided and act according to the principles laid down inJoginder Kumar case."
18. Later, a two-Judge Bench of this Court in Som Mittal v. State of Karnataka(2008) 3 SCC 753, while dealing with an order of the Karnataka High Court under Section 482CrPC, one of the Judges made some strong observations as well as recommendations to restore Section 438 in the State of U.P. Learned Judges constituting the Bench also expressed contrary views on certain legal issues, hence, the matter was later placed before a three-Judge Bench, the judgment of which is reported in same caption (2008) 3 SCC 574, wherein this Court opined that insofar as the observations, recommendations and directions in paras 17 to 39 of the concurrent judgment is concerned, they did not relate to the subject matter of the criminal appeal and the directions given were held to be obiter and were set aside.
19. I notice in this case FIR was lodged for offences, under Sections 419 and 420 IPC which carry a sentence ofmaximum of three years and seven years respectively with or without fine. Benefit of Section 41(a) Cr.P.C. must be available in a given case, which provides that an investigating officer shall not arrest the accused of such offences in a routine manner and the arrest be made, only after following the restrictions imposed under Section 41(b). The relevant provisions, as it stands now reads as follow:
"41. When police may arrest without warrant.- (1) Any police officer may without anorder from a Magistrate and without a warrant, arrest any person –
(a) who commits, in the presence of a police officer, a cognizable offence;
(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied,
namely:-(i) the police officer has reason to believe on the basis of suchcomplaint, information, or suspicion that such person has committed the said offence;
(ii) the police officer is satisfied that such arrest is necessary –
(a) to prevent such person from committing any further offence; or
(b) for proper investigation of the offence; or
(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner, or(d) to prevent such person from making

any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,and the police officer shall record while making such arrest, his reasons in writing:
Provided that a police officer shall, in all cases where the arrest of a person is notrequired under the provisions of this sub-section; record the reasons in writing for not making the arrest."
20. Amended provisions make it compulsory for the police to record the reasons for making arrest as well as for not making an arrest in respect of a cognizable offence for which the maximum sentence is upto seven years. Reference in this connection may also be made to Section 41A inserted vide Act 5 of 2009 w.e.f. 01.11.2010, which reads as follows:
"41A. Notice of appearance before police officer– (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section
(1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.
(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.
(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.
(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."
21. Above mentioned provisions make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under Clause (b) of sub-section (1) of the amended Section 41. But, all the same, unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under Section 41A, could be a ground for his arrest. Legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty guaranteed under Article 21 of the Constitution of India.
22. I may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pin-point what are the appropriate cases, which have to be left to the wisdom of the Court exercising powers under Article 226 of the Constitution of India.
23. I am also faced with the situation that on dismissal of the writ by the High Court under Article 226 of the Constitution of India, while examining the challenge for quashing the FIR or a charge-sheet, whether the High Court could grant further relief against arrest for a specific period or till the completion of the trial. This Court in State of Orissa v. Madan Gopal Rungtareported in AIR 1952 SC 12, while dealing with the scope of Article 226 of the Constitution, held as follows :-"Article 226 cannot be used for the purpose of giving interim

relief as the only and final relief on the application. The directions had been given here only to circumvent the provisions of Section 80 of the Civil Procedure Code, and that was not within the scope of Article 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its meritsand come to a decision as to whether the petitioners succeeded in establishing that therewas an infringement of any of their legal rights which entitled them to a writ of mandamusor any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under Article 226 of the Constitution. The language of Article 226 does not permit such an action."

24. The language of Article 226 does not permit such an action and once the Court finds no merits in the challenge, writ petition will have to be dismissed and the question ofgranting further relief after dismissal of the writ, does not arise. Consequently, once a writ is dismissed, all the interim reliefs granted would also go.

25. This Court has already passed an interim order on 1.3.2013 granting bail to the appellant on certain conditions. The said order will continue till the completion of the trial. However, if the appellant is not co-operating with the investigation, the State can always move for vacating the order. The appeal is accordingly dismissed as above.

A.K.SIKRI,J.

26. I have carefully gone through the judgment authored by my esteemed brother, Justice Radhakrishnan. I entirely agree with the conclusions arrived at by my learned brother in the said judgment. At the same time, I would also like to make some observations pertaining to the powers of High Court under Article 226 of the Constitution of India to grant relief against pre-arrest (commonly called as anticipatory bail), even when Section 438,Cr.P.C. authorizing the Court to grant such a relief is specifically omitted and made inapplicable in so far as State of Uttar Pradesh is concerned. I would like to start with reproducing the following observations in the opinion of my brother, on this aspect which are contained in paragraph 21 of the judgment. It reads as under:

"We may, however, point out that there is unanimity in the view that in spite of the fact that

Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible topin-point what are the appropriate cases, which we have to leave to the wisdom of the Court exercising powers under Article 226 of the Constitution of India."

27. Another aspect which is highlighted in the judgment rendered by Justice Radhakrishnan is that many times in the Writ Petition filed under Article 226 of the Constitution of India seeking quashing of the FIR or the charge-sheet, the petitioners pray for interim relief against arrest. While entertaining the Writ Petition the High Court invariably grants such an interim relief. It is rightly pointed out that once the Writ Petition claiming main relief for quashing of FIR or the charge-sheet itself is dismissed, the uestion

of granting further relief after dismissal of the Writ Petition, does not arise. It is so explained in para 22 and 23 of the judgment of my learned brother.

28. I would like to remark that in the absence of any provisions like Section 438 of Cr. P.C. applicable in the State of Uttar Pradesh, there is a tendency on the part of the accused persons, against whom FIR is lodged and/or charge-sheet is filed in the Court to file Writ Petition for quashing of those proceedings so that they are able to get protection against the arrest in the interregnum which is the primary motive for filing such petitions. It is for this reason that invariably after the lodging of FIR, Writ Petition under Article 226 is filed with main prayer to quash those proceedings and to claim interim relief against pre-arrest in the meantime or till the completion of the trial. However, the considerations which have to weigh with the High Court to decide as to whether such proceedings are to be quashed or not are entirely different than that of granting interim protection against the arrest. Since the grounds on which such an FIR or charge sheet can be quashed are limited, once the Writ Petition challenging the validity of FIR or charge-sheet is dismissed, the grant of relief, incidental in nature, against arrest would obviously not arise, even when a justifiable case for grant of anticipatory bail is made out .

29. It is for this reason, we are of the opinion that in appropriate cases the High Court is empowered to entertain the petition under Article 226 of the Constitution of India where the main relief itself is against arrest. Obviously, when provisions of Section 438 of Cr.P.C. are not available to the accused persons in the State of Uttar Pradesh, under the normal circumstances such an accused persons would not be entitled to claim such a relief under Art. 226of the Constitution. It cannot be converted into a second window for the relief which is consciously denied statutorily making it acase of casus omissus. At the same time, as rightly observed in para 21 extracted above, the High Court cannot be completely denuded of its powers under Article 226 of the Constitution, to grant such a relief in appropriate and deserving cases; albeit thispower is to be exercised with extreme caution and sparingly in those cases where arrest of a person would lead to total miscarriage of justice. There may be cases where pre-arrest may
be entirely unwarranted and lead to disastrous consequences. Whenever the High Court is convinced of such a situation, it would be appropriate to grant the relief against pre-arrest in such cases. What would be those cases will have to be left to the wisdom of the High Court. What is emphasized is that the High Court is not bereft of its powers to grant this relief under Art. 226 of the Constitution. A Bench of this Court, headed by the then Chief Justice Y.V.Chandrachud, laid down first principles of granting anticipatory bail in the Gurbaksh Singh v. State of Punjab 1980 Crl. L.J. 417 (P&H), reemphasizing that liberty… - 'A person who hasyet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent.

30. In Joginder Kumar v. State of U.P. and Others, 1994 Cr L.J. 1981, the Supreme Court observed:"No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self esteem of a person. No arres tcan be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest."

31. It is pertinent to explain there may be imminent need to grant protection against pre-arrest. The object of this provision is to relieve a person from being disgraced by trumped up charges so that liberty of the subject is not put in jeopardy on frivolous grounds at the instance of the unscrupulous or irresponsible persons who may be in charge of the prosecution. An order of anticipatory bail does not in any way, directly or indirectly; takeaway for the police their right to investigate into charges made or to be made against the person released on bail.
32. The purposes for which the provisions of anticipatory bail are made are quite obvious. One of the purposes of the arrest is that the accused should be available to the investigating machinery for further investigation and questioning whenever he is required. Another purpose is that the trial should not be jeopardized and for this purpose the restrictions on the movements of the accused are necessary. The genuineness of the alleged need for police custody has to be examined and it must be balanced against the duty of courts to uphold the dignity of every man and to vigilantly guard the right to liberty without jeopardizing the state objective of maintenance of law and order.
33. I would also like to reproduce certain paragraphs from Kartar Singh and Ors. V. State of Punjab(1994) 3 SCC 569, wherein Justice K. Ramaswamy, speaking for the Court, discussed the importance of life and liberty in the following words.
"The foundation of Indian political and social democracy, as envisioned in the preamble of the
Constitution, rests on justice, equality, liberty and fraternity in secular and socialist republic in which every individual has equal opportunity to strive towards excellence and of his dignity of person in an integrated egalitarian Bharat. Right to justice and equality and stated liberties which include freedom of expression, belief and movement are the means for excellence. The right to life with human dignity of person is a fundamental right of every citizen for pursuit of happiness and excellence. Personal freedom is a basic condition for full development of human personality. Art.21 of the Constitution protects right to life which is the most precious right in a civilized society. The trinity i.e. liberty, equality and fraternity always sblossoms and enlivens the flower of human dignity. One of the gifts of democracy to mankind is the right to personal liberty. Life and personal freedom are the prized jewels under Art.19 conjointly assured by Art.20(3), 21 and 22of the Constitution and Art.19 ensures freedom of movement. Liberty aims at freedom not only from arbitrary restraint but also to secure such conditions which are essential for the full development of human personality. Liberty is the essential concomitant for other rights without which a man cannot be at his best. The essence of all civil liberties is to keep alive the freedom of the individual subject to the limitations of social control envisaged in diverse articles in the chapter of Fundamental Rights Part III in harmony with social good envisaged in the Directive Principles in Part IV of the Constitution. Freedom cannot last long unless it is coupled with order. Freedom can never exist without order. Freedom and order may coexist. It is essential that freedom should beexercised under authority and order should been forced by authority which is vested solely in the executive. Fundamental rights are the means and directive principles are essential ends in a welfare State. The evolution of the State from police State to a welfare State is the ultimate measure and accepted standard of democratic society which is an avowed constitutional mandate. Though one of the main functions of the democratic Government is to safeguard liberty of the individual, unless its exercise is subject to social control, it becomesanti-social or undermines the security of the State. The Indian democracy wedded to rule of law aims not only to protect the fundamental rights of its citizens but also to establish an egalitarian social order. The individual has to grow within the social confines preventing his unsocial or unbridled growth which could be done by reconciling individual liberty with social control. Liberty

must be controlled in the interest of the society but the social interest must never be overbearing to justify total deprivation of individual liberty. Liberty cannot stand alone but must be paired with a companion virtue; liberty and morality; liberty andlaw; liberty and justice; liberty and common good; liberty and responsibility which are concomitants for orderly progress and social stability. Man being a rational individual has to life in harmony with equal rights of others and more differently for the attainment of antithetic desires. This inter twined net work is difficult to delineate within defined spheres of conduct within which freedom of action may be confined. Therefore, liberty would notalways be an absolute license but must arm itself within the confines of law. In other words, here can be no liberty without social restraint. Liberty, therefore, as a social conception is a right to beassured to all members of a society. Unless restraint is enforced on and accepted by all members of the society, the liberty of some must involve the oppression of others. If liberty be regarded a social order, the problem of establishing liberty must be a problem of organizing restraint which society controls over the individual. Therefore, liberty of each citizen isborne of and must be subordinated to the liberty of the greatest number, in other words common happiness as an end of the society, lest lawlessness and anarchy will tamper social weal and harmony and powerful courses or forces would be at work to undermine social welfare and order. Thus the essence of civil liberty is to keepalive the freedom of the individual subject to the limitation of social control which could be adjusted according to the needs of the dynamic social evolution. The modem social evolution is the growing need to keep individual to be as free as possible, consistent with his correlative obligation to the society. According to Dr. Ambedkar in his closing speech in the Constituent Assembly, the principles of liberty, equality and fraternity are not to betreated as separate entities but in a trinity. They form the union or trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality. Equality cannot be divorced from liberty. Nor can equality and liberty be divorced from fraternity. Without equality, liberty would produce supremacy of law. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality would not become a natural course of things. Courts, as sentinel on the qui vive, therefore, must strike a balance between the changing needs of the society for peaceful transformation with orders and protection of the rights of the citizen.(Para 374)

34. It was also held in that judgment that the High Courts under Art.226 had the right to entertain writ petitions for quashing of FIR and granting of interim protection from arrest. This position, in the context of contours of Art.226, is stated as follows in the same judgment: "From this scenario, the question emerges whether the High Court underArt.226 would be right in entertaining proceedings to quash the charge-sheet or to grant bail to a person accused of an offence under the Act or other offences committed during the course of the same transaction exclusively triable by the Designated Court. Nothing is more striking than the failure of law to evolve a consistent jurisdictional doctrine or even elementary principles, if it is subject to conflicting or inconceivable or inconsistent result which lead to uncertainty, incongruity and disbelief in the efficacy of law. The jurisdiction and power of the High Court under Art.226 of the Constitution is undoubtedly constituent power and the High Court has untrammeled powers and jurisdiction to issue any writ or order or direction to any person orauthority within its territorial jurisdiction for enforcement of any of the fundamental rights or for any other purpose. The legislature has no power to divest the court of the constituent power engrafted under Art.226. A superior court is deemed to have general jurisdiction and the law presumes that the court has acted within its jurisdiction. This presumption is denied to the inferior courts. The judgment of a superior court unreservedly is conclusive as to all

relevant matters thereby decided, while the judgment of the inferior court involving a question of jurisdiction is not final. The superior court, therefore, has jurisdiction to determine its own jurisdiction, may be rightly or wrongly. Therefore, the court in an appropriate proceeding may erroneously exercise jurisdiction. It does not constitute want of jurisdiction, but it impinges upon its propriety in the exercise of the jurisdiction. Want of jurisdiction can be established solely by a superior court and that in practice no decision can be impeached collaterally by an inferior court. However, acts done by a superior court are always deemed valid wherever they are relied upon. The exclusion thereof from the rule of validity is indispensable in its finality. The superior courts, therefore, are the final arbiters of the validity of the acts done not only by other inferior courts or authorities, but also their own decisions. Though they are immune from collateral attack, but to avoid confusion the superior court's decisions lay down the rules of validity; are not governed by those rules. The valid decision is not only conclusive, it may affect, but it is also conclusive in proceedings where it is sought to be collaterally impeached. However, the term conclusiveness may acquire other specific meanings. It may mean that the finding upon which the decision is founded as distinct or it is the operative part or has to be conclusive or these findings bind only parties on litigated disputes or that the organ which has made the decision is itself precluded from revoking, rescinding or otherwise altering it."

35. It would be pertinent to mention here that in light of above mentioned statements and cases, the High Court would not be incorrect or acting out of jurisdiction if it exercises its power under Art.226 to issue appropriate writ or direction or order in exceptional cases at the behest of a person accused of an offence triable under the Act or offence jointly triable with the offences under the Act.

36. It is pertinent to mention that though the High Courts have very wide powers under Art.226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles, so much so that while entertaining writ petitions for granting interim protection from arrest, the Court would not go on to the extent of including the provision of anticipatory bail as a blanket provision.

37. Thus, such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a devise to advance justice and not to frustrate it. The owers are, therefore, to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by authorities indiscriminately making pre-arrest of the accused persons. In entertaining such a petition under Art.226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Art.226 is not to be exercised liberally so as to convert it into Section 438,Cr.P.C. proceedings, keeping in mind that when this provision is specifically omitted in the State of Uttar Pradesh, it cannot be resorted to as to back door entry via Art.226. On the other hand, wherever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its power under Art. 226 of the Constitution. It is again clarified that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified.

(A.K. SIKRI)

New Delhi,

16th January 2014

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