IN THE SUPREME COURT OF INDIA

Writ Petition (C) No. 699 of 2016

Ashwini Kumar Upadhyay vs. Union of India

&

Writ Petition (Civil) No. 442, 443 and 444 of 2021

Tazheen Fatima vs. Union of India and others etc

Fifteenth Report by Vijay Hansaria, Sr. Advocate, Amicus Curiae

In Re Magisterial Trial Cases dated 23.11.2021

1. That the present submissions are made by the Amicus in terms of the order of this Hon'ble Court dated 15.11.2021 as regards trial of Magisterial cases by Special Court MP/ MLA presided over by officers of the rank of Sessions Judge.

I. PROCEEDINGS BEFORE THE HON'BLE COURT IN WP (C) No 699 OF 2016 AND CONSTITUTION OF SPECIAL COURTS FOR MPs/ MLAs

2. That this Hon'ble Court in the case of *Public Interest Foundation vs. Union of India* 2015 (11) SCC 433 directed as under:-

> "We, accordingly, direct that in relation to sitting MPs and MLAs who have charges framed against them for the offences which are specified in Sections 8(1), 8(2) and 8(3) of the RP Act, the trial shall be concluded as speedily and expeditiously as may be possible and ***in no case later than one year from the date of the framing of charge(s).*** In such cases, as far as possible, the trial shall be conducted on a day-to-day basis. If for some extraordinary circumstances the court concerned is not being able to conclude the trial within one year from the date of framing of charge(s), such court would submit the report to the Chief Justice of the respective

High Court indicating special reasons for not adhering to the above time-limit and delay in conclusion of the trial. In such a situation, the Chief Justice may issue appropriate directions to the court concerned extending the time for conclusion of the trial." (emphasis supplied)

3. That despite the aforesaid directions for expeditious disposal, cases were pending against legislators for years and decades. WP (C) No 699 of 2016 (*Ashwini Kumar Upadhyay v. Union of India*) was filed on 30.08.2016 seeking a writ of mandamus directing the Union of India to provide adequate infrastructure to set up Special Courts to decide criminal cases against legislators within one year. Further challenge has been made to the Constitutional validity of Sections 8(1)(ii), 8(2) and 8(3) of the Representation of the People Act, 1951 in so far as the said provisions restrict the disqualification, upon conviction, for a period of six years, since release of the convict.

4. That this Hon'ble Court vide order dated 01.11.2017 passed order for setting up of Fast Track Courts to deal with criminal cases of political personnel in the following terms:

"4. Insofar as setting up of Special Courts are concerned, setting up of Special Courts and infrastructure would be dependent on the availability of finances with the States. Without going into the controversy raised on the aforesaid score, the problem can be resolved by having a Central Scheme for setting up of Courts exclusively to deal with criminal cases involving political persons on the lines of the Fast Track Courts which were set up by the Central Government for a period of five (05) years and extended further which Scheme has now been discontinued.

5. A Scheme to give effect to the above may be laid before the Court on the next date fixed indicating the amount of funds that can be earmarked for setting up of Special Courts where-after the issue of appointment of Judicial Officers, Public Prosecutors, Court staff and other such requirement of man-power and infrastructure (which would depend on the availability of funds from the Central Government) will be dealt with by the Court, if required, by interacting with the representatives of the respective State Governments."

5. That pursuant to the direction of this Hon'ble Court, the Central Government sanctioned constitution of twelve (12) Special Courts for trial of cases against MPs/ MLAs

- Nine (9) courts at the Sessions level in the States/ UTs of Andhra Pradesh, Bihar, Karnataka, Madhya Pradesh, Tamil Nadu, Telangana, Uttar Pradesh, West Bengal and Delhi, and
- Three (3) at Magistrate Level courts in the State/ UT of Maharashtra, Kerala and Delhi.

These courts were to be presided over by the existing judicial officers. In the Special Courts so constituted, many cases triable by Magistrates were transferred to Special Courts of Sessions. In other States, cases continued to be tried in respective jurisdictional courts. Only in the Union Territory of Delhi, Special Courts were constituted both at the Sessions level and at the Magistrate level.

6. That this Hon'ble Court vide order dated 14.12.2017, after taking into consideration the decision of the Central Government to constitute twelve Special Courts made the following directions:

> "Immediately after such allocation is made and intimated to the respective State Governments, the State Governments in consultation with the High Courts will set up the Fast Track Courts (12 in all) to ensure that the said Courts start functioning from 01.03.2018. All necessary/required notification(s) shall be issued by the concerned/respective State Government(s). The High Court(s), acting through the various trial Courts, will trace out from the case records the particular case(s) pending in the files of the respective judicial officers under the jurisdiction of the High Court(s) which are required to be dealt with by the Special Courts under the Scheme and thereafter transfer the said cases to such Special Courts(s) for adjudication.

7. That this Hon'ble Court vide order dated 21.08.2018 directed the Union of India to furnish the following information:

    1. Number of Special Courts set up pursuant to the order of this Court dated 14th December, 2017;
    2. Whether the courts set up are Courts of Sessions or Magisterial Courts;
    3. The territorial jurisdiction of each of these Courts;
    4. Number of cases pending before each of these Courts, with break-up of Magisterial and Sessions triable cases;
    5. Whether the Union of India intends to set up additional number of Courts over and above the Courts that may have already been set up pursuant to the order of this Court dated 14th December, 2017. The details in this regard may also be furnished.

8. That this Hon'ble Court vide order dated 10.10.2018 appointed the undersigned as an amicus to assist this Hon'ble Court: The Amicus submitted his first report dated 23.10.2018, inter-alia, stating that there is no uniform pattern in the constitution of Special Courts; and suggested constitution of Special Courts both at the Sessions level and Magisterial level.

9. That this Hon'ble Court vide order dated 01.11.2018, directed all the High Courts to furnish information as regards pending criminal cases against elected representatives in a prescribed format. The amicus in his second report dated 03.12.2018, analysed the details of cases furnished by the High Courts as hereunder :

"a. There are 4122 number of cases pending against MPs/ MLAs including former MPs/ MLAs. Some of these cases are pending for more than three decades. 2324 number of cases are against sitting legislators (both MP/ MLA) and 1675 number of cases are against former legislators.

b. Out of the aforesaid 4122 number of cases, in 1991 number of cases even charges have not been framed. Many cases are pending due to stay (264 such cases) granted by the higher courts.

c. In some States cases against MPs/ MLAs have been transferred to Special courts for MPs/ MLAs constituted under the orders of this Hon'ble court. In the State of U.P. all the 992 cases and in the State of Madhya Pradesh all 168 cases have been transferred to the Special court headed by Additional Sessions Judge rank officer in Allahabad and Bhopal respectively, which include cases triable by Sessions courts, Magistrate courts. In the State of Andhra Pradesh, 38 out of total 109 cases, in State of Telengana 66 out of total 99 cases, have been transferred to

the Special courts so constituted manned by Sessions judge rank officers. In the State of Maharashtra 31 cases of Bombay have been transferred to the Special courts so constituted manned by Magistrate rank officers. In Delhi 38 cases have been transferred to ADJ rank and 86 cases to Special judge at Magisterial level."

10. This Hon'ble Court on consideration of the reports of the Amicus passed order dated 04.12.2018 to the following effect:

"Having considered the matter we are of the view that the suggestions of the learned Amicus Curiae should be tried out with certain modifications and in a limited manner which is indicated below:

1. Instead of designating one Sessions Court and one Magisterial Court in each District we request each High Court to assign/allocate criminal cases involving former and sitting legislators to as many Sessions Courts and Magisterial Courts as each High Court may consider proper, fit and expedient. This, according to us, would be a more effective step instead of concentrating all the cases involving former and sitting legislators in a Special Court(s) in the district.
2. The procedural steps indicated by the learned Amicus Curiae, narrated above, will be followed by each of the designated Court to whom work would be allocated in terms of the directions above except that offences punishable with imprisonment for life/death against sitting MPs/MLAs as well as former MPs/MLAs would be taken up on first priority followed by sequential order indicated above without creating any distinction between cases involving sitting legislators and former legislators.
3. At this stage, we are of the view that the above directions should be made applicable to cases involving former and sitting legislators **in**

the States of Bihar and Kerala. The National Capital Territory of Delhi where the position is somewhat different and the difficulties of distance and territories do not come in the way the trial of cases by the Special Courts (both Sessions Court and Magisterial Court) will continue. (emphasis supplied)

4. So far as the cases involving States of Kerala and Bihar are concerned, such of the case records which have been transmitted to the Special Courts in the two States will be re-transmitted to the jurisdictional courts where from the records have been sent for being dealt with in the manner indicated above. This will be done forthwith.
5. The registry of the High Courts of Kerala (State of Kerala) and Patna (State of Bihar) will initiate necessary action in this matter without any delay.
6. Rest of the Special Courts already set up shall continue to work and try cases assigned to it until further orders are passed in this regard by this Court."

11. That the Allahabad High Court by notification dated 16.08.2019 constituted sixty-two (62) Special Courts at the level of Sessions Judge for trial of criminal cases pending against elected MPs/MLAs instead of one Special Court at Allahabad created earlier by order dated 29.06.2018. In all the Districts, a designated Court at the level of Additional Session Judge was constituted except for Allahabad. The Special Judge at Allahabad was conferred jurisdiction over 12 adjoining districts were 300 cases are pending. The Amicus in his 13th report submitted that a Special Court should be constituted in each of the districts for expeditious disposal of cases.

12. That this Hon'ble Court vide order dated 05.03.2020 considered the seventh report of the Amicus dated 03.03.2020 and directed all the High Courts to furnish information in a revised format as regards pendency of cases against MPs/MLAs and expected time for the completion of trial. On receipt of the reports from the various High Courts, the Amicus submitted ninth report dated 08.09.2020 collating the information as hereunder:

> "a. There are a total 4442 cases pending against MPs/ MLAs (sitting and former) in different courts including Special Courts for MPs and MLAs.
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> b. In 2556 cases sitting legislators are accused persons. The number of legislators involved are more than the total number of cases since there are more than one accused in one case, and the same legislator is an accused in more than one case.
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> c. There are 413 cases in respect of offences, which are punishable with imprisonment for life, out of which in 174 cases sitting MPs/ MLAs are accused.
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> d. Other cases include offences under Prevention of Corruption Act 1988, Prevention of Money Laundering Act 2002, Arms Act 1959, Prevention of Damage to Public Property Act, 1984, defamation under section 500 IPC, cheating under section 420 IPC. Large number of cases are for violation of section 188 IPC for wilful disobedience/ obstruction of orders promulgated by a public servant.
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> e. Trial of 352 cases have been stayed by the High Court and this Hon'ble Court.

f. Large number of cases are pending at the appearance stage and even non-bailable warrants (NBWs) issued by the courts have not been executed.

g. In a large number of cases even charges have not been framed including those punishable with imprisonment for life.

h. There is **one Special Court in the States of Andhra Pradesh, Karnataka, Madhya Pradesh, Tamil Nadu, Telangana and West Bengal** where all cases are pending. The Special Courts have been constituted under the orders of this Hon'ble Court and case records have been transferred to the said Court irrespective of the place of occurrence of the offence. (emphasis supplied)

i. Special courts, wherever constituted, exercise jurisdiction over other cases as well, in addition to the trial cases against MPs/MLAs."

13. This Hon'ble Court in the order dated 10.09.2020 noted that cases under special legislations such as Prevention of Corruption Act, 1988, Prevention of Money Laundering Act, 2002 etc. have not been placed on record and granted further time for compliance.

14. That this Hon'ble Court vide order dated 16.09.2020 interalia made the following directions:

> "16. With respect to increasing the number of Special Courts and rationalizing the pending criminal cases, we deem it appropriate that, before passing any specific direction in respect thereto, it would be appropriate to direct the learned Chief Justice of each High Court to formulate and submit an action plan for rationalization of the number of Special Courts necessary, with respect to the following aspects:

a. Total number of pending cases in each district,
b. Required number of proportionate Special Courts,
c. Number of Courts that are currently available,
d. Number of Judges and the subject categories of the cases,
e. Tenure of the Judges to be designated,
f. Number of cases to be assigned to each Judge,
g. Expected time for disposal of the cases,
h. Distance of the Courts to be designated and
i. Adequacy of infrastructure.

17. The learned Chief Justices while preparing the action plan should also consider, in the event the trials are already ongoing in an expeditious manner, whether transferring the same to a different Court would be necessary and appropriate."

15. That the Criminal Rules Committee of the Madras High Court submitted a report dated 13.10.2020 raising certain issues on the status of the Special Courts under the constitutional scheme. The Amicus submitted his twelfth report dated 02.11.2020 and justified the setting up of the Special Courts for MPs/MLAs in larger public interest and within the Constitutional framework.

16. This Hon'ble Court vide order dated 04.11.2020 made further directions for expeditious trial of cases and also for early disposal of petitions pending before the High Court which have impeded the progress of trial.

17. This Hon'ble Court vide order dated 10.08.2021 directed that no prosecution against a sitting or former MP/MLA shall be withdrawn under section 321 Cr.P.C. without the leave of the High Court. The High Courts were further directed to examine the withdrawals, whether pending or disposed of since 16.09.2020, in

light of guidelines laid down in the case of *State of Kerala v. K. Ajith* 2021 SCC OnLine SC 510.

18. This Hon'ble Court vide order dated 25.08.2021 directed the Central and the State Government to provide infrastructural facilities to the High Court to establish CBI/Special Courts and also expedite investigation. This Hon'ble Court sought response as to the constitution of a Monitoring Committee to evaluate reasons for delay in the investigation.

19. That in WP (C) 442, 443 and 444 of 2021 (*Tazheen Fatima v. Union of India*), the petitioners have assailed the notification dated 16.08.2019 issued by the Allahabad High Court in so far as the cases triable by Magistrates are transferred to the Special Court headed by an officer of the rank of Additional Sessions Judge. The same issues was raised by the Karnataka High Court, on the judicial side, in the suo motu writ petition No. 10240 of 2020; and the Amicus has made submission in this regard in his 13th report dated 09.08.2021. The amicus has been informed that the State of Karnataka by notification dated 10.11.2021 has constituted a Special Court at Magistrate level for trial of MPs/ MLAs triable by Magistrate.

20. That in the light of the facts and circumstances mentioned hereinabove, the following issues arise for consideration before this Hon'ble Court :

    A. Whether Special Court MP/ MLA headed by an officer of the rank of Additional Sessions Judge can try cases which are triable by Magistrate under Cr.P.C.?

B. Whether Special Court can try offenses without a committal order under section 209 Cr.P.C. and try cases without cognizance being taken by the magistrate under section 193 Cr.P.C.?

V. SUBMISSIONS

Issue A: Whether Special Court MP/ MLA headed by an officer of the rank of Additional Sessions Judge can try cases which are triable by Magistrate under Cr.P.C.?

21. That as per Code of Criminal Procedure 1973, every State is a Sessions division and the same can be altered by the State Government in consultation with the High Court. Under sub section (1) of Section 9 a court of sessions is established for every sessions division by the State Government. Under sub section (3) of Section 9 the High Court has power to appoint Additional and Assistant Sessions Judge to exercise jurisdiction in the Court of Session. Further, the Sessions Judge of one session division can be appointed by the High Court to be Additional Sessions judge of another division. Under section 11, courts of Judicial Magistrate are required to be constituted in every district by the State Government after consultation with the High Court.
22. Sections 3 to 6 of Prevention of Corruption Act, 1988 provides for the constitution of Special Courts and the procedure to be followed. Sections 43 to 46 of Prevention of Money Laundering Act, 2002; Sections 14 to 18 of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989; and Sections 28 to 37 of

Prevention of Children from Sexual Offences Act, 2012 provides for constitution of Special Courts, their jurisdiction and procedure to be followed. According to Section 5(1) of the PC Act, the Special Judge shall follow the procedure prescribed by the Cr.P.C. for trial of warrant cases by the Magistrate. Section 44(1)(d) of PMLA Act and Section 33(9) of POCSO Act states that the Special Judge shall follow the procedure for trial before court of Sessions. All the aforesaid Courts have been constituted to be presided over by an officer of the rank of Sessions Judge irrespective of the punishment/ sentence prescribed for the offence.

23. That the constitution of Special Courts MP/ MLA for expeditious trial of cases against Parliamentarians and Legislators under the direction of this Hon'ble Court issued in exercise of power under Article 142 of the Constitution are valid and no illegality or unconstitutionality can be attached to trial of cases by these Courts against MPs/ MLAs. All the accused persons are granted a fair trial as per the Constitutional norm. The cases are tried by judicial officers trained in law and no special procedure less advantageous to accused persons has been prescribed for trial of the cases. The cases are tried by the independent and qualified judges as per the procedure laid down in the Code of Criminal Procedure. MPs and MLAs constitute a separate class in themselves and expeditious trial of criminal cases against them by Special Courts do not suffer from any constitutional infirmity.

24. It is further submitted that under section 406 of Cr.P.C., this Hon'ble Court has power to transfer a case from one court to another court of "**equal or superior jurisdiction**." Similar power is possessed by the High Court under section 407

Cr.P.C. Thus, merely because a case has been transferred from a court of inferior jurisdiction to a court of superior jurisdiction, the same cannot be challenged as illegal. (emphasis supplied)

Case law on Constitution of Special Court and fair trial

25. It is submitted that under the Constitutional scheme, a person accused of an offence is entitled to a fair trial. The concept of 'fair trial' has been laid down by *Hon'ble Mr. Justice Vivian Bose* in the case of *Syed Qasim Razvi v. State of Hyderabad* [1953 SCR 589: AIR 1953 SC 156] as under:

> "43. I conclude that the true principle is that it is not the setting up of Special Courts which matters, unless composition is objectionable, but the procedure which they are directed to follow. If the Special Judges are selected from the class of judicially qualified and experience man of recognised impartiality and they are enjoin to follow a procedure which does not differ substantially from the ordinary course, there can be no reasonable objection, but if the procedure deprived the accused of substantial advantages which other accused similarly placed can demand then Article 14 comes into play."

26. Another five judges bench of this Hon'ble Court in the case of *Kedar Nath Bajoria vs. State of West Bengal,* [1954 SCR 30: AIR 1953 SC 404] upheld the constitutional validity of the West Bengal Criminal Laws Amendment (Special Courts) Act, 1949 and the notification issued thereunder directing trial of a particular case by a Special Court. *Chief Justice Patanjali Sastri* delivering majority opinion held:

"7. Now, it is well settled that the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain."

12. It will seen that the main reasoning of the majority Judges in *Anwar Ali Sarkar* (AIR 1952 SC 284) *case* as disclosed in the passages extracted above is hardly applicable to the statute here in question which is based on a classification which, in the context of the abnormal post-war economic and social conditions is readily intelligible and obviously calculated to subserve the legislative purpose……I think that a distinction should be drawn between ***discrimination without reason and discrimination with reason***. The main objection to the West Bengal Act was that it permitted discrimination without reason or without any rational basis The mere mention of speedier trial' as the object of the Act did not 'cure the defect', as the expression afforded no help in determining what cases required speedier trial The clear recital (in the Saurashtra Ordinance) of a definite objective furnishes a tangible and rational basis of classification to the State Government for the purpose of applying the provisions of the Ordinance and for choosing only such offences or cases as affect public safety, maintenance of public order and the preservation of peace and tranquility." (emphasis supplied)

Transfer of Coal Block Allocation cases to Special Court

27. That this Hon'ble Court in the case of *Manohar Lal Sharma vs. UOI,* [(2015) 13 SCC 35] vide dated 18.07.2014 passed the following order:

> "6. In pursuance of our order dated 18-7-2014, the Registrar General, Delhi High Court has intimated to the Secretary General of this Court that the Hon'ble the Chief Justice of Delhi High Court has been pleased to nominate Mr Bharat Prashar, an officer of Delhi Higher Judicial Service for being posted as Special Judge to deal and exclusively try the offences pertaining to coal block allocation matters under the Penal Code, 1860, Prevention of Corruption Act, 1988, Prevention of Money-Laundering Act, 2002 and other allied offences.
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> 10. All cases pending before different courts in Delhi pertaining to coal block allocation matters shall stand transferred to the Court of the Special Judge as aforenoted. We also make it clear that any prayer for stay or impeding the progress in the investigation/trial can be made only before this Court and no other court shall entertain the same."

28. That the validity of the order of transfer of coal block allocation cases to the Special Court was considered by a three judge bench of this Hon'ble Court in *Girish Kumar Suneja vs. CBI,* [(2017) 14 SCC 809]. This Hon'ble Court rejected the contention that the Supreme Court cannot transfer a particular case to a particular officer by creating a Special Court, and held:

> "43. In our opinion, it is not as if one single case has been taken up for allegedly discriminatory treatment out of an entire gamut of cases. All the cases relating to the allocation of coal blocks have been compartmentalized and are required to be treated and dealt with in the same manner. The coal block allocation cases form one identifiable category of cases that are distinct from other cases since they have had a massive impact on public

interest and there have been large scale illegalities associated with the allocation of coal blocks. It is therefore necessary to treat these cases differentially since they form a unique identifiable category. The treatment of these cases is certainly not arbitrary – on the contrary, the classification is in public interest and for the public good with a view to bring persons who have allegedly committed corrupt activities, within the rule of law. It is hence not possible to accept the submission that by treating the entire batch of coal block allocation cases in a particular manner different from the usual cases that flood the Courts, there is a violation of Article 14 of the Constitution.

44. In *Kedar Nath Bajoria v. State of West Bengal* AIR 1953 SC 404 this Court explained Anwar Ali Sarkar and held that it proceeded on the basis that no identifiable principle was laid down for the trial of a case by the Special Court except that it was for the "speedier trial of certain offences". However, where there is a definite objective that furnishes a tangible and rational basis of classification, then there would be no violation of Article 14 of the Constitution. A distinction was drawn between discrimination with reason and discrimination without reason. No general rule can be laid down and it would depend on the relevant facts in each situation and a practical assessment of the law."

Transfer of 2G scam cases to Special Court

29. That under the orders of this Hon'ble Court in the case of *Centre for PIL* dated 10.02.2011[1] and dated 16.03.2011[2], an officer of the rank of sessions judge was appointed as a Special Judge to undertake trial of cases in relation to all matters pertaining to 2G scam exclusively. In the said case, the CBI filed a supplementary

[1] (2013) 8 SCC 18
[2] (2011) 15 SCC 169

chargesheet dated 12.12.2011 against Essar Teleholdings Ltd., its directors and other accused persons for commission of offences under section 420 read with 120B of IPC, triable by the Court of Magistrate. No other offence was alleged in the said charge sheet against the petitioner or other accused person. The Special Judge 2G scam took cognizance of the said chargesheet and the accused persons were summoned. The same was assailed before the Delhi High Court and subsequently before the Supreme Court on the ground that the notification constituting Special Court travels beyond the provisions of Cr.P.C. which mandates that offences under IPC ought to be tried as per its provisions. It was further contended that if the offence of Section 420 IPC, which ought to be tried by a Magistrate, is to be tried by a Court of Session, a variety of valuable rights of the petitioner would be jeopardised.

30. This Hon'ble Court in the case of *Essar Teleholdings Ltd. v. Delhi High Court*, [(2013) 8 SCC 1] rejected that contention holding as under:

> "31. In the present case there is nothing on the record to suggest that the petitioners will not get fair trial and may face miscarriage of justice. In absence of any such threat and miscarriage of justice, no interference is called for against the impugned order taking cognizance of the offence against the petitioners.
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> 33. From the aforesaid order it is clear that this Court passed the order under Article 136 read with Article 142 of the Constitution, in the interest of holding a fair prosecution of the case."

31. That the same issue was re-agitated before this Hon'ble Court and a three judge bench in *Essar Teleholdings Ltd. v. CBI*, [(2015) 10 SCC 562] held as under:

> "18. Having heard the learned counsel for both the parties, we are of the view that the learned Senior Advocate for the petitioners is attempting to raise submissions which have already been rejected by this Court by its judgment dated 1-7-2013[3]. His main submission, that in the fitness of things, the second supplementary charge-sheet should be tried by a Magistrate of the First Class would be directly contrary to the finding of this Court that the said second supplementary charge-sheet be tried only by the learned Special Judge…..
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> 20. The other contention of the learned Senior Counsel for the petitioners before us has already been answered by this Court by upholding both the Administrative Order dated 15-3-2011 and the NCT Notification dated 28-3-2011. This Court having held that the Administrative Order dated 15-3-2011 of the High Court was valid, it is clear that even a Penal Code offence by itself—that is, such offence which is not to be tried with a Prevention of Corruption Act offence—would be within the Special Judge's jurisdiction inasmuch as the administrative order of the High Court gives power to the Special Court to decide all offences pertaining to the 2G Scam. In fact, once this order is upheld, the learned Senior Advocate's argument based on Section 4(3) of the Prevention of Corruption Act pales into insignificance. This is for the reason that independent of Section 4(3) of the Prevention of Corruption Act and of the Notification dated 28-3-2011, the Special Judge has been vested with the jurisdiction to undertake the trial of all cases in relation to all matters pertaining to the 2G Scam exclusively, which would include the Penal Code offences by themselves, so long as they pertain to

[3] *Essar Teleholdings Ltd.* v. *Delhi High Court*, (2013) 8 SCC 1

the 2G Scam. Shri Salve cited *State* v. *Jitender Kumar Singh*[4], and para 38 in particular to submit that a Special Judge appointed to try the Prevention of Corruption Act cases, cannot try non-Prevention of Corruption Act cases unless there is a causal link between such cases and the Prevention of Corruption Act cases, in which case they must be tried together. As has been held by us, once the challenge to the Administrative Order dated 15-3-2011, is specifically rejected, the offences arising out of the second supplementary charge-sheet, being offences under the Penal Code relatable to the 2G Scam, can be tried separately only by the Special Judge."

Trial of offences under FERA by the Special Judge in Fodder Scam cases

32. That under the orders of this Hon'ble Court, Special judge CBI was directed to hear all cases relating to Animal Husbandry Department (AHD) scam cases (Fodder Scam cases). An offence under FERA which relates to the fodder scam was also transferred to the Special judge (AHD scam cases). The order of taking cognizance was assailed on the ground that the transfer of the appellants' prosecution under FERA/FEMA from the Magistrate's Court to the Court of the Special Judge was unlawful, since the transfer was being made to a court which had no jurisdiction to try the offence.The case under FERA/ FEMA was triable by Court of Magistrate being punishable for imprisonment for seven years, thus, trial by an officer of the rank of Sessions judge is against the provisions of Cr.P.C. and would take away the right of appeal.

[4] (2014) 11 SCC 724

33. This Hon'ble Court in the case of *Kamlesh Kumar v. State of Jharkhand*, [(2013) 15 SCC 460] rejected the contention. *Hon'ble Mr. Justice H.L. Gokhale* in the leading judgment held thus:

> "19. The First Schedule to CrPC deals with the classification of offences. Part I thereof deals with the offences under the Penal Code, 1860, Part II deals with classification of offences against other laws, which would include offences under laws such as FERA. The petitioners were being prosecuted under Section 56 of FERA, wherein the maximum punishment that could be awarded was up to seven years. The second entry of this Part II laid down that such offences were triable by a Magistrate of the First Class, provided those offences were cognizable offences. As noted earlier, Section 62 of FERA made the offence under Section 56 non-cognizable. Besides, Section 61(1) of FERA stated that "*it shall be lawful*" for the Magistrate to pass the necessary sentence under Section 56. It does not state that the Magistrate alone is empowered to pass the necessary sentence, in which case the proceeding cannot be transferred from his Court. This provision is not like the one in *A.R. Antulay*[5] where under Section 7(1) of the Criminal Law Amendment Act, 1952 the offence was "*triable by Special Judge only*". In the instant case it was merely lawful for the Magistrate to try the offences under Section 61, but the Court of the Magistrate was not a court of exclusive jurisdiction as in *Antulay case*. The offence was a non-cognizable one, and therefore it was not mandatory that it ought to have been tried only by the Magistrate of the First Class. Thus the petitioner could not claim that the Magistrate had the special jurisdiction to try the offence, and that the State could not transfer the case to the Sessions Judge. In view of what is stated above, it cannot be said that the Magistrate's Court had an

[5] (1988) 2 SCC 602

exclusive jurisdiction to try the cases relating to violations of the provisions of FERA, and those cases could not be transferred to the Special Judge…..

20. The petitioner had relied upon the judgment of a Division Bench of the Delhi High Court in *A.S. Impex Ltd.*[6], on the question of transfer of a proceeding. Mr Malhotra pointed out that although the judgment in *Ranbir Yadav*[7] was brought to the notice of the Division Bench in that matter, the Division Bench had erroneously held that the reliance thereon to be a "misplaced" one, as can be seen from the sentence at the end of para 12 of that judgment. This judgment has been distinguished and found to be not laying down a good law by another Division Bench of the Delhi High Court in *Mahender Singh* v. *High Court of Delhi*[8] . In that matter, the Court was concerned with transfer of prosecutions under the Securities and Exchange Board of India Act, 1992 from the Magistrate's Court to the Court of Session, and the High Court has held it to be valid and permissible. The Division Bench in *Mahender Singh* has in terms held that reliance on the judgment in *A.R. Antulay*[9] to oppose such transfer was of no help, and rightly so. There is no difficulty in stating that *A.S. Impex Ltd.* does not lay down the correct proposition of law."

Hon'ble Mr. Justice Madan B. Lokur in the concurring judgement held thus:

"31. The right of appeal available to the petitioners in the present case is not taken away by transferring the case from the Magistrate to the Special Judge. The petitioners continue to have the right to appeal, but it is only the forum that has changed. They can now prefer an appeal from the order of the Special Judge to the High Court. Therefore, it is not as if the

[6] (2003) 107 DLT 734
[7] (1995) 4 SCC 392
[8] (2009) 151 Comp Cas 485 (Del)
[9] (1988) 2 SCC 602

petitioners are denuded of any right to agitate their cause in a superior forum by the transfer of the case to the Special Judge.

37. A similar question came up for consideration in *Ranbir Yadav*[10] and this Court noted the duality of power in the High Court. It was observed that the High Court has the judicial power of transfer of a case from one court to another under Section 407 of the Code. It also has the administrative power to transfer a case from one court to another under Article 227 of the Constitution.

38. In the context of Article 227 of the Constitution, this Court observed in para 12 of *Ranbir Yadav* that the High Court has superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction and that in its plenary administrative power, the High Court could transfer a case from one court to another. It was further held that so long as the power is exercised for administrative exigency, without impinging upon or prejudicially affecting the rights and interests of the parties to any judicial proceeding, there is no reason to hold that administrative powers must yield to judicial powers simply because in a given circumstance they coexist.

39. In the present case, the High Court could have exercised its judicial power of transfer under Section 407 of the Code (if called upon to do so) and it could also have exercised its administrative power of transfer under Article 227 of the Constitution, which it did, as is evident from the letter dated 6-5-2002 issued by the Registrar General of the High Court of Jharkhand to the Secretary to the Government, Law (Judicial) Department, Government of Jharkhand. The fact that for an administrative exigency, the

[10] (1995) 4 SCC 392

High Court decided to exercise its plenary administrative power does not per se lead to the conclusion that the transfer of the case from the Magistrate to the Special Judge was unlawful. The legality of the action cannot be called in question in this case since no prejudice has been caused to the petitioners by such a transfer.

43. While the revisional power of a superior court actually enables it to correct a grave error, the existence of that power does not confer any corresponding right on a litigant. This is the reason why, in a given case, a superior court may decline to exercise its power of revision, if the facts and circumstances of the case do not warrant the exercise of its discretion. This is also the reason why it is felicitously stated that a revision is not a right but only a "procedural facility" available to a party. If the matter is looked at in this light, the transfer of a case from a Magistrate to a Special Judge does not take away this procedural facility available to the petitioners. It only changes the forum and as already held above, the petitioners have no right to choose the forum in which to file an appeal or move a petition for revising an interlocutory order."

Constitution of Fast Track Court cases by executive order upheld

34. That this Hon'ble Court has in the case of *Brij Mohan Lal vs. UOI,* [(2002) 5 SCC 1] upheld the constitution validity of the Fast Track Courts in the following terms:

> "One of the pleas taken by the parties questioning constitutional validity of the Fast Track Courts Scheme is that the Constitution does not envisage establishment of Fast Track Courts. This plea is clearly without any substance. ….. Though the Fast Track Courts Scheme is envisaged by the Central Government on the basis of the views indicated by the Finance Commission, yet appointments to the Fast Track Courts are to be made by the High Court keeping in view the modalities set out. Therefore, merely because the suggestion has stemmed from the Central Government, it cannot be said that there has been any violation of any constitutional mandate.….The above being the position there is nothing constitutionally improper in the Scheme. It is the High Court which has to play a pivotal role in the implementation of the Scheme for its effective implementation and achievement of the above objectives, of course, complying with the constitutional requirements embodied in the relevant provisions of Chapter VI of the Constitution"

Direction regarding Magisterial Triable cases to be tried by Special Courts headed by Magistrate to apply prospectively

35. That, in the event, this Hon'ble Court comes to the conclusion that the cases triable by the Magistrate under Cr.P.C. can be tried only by the Special Courts manned by an officer of the rank of Magistrate, the said direction may be applied prospectively. The Special Court MP/ MLA constituted under direction of this Hon'ble Court has conducted trial in a large number of cases and has also disposed off a number of cases triable under Cr.P.C., both by the Sessions Court as well by the Magistrate Court. The direction to constitute the Special Court has been issued by this Hon'ble Court in exercise of power under Article 142 and no fault can be

found in trial of such cases, particularly when no objection has been raised by any of the accused persons except in the writ petition no. 442, 443 and 444 of 2021.

36. It is submitted that the concept of prospective ruling has been recognised by this Hon'ble Court in a catena of cases. The amicus craves leave to refer and rely on the following judgements:

a. *Waman Rao v. Union of India*, (1981) 2 SCC 362

> 51. Thus, insofar as the validity of Article 31-B read with the Ninth Schedule is concerned, **we hold that all Acts and Regulations included in the Ninth Schedule prior to April 24, 1973 will receive the full protection of Article 31-B.** Those laws and regulations will not be open to challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred by any of the provisions of Part III of the Constitution. Acts and Regulations, which are or will be included in the Ninth Schedule on or after April 24, 1973 will not receive the protection of Article 31-B for the plain reason that in the face of the judgment in *Kesavananda Bharati*[11] there was no justification for making additions to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein. The various constitutional amendments, by which additions were made to the Ninth Schedule on or after April 24, 1973, will be valid only if they do not damage or destroy the basic structure of the Constitution. (emphasis supplied)

b. *ECIL v. B. Karunakar*, (1993) 4 SCC 727

> 44. The need to make the law laid down in *Mohd. Ramzan Khan case*[12] prospective in operation requires no emphasis. As pointed out above, in view of the unsettled position of the law on the subject, the

[11] (1973) 4 SCC 225
[12] (1991) 1 SCC 588

authorities/managements all over the country had proceeded on the basis that there was no need to furnish a copy of the report of the enquiry officer to the delinquent employee and innumerable employees have been punished without giving them the copies of the reports. In some of the cases, the orders of punishment have long since become final while other cases are pending in courts at different stages. In many of the cases, the misconduct has been grave and in others the denial on the part of the management to furnish the report would ultimately prove to be no more than a technical mistake. To reopen all the disciplinary proceedings now would result in grave prejudice to administration which will far outweigh the benefit to the employees concerned. Both administrative reality and public interests do not, therefore, require that the orders of punishment passed prior to the decision in *Mohd. Ramzan Khan case* without furnishing the report of the enquiry officer should be disturbed and the disciplinary proceedings which gave rise to the said orders should be reopened on that account. Hence we hold as above.

c. *Ganga Ram Moolchandani v. State of Rajasthan*, (2001) 6 SCC 89 19

Last submission of Shri Rao is that in case the Rules are held to be ultra vires, the decision may be made prospective in operation as for a period of 32 years, when the Rules remained in force, innumerable appointments have been made thereunder which should not be disturbed to avoid a lot of complications. It is now well settled that the courts can make the law laid down by it prospective in operation to prevent unsettlement of the settled positions and administrative chaos apart from meeting the ends of justice....

20. Accepting the lead given in the above decision, this Court has since extended the doctrine to the interpretation of ordinary statutes as well. In

the cases of *Waman Rao* v. *Union of India*[13], *Atam Prakash* v. *State of Haryana*[14], *Orissa Cement Ltd.* v. *State of Orissa*[15], *Union of India* v. *Mohd. Ramzan Khan*[16] : and *Managing Director, ECIL* v. *B. Karunakar*[17] the device of prospective overruling was resorted to even in the case of ordinary statutes. We find in the fitness of things, the law decided in this case be declared to be prospective in operation.

24. In the result, Civil Appeal No. 6469 of 1998 is allowed, the impugned judgment passed by the High Court upholding the Rules is set aside and Rules 8(*ii*) and 15(*ii*) are struck down being violative of Articles 14 and 16 of the Constitution. It is made clear that this judgment will not affect any appointment made prior to this date under the Rules which have been found to be invalid hereinabove.

37. It is submitted that the Magisterial trial cases, so far tried and judgment pronounced by the Special Court MP/ MLA, manned by officers of the rank of Additional Session Judge, be held to be valid and legal.

Issue B : Whether Special Court can try offenses without a committal order under section 209 Cr.P.C. and try cases without cognizance being taken by the magistrate under section 193 Cr.P.C.?

38. That it is submitted that taking cognizance under section 193 Cr.P.C. or an order of committal by the magistrate under section 209 Cr.P.C. is not necessary in case of trial by Special Court, be it statutory Special Court or Special Court constituted

[13] (1981) 2 SCC 362
[14] (1986) 2 SCC 249
[15] 1991 Supp (1) SCC 430
[16] (1991) 1 SCC 588
[17] (1993) 4 SCC 727

under the orders of this Hon'ble Court passed under Article 142 of the Constitution. Neither the committal order nor taking of cognizance by magistrate are ingredients of a fair trial mandated under the Constitution. Absence of order of cognizance or a committal order by magistrate is an irregularity of procedure and does not result in failure of justice and the proceedings are saved by section 465 Cr.P.C. No other accused has raised any such objection in the trial.

39. The Amicus craves leave to invite the attention of this Hon'ble Court to the decision in *State of M.P. v. Bhooraji*, [(2001) 7 SCC 679], wherein a two judge Bench of this Hon'ble Court held as hereunder:

> "17. It is an uphill task for the accused in this case to show that failure of justice had in fact occasioned merely because the specified Sessions Court took cognizance of the offences without the case being committed to it. The normal and correct procedure, of course, is that the case should have been committed to the Special Court because that court being essentially a Court of Session can take cognizance of any offence only then. But if a specified Sessions Court, on the basis of the legal position then felt to be correct on account of a decision adopted by the High Court, had chosen to take cognizance without a committal order, what is the disadvantage of the accused in following the said course?
>
> 21. The expression "a court of competent jurisdiction" envisaged in Section 465 is to denote a validly constituted court conferred with jurisdiction to try the offence or offences. Such a court will not get denuded of its competence to try the case on account of any procedural lapse and the competence would remain unaffected by the non-compliance with the procedural requirement. The inability to take cognizance of an offence without a

committal order does not mean that a duly constituted court became an incompetent court for all purposes. If an objection was raised in that court at the earliest occasion on the ground that the case should have been committed by a Magistrate, the same specified court has to exercise a jurisdiction either for sending the records to a Magistrate for adopting committal proceedings or return the police report to the Public Prosecutor or the police for presentation before the Magistrate. Even this could be done only because the court has competence to deal with the case. Sometimes that court may have to hear arguments to decide that preliminary issue. Hence the argument advanced by the learned counsel on the strength of the aforesaid decisions is of no avail."

40. In *Rattiram v. State of M.P.*, [(2012) 4 SCC 516] a three judge Bench of this Hon'ble Court re-iterated the same principle by holding as under:

"20. After so stating, this Court in *Bhooraji case*[18] proceeded to deal with the stance whether the Special Judge as a Court of Session would remain incompetent to try the case until the case is committed and, after critical ratiocination, declined to accept the said stand and opined that the expression "a court of competent jurisdiction" as envisaged in Section 465 of the Code is to denote a validly constituted court conferred with the jurisdiction to try the offence or offences and such a court could not get denuded of its competence to try the case on account of any procedural lapse and the competence would remain unaffected by the non-compliance with the procedural requirement. The Bench further proceeded to lay down that the inability to take cognizance of an offence without a committal order does not mean that a duly constituted court becomes an incompetent court for all purposes. It was also ruled that had an objection been raised at the earlier stage, the Special Judge could have sent the record to the Magistrate

[18] (2001) 7 SCC 679

for adopting committal proceeding or return the police report to the Public Prosecutor or the police for presentation before the Magistrate. In essentiality, it has been laid down that the bar against taking cognizance of certain offences or by certain courts cannot govern the question whether the court concerned is a "court of competent jurisdiction" and further the condition precedent for taking cognizance is not the standard to determine whether the court concerned is "a court of competent jurisdiction".

39. The question posed by us fundamentally relates to the non-compliance with such interdict. The crux of the matter is whether it is such a substantial interdict which impinges upon the fate of the trial beyond any redemption or, for that matter it is such an omission or it is such an act that defeats the basic conception of fair trial. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.

66. Judged from these spectrums and analysed on the aforesaid premises, we come to the irresistible conclusion that the objection relating to non-compliance with Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial and, therefore, the decision rendered in *Bhooraji* lays down the correct law inasmuch as there is no failure of justice or no prejudice is caused to the accused."

CONCLUSION

41. It is submitted that the constitution of Special Courts both at the Sessions level and the Magistrate level is desirable, and has been so recorded by this Hon'ble Court in the order dated 04.12.2018. However, no illegality can be attached to the constitution of Special Courts at Sessions level for trial of both Sessions cases and Magisterial Trial cases, as the accused persons will get a fair trial before the said Court. The right of first appeal is not taken away, and instead of Session Court, the appeal would lie to the High Court. The right of revision is not an inherent right but only a supervisory jurisdiction.

42. The Allahabad High Court and the State of U.P. may be directed to constitute Special Court both at the Sessions level and Magistrate levels in all the districts of the State.

43. Similar directions may be issued to all the High Courts and the State Governments to constitute Special Courts both at Sessions level and at Magistrate level in each district or group of districts as may be considered appropriate by the High Court having regard to the number of cases and geographical location.

44. The Special Courts may be directed to conduct the trial against the MP/ MLAs on priority and on day to day basis. These Courts will take up other cases only after the trial of criminal cases of MPs/ MLAs are completed and in terms of the directions issued from time to time in the present proceedings.

45. This Hon'ble Court may be pleased to clarify that the directions to constitute Special Court both at Sessions level and Magistrate level will not affect the orders passed by the Special Courts at the Sessions level in respect of cases triable by

Magistrate under the Cr.P.C. The Magisterial trial cases already concluded or pending trial will not be open to challenge only on the ground that the final judgement and/or the interim orders have been passed by the Special Court headed by an officer of the rank of Sessions Judge.

46. The Special Court manned by the Sessions Judge/ Additional Sessions Judge shall transfer cases triable by Magistrate to the Special Court presided over by the Magistrate under the respective jurisdiction and the Magistrate shall conduct the trial from the stage the file has been received.

DATED : 23.11.2021

SUBMITTED BY

VIJAY HANSARIA, SR ADVOCATE