

A.R. ANTULAY
v.
R.S. NAIK & ORS.

OCTOBER 29, 1986

[E.S. VENKATARAMIAH AND SABYASACHI MUKHARJI, JJ.]

Supreme Court Rules, 1966 Order XVI read.

With Order XXLVII—Revocation of special leave—Whether an application for revocation of special leave can be granted by the Supreme Court when in a case in the presence of the counsel for the respondents and after hearing his submissions the said special leave was granted.

HELD: Having regard to the various aspects of the case and the important points of law which arise for consideration the petition to revoke the special leave cannot be granted. Further the special leave, was granted by the Court in the presence of the counsel for the respondents and after hearing his submissions. The petition has not only culminated in criminal appeal but the very same counsel has made a request that the case should be referred to a Constitution Bench. [92B, 91H]

CRIMINAL APPELLATE JURISDICTION: Criminal Miscellaneous Petition No. 4248 of 1986

IN

Criminal Appeal No. 468 of 1986

From the Judgment and Order dated 24.7.1986 of the Bombay High Court in special Case No. 24 of 1982.

Ram Jethmalani and Miss Rani Jethmalani for the Appellant.

P.P. Rao, R.S. Desai, M.N. Shroff, A.M. Khanwilkar and A.S. Bhasme for the Respondents.

The following Order of the Court was delivered:

The Special leave was granted by this court in this case in the presence of the learned counsel for the respondents and after hearing his submissions. Today we are asked to revoke the leave already

- A granted by us. We have considered the points urged before us in support of the application for revocation. We do not find any ground to revoke the special leave already granted by us. Shri Jethmalani learned counsel for the respondents reiterates his request which he had made on the date on which the Special leave was granted, namely that this case should be referred to a Constitution Bench. Having regard to
- B the various aspects of this case and the points which arise for consideration which we have recorded in the form of a note which forms part of this order, we agree with Shri Jethmalani that this case should be referred to a larger bench. We accordingly direct that this case should be listed for hearing before a bench of 7 Judges of this Court. Liberty to mention for early hearing. The papers may be placed before
- C the Hon'ble the Chief Justice of India for further directions regarding Constitution of the Bench.

The prayer for vacating the stay is rejected.

NOTE APPENDED

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A private complaint was first heard by Shri R.B. Sule who had been appointed as a Special Judge under section 6 (1) of the Criminal Law Amendment Act, 1952 by the Government of Maharashtra. The said Special Judge discharged the accused on the ground that there was no valid sanction to institute the complaint.

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The correctness of the said Order of the Special Judge was challenged before this Court by the Complainant in appeal. That appeal was allowed and the order of discharge passed by the Special Judge was set aside on February 16, 1984.

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The operative part of the judgment of this Court (*R.S. Nayak v. A.R. Antulay*, [1984] S.C.R. 495) is found at page 557 of the Report. It reads thus:

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"This appeal accordingly succeeds and is allowed. The order and decision of the learned Special Judge Shri R.B. Sule dated July 25, 1983 discharging the accused in Special Case No. 24 of 1982 and Special Case No. 3/83 is hereby set aside and the trial shall proceed further from the stage where the accused was discharged.

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The accused was the Chief Minister of a premier State—the State of Maharashtra. By a prosecution laun-

ched as early as on September 11, 1981, his character and integrity came under a cloud. Nearly 2½ years have rolled by and the case has not moved an inch further. An expeditious trial is primarily in the interest of the accused and a mandate of Art. 21. Expeditious disposal of a criminal case is in the interest of both the prosecution and the accused. Therefore, special Case No. 24 of 1982 and Special Case No. 3/83 pending in the Court of Special Judge, Greater Bombay shri R.B. Sule are withdrawn and transferred to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. On being so assigned, the learned Judge may proceed to expeditiously dispose of the cases preferably by holding the trial from day to day."

In this case the following points arise for consideration:

1. If an order of transfer of a criminal case which purports to violate Article 14 and Article 21 is passed against an accused person by this Court *without any pleading or hearing or even consulting his wishes in that regard*, can he not question it by an independent petition since a review is not an adequate remedy because the petitioner in a review petition (which by its very nature is of a restricted character) has no right of personal hearing at the stage of admission of the review petition?
2. Under the Criminal Law Amendment Act, 1952 an offence punishable under section 5 of the Prevention of Corruption Act or under sections 161, 162, 163, 164, 165 and 165A of the Indian Penal Code can be tried *only* by a Special Judge appointed under section 6 of that Act by the State Government. An order of transfer by this Court cannot be a substitute for an order of appointment to be made by the State Government under section 6 of that Act. In *Gurucharandas Chadha v. State of Rajasthan*, [1966] 2 S.C.R. 678 it is laid down that the trial by a special Judge is the *sine qua non* of a trial under that Act and a case can be transferred by this Court from one *Special Judge* to another *Special Judge* only. That means that all other courts including the High Court are excluded. In *Bhajahari Mondal v. State of West Bengal*, [1959] S.C.R. 1276 it is held that the trial

- A by a Judge who is not authorised to try a case amounts to an incurable illegality and the trial would be a nullity. In view of these decisions can the trial in this case proceed before a High Court Judge who is not a Special Judge? It may be noted that section 7(1) of the Criminal Law Amendment Act, 1952 which opens with a *non-obstante* clause prevails upon every provision in the Criminal Procedure Code including sections 406 and 407 which deal with the powers of transfer of criminal cases exercisable by the Supreme Court and the High Court respectively and upon every other law in force. Does not the order of transfer in this case deny the right of the accused to be tried according to the procedure established by law and is not Article 21 violated thereby?
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3. Has the accused in this case a remedy by way of appeal *as of right* under the Criminal Procedure Code? There appears to be a reasonable doubt in this case because section 374(1) of the Code of Criminal Procedure, 1973 provides for an appeal to this Court against a conviction by a High Court under its extraordinary original criminal jurisdiction. Clause 24 of the Letters Patent of the Bomaby High Court which confers extraordinary original criminal jurisdiction on the High Court refers only to cases brought before the High Court by the Advocate General, any Magistrate or any other officer specially empowered by the Government in that behalf. But this case is brought by a private person. If it falls outside clause 24 of the Letters Patent, the accused will have perhaps a remedy of appeal *by way of special leave* of this Court under Article 136 of the Constitution. Denial of even one appeal *as of right* may amount to violation of Article 14 and Article 21. Does not this question require examination?
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4. The Criminal law Amendment Act, 1952 as its preamble says is passed to provide for *speedier* trial? Does not further speeding up of the case by transferring the case of the High Court for speedy disposal violate the principle laid down by seven learned Judges of this Court in *Anwar Ali Sarkar's* case [1952] S.C.R. 284 and result in violation of Article 14 of the Constitution? The following observations of Vivian Bose, J. in *Anwar Ali Sarkar's*
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case at pages 366-367 of the Report are relevant:

"Tested in the light of these considerations, I am of opinion that the whole of the West Bengal Special Courts Act of 1950 offends the provisions of article 14 and is therefore bad. When the froth and the foam of discussion is cleared away and learned dialectics placed on one side, we reach at last the human element which to my mind is the most important of all. We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows, and however much the new procedure may give them a few crumbs of advantage, in the bulk they are deprived of substantial and valuable privileges of defence which others, similarly charged, are able to claim. It matters not to me, nor indeed to them and their families and their friends, whether this be done in good faith, whether it be done for the convenience of government, whether the process can be scientifically classified and labelled, or *whether it is an experiment in speedier trials made for the good of society at large*. It matters not how lofty and laudable the motives are. The question with which I charge myself is, can fair-minded, reasonable, unbiassed and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad."

(underlining by us)

Do not the above observations apply to judicial orders also?

If under the American Constitution a prisoner can challenge successfully a conviction which has become final on the ground of contravention of the VIth Amendment even after he is sent to jail, by an independent petition, (vide *Gideon's* case 372 U.S. 335) cannot an Indian citizen who had not been heard by this Court on the question of transfer complain by an independent petition before this Court before the commencement of

- A the trial that his fundamental rights under Article 14 and Article 21 are being violated even though he may have a remedy of a restricted character like a review petition and ask for a writ of prohibition against the trial Judge?
- B 6. Does the degree of heinousness of the crime with which an accused is charged or his status or the influence that he commands in society have any bearing on the applicability or the construction of Article 14 or Article 21?
- C 7. If a decision of this Court is given *per incuriam*, that is, without taking note of the appropriate legal provisions can that decision be treated as a binding precedent? Is it not a circumstance in jurisprudence which entitles a Court to disregard an earlier judicial precedent?
- D (See Salmond's Jurisprudence (Eleventh Edn. P. 203).
- E 8. We find that even when the accused in this case brought to the notice of this Court (before a Bench presided over by the Judge who delivered the judgment), the accused was not given relief. He was asked to file a review petition which is restricted in character and where he would have no right of oral hearing at the stage of admission or to file any other application which he may be entitled in law to file. In that situation, what is wrong in the accused who apprehends that a trial is going on against him contrary to the law and the Constitution without giving him a reasonable opportunity of being heard personally on that question as every other litigant in this Court is given except in review petitions, raising the question before the Judge who is trying him or in an appeal filed before this Court against the order of the Trial Judge?
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- G 9. Could the High Court not have requested the State Government to appoint a Judge of the High Court as a Special Judge in order to implement the direction of this Court? If this was possible, both the order of transfer passed by this Court and the Criminal Law Amendment Act, 1952 could have been satisfied by the issue of the necessary notification by the State Government. If this
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was possible, the accused can always raise the objection to the trial of the case before a Judge of the High Court until the notification is issued by the Government appointing him as a Special Judge, without in any way questioning the binding nature of the order of this Court, because while the order of transfer takes care of the territorial jurisdiction of the Trial Judge, a notification issued by the Government would confer the necessary competence on the Judge concerned. It may be noted that in *Chadha's* (supra) this Court has made this distinction between the territorial jurisdiction and the competence of the trial court.

There is another point to be considered in this context. Section 6(2) of the Criminal Law Amendment Act, 1952 says that a person shall not be qualified for appointment as a Special Judge under that Act unless he *is or has been* a Sessions Judge or an Additional Sessions Judge, or an Assistant Sessions Judge under the Code of Criminal Procedure. Even if the State Government wishes to appoint a High Court judge as a Special Judge it can only appoint such Judge who has filled any of these offices under the Criminal Procedure Code earlier. Justice P.S. Shah who is now trying the case was only a member of the Bar before he became a High Court Judge.

10. In recent times Article 21 is being interpreted liberally and is being extended to issues which were not considered to be within the scope of Article 21. Does that Article not, therefore, apply with greater force in the case of those persons, i.e., persons accused of criminal offences, for whom that Article was primarily intended?
11. *Question of Judicial discipline:* Recently the question of constitutional validity of certain provisions of the Punjab Pre-emption Act, 1913 as in force in Haryana came up for consideration before a Division Bench of two Judges (E.S. Venkataramiah and R.B. Misra, JJ). It was noticed by the Division Bench that the said provisions had been upheld by a Constitution Bench in *Ram Sarup v. Munshi*, [1963] 3 S.C.R. 858. The Division Bench felt that the decision in *Ram Sarup's* case

(supra) was erroneous and needed reconsideration. It accordingly admitted the case, issued stay orders and referred the matter to a larger Bench. Thereupon another Constitution Bench of five Judges accepted the reference, overruled the view of the another Constitution Bench and declared the impugned provisions as unconstitutional. (See *Atam Prakash v. State of Haryana*, [1986] 2 S.C.C. 249). In almost all the cases references to larger Benches are made by smaller Benches where the smaller Benches do not agree with the view of a larger Bench expressed earlier. It was a smaller Bench which doubted the view in *Shankari Prasad's case* [1952] S.C.R. 89 and in *Sajjan Singh's case* [1965] 1 S.C.R. 938 that referred the case to a larger Bench which decided *Golak Nath's case* [1967] 2 S.C.R. 762. It was again a smaller Bench which did not agree with the decision in *Golak Nath's case* that referred the case to a larger Bench which decided the *Keshvananda Bharati's case* [1973] Supp. S.C.R. 1 which overruled *Golak Nath's case*. In all such cases the smaller Benches had entertained the petitions and passed appropriate interim orders. In view of what is stated above, can it be said that in this case the Division Bench which having regard to the various constitutional issues involved in it merely granted Special Leave to Appeal and issued an interim order of stay had violated rules of judicial discipline? Even if all the issues are to be held against the appellant ultimately after hearing the appeal until that decision is given by this Court, is it not reasonable to stay the trial pending disposal of this appeal?

12. If ultimately it is found in this that the proceedings before the High Court consequent upon the order of transfer are not constitutional, what is the effect of that decision on all the proceedings which have gone on till now in the High Court and the decisions of this Court passed in appeals against the orders of the High Court passed at different stages in these proceedings?