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DHARAM PAL

v.

STATE OF HARYANA & ORS.

(Criminal Appeal No. 85 of 2016)

JANUARY 29, 2016

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[DIPAK MISRA AND PRAFULLA C. PANT, JJ.]

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Code of Criminal Procedure, 1973: s.173 – Investigation, transfer of – Rape of appellant's daughter and after few days murder of his wife – Acquittal of accused persons in rape case – Appeal thereagainst pending before the High Court – In murder case, appellant provided with security as threats received by him – Recommendation for transfer of cases to CBI – Whether situation calls for issuance of direction for transfer of the investigation to the CBI – High Court declined to so direct as trial had commenced and some witnesses were examined – On appeal, Held: Constitutional Courts can direct for further investigation or investigation by some other investigating agency – The power to order fresh, de-novo or re-investigation being vested with the Constitutional Courts, the commencement of a trial and examination of some witnesses cannot be an absolute impediment for exercising the said constitutional power which is meant to ensure a fair and just investigation – Order of High Court set aside and CBI directed to conduct the investigation.

Allowing the appeal, the Court

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HELD: 1. As the facts would reveal there was a request by the Additional Chief Secretary for handing over the investigation to the CBI; that departmental action was taken against the investigating authorities for negligent investigation; that the concerned ASI was reverted to the post of Head Constable; and that apart, certain material witnesses were not examined by the investigating agency without any rhyme or reason. The reasoning of the High Court was as the trial has commenced, there cannot be a transfer of the case to another investigating agency. [Para 16] [204-B-C]

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2. Section 173 Cr.P.C. empowers the Police Officer conducting investigation to file a report on completion of the investigation with the Magistrate empowered to take cognizance

of the offence. Section 173(8) Cr.P.C. empowers the office-in-charge to conduct further investigation even after filing of a report under Section 173(2) Cr.P.C. if he obtains further evidence, oral or documentary. Thus, the power of the Police Officer under Section 173(8) Cr.P.C. is unrestricted. The Magistrate has no power to interfere but it would be appropriate on the part of the investigating officer to inform the Court. [Para 17] [204-D-E]

3. The constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation. The direction for further investigation by another agency has to be very sparingly issued but in the facts of the instant case, the said power needs to be exercised. The purpose of justice commands that the cause of the victim, the husband of the deceased, deserves to be answered so that miscarriage of justice is avoided. Therefore, in this case the stage of the case cannot be the governing factor. [Para 20] [205-F-G]

4. It is the bounden duty of a Court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful investigation is imperative. The order of the High Court is set aside, and it is directed that the CBI shall conduct the investigation and file the report before the trial judge. The said investigation report shall be considered by the trial judge as per law. Till the report by the CBI is filed, the trial judge shall not proceed with the trial. [Paras 21, 22] [206-C-D, G]

State of West Bengal & others v. Committee for Protection of Democratic Rights, West Bengal and Others (2010) 3 SCC 571:2010 (2) SCR 979 – distinguished.

Narmada Bai v. State of Gujarat and Others (2011) 5 SCC 79: 2011 (5) SCR 729; *K.V. Rajendran v. Superintendent of Police, CBCID South Zone, Chennai and Others* (2013) 12 SCC 480: 2013 (9) SCR 199; *Rama Chaudhary v. State of Bihar* (2009) 6 SCC

- A **346: 2009 (5) SCR 482; *Vinay Tyagi v. Irshad Ali* (2013) 5 SCC 762; 2012 (13) SCR 1005; *Bhagwant Singh v. Commr. Of Police* (1985) 2 SCC 537; 1985 (3) SCR 942 – referred to.**

Case Law Reference

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|---|---------------------------|-----------------------|----------------|
| B | 2010 (2) SCR 979 | distinguished. | Para 8 |
| | 2011 (5) SCR 729 | referred to. | Para 14 |
| | 2013 (9) SCR 199 | referred to. | Para 15 |
| | 2009 (5) SCR 482 | referred to. | Para 17 |
| C | 2012 (13) SCR 1005 | referred to. | Para 18 |
| | 1985 (3) SCR 942 | referred to. | Para 18 |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 85 of 2016

- D From the Judgment and Order dated 26.02.2015 of the High Court of Punjab & Haryana at Chandigarh in CRMM No. 24527 of 2013.

Colin Gonsalves, Kamlesh Kumar Mishra, Satya Mitra for the Appellant.

- E Tushar Mehta, ASG, P. K. Dey, Kumar Parimal, B. V. Balram, Sanjay Kumar Visen for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

- F 2. Cry for fair trial by the accused as well as by the victim sometimes remains in the singular and individualistic realm, may be due to the perception gatherable from the facts that there is an attempt to contest on the plinth of fairness being provoked by some kind of vengeance or singularity of “affected purpose”; but, irrefutably a pronounced and pregnant one, there are occasions when the individual cry is not guided
- G by any kind of revengeful attitude or anger or venom, but by the distressing disappointment faced by the grieved person in getting his voice heard in proper perspective by the authorities who are in charge of conducting investigation and the frustration of a victim gets more aggravated when he is impecunious, and mentally shattered owing to the situation he is in
- H and thereby knows not where to go, the anguish takes the character of

collective agony. When the investigation, as perceived by him, is nothing but an apology for the same and mirrors before him the world of disillusionment that gives rise to the scuffle between the majesty and sanctity of law on one hand and its abuses on the other, he is constrained to seek intervention of the superior courts putting forth a case that his cry is not motivated but an expression of collective mortification and the intention is that justice should not be attenuated.

3. Justice, which is “truth in action” and “the firm and continuous desire to render to everyone which in his due” becomes a mirage for the victim and being perturbed he knocks at the doors of the High Court under Article 226 of the Constitution alleging that principle of fair and proper investigation has been comatosed by the investigating agency, for the said agency has crucified the concept of faith in the investigation which is expected to maintain loyalty to law and sustain fidelity to its purpose. In the case at hand, the assertions made with immense anguish gave rise to the question before the High Court whether some progress in trial would act as a remora in the dispensation of justice and the situation should be allowed to remain as it is so that an organic disorder is allowed to creep in and corrode and create a cul-de-sac in administration of justice. The further question posed whether the non-approach to the court prior to the stage of commencement of trial would be a peccadillo so as to usher in an absolutely indifferent, unconcerned and, in a way, biased investigation to rule and in the ultimate eventuate lead to guillotining of justice. The High Court having negatived the stand put forth by the appellant, the husband of the deceased, he has approached this Court by way of special leave.

4. With the aforesaid prefatory note and a short prelude to the grievance of the appellant, we proceed to narrate the facts.

5. The minor daughter of the appellant who was raped by the accused persons was threatened with dire consequences in case she disclosed the incident. The incident, as alleged, occurred on 06.08.2012. Despite the threat, the daughter disclosed the incident to her parents. Keeping in view the future of the girl and the social repercussions, they chose to suffer in silence rather than set the criminal law in motion. When the family stood reconciled to the situation, something extremely untoward happened. On 02.09.2012, Kamlesh Devi, wife of the appellant, had gone to village Nilikhen for taking medicine for her teeth and gums problem but did not return home on that day. The appellant searched for

A his wife along with his relatives and eventually a bag containing vegetables
and medicines and some other articles belonging to the wife was found
underneath the bridge Manak Majra on the lower side of Sarsa Branch
river. The appellant suspected that Kusum, wife of Sukh Ram, resident
of Kalsi and Aman alias Virender had abducted his wife or had thrown
her into the river. In such a situation, the appellant lodged an FIR, on
B 05.09.2012 at P.S. Butana. The investigating agency registered the FIR
No. 354 for the offences under Section 363, 366-A, 506, 365 and 34 of
the Indian Penal Code (for short "IPC"). During the investigation, on
05.09.2012, the dead body of Kamlesh Devi was found near the Sarsa
Branch canal bridge. Thereafter, the appellant and his daughter were
C examined and on that basis, offence under Section 376 IPC was added.
Eventually, the allegations were segregated and FIR No. 394 dated
20.09.2012 under Sections 363, 365, 376(2)G, 506, 201 and 120-B IPC
and Section 3 of the Scheduled Castes and the Scheduled Tribes
(Prevention of Atrocities) Act, 1989 was registered and after the
investigation, a charge-sheet was filed. Be it stated, the accused persons
D in FIR No. 394 dated 20.09.2012 have been acquitted by the judgment
dated 12.03.2014 by the learned Sessions Judge. Against the judgment
of acquittal, the appellant has filed a criminal appeal which is pending
before the High Court of Punjab and Haryana. Therefore, we shall refrain
from referring to the facts of the said case.

E 6. Coming to the subject matter of FIR No. 354 which relates to
the murder of the wife of the appellant, as is evident, the report would
show that the cause of death was due to strangulation coupled with
head injury which is antiemortem in nature and sufficient to cause death
in ordinary course. Apart from the accused persons named in the FIR,
F another person, namely, Krishan Kumar, was also implicated who was
arrested on 19.10.2012. The other two accused persons, namely, Aman
and Kusum were taken into custody on 30.10.2012. It is a matter of
record that the appellant was provided security personnel as threats
were received by the appellant for entering into a compromise in the
rape case, and for change of his version in the murder case of his wife.

G 7. It has been asserted and not denied by the respondents that
on 28.01.2013, the Superintendent of Police, Karnal vide Office Memo
No. 3961 recommended to the Director General of Police, Haryana that
the case bearing FIR No. 354 along with the rape case and the unsolved
case of murder of the sister-in-law of the appellant be transferred to the
H Central Bureau of Investigation (CBI), New Delhi. Based on the said

recommendation, the Additionally Chief Secretary, Government of Haryana vide Office Memo No. 20/2/2013-3HG1 requested the Secretary to the Government of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, New Delhi for handing over the investigation to the CBI. It has also been asserted that a departmental action has been taken against ASI Ram Prakash and SHO Sanjeev Malik on the basis of the complaints made by the appellant. On information being sought by the appellant under the Right to Information Act, 2005, he has been informed vide communication dated 17.11.2014 that departmental inquiry had already been initiated against ASI Ram Prakash and SHO Sanjeev Malik on charges of dereliction and negligence of duty. It was also mentioned in the reply that as a result of departmental inquiry, Ram Prakash had been reverted from the post of ASI to Head Constable, and with respect to Sanjeev Malik, the proceedings had been sent to the Deputy Commissioner of Police, Ambala for being transferred.

8. The issue that arises for consideration is whether such a situation calls for issuance of direction for transfer of the investigation to the CBI. The High Court has declined to do so direct as trial has commenced and some witnesses have been examined. The High Court has gone by the principle of “stage”. When the matter was listed on 18.09.2015, this Court had directed a copy of the petition to be served on Mr. P.K. Dey, learned counsel who ordinarily appears for the CBI. The stand of the CBI is that the case does not fall within the guidelines laid down by this Court in *State of West Bengal & others v. Committee for Protection of Democratic Rights, West Bengal and others*¹.

9. Learned counsel for the State has supported the order passed by the High Court and also emphasized that regard being had to the stage of the trial, there is no need for directing for investigation by another agency.

10. First, we intend to deal with the stand of the CBI and the principles laid down in *Committee for Protection of Democratic Rights* (supra). In the said case, the Constitution Bench, after examining the rival contentions in the context of the constitutional scheme, recorded the following conclusions:-

“(i) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any constitutional or

¹ (2010) 3 SCC 571

- A statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.
- B (ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers.
- C In certain situations even a witness to the crime may seek for and shall be granted protection by the State.
- D (iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Courts under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the constitutional courts with regard to the enforcement of fundamental rights. As a matter of fact, such a power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of “the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review”.
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- H (iv) If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that the Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226,

whenever there is an attempted violation. In the circumstances, any direction by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure. A

(v) Restriction on Parliament by the Constitution and restriction on the executive by Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Articles 32 and 226 of the Constitution. B

(vi) If in terms of Entry 2 of List II of the Seventh Schedule on the one hand and Entry 2-A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, the Court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the statute. In our opinion, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the Court fails to grant relief, it would be failing in its constitutional duty. C D

(vii) When the Special Police Act itself provides that subject to the consent by the State, CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State police, the Court can also exercise its constitutional power of judicial review and direct CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the constitutional courts. Therefore, exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure. E F G

[emphasis added]

11. After recording the conclusions, the Constitution Bench added a note of caution which we may profitably reproduce:-

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- A “Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the
- B said articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has
- C levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.”
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[underlying is ours]

- E 12. In the said case, a contention was raised that a detailed charge-sheet had been filed and subsequent to the filing of the said detailed charge-sheet, a supplementary charge-sheet had also been filed to complete the evidence, both oral and documentary, to bring home the guilt of the accused before the competent court and in accordance with
- F the direction given by the Court further investigation had been carried out in accordance with Section 173(8) of the Code of Criminal Procedure and, therefore, the jurisdiction of this Court under Article 32 of the Constitution had come to an end. In essence, the submission was that when a charge-sheet was filed after conducting the investigation under
- G the supervision and monitoring of the Court, there was no need to transfer the case to another agency. Repelling the said submission, the larger Bench opined, regard being had to the nature of the crime and the persons involved, the investigation could not be said to be satisfactorily held. That apart, the Constitution Bench also ruled that in the circumstances it was not sufficient to instill confidence in the minds of the victims as well
- H as the public at large that State should be allowed to continue the

investigation when the alleged offences were against its officials. Under these circumstances, the Court directed the CBI to take up the investigation and submit a report. A

13. On a perusal of the said authority, we really do not find any aspect which would support the stand put forth by the learned counsel for the CBI. On the contrary, as we perceive, the Constitution Bench has laid great emphasis on instilling of faith of the victim and the public at large in the investigating agency. True it is, the facts in the said case were different and related to alleged crimes committed by certain State officials, but the base of confidence in investigation has been significantly highlighted. B C

14. In the context, we may profitably refer to a two-Judge Bench decision in *Narmada Bai v. State of Gujarat and others*². The Court, in the factual matrix of the case, has emphasized that if the majesty of the rule of law is to be upheld and if it is to be ensured that the guilty are punished in accordance with law notwithstanding their status and authority which they might have enjoyed, it is desirable to entrust the investigation to CBI. D

15. A three-Judge Bench in *K.V. Rajendran v. Superintendent of Police, CBCID South Zone, Chennai and others*³ reiterating the said principle stated that the power of transferring such investigation must be in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instill confidence in the public mind, or where investigation by the State police lacks credibility and it is necessary for having “a fair, honest and complete investigation”, and particularly, when it is imperative to retain public confidence in the impartial working of the State agencies. The Court, after referring to earlier decisions, has laid down as follows:- E F

“In view of the above, the law can be summarised to the effect that the Court could exercise its constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like CBI only in rare and exceptional cases. Such as where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further that it is so necessary to G

² (2011) 5 SCC 79

³ (2013) 12 SCC 480

A do justice and to instil confidence in the investigation or where the investigation is prima facie found to be tainted/biased.”

16. The factual scenario in the present case has to be appreciated on the touchstone of the aforesaid authorities. As the facts would reveal there was a request by the Additional Chief Secretary for handing over the investigation to the CBI; that departmental action was taken against the investigating authorities for negligent investigation; that the concerned ASI has been reverted to the post of Head Constable; and that apart, certain material witnesses have not been examined by the investigating agency without any rhyme or reason. The reasoning of the High Court is as the trial has commenced, there cannot be a transfer of the case to another investigating agency.

17. In this context, we may notice the statutory scheme pertaining to investigation. Section 173 Cr.P.C. empowers the Police Officer conducting investigation to file a report on completion of the investigation with the Magistrate empowered to take cognizance of the offence. Section 173(8) Cr.P.C. empowers the office-in-charge to conduct further investigation even after filing of a report under Section 173(2) Cr.P.C. if he obtains further evidence, oral or documentary. Thus, the power of the Police Officer under Section 173(8) Cr.P.C. is unrestricted. Needless to say, the Magistrate has no power to interfere but it would be appropriate on the part of the investigating officer to inform the Court. It has been so stated in *Rama Chaudhary v. State of Bihar*⁴.

18. In *Vinay Tyagi v. Irshad Ali*⁵, wherein a two-Judge Bench, after referring to the decision in *Bhagwant Singh v. Commr. Of Police*⁶ has held thus:-

F “However, having given our considered thought to the principles stated in these judgments, we are of the view that the Magistrate before whom a report under Section 173(2) of the Code is filed, is empowered in law to direct “further investigation” and require the police to submit a further or a supplementary report. A three-Judge Bench of this Court in *Bhagwant Singh* has, in no uncertain terms, stated that principle, as aforenoticed.”

19. In the said case, the question had arisen whether a Magistrate can direct for re-investigation. While dealing with the said issue, the

⁴ (2009) 6 SCC 346

⁵ (2013) 5 SCC 762

⁶ (1985) 2 SCC 537

Court has observed:-

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“At this stage, we may also state another well-settled canon of the criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct “further investigation”, “fresh” or “de novo” and even “reinvestigation”. “Fresh”, “de novo” and “reinvestigation” are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection.”

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[Emphasis supplied]

And again:-

“Whether the Magistrate should direct “further investigation” or not is again a matter which will depend upon the facts of a given case. The learned Magistrate or the higher court of competent jurisdiction would direct “further investigation” or “reinvestigation” as the case may be, on the facts of a given case. Where the Magistrate can only direct further investigation, the courts of higher jurisdiction can direct further, reinvestigation or even investigation de novo depending on the facts of a given case. It will be the specific order of the court that would determine the nature of investigation.”

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20. Be it noted here that the constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation. We are absolutely conscious that direction for further investigation by another agency has to be very sparingly issued but the facts depicted in this case compel us to exercise the said power. We are disposed to think that purpose of justice commands that the cause of the victim, the husband of the deceased, deserves to be answered so that miscarriage of justice is avoided. Therefore, in this case the stage of the case cannot be the governing factor.

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21. We may further elucidate. The power to order fresh, *de-novo* or re-investigation being vested with the Constitutional Courts, the

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- A commencement of a trial and examination of some witnesses cannot be an absolute impediment for exercising the said constitutional power which is meant to ensure a fair and just investigation. It can never be forgotten that as the great ocean has only one test, the test of salt, so does justice has one flavour, the flavour of answering to the distress of the people without any discrimination. We may hasten to add that the democratic
- B setup has the potentiality of ruination if a citizen feels, the truth uttered by a poor man is seldom listened to. Not for nothing it has been said that Sun rises and Sun sets, light and darkness, winter and spring come and go, even the course of time is playful but truth remains and sparkles when justice is done. It is the bounden duty of a Court of law to uphold
- C the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful investigation is imperative. If there is indentation or concavity in the investigation, can the 'faith' in
- D investigation be regarded as the gospel truth? Will it have the sanctity or the purity of a genuine investigation? If a grave suspicion arises with regard to the investigation, should a Constitutional Court close its hands and accept the proposition that as the trial has commenced, the matter is beyond it? That is the "tour de force" of the prosecution and if we allow ourselves to say so it has become "id'ee fixe" but in our view the
- E imperium of the Constitutional Courts cannot be stifled or smothered by bon mot or polemic. Of course, the suspicion must have some sort of base and foundation and not a figment of one's wild imagination. One may think an impartial investigation would be a nostrum but not doing so would be like playing possum. As has been stated earlier facts are self-
- F evident and the grieved protagonist, a person belonging to the lower strata. He should not harbor the feeling that he is an "orphan under law".

22. In view of the aforesaid analysis, the appeal is allowed, the order of the High Court is set aside, and it is directed that the CBI shall conduct the investigation and file the report before the learned trial judge.
- G The said investigation report shall be considered by the trial judge as per law. Till the report by the CBI is filed, the learned trial judge shall not proceed with the trial. A copy of the order be handed over to Mr. P.K. Dey, learned counsel for the CBI to do the needful.