

ITEM NO.14 Court 1 (Video Conferencing) SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Writ Petition(s)(Civil) No(s).699/2016

ASHWINI KUMAR UPADHYAY

Petitioner(s)

VERSUS

UNION OF INDIA & ANR.

Respondent(s)

(MR. VIJAY HANSARIA, (SR.ADV.) IS AMICUS CURIAE IN THE INSTANT MATTER.

IA No. 73459/2019 - APPROPRIATE ORDERS/DIRECTIONS

IA No. 107427/2018 - APPROPRIATE ORDERS/DIRECTIONS

IA No. 39027/2020 - APPROPRIATE ORDERS/DIRECTIONS

IA No. 54637/2017 - CLARIFICATION/DIRECTION

IA No. 81287/2018 - CLARIFICATION/DIRECTION

IA No. 2029/2020 - CLARIFICATION/DIRECTION

IA No. 136819/2017 - CLARIFICATION/DIRECTION

IA No. 54552/2017 - DIRECTIONS

IA No. 107431/2018 - EXEMPTION FROM FILING O.T.

IA No. 146933/2018 - EXEMPTION FROM FILING O.T.

IA No. 130543/2018 - EXEMPTION FROM FILING O.T.

IA No. 103522/2019 - EXEMPTION FROM FILING O.T.

IA No. 127368/2018 - INTERVENTION APPLICATION

IA No. 2083/2019 - INTERVENTION APPLICATION

IA No. 81286/2018 - INTERVENTION APPLICATION

IA No. 2027/2020 - INTERVENTION APPLICATION

IA No. 58124/2017 - INTERVENTION/IMPLEADMENT

IA No. 57812/2017 - INTERVENTION/IMPLEADMENT

IA No. 127023/2018 - INTERVENTION/IMPLEADMENT

IA No. 71929/2019 - INTERVENTION/IMPLEADMENT

IA No. 2085/2019 - PERMISSION TO APPEAR AND ARGUE IN PERSON

IA No. 98425/2019 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES

IA No. 72938/2019 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES

IA No. 130542/2018 - STAY APPLICATION)

Date : 10-08-2021 These matters were called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE VINEET SARAN

HON'BLE MR. JUSTICE SURYA KANT

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SATISH KUMAR YADAV
Date: 2021.08.10
20:01:52 IST
Reason: I

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UPON hearing the counsel the Court made the following
O R D E R

The Court is convened through Video Conferencing.

At the commencement of hearing, Mr. Tushar Mehta, learned Solicitor General appearing on behalf of the Union of India seeks further time to comply with the directions passed by this Court on 10.09.2020, 16.09.2020, 06.10.2020 and 04.11.2020 regarding filing of Status Report regarding pending cases against the legislators(sitting or former).

Finally, two weeks' time is granted to the learned Solicitor General to file response/affidavit in compliance of the directions given by this Court vide orders dated 10.09.2020, 16.09.2020, 06.10.2020 and 04.11.2020 with a copy in advance to the learned *amicus curiae* within ten days.

We have heard Mr.Vijay Hansaria, learned *amicus curiae*, Mr. Tushar Mehta, learned Solicitor General as also the learned counsel for the parties.

At the outset we may note that the learned *Amicus* has filed his 13th Report dated 09.08.2021. The Report, *inter alia*, addresses various concerns which are broadly indicated as under:

- (I) Misuse of the Prosecutor's power to withdraw cases under Section 321, Cr.P.C.
- (II) Continuity of tenure of Judicial Officers
- (III) Jurisdiction of Special Court (M.P./M.L.A.) to try cases against legislators elected from other States
- (IV) Jurisdiction of Special Courts with respect to cases triable by Magistrates
- (V) Trial of cases where an M.P./M.L.A. is the complainant
- (VI) Safe and secure witness examination facility

We are inclined to address the first two issues by this order as these issues are of immediate concern and may be easily disposed of. It may not be out of context to state that issues no. 3 and 4

give rise to substantive question of law which may require some elaborate arguments, which will be taken up on a subsequent date.

Misuse of Prosecutor's Power u/s 321 of Cr.P.C.

Learned *amicus* has drawn our attention to various instances across the country, wherein various State Governments have resorted to withdrawal of numerous criminal cases pending against M.P./M.L.A. by utilising the power vested under Section 321, Cr.P.C. It merits mentioning that the power under Section 321, Cr.P.C. is a responsibility which is to be utilized in public interest, and cannot be used for extraneous and political considerations. This power is required to be utilized with utmost good faith to serve the larger public interest. Recently, this Court in *State of Kerala Vs. K. Ajith*, (2021) SCC Online SC 510, held as under:

“The principles which emerge from the decisions of this Court on the withdrawal of a prosecution under Section 321 of the CrPC can now be formulated:

(i) Section 321 entrusts the decision to withdraw from a prosecution to the public prosecutor but the consent of the court is required for a withdrawal of the prosecution;

(ii) The public prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;

(iii) The public prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;

(iv) While the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to

ensure that the public prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons;

(v) In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:

(a) The function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes;

(b) The application has been made in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law;

(c) The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given;

(d) The grant of consent sub-serves the administration of justice; and

(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the public prosecutor is duty bound to maintain;

(vi) While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and

(vii) In a situation where both the trial judge

and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent."

In view of the law laid down by this Court, we deem it appropriate to direct that no prosecution against a sitting or former M.P./M.L.A. shall be withdrawn without the leave of the High Court in the respective *suo-motu* writ petitions registered in pursuance of our order dated 16.09.2020. The High Courts are requested to examine the withdrawals, whether pending or disposed of since 16.09.2020, in light of guidelines laid down by this Court.

Continuity of Tenure for Judicial Officer

This Court vide order dated 16.09.2020 had recorded the submissions of the learned *amicus curiae* as under: -

"The High Courts would designate a judicial officer for all such cases, who shall try these cases on priority basis. The judicial officer can be allotted other work depending on the workload, number and nature of criminal cases against MPs/MLAs. The judicial officer so designated shall have continuity of tenure for a minimum period of two years."

It may be noticed that during the intervening period, we faced a pandemic which scuttled many Courts in effectively conducting

trials, or recording evidence or hearing applications. In this context, the Registrar Generals of all High Courts are directed to furnish the following information in form of the following table :

NAME OF THE JUDGE	PLACE/COURT OF POSTING	DATE OF PRESENT POSTING	No. OF DAYS/YEARS IN THE PRESENT POSTING	NUMBER OF CASES DISPOSED DURING CURRENT POSTING	NUMBER OF PENDING CASES BEFORE HIM/HER (DETAILS)	STAGE OF PENDING CASES (DETAILS)	DETAILS OF ORDERS/JUDGMENTS RESERVED

In the meanwhile, to ensure expeditious disposal of pending cases, it is necessary for this Court to direct the officers presiding over Special Courts or CBI Courts involving prosecution of MPs or MLAs to continue in their present posts until further orders. This direction, barring transfer of Judicial Officers, will be subject to their superannuation or death. If any further necessity or emergency arises, the Registrar General of the High Courts are at liberty to make an application before us for retention or to relieve those officers.

List the matter on 25.08.2021 for arguments on other issues indicated above.

In the meantime, the Registry is directed to serve copies of the IAs immediately to the learned *amicus curiae*, which have been filed recently and not been served to him.

Liberty is granted to Ms. Kamini Jaiswal, learned counsel appearing on behalf of the applicant in I.A.Nos.51582/2021, 51586/2021 and 51587/2021 in WP(C)No.699/2016 to make request to the High Court of Gujarat to adjourn the case which is stated to be listed for hearing on 23.08.2021.

(SATISH KUMAR YADAV)
DEPUTY REGISTRAR

(R. S. NARAYANAN)
COURT MASTER (NSH)