IN THE HIGH COURT FOR THE STATE OF TELANGANA AT HYDERABAD

FRIDAY, THE TWENTY SEVENTH DAY OF SEPTEMBER
TWO THOUSAND AND TWENTY FOUR

PRESENT

THE HONOURABLE THE CHIEF JUSTICE ALOK ARADHE
AND
THE HONOURABLE SRI JUSTICE J SREENIVAS RAO

WRIT APPEAL NO: 1005 OF 2024

Writ Appeal under clause 15 of the Letters Patent against the order dated 15/04/2024 in W.P.No. 27309 of 2023 on the file of the High Court.

Between:

Abdul Khader @ Abdul Quadar, S/o Abdul Azeez, Aged 52years,Occupation KarateMaster, R/o H- No. 9- 20- 1980/1, Autonagar, Near Osman Masjid, Nizamabad.

...APPELLANT

AND

1. Union of India, Rep by its Under Secretary, Ministry of Home, Central Secretariat, New Delhi
2. National Investigation Agency, Rep by its Inspector of Police National Investigation Agency, Hyderabad.

...RESPONDENTS

IA NO: 2 OF 2024

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to suspend the order of the learned Single Judge in WP. No. 27309 of 2023 dated 15. 04. 2024 and Quash the statements of the witnesses mentioned in List No. 1 and presented in Annexure P3 Series, which are enumerated in the witness list of the charge sheet filed by the Respondent issue any other writ, order, or direction as this Honble Court deems fit in the interest of justice and equality.

IA NO: 4 OF 2024

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to direct the court below tc defer the charge in SPL SC No.1 of 2023 pending on the file of IV Metropolitan Session Judge cum special court for NIA Cases at Hyderabad arising out Crime No. RC - 03/2022/NIA/HYD in NIA Police Station Hyderabad U/s 120B, 153A of IPC and section 13(1) (b), 18, 18A and 18B of the UA (P) Act, 1967 wherein petitioner is arrayed as Accused No.1.

Counsel for the Appellants : SRI TAHIR, rep., SRI MOHAMMED MOINUDDIN

Counsel for the Respondents: SRI B.NARASIMHA SHARMA,
ADDL.SOLICITOR GEN. OF INDIA

The Court made the following: JUDGMENT

THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE

AND

THE HON'BLE SRI JUSTICE J.SREENIVAS RAO

WRIT APPEAL No.1005 of 2024

JUDGMENT: *(Per the Hon'ble Sri Justice J. Sreenivas Rao)*

This intra-court appeal is filed by the appellant aggrieved by the order dated 15.04.2024 passed by the learned Single Judge in dismissing W.P.No.27309 of 2023.

2. Heard Sri Tahir, learned counsel representing Sri Mohammed Moinuddin, learned counsel for the appellant and Sri B.Narasimha Sharma, learned Additional Solicitor General of India appearing for the respondents.

3. **Brief facts of the case:**

3.1. On 04.07.2022 at 04:30 hours on credible information that some anti-national activities are going on in a house bearing No.9-20-1980/1 at Auto Nagar, near Osmania Masjid, Nizamabad, wherein suspicious persons from other districts of Telangana and other States are visiting the house at odd hours and involving in clandestine activities and some anti-national elements are conducting training classes at the said premises, the Sub-Inspector of Police, Nizamabad VI Town, Nizamabad District,

prepared search memo under Section 165 of Code of Criminal Procedure, 1973 (Cr.P.C) and he along with other officials went to the spot. During their search at the above mentioned house, they found flexi hanging to the wall with the caption of 'LEGAL AWARENESS PROGRAM' and under it 'organising' was written and also written as POPULAR FRONT OF INDIA (PFI). On enquiry, the owner of the house i.e., accused No.1, confessed that some accused persons, who belong to PFI, approached him and told that they would provide a financial assistance of Rs.6.00 lakhs in each phase-wise so as to construct a portion on the roof of his house to impart training to the cadres of PFI and also to use the premises for meetings of the organization, for which, he accepted the proposal of PFI and as per their suggestion, he constructed walls around the top of his building and built a conference hall and started imparting karate training to the PFI members of Telangana. Further, they also decided to fight against the speeches of BJP State President-Bandi Sanjay and Nizamabad Member of Parliament-Aravind and to achieve this goal, they started giving coaching/physical exercises to the youth persons in the name of Karate classes and briefing them and they also used to provoke the Hindu community people with their hatred speeches etc. The

activities of accused No.1 and his associates, who are the members of the organization PFI and are mostly from the banned organization SIMI (Student Islamic Movement of India), are illegal and against the Constitution of India. On that, the Sub-Inspector of Police recorded the confessional statement of accused No.1 and seized four Flexies, white board, Bardan, sticks (15), Nonchaks (3), Note books (3), Paper bunches, Hand books (3), Podiam, 7 bus Tickets and 2 train tickets along with two cell phones of accused No.1 and registered Crime No.141 of 2022 on 04.07.2022 for the offences punishable under Sections 120B, 121A, 153A and 141 read with 34 IPC and Section 13(1)(b) of the Unlawful Activities (Prevention) Act, 1967 (for short, 'UA (P) Act').

3.2. The Central Government has received the above said information regarding registration of F.I.R.No.141 of 2022 dated 04.07.2022 against accused No.1 and 26 persons and others, relating to some anti-national activities that are conducting in the house of accused No.1, which amounts to a conspiracy to wage war against the Government of India and since accused No.1 had admitted that in lieu of financial assistance of Rs.6 lakhs promised by some accused persons belonging to PFI constructed a portion on the roof of his house and allowed the premises to be used for

imparting training to the cadres of PFI and started coaching/physical exercises for the youth in the name of Karate classes, added Sections 18A and 18B of UA (P) Act in the above said crime.

3.3. The Central Government is of the opinion that a Scheduled Offence under the National Investigation Agency Act, 2008, has been committed and having regard to the gravity of the offence and its repercussions on national security, it is required to be investigated by the National Investigation Agency in accordance with the National Investigation Agency Act, 2008. Therefore, the Government of India, Ministry of Home Affairs, CTCR Division, North Block, New Delhi, vide Order F. No. 11011/73/2022/NIA dated 25.08.2022 issued as per provisions of sub-section (5) of Section 6 read with Section 8 of the National Investigation Agency Act, 2008 directing National Investigating Agency (NIA) to take up investigation of the aforesaid case.

3.4. The NIA filed charge sheet on 29.12.2022 against the appellant and others before the IV Additional Metropolitan Sessions Judge-cum-Special Court for NIA Cases at Hyderabad and the said Court has taken cognizance and numbered as SPL.S.C.No.1 of 2022.

3.5. The appellant filed writ petition i.e., W.P.No.27309 of 2023 seeking to quash the statements of witnesses on the ground that the investigating agency recorded the statements of witnesses under Sections 161 and 164 of Cr.P.C., though they have to record the same under Section 306 of Cr.P.C. Learned Single Judge dismissed the said writ petition, by its order dated 15.04.2024. Hence, this writ appeal.

4. Submissions of the learned counsel for the appellant:

4.1. Learned counsel for the appellant contended that the investigating agency ought to have recorded the statements of witnesses under the provisions of Section 306 of Cr.P.C. as all the cited witnesses are the members of notified association. He further contended that there is a clear distinction between the offences in the Code and there is specific bar to record the statement of accomplice under Sections 161 and 164(5) of Cr.P.C. and right and proper procedure to elicit facts of the case or tender pardon is provided under Section 306 of Cr.P.C. The statements recorded by the investigating agency are in contravention of Section 306 of Cr.P.C.

4.2. It is submitted that under the guise of investigation, the investigating agency has interrogated innocent individuals and by

instilling fear of prosecution recorded their statements under Sections 161 and 164 of Cr.P.C. in order to falsely implicate the appellant and other accused persons and stigmatize one section of the society, without following the mandatory procedure as envisaged under Section 306 of Cr.P.C. and filed charge sheet. The learned Single Judge without properly considering the said contentions dismissed the writ petition.

4.3. It is argued that the learned Single Judge has not appreciated the principle laid down in **Laxmipat Choraria and others v. State of Maharashtra**[1], wherein the Division Bench of the Hon'ble Supreme Court of India held at paragraph Nos.14 and 28, as follows:

> "14. It is, however, necessary to say that where s. 337 or 338 of the Code apply, it is always proper to invoke those sections and follow the procedure there laid down. Where these sections do not apply there is the procedure of withdrawal of the case against an accomplice. The observations of Cockburn, C.J. and Black-burn and Mellor, JJ. in Charlotte Winsor v. Queen(1) must always be borne in mind. Cockburn, C.J. observed:
>
> > "No doubt that state of things, which the resolution of the judges, as reported to have

[1] AIR 1968 SC 938

> been made in Lord Hold's time, was intended to prevent, occurred; it did place the prisoner under this disadvantage; whereas, upon the first trial that most important evidence could not be given against her, it was given against her upon the second, so that the discharge of the jury was productive to her of that disadvantage. I equally feel the force of the objection that the fellow prisoner was allowed to give evidence without having been first acquitted, or convicted and sentenced. I think it much to be lamented."

18. The above observations have received adverse comments from Wigmore (3rd Edition) Vol. III paragraph 797. The earlier cases probably took into account the possibility of trick photography and the changes likely by adjustment of the apparatus. Wigmore rightly points out that unless we are prepared to go to the length of maintaining that exact reproduction of the handwriting by photography is in the nature of things impossible, the photograph must be admissible in proof. Wigmore then observes

> "The state of the modern photographic art has long outlawed the judicial doubts above quoted. All that can be said is that a photograph of a writing may be made to falsify, like other photographs and like other kinds of testimony, and that a qualified witness affirmation of its exactness suffices to remove this danger, -as much as any such testimonial danger can be

> removed. Accordingly, it is generally conceded that a photographic copy of handwriting may be used instead of the original, so far as the accuracy of the medium is concerned."

4.4. Reliance has also been placed on judgments of the Hon'ble Supreme Court in **Chandran @ Manichan @ Maniyan v. State of Kerala**[2], and **Girish Sharma v. State of Chahattisgarh**[3] and contended that the above said judgments are *per incuriam*

4.5. In support of aforesaid submission, reference has been made to decision of the Hon'ble Supreme Court in **Hyder Consulting (UK) Limited v. Governor, State of Orissa, through Chief Engineer**[4], wherein it was held at paras 46 and 47 that:

> "46. Before I consider the correctness of the aforementioned decisions, it would be necessary to elaborate upon the concept of "per incuriam". The latin expression per incuriam literally means 'through inadvertence'. A decision can be said to be given per incuriam when the Court of record has acted in ignorance of any previous decision of its own, or a subordinate court has acted in ignorance of a decision of the Court of record. As regards the judgments of this Court rendered per incuriam, it cannot be said that this Court has "declared the law" on a given subject matter, if the relevant law was

[2] (2011) 5 SCC 161
[3] (2018) 15 SCC 192
[4] (2015) 2 SCC 189

not duly considered by this Court in its decision. In this regard, I refer to the case of State of U.P. v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139, wherein Justice R.M. Sahai, in his concurring opinion stated as follows:

> "40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. ..."

47. Therefore, I am of the considered view that a prior decision of this Court on identical facts and law binds the Court on the same points of law in a later case. In exceptional circumstances, where owing to obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of *per incuriam* may apply. The said principle was also noticed in Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2001) 6 SCC 356."

5. Submissions of learned Additional Solicitor General of India:

5.1. *Per contra*, learned Additional Solicitor General appearing for the respondents vehemently contended that the appellant is not entitled to seek quashing the statements recorded by the investigating agency invoking the provisions of Article 226 of the

Constitution of India and the provisions of Section 306 of Cr.P.C. are not applicable to the present case. He further contended that the appellant is entitled to take all the defence during the course of trial in Spl.S.C.No.1 of 2022 or subsequent stages.

5.2. He further submitted that the prosecution after following the due procedure and after issuing notice under Section 160 of Cr.P.C. recorded the statements of the witnesses under Sections 161 and 164 of Cr.P.C. and filed charge sheet. The statements of the witnesses are part of the charge sheet and the same have not become final and the same are subject to cross-examination. The appellant is entitled to canvass his defence during the course of trial and that stage is not yet reached so far.

5.3. He also contended that Section 306 of Cr.P.C. is not applicable to the present facts and circumstances of the case, as the witnesses have not been directly or indirectly concerned in or privy to the offence. Hence, the learned Single Judge rightly dismissed the writ petition and there are no grounds to interfere with the impugned order passed by the learned Single Judge.

Analysis of the case:

6. Having considered the rival submissions made by the respective parties and after perusal of the material available on record, it reveals that the VI Town Police Station, Nizamabad, Nizamabad District, registered Crime No.141 of 2022 on 04.07.2022 for the offences punishable under Sections 120B, 121A, 153A and 141 read with 34 IPC and Section 13(1)(b), 18A and 18B of the UA (P) Act against the appellant and other accused. In the said crime, the appellant is arrayed as accused No.1. Respondent No.2 had taken up the investigation and the investigating agency recorded the statements of witnesses. After completion of investigation, respondent No.2 filed charge sheet and the same was taken on record by the learned IV Additional Metropolitan Sessions Judge-cum-Special Court of NIA Cases at Hyderabad and numbered as Spl.S.C.No.1 of 2022.

7. It is relevant to extract the provision of Section 306 of Cr.P.C. hereunder:

> **"306 - Tender of pardon to accomplice.**
>
> (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief

Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952);

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record –

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case,

(a) commit it for trial

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself."

8. The impugned statements form part of the charge sheet before the trial Court. It is open for the investigating agency to examine the said witnesses as it may deem fit in support of its case. The duty is on the prosecution to prove its case by examining the said witnesses as it may deem fit during the course of trial. The issue with regard to the evidentiary value of the statements can be agitated by the appellant in the course of trial. The appellant is entitled to cross-examine the aforesaid witnesses during the course

of trial. The contention whether or not the statements of witnesses under Sections 161 and 164 of Cr.P.C., have been recorded in violation of Section 306 of Cr.P.C., can also be urged before the trial Court. At this stage, no prejudice appears to have been caused to the appellant as his rights are protected and all the pleas urged in the writ appeal can be raised during the course of trial.

9. The judgments relied upon by the learned counsel for the appellant are not applicable to the facts and circumstances of the case, since the appellants therein were convicted for various offences after full-fledged trial. It is already stated supra, in the present case, the appellant is arrayed as accused No.1 and the investigating agency after conducting investigation filed charge sheet and the concerned Court has taken cognizance and statements of witnesses are part of charge sheet and the prosecution has to prove the offence by examining the said witnesses in the Court of law and the appellant is entitled to cross-examine the said witnesses during the course of trial and that stage is not yet reached.

10. It is not the case of the appellant that the investigating agency has carried out the investigation for some extraneous considerations or the investigation carried out by the investigating

agency suffers from *mala fides*. Therefore, no case to quash the statements recorded under Sections 161 and 164 of Cr.P.C., in exercise of extraordinary discretionary jurisdiction under Article 226 of the Constitution of India is made out.

11. For the above said reasons, we do not find any ground to differ with the view taken by the learned Single Judge.

12. In the result, the writ appeal fails and is hereby dismissed.

Miscellaneous applications pending, if any, shall stand closed.

SD/-T.KRISHNA KUMAR
DEPUTY REGISTRAR

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SECTION OFFICER

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(For His Lordship's Kind Perusal)
&
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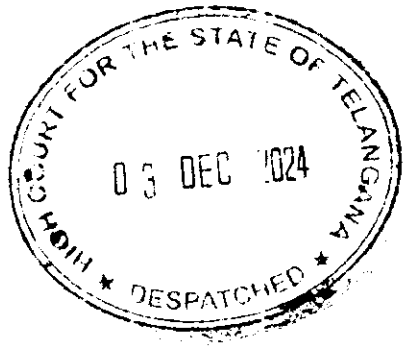
HIGH COURT

DATED:27/09/2024



JUDGMENT

WA.No.1005 of 2024

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