SNEHA KALITA
Advocate On Record , Supreme Court
422, New Lawyers' Chamber
Supreme Court of India, New Delhi-110 001

2.11.2020

To
The Registrar General,
Supreme Court of India
New Delhi

Sub: Filing of submission of 12th report of Amicus Curiae in "WP (Civil) No. 699 0f 2016 Ashwani Kumar Upadhyay vs. Union of India and others

Respected Sir,

That the undersigned is assisting Amicus Curiae Mr. Vijay Hansaria,Sr. Adv in the aforesaid matter and after receiving the status Reports from all High Courts, the Amicus have prepared the report dated 2.11.2020 which I have attached along with this letter and have filed the same on 2.11.2020 through e-filing .

I would request your esteemed office to circulate and place the report prepared by us before the Hon'ble Judges.

The aforesaid matter is coming up for hearing on **4.11.2020 before VC 2 as ITEM 13.**

From the office of Amicus, the present letter along with the Report of Amicus dated 2.11.2020 has been sent through mail to the Petitioner and all the AORs appearing on behalf of respective High Court as a proof of service and the office of Solicitor General of India.

Thanking You,

Yours faithfully,
(SNEHA KALITA)
Assisting Counsel of Amicus Curiae Mr. Vijay Hansaria, Sr.Adv

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 699 0f 2016

Ashwani Kumar Upadhyaya vs. Union of India and others

REPORT BY VIJAY HANSARIA, SR. ADVOCATE (AMICUS CURIAE)

IN RE:

MADRAS HIGH COURT REPORT ON JURISDICTION OF SPECIAL COURT MP/ MLA & RATIONALISATION OF COURTS AS PER ORDER DATED 06.10.2020

FILED BY SNEHA KALITA, ADVOCATE FOR AMICUS CURIAE
DATED 02.11.2020

IN THE SUPREME COURT OF INDIA
Writ Petition (Civil) No. 699 0f 2016

Ashwani Kumar Upadhyaya vs. Union of India and others

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IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 699 0f 2016

Ashwani Kumar Upadhyaya vs. Union of India and others

Twelfth Report by Vijay Hansaria, Senior Advocate, Amicus Curiae

Dated 02.11.2020

1. This Hon'ble Court vide order dated 06.10.2020 directed all the High Courts to provide information of the number of Special Courts MP/MLA in a prescribed format to provide more clarity on rationalizing exercise. Reports received from High Courts have been analysed and summarized in the later part of the present report.

2. This Hon'ble Court further directed that the Union of India will file a status report with respect to initiation and current stage of cases against the legislators pending before CBI, Enforcement Directorate and other central agencies, pendency/grant of sanction, expected time of completion etc. The learned Solicitor General was further directed to enquire from the Central Government regarding the possibility of providing funding for establishment of at least one video conferencing facility in every district for conducting these cases. No report has been submitted from the Union of India.

MADRAS HIGH COURT REPORT : CONSTITUTIONAL VALIDITY OF SPECIAL COURT MP/MLA

3. The Amicus craves leave to invite attention of this Hon'ble Court to the report dated 13.10.2020 by the Madras High Court wherein, Criminal Rules Committee

of three Hon'ble judges of the said High Court have raised the issue of constitutional validity of the Special Courts for MPs/ MLAs (hereinafter referred as 'the Special Court MP/ MLA') designated to try criminal cases against MPs/ MLAs in fast track mode in terms of the directions issued by this Hon'ble Court in the present proceedings. The Madras High Court in its report has, inter alia, made the following observations:-

a. The Hon'ble Supreme Court had never directed the High Courts to constitute Special Courts for MP/MLAs exclusively, for the simple reason that the Hon'ble Supreme Court is aware that it is not legally permissible to create such Special Courts.
b. Special Courts can only be "Offence Centric" and not "Offender Centric".
c. Courts can be constituted only by statute and cannot be constituted by judicial or executive fiats.
d. An MP/MLA, who commits an offence under POCSO Act (or other special Acts like PC Act, NDPS Act) can only be tried by a Special Court created under the POCSO Act (PC Act, NDPS Act) and there cannot be another Special Court exclusively for trial of an MP/MLA, who commits POCSO offence. (hereinafter referred as 'the statutory Special Court')
e. The Hon'ble Supreme Court was very guarded in its orders, but unfortunately, fell in error by creating Special Courts for trial of criminal cases involving MPs and MLAs by implicitly adopting the format of the Government Order that was passed by the Telangana State.
f. The fallacy in the Government Order creating Special Court MP/MLA is that it erroneously traces the source of power to the Supreme Court

Order dated 1.11.2017 in *Ashwini Kumar Upadhyay* case and not to any statute.

g. The whole State of Tamil Nadu has been considered as a Session Division, whereas there are 32 District in Tamil Nadu, each having a Court of Session and Additional Sessions Court. It is not known how a Court of Session can function covering the entire State.

h. By sending the case from Kanyakumari District to the Special Court MP/MLA in Chennai, the witnesses from Kanyakumari were required to travel 700 kms for giving evidence and none thought about their safety.

i. The two principal political parties viz., DMK and ADMK, whenever they come to power, file defamation cases against opposition leaders in the Court of Session. These cases will invariably be stayed by the High Court. When there is change in Government, all the cases filed by the previous Government will be withdrawn.

j. The Government Order dated 26.4.2019 states that if the offences stated in the Special Act were to be committed by an MP or MLA in Chennai, he will have to be tried by the Special Court MP/MLA No. II. This Government Order ignores the fact that there are already Special Courts under the SC/ST Act, POCSO Act, and PC Act and other Central and State enactments, for exclusive trial of the offence under those Acts.

k. Special Court MP/ MLA created by virtue of a Government Order cannot oust the jurisdiction of the Special Court constituted under the enactment.

l. The existing Court structure in the State of Tamil Nadu, which is robust, is more than enough to deal with the cases involving MPs and MLAs. Hon'ble Chief Justice is requested to bring this fact to the notice of the Hon'ble Supreme Court and get exemption from establishing Special Courts for trial of cases involving MPs and MLAs and permit restoration of status quo ante.

m. The constitution of the Special Courts MP/MLA cannot be sustained on the judicial side in the light of the authoritative pronouncements of the Hon'ble Supreme Court.

A copy of the Madras High Court report dated 13.10.2020 is annexed herewith for ready reference and marked as **Annexure A.**

4. The Madras High Court while arriving at the aforesaid conclusion, based its conclusion on the following three judgments of this Hon'ble court:-

a. *State of W.B. vs. Anwar Ali Sarkar*, 1952 SCR 284: AIR 1952 SC 284

b. *A.R. Antulay vs. R.S.Nayak ,* (1988) 2 SCC 602

c. *A.P.D. Jain Pathshala vs. Shivaji Bhagwat More,* (2011) 13 SCC 99

STATUTORY PROVISIONS

5. Before dealing with the three judgments of this Hon'ble Court, the relevant statutory provisions are referred herein below. Sections 7, 9, 10 and 11 of Cr.P.C. provide for constitution of courts and their jurisdiction, and are quoted herein below:-

> **"Section 7. Territorial divisions**.—(1) Every State shall be a sessions division or shall consist of sessions divisions; and every sessions divisions shall, for the purposes of this Code, be a district or consist of districts:

Provided that every metropolitan area shall, for the said purposes, be a separate sessions division and district.

(2) The State Government may, after consultation with the High Court, alter the limits or the number of such divisions and districts.

(3) The State Government may, after consultation with the High Court, divide any district into sub- divisions and may alter the limits or the number of such sub-divisions.

(4) The sessions divisions, districts and sub-divisions existing in a State at the commencement of this Code, shall be deemed to have been formed under this section.

"Section 9. Court of Session.—(1) The State Government shall establish a Court of Session for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Session Judges to exercise jurisdiction in a Court of Session.

(4) The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.

(5) Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.

(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the

prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

Explanation.—For the purposes of this Code, "appointment" does not include the first appointment, posting or promotion of a person by the Government to any Service, or post in connection with the affairs of the Union or of a State, where under any law, such appointment, posting or promotion is required to be made by Government.

Section 10. Subordination of Assistant Sessions Judges.— (1) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction.

(2) The Sessions Judge may, from time to time, make rules consistent with this Code, as to the distribution of business among such Assistant Sessions Judges.

(3) The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed to have jurisdiction to deal with any such application.

Section 11. Courts of Judicial Magistrates.— (1) In every district (not being a metropolitan area) there shall be established as many Courts of Judicial Magistrates of the first class and of the second class, and at such places, as the State Government may, after consultation with the High Court, by notification, specify:

Provided that the State Government may, after consultation with the High Court, establish, for any local area, one or more Special Courts of Judicial Magistrates of the first class or of the second class to try any particular case or particular class of cases, and where any such Special Court is established, no other Court of Magistrate in the local area shall have jurisdiction to try any case or class of cases for the trial of which such Special Court of Judicial Magistrate has been established.

(2) The presiding officers of such Courts shall be appointed by the High Court.

(3) The High Court may, whenever it appears to it to be expedient or necessary, confer the powers of a Judicial Magistrate of the first class or of the second class on any member of the Judicial Service of the State, functioning as a Judge in a Civil Court. "

6. A perusal of the aforesaid provisions clearly reveal that 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 proviso to Section 11 the State Government may, after consultation with High Court, establish a Special Court of Judicial Magistrate to try any particular case or class of cases.

7. Sections 3 to 6 of Prevention of Corruption Act, 1988 provides for 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. It is pertinent to note that the Special Courts constituted under the statutes are by way of designation of the existing judicial officers of the State Judicial Service and the procedure to be followed is as prescribed in Cr.P.C. None of the aforesaid statutes prescribed a procedure for trial of cases which is less advantageous to the accused persons or substantially different from that contemplated under the Cr.P.C or takes away right of any accused available under the normal.

SUPREME COURT JUDGEMENTS ON SPECIAL COURTS

I. Anwar Ali Sarkar & its following

8. In the case of *Anwar Ali Sarkar,* a Bench of seven judges of this Hon'ble Court struck Section 5(1) of the West Bengal Special Courts Act, 1950 (Act 10 of 1950) which authorized setting up of Special Courts for trial of "such offences or class of cases, as the classes of offences or cases or classes of cases, as the State Government may by general or special order in writing, direct." In this case, the State Government directed that the case of *Anwar Ali* and 49 co-accused who committed crime of robbery and murder with utmost brutality in a particular factory to be tried by the designated judicial officer. The procedure prescribed in the said Act was different in many respects than the procedure under Cr.P.C., which was less advantageous to them. All the seven Hon'ble judges delivered separate opinions. *Hon'ble the Chief Justice Mr. S. Patanjali Sastri* and *Hon'ble Justice SR Das* (partially) upheld the constitutional validity of the Act, while other five Hon'ble Judges struck down the same.

Chief Justice Mr. S. Patanjali Sastri upheld the validity of the Act having recorded the following conclusion:

> "15. It seems to me difficult to hold that Section 5(1) in whole or in part is discriminatory. It does not, either in terms or by necessary implication, discriminate as between persons or classes of persons; nor does it purport to deny to any one equality before the law or the equal protection of the laws."
>
> "19. In view of these facts it seems to me impossible to say the State Government has acted arbitrary or with a discriminatory intention in referring these cases to the Special Court, for there are obviously special features which mark off this group of cases as requiring speedier disposal than would be possible under the ordinary procedure, and the charge of discriminatory treatment must fail."

Hon'ble Justice Saiyid Fazl Ali struck down the Act having recorded the following conclusion:

> "25. The impugned Act has completely ignored the principle of classification followed in the Code and it proceeds to lay down a new procedure without making any attempt to particularize or classify the offences or cases to which it is to apply."
>
> "30. An Act which gives uncontrolled authority to discriminate cannot but be hit by Article 14 and it will be no answer simply to say that the legislature having more or less the unlimited power to delegate has merely exercised that power."

Hon'ble Justice Mehr Chand Mahajan struck down the Act having recorded the following conclusion:

> "35. Section 5 of the West Bengal Special Courts Act is hit by Article 14 of the Constitution inasmuch as it mentions no basis for the

differential treatment prescribed in the Act for trial of criminals in certain cases and for certain offences."

"37. The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis."

"38. It has laid down no yard stick or measure for the grouping either of persons or of cases or of offences by which measure these groups could be distinguished from those who are outside the purview of the Special Act. The Act has left this matter entirely to the unregulated discretion of the provincial government. It has the power to pick out a case of a person similarly situate and hand it over to the Special Tribunal and leave the case of the other person in the same circumstance to be tried by the procedure laid down in the Criminal Procedure Code."

Hon'ble Justice Mukherjea recognised that there can be classification of persons differently situated or for a class of cases and held:

"44. As there is no infringement of the equal protection rule, if the law deals alike with all of a ***certain class***, the legislature has the undoubted right of classifying ***persons*** and placing those whose conditions are substantially similar under the same rule of law, while applying different rules to ***persons*** differently situated. It is said that the entire problem under the equal protection clause is one of classification or of drawing lines. In making the classification the legislature cannot certainly be expected to provide "abstract symmetry". It can make and set apart the ***classes*** according to the needs and exigencies of the society and as suggested by experience. It can recognise even "degrees of evil", but the classification should never be arbitrary, artificial or evasive. It must rest always upon rea

> and substantial distinction bearing a reasonable and just relation to the thing in respect to which the classification is made; and classification made without any reasonable basis should be regarded as invalid." (emphasis supplied)

However, *Hon'ble Justice B.K. Mukherjea* struck down the Act having recorded the following conclusion:

> "51.The fact that it gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoy under the criminal law of the country, is on the face if it discriminatory."

Hon'ble Justice SR Das upheld the validity of the Act insofar as the Act makes classification based on 'offences' or 'class of offences' or ***'classes of cases'*** to be tried by the special courts, and struck down the Act only to the extent it empowers State Government to notify 'cases' to be tried by the Special Courts as violative of Article 14. The Madras High Court in its report relied upon the dicta laid down by *Hon'ble Justice SR Das* in para 62 and 63 of the judgment; however, failed to note the final conclusion in paras 64 and 65 of the judgment. *Hon'ble Justice SR Das* recorded the following conclusion:-

> "62. offences or cases have to be classified upon the basis of some differentia which will distinguish those offences ***or cases*** from others which will have reasonable relation to the cited object of the Act The differentia and the object being, as I have said, different elements, it follows that the object itself cannot be the basis of classification of offences ***or cases,*** for, in the absence of any special circumstances which may be distinguish one offence or one class of offences or ***one class of cases*** from another offence, or class of

classes, speedier trial is desirable in the disposal of all offences or classes of offences or classes of cases. Offences or cases cannot be classified in two categories on the basis of the preamble alone as suggested by the Learned Attorney General (emphasis supplied)."

"63. In order to be a proper classification so as not to offend against the Constitution it must be based on some intelligible differentia which should have a reasonable relation to the object of the Act as recited in the preamble."

"64. Section 5(1), insofar as it empowers the State Government to direct "offences" or "classes of offences" or "***classes of cases***", to be tried by a Special Court, also, by necessary implication and intendment, empowers the State Government to classify the "offences" or "classes of offences" or "***classes of cases***", that is to say, to make a proper classification in the sense I have explained. In my judgment, this part of the section, properly construed and understood, does not confer an uncontrolled and unguided power on the State Government. On the contrary, this power is controlled by the necessity for making a proper classification which is guided by the preamble in the sense that the classification must have a rational relation to the object of the Act as recited in the preamble. It is, therefore, not an arbitrary power. I, therefore, agree with Harris, C.J., that this part of Section 5(1) is valid." (emphasis supplied)

"65. I, therefore, agree with the High Court that Section 5(1) of the Act insofar as it empowers the State Government to direct "cases" to be tried by a Special Court offends against the provisions of Article 14 and, therefore, the Special Court had no jurisdiction to try these "cases" of the respondents."

Hon'ble Justice N. Chandrasekhara Aiyar struck down the Act on the following grounds:-

> "68. The Act under scrutiny has deviated in many matters of importance from the procedure prescribed by the Criminal Procedure Code for the trial of offences and that this departure has been definitely adverse to the accused."
>
> "74. We have before us an enactment which does not make any reasonable classification and which confers on the executive an uncontrolled and unguided power of discrimination."
>
> "80. If the statute makes no classification at all, or if the classification purported to be made is not reasonable or rational but is arbitrary and illusory, as in this case, Section 5 would be void as contravening Article 14."

Hon'ble Justice Vivian Bose also struck down the Act having recorded the following conclusion:

> "98. 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...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."

9. It is thus submitted that this Hon'ble Court in *Anwar Ali* case struck down the Act not on the ground that there cannot be 'offender centric' classification, but on the ground that the Act prescribed a procedure less favourable to accused persons vis a vis prescribed under Cr.P.C. and that the executive has been given unrestricted and unguided power to select class of cases or cases which will be

tried by the Special Court without any statutory guideline and there is no intelligible differentia having reasonable nexus with object of the Act.

10. That this Hon'ble Court in the case of *Kathi Raning Rawat v. State of Saurashtra* 1952 SCR 435 : AIR 1952 SC 123 delivered by the same seven Hon'ble judges who were part of the Bench in *Anwar Ali* case, by majority, upheld the constitutional validity of the Special Courts established under Saurashtra State Public Safety Measures Ordinance (9 of 1948) and notification issued under the said Ordinance for trial of cases by a Special Court in a particular area. *Hon'ble Chief Justice S. Patanjali Sastri*, *Hon'ble Justice Fazl Ali, Hon'ble Justice B K Mukherjea* and *Hon'ble Justice S R Das* delivered the majority opinion.

Hon'ble Chief Justice S. Patanjali Sastri recorded the following conclusion

> "8. The impugned Ordinance having thus been passed to combat the increasing tempo of certain types of regional crime, the two-fold classification on the lines of type and territory adopted in the impugned Ordinance, read with the notification issued thereunder, is, in my view, reasonable and valid, and the degree of disparity of thereunder, is, in my view, reasonable and valid, and the degree of disparity of treatment involved is in no way in excess of what the situation demanded."

Hon'ble Justice Saiyid Fazl Ali held

> "19. I think that a distinction should be drawn between ***"discrimination without reason"*** and' ***"discrimination with reason"***. The whole doctrine of classification is based on this distinction and on the well-known fact that the circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really arise as

between persons governed by different conditions and different sets of circumstances. The main objection to the West Bengal Act was that it permitted discrimination "without reason" or without any rational basis. Having laid down a procedure which was materially different from and less advantageous to the accused than the ordinary procedure, that Act gave uncontrolled and unguided authority to the State Government to put that procedure into operation in the trial of any case or class of cases or any offence or class of offences." (emphasis supplied)

Hon'ble Justice B K Mukherjea concluded

"36. I am unable to hold that Section 11 of the Ordinance in so far as it authorises the State Government to direct classes of offences or ***cases*** to be tried by the Special Court offends against the provision of the equal protection clause in our Constitution."

Hon'ble Justice S R Das concluded

"45. It will be noticed that section 11 of the Saurashtra Ordinance, like Section 5 (1) of the West Bengal Special Courts Act, refers to four distinct categories, namely, "offences", "classes of offences", "cases" and "classes of cases" and empowers the State Government to direct any one or more of these categories to be tried by the Special Court constituted under the Act. The expressions "offences", "classes of offences" and ***"classes of cases"*** clearly indicate and obviously imply a process of classification of offences or cases. Prima facie those words do not contemplate any particular offender or any particular accused in any particular case. The emphasis is on "offences", "classes of offences" or "classes of cases." The classification of "offences" by itself is not calculated to touch any individual as such, although it may, after the classification is made, affect all individuals who

> may commit the particular offence. In short, the classification implied in this part of the sub- section has no reference to, and is not directed towards, the singling out of any particular person as an object of hostile State action but is concerned only with the grouping of "offences", "classes of offences" and "classes of cases" for the purposes of the particular legislation as recited in its preamble." (emphasis supplied)

However, *Justice Meher Chand Mahajan , Justice N Chandrashekara Aiyer* and *Justice Vivian Bose* struck down the Act on the principles laid down in the *Anwar Ali* case. Is it thus submitted that in this case, this Hon'ble in this case held that there can classification of "class of cases" and there can be "discrimination with reason".

11. A five judges bench of this Hon'ble Court in the case of *Syed Qasim Razvi v. State of Hyderabad* 1953 SCR 589: AIR 1953 SC 156 (comprising of four Hon'ble judges who were part of *Anwar Ali* case) upheld the constitutional validity of the Special Tribunal constituted by Military Governor under Special Tribunal Regulation (5 of 1358 F) for trial of a particular case of robbery, looting etc. by armed people. *Hon'ble Justice B.K. Mukherjea* delivering the majority opinion (for self, *Chief Justice Patanjali Sastri* and *Justice N Chandrashekara Aiyer*) held

> "21. There was nothing per se unreasonable in appointing a Special Court and Section 13 of the Hyderabad Criminal Procedure Code expressly empowers the Government to confer the powers of a court on any Government servant in any local area or with respect to a particular ***case*** or ***cases*** and such person is denominated a Special Judge."

Hon'ble Justice Mukherjea specifically rejected the contention that Special Tribunal cannot be constituted for an individual case. It was held

> "24.What he (counsel for the petitioner) said is, that the Military Governor had no authority under Section 3 of the Regulation to refer an individual case to the Special Tribunal for trial for it authorized him to direct the Special Tribunal to try "any offence whether committed before or after the commencement of this Regulation or any classes of offences", but ***not any individual case***. A distinction is made between an "offence" and a "case", and the learned counsel points out that an offence could be described as a case only when it is connected with a particular person who is alleged to have committed it. The direction to try "any offence" must, therefore, mean a direction to try an offence described as such in the Hyderabad Penal Code, no matter by whom it is committed and not an offence committed by any particular person which is a case. ***We see no force in this argument***." Whatever interpretation may be put upon the words "offence" and "case" in a context where both are used in the same provision, as for instance, in Section 5 of the West Bengal Special Courts Act, which was under consideration in *Anwar Ali Sarkar* case we are of opinion that Section 3 of the Regulation contemplates no such distinction and that it empowers the Military Governor to direct a Special Tribunal to try an offence committed by a particular person, in other words, to try an individual case. (emphasis supplied)

Hon'ble Mr. Justice Vivian Bose laid down the principle of a constitutionally permissible procedure of trial and held:

> "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."

Hon'ble Justice Bose struck down the Regulation on the ground that the same conferred unfettered and absolute discretion on the military Governor to direct any offence or class of offences or any particular case to be tried by Special Tribunal. The Learned Judge also found that the procedure prescribed by the Regulation was 'abhorrent to Article 14'.

12. 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 on behalf of four Hon'ble judges 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."
>
> "11. The majority decision in Anwar Ali Sarkar's case(1) proceeded on the view that no standard was laid down and no principle or policy was disclosed in the legislation challenged in

that case, to guide the exercise of discretion by the Government in selecting a " case" for reference to the Special Court for trial under the special procedure provided in the Act."

"12. It will seen that the main reasoning of the majority Judges in *Anwar Ali Sarkar 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)

13. The Law Commission of India in its 239th report (2012) has stated as under:

"4.3.5 The Commission is of the view that the cases of influential persons in public life need to come up for special focus for the reason that the experience shows occurrence of long delays both in investigation and trial. This is because of the influence they can wield with the Police and witnesses. Delays are also often caused by their prolonged abstinence from the court proceedings and the Police not taking effective steps to produce them in Court. Secondly, the persons holding public offices have

a role to play in democratic governance and the people have legitimate expectation that the elected representatives are clean and free from criminal misconduct. Thus, public are equally interested in early conclusion of trial."

14. That this Hon'ble Court in the case of *Public Interest Foundation vs. UOI,* (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 situation, the Chief Justice may issue appropriate directions to the court concerned extending the time for conclusion of the trial." (emphasis supplied)

15. This Hon'ble Court in *Public Interest Foundation vs. UOI,* (2019) 3 SCC 224 has expressed concern over increasing criminalisation in Indian polity and said as under:

> "The constitutional functionaries, who have taken the pledge to uphold the constitutional principles, are charged with the responsibility to ensure that the existing political framework does not get tainted with the evil of corruption. However, despite this heavy mandate prescribed by our Constitution, our Indian democracy, which is the world's largest democracy, ***has seen a steady increase in the level of***

criminalization that has been creeping into the Indian polity. This unsettlingly increasing trend of criminalization of politics, to which our country has been a witness, tends to disrupt the constitutional ethos and strikes at the very root of our democratic form of government by making our citizenry suffer at the hands of those who are nothing but a liability to our country." (emphasis supplied)

II. R.S. Antulay

16. In the case of *R.S. Antulay,* (1984) 2 SCC 183, (hereinafter referred as *Antulay I*) this Hon'ble court was considering the issue as to whether sanction for prosecution under Prevention of Corruption Act, 1988 would be required in respect of an offence committed by a Chief Minister of a State and cognizance can be taken without sanction of the Speaker of the Assembly. This Hon'ble Court held that if the accused was no more a Chief Minister on date of cognizance, no such sanction is required even though he is an MLA. However, in the operative part of the judgment, without any discussion or an issue being there before this Hon'ble Court, direction was issued that the trial of the case against Mr. Antulay pending before the court of Special Judge, Bombay to be tried by the Bombay High Court.

17. Correctness of the aforesaid decision in *Antulay I* was considered by a Bench of seven Hon'ble judges in the case of *A.R. Antulay vs R.S. Nayak,* (1988) 2 SCC 602 (hereinafter referred as *Antulay II*). The seven judge Bench in *Antulay II* held that the Bombay High Court did not possess original jurisdiction to try cases under the Prevention of Corruption Act, 1988 and the power of trial rests exclusively in the Special Courts established under Criminal Laws Amendment Act, 1952. It was held that the direction of this Hon'ble Court in the five judges

in *Antulay I* was per-incuriam since the express bar contained in 1952 Act[1] was not taken into consideration while passing the direction to transfer the case to the High Court. In that context this Hon'ble Court in *Antulay II* held that "the power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by law and no court, whether superior or inferior or both combined can enlarge jurisdiction or divest his right of appeal or revision or both."

18. It is submitted that the present case is clearly distinguishable from *Antulay II*, inasmuch as, cases are not transferred to a court lacking jurisdiction. What has been done is to designate a judicial officer who is otherwise competent and possesses jurisdiction to try such cases. No right of appeal or revision is taken away of any accused person, and the hierarchy of court is at the same level unlike in the case *Antulay II* where case was transferred from Special Judge of the rank of ADJ to the High court resulting in deprivation of right of appeal to the High Court.

III. A.P.D. Jain Pathshala

19. In the case of *A.P.D. Jain Pathshala vs. Shivaji Bhgawat More,* (2011) 13 SCC 99, a Grievance Redressal Committee was constituted by the State Government for redressal of grievances of teachers. The High Court by a judicial order conferred quasi-judicial adjudicatory powers on the said Committee to the

[1] The Criminal Law Amendment Act, 1952; Section 7 (1) – Notwithstanding anything contained in the Code of Criminal Procedure, 1898(Act V of 1898) or in any other law the offences specified in sub-section (1) of section 6 shall be triable by special judges only.

exclusion of civil courts. This Hon'ble Court held that the order of the Grievance Committee is only recommendatory and is not an enforceable order since no adjudicatory tribunal can be constituted by the State Government nor High Court can issue any direction. In the present case, the decision of this Hon'ble Court in *A.P.D. Jain* does not apply, as no new forum has been constituted by this Hon'ble Court. All that has been done is that the existing courts will try cases involving a particular class of persons in an expeditious manner and for that purpose the State Governments have issued requisite notifications in consultation with the High Courts.

IV. Other case laws

20. It may be noted that in the cases relating to *Coal Block Allocation* matters under Indian Penal Code, Prevention of Corruption Act, 1988, Prevention of Money Laundering Act, 2002 and other allied offences were transferred to a Special Judge to exclusively deal and try these offences by an order of this Hon'ble Court dated 18.07.2014 in the case of *Manohar Lal Sharma vs. UOI,* (2015) 13 SCC 35. In the same order this Hon'ble Court further directed that no court shall pass any order of stay or impede the process of trial except this Hon'ble Court. Validity of the said order of transfer and restrain on other courts to entertain a plea of stay was considered by 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."

It is thus submitted that the ratio of the aforesaid case fully applies to the present case and the observation of the Madras the High Court that the Special Courts cannot be constituted by a judicial or executive fiat is not correct.

21. 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"

PROCEEDINGS IN THE PRESENT CASE

22. That in the present case this Hon'ble court is, inter alia, considering the issue of speedy disposal of criminal cases against the elected representatives to the Parliament and the State legislatures including former MPs/ MLAs. Pursuant to the direction of this Hon'ble Court, the Central government sanctioned constitution of 12 Special Courts for trial of cases against MPs/ MLAs have been – 9 for Sessions trial cases in the States/ UTs of Andhra Pradesh, Bihar, Karnataka, Madhya Pradesh, Tamil Nadu, Telangana, Uttar Pradesh, West Bengal and Delhi; and 3 for Magisterial cases in the State/ UT of Maharashtra,

Kerala and Delhi. Subsequently, Special Courts have been constituted in all the States/ UTs for trial of cases against MPs/ MLAs. All these courts are manned by the existing judicial officers and the procedure prescribed in Cr.P.C. is followed. All the State Governments in consultation with the High Courts issued notifications conferring jurisdiction to the officers of the State Judicial Service to try cases of pending against MPs/ MLAs either district wise or group of districts. No separate procedure was laid down and the provisions of Cr.P.C. are followed.

Amicus sent a mail dated 24.10.2020

24. That subsequent to the receipt of the report of the Madras High Court, the Amicus sent a mail dated 24.10.2020 to all the High Courts requesting the Registrar Generals to furnish the following information:-

> a. Whether the cases pending/triable Special Courts under Prevention of Corruption Act, 1988, Prevention of Money Laundering Act, 2002, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, POCSO Act etc. have been transferred to the Special Courts (MP/ MLA) or they are continuing before the respective Special Courts under those statues ?
>
> b. Notification(s) constituting/ designating Special Court (MP/ MLA). The said notifications may be sent in chronological order in a separate PDF file with index and pagination of the said notification(s).

25. In pursuance to the e-mail of the Amicus, some of the High Courts have furnished the requisite information, and the same is as hereunder:

Bihar: In some of the districts, cases under Special statutes have been transferred to Special Courts MP/ MLA while in some other districts they are continuing in the Statutory Special Courts.

Bombay: cases pending/ triable under Special statutes have been transferred to Special Courts MP/ MLA from the respective Statutory Special Courts.

Jharkhand: In some of the districts, cases under Special statutes have been transferred to Special Courts MP/ MLA while in some other districts they are continuing in the Statutory Special Courts.

Gujarat: cases under special statutes are pending before the statutory special court and have not been transferred to Special Court MP/ MLA.

Meghalaya: cases under special statutes are pending before the statutory special court and have not been transferred to Special Court MP/ MLA.

Telangana: cases under special statutes are pending before the statutory special court and have not been transferred to Special Court MP/ MLA.

Punjab & Haryana: cases under special statutes are pending before the statutory special court and have not been transferred to Special Court MP/ MLA.

Chhattisgarh: out of 20 cases triable by the statutory special court, 19 have been transferred to Special Court MP/ MLA, and one case is pending before Special Judge CBI (Magistrate).

Manipur: one case has been transferred to Special Court MP/ MLA from the statutory special court.

Tamil Nadu: cases triable by statutory Special Courts (PC Act, PML Act, POCSO Act etc.) have been transferred to Special Courts MP/ MLA.

Kerala: cases under special statutes are pending before the statutory special court and have not been transferred to Special Court MP/ MLA.

Odisha: In some of the districts, cases under Special statutes have been transferred to Special Courts MP/ MLA while in some other districts they are continuing in the Statutory Special Courts.

26. Thus, it appears that in some of the States, cases triable by statutory Special Courts have been transferred to Special Court MP/ MLA, while in some other States offences under special statutes are being tried by the respective statutory Special Courts. Yet in certain States, some such cases are tried by Special Court MP/ MLA and some by Statutory Special Courts.

SUMMARY OF HIGH COURT REPORTS ON RATIONALISATION OF COURTS PURSUANT TO ORDER DATED 06.10.2020

27. The summary of reports received from various High Courts on rationalisation of courts in the format prescribed in the order dated 06.10.2020 is as hereunder:

Bihar

- Judicial officers are designated both at Sessions level and Magistrate level and the number of cases are pending before each of them have been mentioned
- No requirement of additional Special Court.
- VC facility is available in some of the courts.
- In most of the courts there is no witness examination room.
- Nodal prosecution officers have been nominated in some districts.
- Names of Public Prosecutor have been mentioned.

Bombay High Court

- Judicial officers are designated both at Sessions level and Magistrate level and the number of cases are pending before each of them have been mentioned.
- No additional Special Court is required.
- VC facility is available in most of the courts. However, witness examination room is available in one or two courts only.
- No details furnished as regards designation of Nodal Prosecution officers and Public Prosecutors.

Chhattisgarh

- Names of judicial officers have been given at the Magistrate level and the number of cases are pending before each of them.
- No additional Special Court is required.
- Witness Examination Rooms available with VC facility in all courts and no additional VC facility required.
- No additional funds required
- Names of Nodal Prosecution Officers and Public Prosecutors mentioned.

Delhi

- Name of three Judicial Officers under PC Act has been mentioned, and names of three Metropolitan Magistrates have been mentioned and cases pending against them.
- All judicial officers are conducting court proceedings through VC. CISCO software enables recording of witness as well. However, no separate witness examination room is available.
- Names of Public Prosecutors and Additional Public Prosecutors have been mentioned.

Gauhati High Court

- Names of judicial officers and the number of cases pending before each of them have been mentioned.
- No additional Special Court is required.
- In most of the courts VC facility is available. However, there is no provision for recording of witnesses through VC.
- Nodal Prosecution Officers have not been designated.
- Names of Public Prosecutors have been mentioned.

Gujarat

- Names of judicial officers and the number of cases pending before each of them have been mentioned.
- No additional Special Court is required.
- In most of the courts VC facility is available.
- Witness examination room available in some districts.
- Nodal Prosecution Officers have not been designated.
- Names of Public Prosecutors have been mentioned.

Himachal Pradesh

- Names of judicial officers and the number of cases pending before each of them have been mentioned.
- No additional Special Court is required.
- In most of the courts VC facility is available.
- There is independent witness examination room.

- Nodal Prosecution Officers have not been designated.
- Names of Public Prosecutors have been mentioned.

Jammu and Kashmir

- Name of judicial officers and the number of cases are pending before each of them have been given.
- No additional Special Court is required.
- VC facility is available. However, no separate witness examination room is available.
- Nodal Prosecution Officers have not been designated.
- Names of Public Prosecutors have been mentioned.

Jharkhand

- There are 2 Special Courts one at Ranchi having territorial jurisdiction over 13 districts and another at Dhanbad having territorial jurisdiction over 11 districts. Name of Judicial Officers has been mentioned.
- There 94 cases pending at Ranchi and 54 at Dhanbad
- Proposal for designation of 4 more Special Courts of rank of District Judge and 6 that of Civil Judge, Junior Division is pending with State Government.
- VC facility is available.
- Online facility for witnesses examination is available at Ranchi but not at Dhanbad.
- The names of Public Prosecutor is given for each of the two courts.

Karnataka

- Names of judicial officers are mentioned.
- Names of Nodal Prosecution Officers mentioned.

- Software Video Conference facility is available. However, hardware video conference facility not available, as it requires huge investment and funds availability necessary for this purpose.
- Witness examination room is not available for online examination.

Kerala

- Names of judicial officers and the number of cases pending before each of them has been given.
- In most of the courts VC facility is available except in 6 districts, and the cost of one unit of VC facility is stated to be Rs. 6.50 lac. No specific information has been furnished regarding online recording of witnesses.
- Nodal Prosecution Officers have not been designated in any district.
- Names of Public Prosecutors/ Additional Public Prosecutors have been mentioned.

Madhya Pradesh

- There is 1 Special Court at Bhopal for entire State having powers of Judicial Magistrate.
- 3 more Special Courts are proposed to be designated as Special Court.
- VC facility is available. Witness examination room also available.
- Name of Nodal Prosecution Officer and Public Prosecutor has been mentioned.

Manipur

- Names of two Judicial Officers and cases pending before them has been mentioned.
- No additional Special Court is required.

- VC facility available; however, needs upgradation.
- Separate witness examination room with VC facility not available.
- High Court by judicial order has directed State Government to provide requisite infrastructure.
- Name of Nodal Prosecution Officer and Public Prosecutor has been mentioned.

Meghalaya

- High Court has submitted an action plan for expeditious disposal of cases.

Odisha

- There are four designated Special Courts (2 sessions level and 2 magisterial level). Names of Judicial Officers including Special Judge Vigilance, CBI court etc. and cases pending before them has been mentioned.
- No additional Special Court is required.
- VC facility is available in some of the courts. However, additional facilities need to be created.
- No witness examination room with online facility is available.

Punjab and Haryana High Court

- Names of Judicial Officers and cases pending before them has been mentioned.
- No additional Special Court is required.
- VC facility available.
- Witness examination room is available; however, for online examination facility is available only in some courts.

Rajasthan

- Names of Judicial Officers and cases pending before them has been mentioned.
- No additional Special Court is required.
- Centralised VC facility is available. But not available for individual courts. Estimated cost for VC facility is stated, as one unit = Rs. 85,900/-.
- Witness examination room not available.
- Names of Nodal Prosecution Officer has been mentioned
- Names of Public Prosecutors have been given.

Sikkim

- Names of Judicial Officers has been mentioned. However, no cases pending.

Tamil Nadu

- Constitution of Special Courts for MPs/ MLAs has been raised, as submitted herein above.
- There are 361 cases out of which 71 are defamation cases filed by the Government against political leaders. 60 such defamation cases have been stayed by the High Court and 3 by the Supreme Court.
- There are three Special Courts, two at District Judge cadre and one at Senior Civil Judge cadre for Chennai district. For rest of the districts, District Judges have been designated in every Division as Special Court and One Judicial Magistrate in every district to try magisterial cases.

Telangana

- There is 1 Special Court at Hyderabad for ten districts.

- Names of Judicial Officers including that of CBI and SPE etc, and cases pending before them has been mentioned.
- Designation of two more Special Courts proposed
- Online VC facility is available in some courts.
- Witness examination room with VC facility not available.
- Names of Nodal Prosecution Officers have been mentioned.
- Names of Public Prosecutors have been given.

Uttar Pradesh

- Names of Judicial Officers, and cases pending before them has been mentioned.
- No additional Special Court is required.
- VC facility is available in some of the courts.
- Names of Nodal Prosecution Officers have been mentioned.
- Names of Public Prosecutors and Additional Public Prosecutors have been given.

West Bengal

- Names of Judicial Officers, and cases pending before them has been mentioned.
- VC facility is not available in most of the courts.
- No witness examination room.
- Nodal Prosecution officers not appointed in any court.
- Names of Public Prosecutors and Additional Public Prosecutors have been given.

Uttarakhand

- There were total 23 cases out of which 6 disposed of and 17 pending.
- There is no necessity of constituting Special Court.

SUBMISSIONS

A. IN RE: MADRAS HIGH COURT REPORT ON JURISDICTION OF SPECIAL COURT MP/ MLA

28. It is thus submitted that the ratio of *Anwar Ali* case and the subsequent judgments following the same did not lay down that 'offender centric' classification is per se unconstitutional and hit by Article 14, and that the classification can only be 'offence centric'. In the present case, this Hon'ble Court has directed expeditious trial of criminal cases against MPs/ MLAs by designating Special Courts in view of the fact that offenders are or have been legislators, who constitute a class in themselves, and speedy trial of such cases is in public interest. The legislators are lawmakers who lay down policies for socio-economic development of the country and are responsible for upholding constitutional morality. It is on record that a large number of cases, including heinous offences, are pending in the courts not only for years but for decades. In such circumstances a special mechanism for speedy trial of these cases cannot be flawed. No special procedure less advantageous to the accused persons has been prescribed for trial of cases involving MPs/ MLAs; these cases are tried as per general procedure prescribed under Cr.P.C. All that has been done is to designate a particular officer to try cases in an expeditious manner, who otherwise has jurisdiction to conduct the trial. It is thus submitted that

directions passed by this Hon'ble Court in the present case for designation of Special Court for trial of criminal cases pending against legislators, who form a class in themselves, are valid as there is a reasonable nexus of decriminalisation of Indian polity in fast tracking disposal of these cases. The twin test of fair trial to meet the constitutional requirement, namely, independent and qualified judge, and a fair procedure applicable to ordinary courts are complied with in the present case. Thus, no objection as to the constitutional validity of the Special Courts can be raised.

29. The conclusion drawn by the Criminal Rules Committee of the High Court that the designation of Special Courts MP/ MLA is unconstitutional as Special Courts can only be 'offence centric' and can never be 'offender centric', with all humility, is not correct. It is also incorrect that Special Courts can never be constituted by judicial order. The MPs/ MLAs constitute a class in themselves and thus Special Courts can be constituted for expeditious trial of criminal cases against MPs/ MLAs, which is in public interest. Thus, Special Courts MP/ MLA designated by issue of a notification by State Governments after consultation with the High Courts is constitutionally valid.

30. Statutory Special Courts constituted under PC Act, SC/ST Act, PML Act, POCSO Act or any other statute made by Parliament or State legislature shall 'ordinarily' have jurisdiction to try cases for offences committed under these statutes. However, trial of cases under the special statutes by the Special Courts MP/ MLAs are valid and do not suffer from any constitutional infirmity as these courts have been constituted under the direction of this Hon'ble Court issued in exercise of the power under Article 142 of the Constitution. The trial of these

cases does not otherwise suffer from breach of any constitutional provision nor any accused person has alleged violation of any fundamental right.

B. SUBMISSIONS IN RE: RATIONALISATION OF COURTS AS PER ORDER DATED 06.10.2020

31. In terms of the order of this Hon'ble Court dated 06.10.2020 the High Courts have sent names and designations of judicial officers manning the Special Courts MP/ MLA. The designation of these judicial officers may be confirmed and they shall continue to hold the said post for a period of two years in the normal circumstances. The High Court will transfer a judicial officer manning Special Court MP/MLA in exceptional circumstances after obtaining approval of the Hon'ble Chief Justice of the High Court. Further, the High Courts would be at liberty to constitute additional Special Courts MP/MLA, as and when required.

32. Most of the High Courts have stated that Nodal Prosecution Officers have not been appointed making them responsible for prosecution of the cases. All the State Governments and Central Government may be directed to appoint an officer not below the rank of Deputy Superintendent of Police, attached to each Special Court MP/ MLA as Nodal Prosecution Officer. The Nodal Prosecution Officer shall be responsible to ensure production of accused persons before the respective courts and the execution of NBWs issued by the courts. The said officer shall also be responsible for service of summons to the witnesses, their appearance and deposition in the courts. Any lapse on the part of the Nodal Prosecution Officer will make him/ her liable to disciplinary proceedings apart from initiation of contempt of court proceedings.

33. So far as conduct of trial through video conferencing is concerned, attention of this Hon'ble Court is invited to the order of this Hon'ble Court dated 26.10.2020 passed by a Bench presided over by the Hon'ble Chief Justice of India in Suo Moto Writ (civil) No. 5 of 2020 *[in re: Guidelines for Court functioning through Video Conferencing in COVID 19 Pandemic*]. In the said order this Hon'ble Courts has directed as under**:**

> "The Video Conferencing in every High Court and within the jurisdiction of every High Court shall be conducted according to the Rules for that purpose framed by that High Court. The Rules will govern Video Conferencing in the High Court and in the district courts and shall cover appellate proceedings as well as trials.
>
> We are given to understand that several High Courts have framed their rules already. Those High Courts that have not framed such Rules shall do so having regard to the circumstances prevailing in the State. Till such Rules are framed, the High Courts may adopt the model Video Conferencing Rules provided by the E-Committee, Supreme Court of India to all the Chief Justices of the High Court. "

A copy of the order dated 26.10.2020 passed by this Hon'ble Court in Suo Moto Writ (civil) No. 5 of 2020 is annexed herewith and marked as **Annexure B**.

34. As per the reports submitted by the High Courts, video conferencing facility is available in some courts and that too for limited purposes. The Central Government may be directed to make necessary funds available for the purpose of making video conference facilities including witness examination in all the courts, at first instance. Funds so allotted/ granted by the Central Government

may be subject to final adjustment with the State Government as per the prevailing sharing pattern.

C. PRACTICE DIRECTIONS FOR EXPEDITIOUS TRIAL

35. This Hon'ble Court may be pleased to issue practice directions for expeditious trial of criminal cases pending against MPs/ MLAs in terms of submissions made by the Amicus dated 09.09.2020, 15.09.2020 and 05.10.2020.

DATED 02.11.2020

SUBMITTED BY

VIJAY HANSARIA, SR ADVOCATE

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) No.699 of 2016

In the matter of
Ashwini Kumar Upadhyay ...Petitioner

-Vs-

Union of India & Ors. ...Respondents

REPORT OF THE CRIMINAL RULES COMMITTEE ON SPECIAL COURTS FOR TRIAL OF CRIMINAL CASES INVOLVING MP/MLAs

INTRODUCTION

Pursuant to the Order dated 16.9.2020 passed by the Hon'ble Supreme Court in ***W.P.(C)No.699 of 2016 (Ashwini Kumar Upadhyay vs. Union of India and others)***, the Hon'ble Chief Justice referred the matter to the Criminal Rules Committee for studying the functioning of the Special Courts for trial of Criminal Cases involving MPs and MLAs, and to suggest ways and means to ensure expeditious disposal of the criminal cases pending against them. We were also requested to look into the suggestions made by Sri.Vijay Hansaria, learned *amicus curiae*, which have been set out in the order of the Supreme Court dated 16.09.2020. In paragraph 19 of the order dated 16.09.2020, the Hon'ble Chief Justice was required to send his comments and suggestions, preferably within a week and therefore, we submitted an interim report to the Hon'ble Chief Justice on 25.09.2020 with a request to forward the same to the Secretary General, Supreme Court of India and to the learned *amicus curiae*. Accordingly, our interim report was communicated by the Registry on 26.09.2020.

GENESIS

2. During the hearings of W.P.(C)No.699 of 2016, the Hon'ble Supreme Court was anguished to note that people with criminal antecedents were entering the Parliament and Legislatures, and that would in turn pose serious threat to the very foundation of Democracy and Rule of Law. This has been spelt out in no uncertain terms by the Hon'ble Supreme Court in paragraph 14 of the order dated 16.09.2020.

3. When the Hon'ble Supreme Court aired its view, the Union of India came forward and submitted that they would provide all necessary infrastructure and finance for setting up of Special Courts for the expeditious disposal of the cases against Parliamentarians and Legislators. With this objective in mind, the Hon'ble Supreme Court issued notice to the States and called for their response.

4. Based on the pendency status obtained from each State Government, the Central Government formulated a scheme titled, "***Scheme for setting up of Special Courts exclusively to deal with 1581 criminal cases involving political persons as directed by the Hon'ble Supreme Court of India in its order dated 1.11.2017***" under which the Central Government sanctioned setting up of one Special Court for the State of Tamil Nadu.

5. The High Court sent a proposal dated 21.02.2018 to the State Government for setting up a Special Court under the Central Government Scheme. In response to that, the State Government addressed a letter dated 16.07.2018 to the High Court, in which a draft notification prepared by them on the lines of the one issued by the neighbouring State of Telangana was sent for consideration. The High Court approved the Telungana format of notification and informed the State Government accordingly on 05.09.2018. In our considered view, we tripped and fell in error here.

6. The spirit of the Hon'ble Supreme Court order was to ensure that the criminal cases against MPs/MLAs are not protracted, but are disposed of expeditiously within the framework of the law. The Hon'ble Supreme Court had never directed the High Courts to constitute Special Courts for MP/MLAs exclusively, for the simple reason that the Hon'ble Supreme Court is aware that it is not legally permissible to create such Special Courts. The Hon'ble Supreme Court is aware of the decision in ***State of West Bengal v. Anwar Ali Sarkar and Others (AIR 1952 SC 75)***, wherein it has been held as follows:

"63.Learned counsel for the respondents then contended that as the object of the Act as recited in the preamble cannot be the basis of classification, then this part of sub-section 5(1) gives an uncontrolled and unguided power of classification which may well be exercised by the State Government capriciously or "with an evil eye and an unequal band" so as to deliberately bring about invidious discrimination between man and man, although both of them are situated in exactly the same or similar circumstances. By way of illustration it is pointed out that in the Indian Penal Code there are different chapters dealing with offences relating to different matters, e.g. Chapter XVII which deals with offences against property, that under this generic head are set forth different species of offences against property, e.g. theft (Section 378), theft in a dwelling house (Section 380), theft by a servant (Section 381), to take only a few examples, and that according to the language of Section 5(1) of the impugned Act it will be open to the State Government to direct all offences of theft in a dwelling house under Section 380 to be tried by the Special Court according to the special procedure laid down in the Act leaving all offences of theft by a servant under Section 381 to be dealt with in the ordinary court in the usual way. In other words, if a stranger is charged with theft in a dwelling house, he may be sent up for trial before the Special Court under Section 380 whereas if a servant is accused of theft in a dwelling house he may be left to be

tried under the Code for an offence under Section 381. The argument is that although there is no apparent reason why an offence of theft in a dwelling house by a stranger should require speedier trial any more than an offence of theft in a dwelling house by a servant should do, the State Government may nevertheless select the former offence for special and discriminatory treatment in the matter of its trial by bringing it under the Act. A little reflection will show that this argument is not sound. The part of sub-section 5(1) which I am now examining confers a power on the State Government to make a classification of offences, classes of offences or classes of cases, which, as said by Chakravartti, J., "means a proper classification". In order to be a proper classification so as not to offend against the Constitution it must be based on some intelligible differentia which should have a reasonable relation to the object of the Act as recited in the preamble. In the illustration taken above the two offences are only two species of the same genus, the only difference being that in the first the alleged offender is a stranger and in the latter he is a servant of the owner whose property has been stolen. Even if this difference in the circumstances of the two alleged offenders can be made the basis of a classification, there is no nexus between this difference and the object of the Act, for, in the absence of any special circumstances, there is no apparent reason why the offence of theft in a dwelling house by a stranger should require a speedier trial any more than the

offence of theft by a servant should do. Such classification will be wholly arbitrary and will be liable to be hit by the principles on which the Supreme Court of the United States in Jack Skinner v. Oklahoma [Vide Skinner v. Oklahoma, 316 US 535 at 540] struck down the Oklahoma Habitual Criminal Sterilisation Act which imposed sterilisation on a person convicted more than twice of larceny but not on one who was convicted of embezzlement on numerous occasions. That sort of classification will, therefore, not clearly be a proper classification such as the Act must be deemed to contemplate."

(Emphasis Supplied)

In other words, Special Courts can only be "Offence Centric" and not "Offender Centric".

7. The Hon'ble Supreme Court is also aware that in ***R.S.Nayak v. A.R.Antulay ((1984) 2 SCC 183)***, a Constitution Bench comprising five Judges directed the transfer of a corruption case against A.R.Antulay from the Special Judge to the High Court for trial. While the trial was mid-way, a Constitution Bench comprising seven Judges in ***A.R.Antulay v. R.S.Nayak ((1988) 2 SCC 602)*** set aside the earlier order by observing as follows:

"39. Shri Jethmalani sought to urge before us that the order made by the court was not without jurisdiction or irregular. We are

unable to agree. It appears to us that the order was quite clearly per incuriam. This Court was not called upon and did not decide the respondent express limitation on the power conferred by Section 407 of the Code which includes offences by public servants mentioned in the 1952 Act to be overridden in the manner sought to be followed as the consequential direction of this Court. This Court, to be plain, did not have jurisdiction to transfer the case to itself. That will be evident from an analysis of the different provisions of the Code as well as the 1952 Act. The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by law and no court, whether superior or inferior or both combined can enlarge the jurisdiction of a court or divest a person of his rights of revision and appeal. See in this connection the observations in M.L. Sethi v. R.P. Kapur [(1972) 2 SCC 427 : AIR 1972 SC 2379 : (1973) 1 SCR 697] in which Justice Mathew considered Anisminic [(1969) 2 AC 147 : (1969) 1 All ER 208] and also see Halsbury's Laws of England, 4th Edn., Vol. 10, page 327 at para 720 onwards and also Amnon Rubinstein — Jurisdiction and Illegality (1965 Edn., pages 16-50). Reference may also be made to Raja Soap Factory v. S.P. Shantharaj. [AIR 1965 SC 1449 : (1965) 2 SCR 800]"

(Emphasis Supplied)

8. In **Secretary, A.P.D. Jain Pathshala and Others v. Shivaji Bhagwat More and Others ((2011) 13 SCC 99)**, the Hon'ble Supreme Court has laid down the law in no uncertain terms, as follows:

> *"23. Apart from constitutional provisions, tribunals with adjudicatory powers can be created only by statutes. Such tribunals are normally vested with the power to summon witnesses, administer oath, and compel attendance of witnesses and examine them on oath and receive evidence. Their powers are derived from the statute that created them and they have to function within the limits imposed by such statute. It is possible to achieve the independence associated with a judicial authority only if it is created in terms of the Constitution or a law made by the legislature.*
>
> *27. If the power to constitute and create judicial tribunals by executive orders is recognised, there is every likelihood of tribunals being created without appropriate provisions in regard to their constitution, functions, powers, appeals, revisions and enforceability of their orders, leading to chaos and confusion. There is also very real danger of citizen's rights being adversely affected by ad hoc authorities exercising judicial functions, who are not independent or competent to adjudicate disputes and render binding decisions. Therefore, the executive power of the State cannot be extended to creating judicial tribunals or authorities exercising*

judicial powers and rendering judicial decisions.

28. Neither the Constitution nor any statute empowers a High Court to create or constitute quasi-judicial tribunals for adjudicating disputes. It has no legislative powers. Nor can it direct the executive branch of the State Government to create or constitute quasi-judicial tribunals, otherwise than by legislative statutes. Therefore, it is not permissible for the High Court to direct the State Government to constitute judicial authorities or tribunals by executive orders, nor permissible for the State by executive order or resolution to create them for adjudication of rights of parties."

9. In other words, from the aforesaid pronouncements of the Hon'ble Supreme Court, it is clear that only by statute can Courts be constituted and not by judicial or executive fiats. The Code of Criminal Procedure, 1973 has constituted classes of Courts and has also set out the offences triable by such Courts in Schedule-I. Special Acts like Prevention of Corruption Act, POCSO Act, NDPS Act, etc., define the offences and provide for constitution of Special Courts for trial of such offences. Therefore, an MP/MLA, who commits an offence under POCSO Act can only be tried by a Special Court created under the POCSO Act and there cannot be another Special Court exclusively for trial of an MP/MLA, who commits POCSO

offence. To make it more clear, there cannot be a Special Court within a Special Court. If a class of persons committing an offence requires to be tried "differently" or "specially", only the Parliament or Legislature can provide for it, and not the Executive or the Court. That is why, the Hon'ble Supreme Court was very guarded in its orders, but unfortunately, we fell in error by creating Special Courts for trial of criminal cases involving MPs and MLAs by implicitly adopting the format of the Government Order that was passed by the Telangana State.

10. The first Government Order on the subject was passed in G.O.Ms.No.697 Home (Courts-II) Department, 09.07.2018 allocating funds and the notification was issued in G.O.Ms.No.1423 Home (Courts-II) Department dated 06.09.2018. The said notification reads as follows:

"**NOTIFICATION**

WHEREAS, the Supreme Court of India by order dated 1st November 2017 in W.P.(Civil) No.669/2016, Ashwini Kumar Upadhyay -versus- Union of India and Another, has directed the Union Government to prepare a scheme for setting up of Courts exclusively to deal with criminal cases involving elected Members of Parliament and Members of Legislative Assembly.

AND WHEREAS, the Government of India in

compliance with the aforesaid order of the Supreme Court prepared and placed before the Supreme Court a scheme for setting up of 12 Fast Track Courts, combining several State(s) in respect of which jurisdiction will be exercised by one Special Court;

AND WHEREAS, the Ministry of Law and Justice, Government of India have informed that the said Scheme has been approved by the Supreme Court on the 14th December 2017 and under the said scheme one Special Court has been approved to be set up in Tamil Nadu for the said purpose;

NOW THEREFORE, pursuant to the aforesaid orders dated 1st November, 2017 and 14th December 2017 in W.P.Civil No.669/2016 of the Supreme Court, the Government of Tamil Nadu, in consultation with the High Court of Madras hereby establishes a Special Court at Chennai having jurisdiction over the entire State of Tamil Nadu, to try criminal cases involving elected Members of Parliament and Members of Legislative Assembly of Tamil Nadu, with effect from the date on which the Judge assumes charge of that Court."

The fallacy in the above Government Order is, it erroneously traces the source of power to the Supreme Court Order dated 1.11.2017 in ***Ashwini Kumar Upadhyay*** case and not to any statute.

11. That apart, the said Government Order did not say, whether the Court so constituted is a Court of Session or a Court of Magistrate. It is common knowledge that in every judicial district, there can be only one Court of Session and only one Court of Chief Judicial Magistrate. All sessions cases are committed by the Judicial Magistrates of the District to the Principal Court of Sessions, and thereafter, they will be made over to the Courts of Additional Sessions Judges or Assistant Sessions Judges for trial under Section 194 Cr.P.C. In the aforesaid Government Order, the Special Court was constituted for the whole state of Tamil Nadu and the Court is located in Chennai. The High Court noticed that the Government Order does not say whether the Special Court is a Court of Session or a Court of Magistrate, and therefore, a communication dated 14.09.2018 was addressed to the Government, pursuant to which the Government issued an amendment vide G.O.Ms.No.1568, dated 17.09.2018 stating that the Special Court will be in the cadre of Sessions Judge at Chennai. Even at that juncture, the High Court did not notice that the whole State of Tamil Nadu has been considered as a Sessions Division, whereas there are 32 District in Tamil Nadu, each having a Court of Session and Additional Sessions Court over and above which it is not known how a Court of Session can function covering the entire State.

12. The Magistrates in the State of Tamil Nadu faced a simple issue, where should the case of an MP involved in an offence of attempt to murder in Kanyakumari town be committed, whether to the Court of Session in Kanyakumari or to the Special Court for MP/MLAs in Chennai ? Should the case of ordinary citizens, who are co-accused along with the MP, be split up and committed to the Court of Session in Kanyakumari and the case of MP alone be sent to the Special Court at Chennai ? By sending the case from Kanyakumari District to the Special Court in Chennai, the witnesses from Kanyakumari were required to travel 700 kms for giving evidence and none thought about their safety.

13. While the Magistrates were in such confusion, the High Court issued an Official Memorndum in ROC.No.5745/2018/G4 dated 14.09.2018 to all the Courts in the State to transfer all the pending cases against MPs and MLAs to the Special Court at Chennai. However, in the same memorandum, the High Court clarified that the Magistrates should commit the cases only to the Court of Session of the District and not to the Special Court and that, after the committal, the Court of Session should make over the case to the Special Court for MP/MLAs in Chennai u/s 194 Cr.P.C.

14. At this juncture, it may be necessary to state about the nature of cases that are pending against MPs and MLAs in Tamil Nadu. The two principal political parties *viz.*, DMK and ADMK, whenever they come to power, file defamation cases against opposition leaders in the Court of Session. These cases will invariably be stayed by the High Court. When there is change in Government, all the cases filed by the previous Government will be withdrawn. Section 199(2) Cr.P.C. states that *defamation cases against persons like Ministers, etc., in respect of his conduct in the discharge of his publilc functions a Court of Session may take congnizance of such offence, without the case being committed to it, upon a complaint in writing made by the Public Prosecutor.* This is a special provision under which only a Court of Session of the District, where the offence had taken place can take congnizance. By constituting a Special Court for the whole State of Tamil Nadu, two power centres were created *viz.*, the Court of Session in the District and an overarching Special Court at Chennai for whole State. Pursuant to the directions of the High Court in Official Memorandum in ROC.No.5745/2018/G4 dated 14.09.2018 alluded to above, all the defamation cases that were pending in all the districts were transferred en masse to the Special Court at chennai.

15. Next to defamation cases, in the State of Tamil Nadu, we have magisterial offences committed during election campaigns, pending in various Magistrate Courts in the State. The following details will show the offences for which the MPs and MLAs are facing trial in the State of Tamil Nadu.

Prevention of Corruption Act	..	26 cases
SC/ST Act	..	--
Prevention of Money Laundering Act, 2002	..	1 case
NDPS Act	..	--
POCSO Act	..	--
Sec.302 IPC	..	5 cases
Sec.307 IPC	..	7 cases
Sec.376 IPC	..	--
Other IPC offences triable by Sessions	..	19 cases
Defamation	..	72 cases
Magisterial offences	..	160 cases*

(* 160 Magisterial Offences includes taking out processions in violation of prohibitory orders, conducting public meetings after 10 p.m., disfiguring walls by graffiti, etc.,)

16. To continue with our narration, the High Court did not realise that the Special Court at Chennai was not designated as a Special Court for trial of offences under the Prevention of Corruption Act, POCSO Act, SC/ST Act, etc., but still all these cases that were pending in various Special Courts in the State of Tamil Nadu were transferred to the Special Court based on the Official Memorandum dated

14.09.2018, little realising that the accused will easily have the whole trial declared as null and void in the event of the verdict going against him.

17. While so, the Hon'ble Supreme Court, by order dated 4.12.2018, observed that the State Government can create more number of Special Court for MP/MLAs cases, depending upon their need. Hence, the High Court addressed a proposal dated 5.03.2019 for creation of one Additional Special Court in the cadre of Sessions Judge and one Additional Special Court in the cadre of Assistant Sessions Judge at Chennai. The High Court realised that, unless the Special Courts are designated as Special Courts under various statutes, they will not be able to try those cases and therefore the High Court sent a proposal dated 12.04.2019 for designating the Special Courts under various statutes. The Government accepted the two proposals and by G.O.Ms.No.210 dated 26.04.2019, constituted an Additional Special Court called Special Court No.II in the cadre of Sessions Judge and one Additional Special Court in the cadre of Assistant Sessions Judge at Chennai having jurisdiction over the entire district of Chennai and also issued a Notification dated 26.04.2019 empowering the Special Courts, which reads as under:

"NOTIFICATION-I

The Government of Tamil Nadu, in consultation with the High Court of Madras, hereby establishes one more Special Court at Chennai as Special Court No.II in the cadre of Sessions Judge having jurisdiction over the entire District of Chennai to try all the criminal cases including Sessions cases and cases arising from (i) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 2989 (Central Act 33 of 1989); (ii) Protection of Children from Sexual Offences Act (POCSO) (Central Act 32 of 2012); (iii) Exclusive trial of cases of Offences against Women; (iv) Prevention of Corruption Act; (vi) Bomb Blast Cases; (vii) Land Grabbing cases, as well as cases under Special Acts, Central Acts and State Acts involving elected Members of Parliament and Members of Legislative Assembly of Tamil Nadu, with effect from the date on which the Judge assumes charge of that Court, in addition to the existing Special Court in the cadre of Sessions Judge constituted vide Home Department Notification (No.II(2)/HO/800(d)2018, published in Part II-Section 2 of the Tamil Nadu Government Gazette Extra ordinary, dated the 6th September, 2018.

NOTIFICATION-II

The Government of Tamil Nadu, in consultation with the High Court of Madras, hereby establishes an Additional Special

Court at Chennai in the cadre of Assistant Sessions Judge (Senior Civil Judge cadre) having jurisdiction over the entire District of Chennai to try all the criminal cases including Sessions cases and Prevention of Corruption Act cases, as well as cases under Special Acts, Central Acts and State Acts involving elected Members of Parliament and Members of Legislative Assembly of Tami Nadu, with effect from the date on which the Judge assumes charge that Court, in addition to the existing Special Court in the cadre of Sessions Judge constituted vide Home Department Notification (No.II(2)/HO/800(d)2018, published in Part II-Section 2 of the Tamil Nadu Government Gazette Extra ordinary, dated the 6th September, 2018."

18. The above Government Order is *per se* illegal because it includes the trial for offences for which there is no special statute at all, like "exclusive trial of cases of offences against women", "Bomb Blast cases", and "Land Grabbing cases". The Government Order states that if the offences stated in the Special Act were to be committed by an MP or MLA in Chennai, he will have to be tried by the Special Court No.II. This Government Order ignores the fact that there are already Special Courts under the SC/ST Act, POCSO Act, and Prevention of Corruption Act and

other Central and State enactments, in Chennai for exclusive trial of the offence under those Acts. For example, if an MP is involved in a POCSO offence in Chennai, the Police would have filed the final report directly in the Special Court for POCSO Act cases in the City Civil Court building, Chennai since the Special Court for POCSO Act cases is a Court of original jurisdiction, which does not require committal. The creation of Special Court No.II for trial of POCSO Act cases for Chennai and locating it in the Collectorate has created a problem for the Police as to where the final report should be filed. The next question was, can the Special Court No.II created by virtue of a Government Order oust the jurisdiction of the Special Court constituted under the enactment ? The answer is an obvious 'No'. Under a statute, more than one special court can be created, but it should be specified as to which will be the Principal Special Court, because the Police cannot pick and choose the special court for filing the charge sheet. For example, we have two special courts for NDPS Act cases in Chennai, of which one has been designated as the Principal Special Court and the other has been designated as Additional Special Court. All the FIRs and charge sheets will be filed only in the Principal Special Court and the Principal Special Judge will distribute the work. Whereas, we now have Special

Courts under all the enactments in Chennai and parallely we have one Special Court invested with the powers under all the enactments located in the Collectorate.

19. Coming to the Notification No.II, it says that the Additional Special Court in the cadre of Assistant Sessions Judge for trial of cases involving MP/MLA will also try cases under the Special Acts, both Central and State. An Assistant Sessions Court does not have original jurisdiction.

20. As stated above, Special Court No.I that was constituted by G.O.Ms.No.1423 dated 6.09.2018 was only a Sessions Court simplicitor and it was not clothed with jurisdiction to try cases under the Special enactment like Prevention of Corruption Act, etc. This anomaly was rectified by G.O.Ms.No.211 dated 26.04.2019 and the jurisdiction of the Special Court No.I was restricted to Chennai district and that Court was also given the jurisdiction to try all criminal cases arising from the Special Acts involving MPs and MLAs. Since we restricted the territorial jurisdiction of the Special Court No.I only to Chennai (earlier it was for the whole State), the cases that were transferred from all over Tamil Nadu had to be sent back to the erstwhile Courts. So, original records travelled to and fro and it is not known how many important documents have gone missing in the transit.

21. We did not stop with it, but at our instance, the Government issued G.O.Ms.No.212 dated 26.04.2019, designating all the Principal Sessions Judges in the State of Tamil Nadu, except Chennai as Special Courts under various statutes for trial of cases involving MP/MLAs. By G.O.Ms.No.213 dated 26.04.2019, one Magistrate in each district was designated for trial of magisterial offences involving MPs and MLAs. In the light of these Government Orders, all the cases that were transferred to Special Court No.I at Chennai, both Sessions and Magisterial, were retransferred to the districts concerned.

22. With this, the problem got further confounded. We have designated the Principal Sessions Judges of every district as Special Judge for dealing all kinds of criminal cases involving MPs/MLAs, both under the various special Acts as well under IPC. The Principal Sessions Judge in a district is the head of the Civil unit, Criminal Unit and Administrative Unit. He will be required to deal with bail and anticipatory bail applications on a daily basis, apart from civil and criminal original and appellate works. We have constituted Mahila Courts and Special Courts in all districts to deal with cases against women and abuse of children. The Mahila Court is not a Court of original jurisdiction, but the POCSO Court is a Court of original

jurisdiction. POCSO Courts are equipped with child-friendly rooms and special rooms with VC facility for recording the testimony of children. Such a facility is not available in the Courts of Principal District Judges. All these will enure to the advantage of the MPs and MLAs involved in such offences, since the Principal Sessions Judges will not be able to take up their cases amidst other judicial and administrative pre-occupation.

23. Coming to the magisterial offences, we have established Judicial Magistrate Courts in almost all the Taluks in the districts. We have also established Magistrate Courts for the trial of cheque bounce cases and for the trial of cases against women under the Protection of Women from Domestic Violence Act, Section 498-A prosecution, etc. Witnesses in such cases will be available only in and around the taluk. Now, we have designated Magistrates in the District headquarters as Special Magistrate for dealing with criminal cases involving MPs/MLAs. This again will prove to be counter productive as the Police from far away taluks will not be able to produce witnesses in the Magistrate Courts for MPs/MLAs that are located in the district headquarters. In magisterial and sessions trials, there will be cases and counter cases, in either of which, if an MP or MLA is involved, his case alone cannot

be shifted to the Special Magistrate Courts in the district headquarters and the counter case composed of non-MP/MLA accused should also be transferred. Then the question is, is the Special Magistrate for MP/MLA cases competent to try the counter case in which there is no MP/MLA as accused ?

COURT STRUCTURE IN TAMIL NADU

24. In Tamil Nadu, we have 126 Combined Court Complexes in 31 districts. We have established Additional District Courts, Sub Courts and Judicial Magistrate Courts in taluks that are far away from the District headquarters, so that the parties are not inconvenienced. As it is, magisterial trial, whether against MPs, MLAs, or others will be held in the Court of all the Judicial Magistrates of the taluk where the witnesses will appear to give evidence.

25. We hereby give the details of the existing Court structure in the State of Tamil Nadu.

Total number of Districts	.. 32
No.of Sessions and Additional Sessions Courts	.. 100
No.of Assistant Sessions Courts	.. 173
No. of CJM Courts	.. 31
No. of Addl.CJM Courts	.. 2
No. of CMM Court	.. 1
No. of Addl.CMM Courts	.. 3
No. of MM Courts	.. 21

No. of Judl. Magistrate Courts	.. 228 + 72 DM-cum-JM Courts
No. of Spl. Courts for PC Act cases	.. 8 (Apart from which all CJMs are empowered to try cases under PC Act)
No. of Spl.Courts for SC/ST Act cases	.. 16 Special Courts in communally sensitive districts and in the remaining 16 districts the PDJs have been conferred powers to try SC/ST Act cases
No.of POCSO Courts	.. 16 (In the remaining 16 districts Mahila Courts are conferred power to try POCSOAct cases)
No. of NDPS Courts	.. 11
Spl.Courts under PC Act for trial of CBI cases	.. 7+1
No. of Courts for Money Laundering Act cases	.. 8 Courts are designated (6 -Chennai, 2- Madurai)

26. In our considered opinion, the existing Court Structure in the State of Tamil Nadu which is robust, is more than enough to deal with the cases involving MPs and MLAs. We request the Hon'ble Chief Justice to bring this fact to the notice of the Hon'ble Supreme Court and get exemption from establishing Special Courts for trial of cases involving MPs and MLAs and permit us to restore *status quo ante*.

27. Our only apprehension is that we may not be able to sustain the challenge to the constitution of the Special Courts on the judicial side in the light of the authoritative pronouncements of the Hon'ble Supreme Court in *Anwar Ali Sarkar* (*supra*), *A.R.Antulay* (*supra*) and *APD Jain Pathshala* (*supra*). At this juncture, we

would like to place on record a previous experience. During the DMK regime (2006-2011), there were serious allegations of land grabbing by DMK politicians. Ms.Jayalalitha, who was in the opposition, fought the election saying that she would create Special Courts for prosecuting land grabbers. After winning the Assembly elections in the year 2011, the ADMK Government after consulting the High Court sanctioned 25 Courts at Magisterial level throughout the State for trial of cases of land grabbers. Her Government constituted a Special Police Cell for investigation of the cases. All this was challenged in the High Court and a Division Bench in ***R.Thamaraiselvan v. Government of Tamil Nadu, (2015 (1) LW 673)***, placed reliance upon the judgment of the Suprme Court in *Anwar Ali Sarkar (supra)* and quashed the Government Order creating the Land Grabbing Cell and also quashed the Government Order constituting Special Courts on the ground that they are redundant. The Government's appeal to the Supreme Court is still pending. Persons who lost their lands do not see any light at the end of the tunnel. Our apprehension is, a similar fate may befall the Special Courts for MP/MLAs, and what the Supreme Court wanted to achieve will stand defeated. The accused MP/MLAs will have the last laugh.

FORENSIC SCIENCES LABORATORY

28. In Tamil Nadu, there is one principal laboratory in Chennai with state of the art facilities and ten regional forensic sciences laboratories located in Madurai, Salem, Coimbatore, Trichy, Ramanathapuram, Thanjavur, Tirunelveli, Vellore, Villupuram and Dharmapuri. Apart from this, in every District, there is a mobile forensic science laboratory unit to assist the Investigating Officers in collecting clue materials. At present, only in Chennai and Madurai, facilities for DNA profiling is available. The Government is proposing to establish DNA labs in Thanjavur and Salem. These two laboratories should also have handwriting experts for which the High Court can itself address the Government on the administrative side.

PROSECUTOR

29. There are two classes of Prosecutors in the trial courts *viz.,* (a) Political Appointees, and (b) Cadre Prosecutors. We find that the Cadre Prosecutors are far more ethical than the political appointeees, who use the Prosecutorship to get acquainted with the Police and use the acquaintance when they resume private practice after the end of their tenure. They sometimes, engage their juniors to represent the accused in bail applications and soft pedal the case. We invited these

political appointees for a training session in the Judicial Academy at Chennai. They came there, marked their attendance and some of them absconded. When the Director of the Academy questioned them, one of them challengingly said that he had gone to meet the Minister in his house. They know that they are not under the control of anyone, except their political bosses, and therefore their loyalty is not for the Institution. At present, pursuant to the directions of the Hon'ble Supreme Court in *suo motu* W.P.No.1 of 2019, the State Government by Notification G.O.Ms.No.84 Home (Courts-VI) Department, dated 10.02.2020, and G.O.(D)No.167 Home (Courts-VI) Department dated 31.01.2020 appointed Cadre Prosecutors in the Special Courts for POCSO Act cases. Similarly, by G.O.Ms.717 Home (Courts-VI) Department, dated 26.12.2019, the Government has appointed Cadre Prosecutors in the Special Courts for MP/MLA cases in Chennai. Under Section 24(6) of the Code of Criminal Procedure, 1973 Cadre Prosecutors alone can be appointed in the districts and political appointments can be made only when a suitable person is not available in the Cadre. The State of Tamil Nadu has amended Section 24 by including sub-section 6A (Tamil Nadu Act 42 of 1980) which gives the power to the State Government to appoint anyone other than the Cadre Prosecutor, notwithstanding the

bar under sub-section (6). Armed with this amendment, political appointments are made in Tamil Nadu eventhough there is a strong Cadre Prosecutor Department. These political appointees are preventing the career progression of Cadre Prosecutors and are not permitting them to argue bail applications in the Court of Session. That is one of the reasons for influential persons like MPs/MLAs to get bails and anticipatory bails in the Courts. Even with regard to trial, these political appointees act in league with their Political Masters in making the witnesses turn hostile. Unless the Hon'ble Supreme Court intervenes and bars the entry of political appointees as Prosecutors in the trial Courts, it will be very difficult to stem the rot. We doubt the very consititutional validity of Tamil Nadu Act 42 of 1980 inasmuch as it is clearly contrary to Section 24(6) of the Code of Criminal Procedure, 1973 and runs foul of Article 50 of the Constitution of India by sanctioning unbridled executive interference in the work of the judiciary.

OUR SUGGESTIONS

i) The Government Orders constituting the Special Court No.II, Chennai and Assistant Sessions Court for MP/MLAs cases should be recalled, since these Courts are simply dealing with the defamation cases which can be dealt with only

by the jurisdictional Court of Session.

ii) Even the Special Court No.I, Chennai requires to be withdrawn but, since a few high profile cases of MPs/MLAs are in part-heard stage, the said Court may continue for sometime. To regularise that Court, a fresh notification should be issued under Section 4 of the Chennai City Civil Court Act, 1892 to declare that Court as an Additional Court. A notification has to be issued under Section 3(1) of the Prevention of Corruption Act, 1988 appointing the said Judge as a Special Judge. Thereafter, a notification should be issued to amend the notification dated 26.04.2019 in such a way as to delete SC/ST Act, POCSO Act, Exclusive Trial of cases of offences against women, Bomb blast cases and Land grabbing cases but, retaining only Prevention of Corruption Act.

iii) Directions may be issued to the Principal Judge, City Civil Court, Chennai and the Principal Judge, CBI Special Court, Chennai not to make over any more cases of MP/MLAs to the Special Court No.I, Chennai for MPs/MLAs.

iv) Notifications may be issued withdrawing G.O.Ms.No.212 and G.O.Ms.No.213 both dated 26.04.2019 so that, the Principal District Judges in the Districts and

the Judicial Magistrates in the Districts are no more Special Courts for MP/MLAs cases.

v) The Hon'ble Chief Justice may create an Administrative Committee of two Judges to monitor the cases of MPs and MLAs through the Principal District Judges.

vi) The Principal District Judges should be instructed to inform the Committee as and when ~~a~~ an FIR is registered against an MP/MLA in his district.

vii) The Magistrates concerned or the Courts having special jurisdiction or the Courts having original jurisdiction like the Special Court for POCSO Act cases and Special Court for PC Act cases, should monitor the investigation as held by the Hon'ble Supreme Court in ***Sakiri Basu v. State of U.P. ((2008) 2 SCC 409)*** and ensure that the investigation is completed expeditiously.

viii) Where final reports are filed, steps should be taken through the Superintendent of Police of the district concerned to serve summons on the accused and subpoena on the witnesses.

ix) At present, if an FIR registered against an MP/MLA and others is challenged under Section 482 Cr.P.C. by a co-accused who is not an MP/MLA and if the

admission Court grants interim stay of investigation, the matter will go to the cold storage. To obviate this possibility, a direction should be given to the numbering clerk that he should not number a petition, unless the Court where the FIR/case is pending is stated in the footnote. If this is done, a copy of the stay order will go to the Court where the FIR/case is pending and the Magistrate/Judge will easily find out that the said FIR/case relates to an MP/MLA. Thereafter, he will bring the matter to the notice of the Hon'ble Chief Justice through the aforesaid channel.

x) At present, one Hon'ble Judge of the High Court in the Principal Bench is exclusively assigned the portfolio of hearing MP/MLAs cases. In our humble opinion, this system may be revisited for the following reasons :

a) The regular portfolio of the Hon'ble Judge may be so heavy that he may not find time to take up the case of MP/MLAs. We studied the trajectory of the case filed by Mr.Karthik Chidambaram, M.P. in the High Court challenging the prosecution against him. This case went to two Judges and on account of paucity of time, they were not able to take up the case and ultimately, it was disposed of by a third Judge. If the decision to post a case of an MP/MLA or the case of

a co-accused, who is not an MP/MLA, is taken by the Hon'ble Chief Justice as and when the need arises, it will be easier for him to choose a Judge depending upon the board.

b) There is possibility of conflicting verdicts occuring inasmuch as the case of the co-accused, who is not an MP/MLA may go before the regular portfolio Judge and the case of the MP/MLA accused may go before the special portfolio Judge and if one quashes the FIR and the other sustains the FIR, it will lead to an anomalous situation.

xi) Every accused who has not been released on bail or anticipatory bail should be directed to furnish a bond under section 88 Cr.P.C. with or without sureties.

xii) If any accused absconds, a fresh FIR should be registered against him under Section 229A IPC because in these cases, the influential accused will not abscond, but will make the co-accused abscond whenever a witness turns up for giving evidence, so that the trial does not progress on that day.

xiii) Discharge petitions should not be entertained piecemeal. On a day fixed by the trial Court, the Public Prosecutor should be directed to follow Section 225/239 Cr.P.C. as the case may be.

xiv)If any quash application or revision against discharge is admitted by a Single Judge of the High Court, whether on the petition filed by the MP/MLA or by a co-accused in that case, the Principal District Judge should inform the same to the Administrative Committee, which in turn shall bring the matter to the knowledge of the Hon'ble Chief Justice. The Hon'ble Chief Justice being the Master of the Roster, may thereafter assign the case to his own board or to any other Division Bench for disposal.

xv)Trial Courts should be directed to follow the law laid down by the Hon'ble Supreme Court in ***Vinoth Kumar v. State of Punjab (2015 (1) Scale 542)*** and the witnesses should be cross-examined by the defence immediately after they are examined in chief, without giving room for the accused to tamper them.

xvi)The trial Courts should be directed to remand the accused in custody under Section 309 Cr.P.C. if dilatory tactics are adopted, by following the Hon'ble Supreme Court judgment in ***State of U.P. v. Shambu Nath Singh (2001 AIR SCW 1335)***.

xvii)Not to adjourn the case on account of boycott of courts by Lawyers and witnesses should not be turned back on that score.

xviii) Similarly, recall of witnesses for the purpose of cross-examination on the ground that the accused was not able to cross-examine the witnesses on account of boycott should not be entertained both by the trial Court and by the High Court.

xix) When important witnesses come, there is a pernicious practice prevalent in several trial Courts to observe boycott. All these can be put down with an iron

hand only with an authoritative pronouncement of the Hon'ble Supreme Court that a witness cannot be recalled on the ground that the counsel was not able to cross-examine him due to Court boycott.

xx)Tamil Nadu Act 42 of 1980 inserting Section 6-A in Section 24 Cr.P.C. should either be declared unconstitutional or diluted so as to prevent political appointees becoming prosecutors in the trial courts.

In our opinion, if the above measures are implemented in letter and spirit, we will be able to achieve the Hon'ble Supreme Court's object of decriminalisation of Legislatures.

Sd/- xxxx
(P.N. PRAKASH, J.)
Sd/- xxxx
(G. JAYACHANDRAN, J.)
Sd/- xxxx
(N. SATHISH KUMAR, J.)

The Report of the Hon'ble Criminal Rules Committee on Special Courts for Trial of Criminal cases involving MP/MLAs was approved by **The Hon'ble The Chief Justice, High Court, Madras,** on 08.10.2020 with the following endorsement:-

RG - Circulate amongst the Hon'ble Administrative Committee Members for discussion in the next meeting of the Administrative Committee. A copy be sent to the learned Amicus Curiae appointed by the Hon'ble Apex Court for his suggestions and further deliberations on the subject matter. This report may be placed before the Hon'ble Apex Court for perusal.

Sd/-
A.P.SAHI
CJ /08.10.2020

//True Copy //

13.10.2020

REGISTRAR GENERAL, HIGH COURT, MADRAS.

ITEM NO.301 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
RECORD OF PROCEEDINGS

SMW (C) No(s). 5/2020

IN RE GUIDELINES FOR COURT FUNCTIONING THROUGH
VIDEO CONFERENCING DURING COVID 19 PANDEMIC Petitioner(s)

VERSUS

Respondent(s)

(IA No. 48252/2020 - INTERVENTION APPLICATION)

Date : 26-10-2020 These matters were called on for hearing today.

CORAM : HON'BLE THE CHIEF JUSTICE
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MR. JUSTICE L. NAGESWARA RAO

For Petitioner(s) By Courts Motion, AOR

For Respondent(s) Mr. K.K. Venugopal, AGI
Mr. Tushar Mehta, SGI
Mr. Ankur Talwar, Adv.
Mr. Rajat Nair, Adv.
Ms. Swati Ghildiyal, Adv.
Mr. B.V. Balram Das, AOR

Mr. Vikas Singh, Sr. Adv.
Ms. Deepika Kaalia, Adv.
Mr. Mrityunjay Singh, Adv.
Mr. Satwik Mishra, Adv.
Mr. Jayant Mohan, AOR

Mr. Harish Salve, Sr. Adv.

Mr. Chirag M. Shroff, Adv.
Ms. Abhilasha Bharti, Adv.

Mr. Abhimanyu Tewari, AOR

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

Application for intervention is allowed.

Heard Mr. K.K. Venugopal, learned Attorney General for India, Mr. Tushar Mehta, learned Solicitor General of India, Mr. Vikas

Mehta, learned senior counsel and Mr. Harish Salve, learned senior counsel.

By our order dated 06.04.2020, we had issued certain directions in furtherance of the commitment to the delivery of justice. Those directions were intended primarily to cover the measures which this Court had to adopt to meet the challenge posed by the COVID Pandemic. There has been a change in the situation since April, 2020. In many States, the situation has eased and it has been possible to even commence hearings in congregation. We must say that the system of Video Conferencing has been extremely successful in providing access to justice.

Be that as it may, we find that the directions issued earlier need not be altered except as follows :-

We propose to substitute sub-para (vii) of Paragraph 6 with the following :

The Video Conferencing in every High Court and within the jurisdiction of every High Court shall be conducted according to the Rules for that purpose framed by that High Court. The Rules will govern Video Conferencing in the High Court and in the district courts and shall cover appellate proceedings as well as trials.

We are given to understand that several High Courts have framed their rules already. Those High Courts that have not framed such Rules shall do so having regard to the circumstances prevailing in the State. Till such Rules are framed, the High

Courts may adopt the model Video Conferencing Rules provided by the E-Committee, Supreme Court of India to all the Chief Justices of the High Court.

List after Diwali Holidays.

(GULSHAN KUMAR ARORA)
AR-CUM-PS

(INDU KUMARI POKHRIYAL)
ASSISTANT REGISTRAR