

Court No. - 10

Case :- CRIMINAL APPEAL No. - 465 of 1999

Appellant :- Surednra Prasad Misra

Respondent :- State Of U.P. And Ors.

Counsel for Appellant :- Arun Sinha, Anurag Singh Chauhan, Brij Mohan Sahai

Counsel for Respondent :- G.A., Abhinandan Kumar Pandey

Hon'ble Mrs. Sangeeta Chandra, J.

Hon'ble Pankaj Bhatia, J.

Hon'ble Mohd. Faiz Alam Khan, J.

(Per: Mrs. Sangeeta Chandra J.)

(Per: Mohd. Faiz Alam Khan, J)

1. We had passed an order yesterday on hearing several young Advocates who had offered assistance to us with regard to the questions referred to us by the Hon'ble the Chief Justice in pursuance of Reference made by the Division Bench of this Court in Criminal Appeal No. 465 of 1999 dated 12.03.2024, wherein the correctness of the order of the Coordinate Bench at Allahabad in Government Appeal No. 454 of 2022, dated 18.01.2024 and in Government Appeal No. 2552 of 1981, dated 19.01.2024 had been doubted. We had fixed this case for today on the limited issue as to whether a Larger Bench has the power to stay the directions issued by the Division Bench at Allahabad in its order dated 18.01.2024 and 19.01.2024 as such directions had wide reaching implications not only on Government Authorities, but also on the general administration of justice in the State of U.P.

2. We have heard Sri Apoorve Tiwari, Sri Nadeem Murtaza, Sri S. M. Singh Royekwar, Sri Vikas Vikram Singh and Sri Naved Ali, learned Advocates, as also Dr. V. K. Singh, learned Government Advocate, and Sri Umesh Verma, learned Additional Government Advocate-I at length on the powers that can be exercised by this Larger Bench in a Reference made to it by a Division Bench.

3. Sri Apoorve Tiwari, Advocate has referred to Chapter V Rule 6 of the Allahabad High Court Rules and has submitted that Reference is made of either the entire case or with respect to some limited questions of law by the Hon'ble Chief Justice to the Larger Bench constituted for the purpose and the Larger Bench while considering such questions of law does not exercise any statutory jurisdiction conferred under any specific Act which would limit its power within the frame work of the statutory provisions of such Act, while considering questions referred to it the Larger Bench exercises powers given to the High Court under Article 226 and 227 of the Constitution and such powers cannot be limited, except of course in accordance with settled principles of Law enumerated in binding precedents.

The questions before this Court relate to directions issued in Paragraph-07 of the order passed by the Division Bench at Allahabad in Government Appeal No. 454 of 2022 dated 18.01.2024 and it is quoted herein below:-

"7. A perusal of Section 390 Cr.P.C. clearly gives power to the Court before whom a accused is brought, either to send him to prison or admit him to bail. It is also worth noticing that repeatedly such type of cases are

coming where in appeal in pursuance of the Non Bailable Warrant issued by the High Court to the accused who were acquitted from the trial court re languishing in jail for more than one year because they were either not served with the warrant or could not engage Advocate in the High Court. It is held by a full Bench of Bombay High Court while interpreting provisions of Section 390 Cr.P.C. that the very purpose of this Section is to ensure presence of an accused before the Court. In view of the above, we deem it appropriate to issue a direction to the Director, Judicial Training and Research Institute, Lucknow to take online seminar of all the Chief Judicial Magistrates as well as Secretary, District Legal Services Authority and inform that:

(a) As and when Non Bailable Warrants are issued in appeal from acquittal and accused is brought before the CJM / Ilaka Magistrate, he will be admitted bail subject to furnishing bail bonds to their satisfaction and on undertaking that they will appear before the High Court on particular date as per the order of the Court.

(b) Even in cases where appeal against conviction is pending before the High Court and sentence is suspended and either he or his counsel could not appear before the High Court and Non Bailable Warrants are issued on and produced before the CJM, they will be released on bail to the satisfaction

of the court concerned with an undertaking that they will appear before the High Court.

(c) The Director of the Judicial Training and Research Institute, Lucknow will conduct a survey in the State of UP to find out where in terms of issuance of Non Bailable Warrant either in case of bail against acquittal or in case where accused sentence is suspended, but subsequently he failed to appear, is in jail (prison) for considerable long time, they will be released on bail in same terms as mentioned in above sub para (a) and (b).

(d) Since keeping a person in judicial custody for long time without any justification violate the right of life and liberty of such person, after 30 days of this order, if still bails are not granted, this Court will impose cost of Rs. 50,000/- to be paid by the District State Legal Services Authority concerned."

4. The Division Bench, which has made the Reference, has referred to Constitution Bench judgement in the case of ***State of U.P. Vs. Poosu and Another, (1976) 3 SCC 1***, where the Supreme Court had occasion to consider the question whether an Appellate Court has a power to issue non-bailable warrant for arrest and committal to prison of the accused respondent, who had been acquitted by the Trial Court, and it has observed that if the Appellate Court while considering an Appeal against an order of acquittal finds that there is sufficient ground for interfering and issuing process to the respondent, his status as an accused person and the proceedings against him, revive. The question of judging his

guilt and innocence in respect of the charge against him, once more becomes *sub-judice*. The Supreme Court also considered that for securing the attendance of the accused respondents bailable warrants or non-bailable warrants can be issued as per the discretion of the Appellate Court and it repelled the contention made before it that an order directing rearrest and detention of an accused respondent who has been acquitted by the Trial Court, in any way, offends Article 21 or any other fundamental right of such accused. It held that by no stretch of imagination could such an order be said to have deprived the accused respondent of his liberty in a manner otherwise than in accordance with the procedure established by law.

5. The Division Bench in its referral order dated 12.01.2024 in Criminal Appeal No. 465 of 1999 also referred to the Larger Bench decision of the Bombay High Court in ***Bal Krishna Mahadev Lad Vs. State of Maharashtra (2012) SCC Online Bombay 1490*** and quoted several paragraphs thereof to say that even the Larger Bench of Bombay High Court, which has been relied upon in the order dated 18.01.2024 in Criminal Appeal No. 454 of 2022 by the Division Bench at Allahabad has been misread and the Division Bench at Allahabad has missed out the ratio of the Full Bench decision of Bombay High Court and also of the judgement of the Hon'ble Supreme Court in the State of U.P. Vs. Poosu and Another (Supra) .

6. It has further been argued by Sri Apoorve Tiwari that in the case of ***Kantaru Rajeevaru Vs. Indian Young Lawyers Association and Others, (2020) 9 SCC 121,***

the Supreme Court in Paragraphs 26 and 27 has observed that there is no fetter on the exercise of discretion of the Court in referring questions of law to a Larger Bench and although the Supreme Court was referring to its own powers under the Constitution, as superior Court such observations would equally apply to the High Court which possesses extraordinary jurisdiction under Article 226 and 227 for administration of justice. Unlike a court of limited jurisdiction, the superior Court of record is entitled to determine for itself questions about its own jurisdiction and no matter is beyond the jurisdiction of a superior Court of record unless it is expressly shown to be so, under the provisions of the Constitution and in the absence of any express provision in the Constitution, a superior Court of record has jurisdiction in every matter, and if there is any doubt, the Court also has the power to determine its own jurisdiction.

7. The Supreme Court in the case of *Kantaru Rajeevaru (Supra)* had relied upon the Halsbury's Laws of England where it was stated that *prima facie* no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings, that the particular matter is within the cognizance of the particular Court.

8. Sri Apoorve Tiwari, Advocate has also argued that under Article 227 of the Constitution the High Court has been given supervisory powers and it cannot issued directions to Subordinate Courts under its supervision which

are apparently *per incuriam* and against the law settled by the Constitution Bench. The sweeping observations made by the Division Bench at Allahabad in Paragraph-07 as aforesaid cannot be allowed to stand even during the interregnum while this Larger Bench decides the questions of law referred to it as it would impede the regular administration of justice.

9. It has also been argued that the Coordinate Bench in its order dated 12.03.2024 has expressed an anxiety with regard to far reaching ramifications of the directions issued in Paragraph-07 of the Division Bench at Allahabad in its order dated 18.01.2024, and even if no particular party, for example, the Judicial Training Research Institute or the State Legal Services Authority has approached this Court praying for an interim stay on the directions issued to them, this Larger Bench, if it is convinced that such directions could not have been issued in ignorance of the statutory Provisions under Section 390 of the Cr.P.C. or the law as settled by the Hon'ble Supreme Court in the case of *State of U.P. Vs. Poosu and Another (Supra)*; does have a jurisdiction and a duty to issue such orders that reiterate the law settled by the Constitution Bench under Article 142 which is binding on all inferior Courts. The Full Bench cannot countenance teaching of law inconsistent with the observations of the Constitution Bench to Judicial Officers as it would lead to chaos in the administration of justice.

10. Sri Nadeem Murtaza, Advocate during the course of his arguments referred to a judgement rendered by the Hon'ble Supreme Court in the case of ***State of Punjab Vs. Salil Sabhlok (2013) 5 SCC 1*** to say that although it is fairly

well settled that when a Reference is made on a specific issue issued to a Larger Bench it cannot adjudicate upon an issue on which the question has not been referred to it, however, notwithstanding the law that a Larger Bench should decide the question referred to it, if a subsidiary question logically and unavoidably arises, the Larger Bench cannot be dogmatic and refuse to answer it. The commonsense approach must be taken on such occasions.

11. Sri Nadeem Murtaza, Advocate has also referred to ***Gopakumar B. Nair Vs. CBI, (2014) 5 SCC 800*** wherein it has been held that Reference of a case to a Larger Bench necessarily has to be for reconsideration of the principle of law on which the case has been decided and even though the decision rendered by any Bench is final *inter partes* the principle of law on which the decision is based is open to reconsideration by a Larger Bench in an appropriate case.

12. Sri Nadeem Murtaza, Advocate has referred to the observations of a Full Bench of the Bombay High Court in ***Maya Sanjay Khandare Vs. State of Maharashtra, 2021 SCC Online Bombay 3*** where this was observed while relying upon decision rendered in *Gopakumar B. Nair (Supra)*.

13. Sri Nadeem Murtaza, Advocate has referred to an order passed by the Hon'ble Supreme Court on 01.05.2023 in ***Special Leave Petition (Criminal) Diary No. 18272 of 2023*** where the Court was pleased to place the matter before the Larger Bench while also deferring proceedings filed with respect to the judgement in ***Ritu Chhabaria Vs. Union of India, Writ Petition (Criminal) No. 60 of***

2023, before any other Court, till pendency of the issue before the Larger Bench. He has referred to a subsequent order dated 12.05.2023 also passed in same Special Leave Petition where the Supreme Court has clarified that although applications filed before any other Court on the basis of the judgement in issue may be deferred it would not preclude the Trial Court or the High Court of considering an application for grant of default bail under Section 167 of the Cr.P.C. independent of and without relying on the judgement dated 26.04.2023 in the case of *Ritu Chhabaria (Supra)*.

14. Sri Nadeem Murtaza, Advocate has also relied upon the interim order passed by the Supreme Court in ***Sita Soren Vs. Union of India, 2014 SCC Online SC 1889***, where while referring the issue of substantial and general public importance to a Larger Bench of three judges the Court also observed that the petitioner would be free to press his application for ad-interim stay of the judgement impugned before the Larger Bench.

15. It has been argued on the basis of such interim orders passed by the Supreme Court that it would be entirely within discretion of the Larger Bench to exercise its power to direct that any proceedings be kept in abeyance so long as they relate directly to the Reference before it.

16. Sri Naved Ali has argued that in the case of *Justice K.S. Putuswamy (Retd.) and another Vs. Union of India and others, Writ Petition (Civil) No.494 of 2012 (Aadhar Case)*, a three Judges Bench by its order dated 11.08.2015 referred the case to a Larger Bench. Thereafter, a Constitution Bench was formed which finally decided the case on 26.09.2018 as

reported in 2019 (1) SCC 1. However, during the pendency of the said Reference on 15.10.2015, the Hon'ble Supreme Court in addition to its earlier interim orders further provided that the Aadhar Card Scheme is purely voluntarily and it cannot be made mandatory till the matter is finally decided by the Supreme Court one way or the other. Similarly, in Chief Executive Officer and Vice Chairman, Gujarat Maritime Board Vs. Haji Daud Haji Harun Abu and others, 1996 (11) SCC 23, the Supreme Court observed in paragraph-10 that-

"It is well-settled that where a substantive power is conferred upon a court or tribunal, all incidental and ancillary powers necessary for an effective exercise of the substantive power have to be inferred. See Khyerbari Tea Company Limited & Another v. State of Assam & others [A.I.R. (1964) S.C. 925]. The rule as quoted in Craies is: "one of the first principles of law with regard to the effect of an enabling Act is that where a legislature enables something to be done, it gives power at the same time by necessary implication to do everything which is indispensable for the purpose of carrying out the purpose in view."

17. The same view has been reiterated by the Hon'ble Supreme Court in the case of "Jamal Uddin Ahmad Vs Abu Saleh Najmuddin and Anr reported in AIR 2003 SUPREME COURT 1917" by additionally quoting "*Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdiction explicari non potuit-* "Where an act confers jurisdiction, it impliedly also grants the power of doing all

such acts, or employing such means, as are essentially necessary to its execution."

18. It has been argued by Sri Naved Ali that there is no specific bar saying that a Larger Bench or a Constitution Bench as the case may be while being seized with the issue in question cannot pass interim directions/ stay in the interregnum. The direction issued in Government Appeal no.454 of 2022 by the Division Bench at Allahabad being in ignorance of the law settled by the Constitution Bench in the case of *State of U.P. Vs. Poosu (supra)*, are, *prima facie, per incuriam* and since this Larger Bench is reconsidering the correctness of the observation of the Division Bench as aforesaid, and also its jurisdiction to issue directions as quoted hereinabove. It has also to consider the fact that the Division Bench at Allahabad while issuing such directions has ordered that such directions have to be complied with and a compliance report submitted to it on the next date of listing.

19. The Division Bench at Allahabad was considering a Criminal Appeal against acquittal by the State where the accused respondent was not appearing for a long time and to secure his presence, bailable warrants had been issued. In pursuance of such warrants, the accused respondent had surrendered but was sent to Prison because of inability to furnish personal bond and sureties. The bail application moved thereafter before the Division Bench was allowed. The jurisdiction being exercised by the Division Bench was for the limited purpose of hearing the Appeal and for securing presence of the accused respondent, it had passed orders under Section 390 of the Cr.P.C. It could also have

passed orders on the bail application of the accused/respondents but it could not have issued such directions as would be contrary to the procedure established by law and settled by the Constitution Bench in *State of U.P. Vs. Poosu* (supra).

20. Sri Vikas Vikram Singh, has referred to the judgement of the Supreme Court in *Income Tax Officer Cannanore Vs. M.K. Mohammed Kunhi*, 1968 SCC OnLine SC 71, and paragraphs 7, 8 and 13 thereof, to argue that since the Larger Bench is constituted under Chapter V Rule 6 of the Allahabad High Court Rules, 1952 to pronounce upon the correctness of an order passed by the Division Bench at Allahabad and such Larger Bench can eventually decide such view to be *per incuriam*, and not in accordance with law, the jurisdiction to so decide also includes the incidental and ancillary jurisdiction to pass an interim order in relation to such directions to make jurisdiction under Rule 6 fully effective. The jurisdiction under Rule 6 must be interpreted in such a manner as to give meaning and purpose to the exercise of such jurisdiction, and it cannot be said that the Larger Bench cannot pass appropriate interim order while considering the questions of law referred to it as any interpretation which renders exercise of such jurisdiction restricted, illusory, unworkable and otiose must be avoided.

21. It has also been argued that a Court hearing any matter as per determination assigned by the Hon'ble Chief Justice, cannot overstep into the determination of another Court lest its orders be rendered without jurisdiction:

22. An Hon'ble Judge of the High Court sitting alone or Hon'ble Judges sitting in a Division Bench, hearing any matter in determinations assigned by the Hon'ble Chief Justice, cannot overstep into the determination of another Hon'ble Judge sitting alone or in a Division Bench.

23. The Hon'ble Supreme Court in ***Dinesh Kumar Singh @Sonu v.State of U.P. & Others 2017 SCC OnLine All 42***, has held that if any such issue or question arises in the matter including a question in public interest which is not connected with the matter before them and which in their opinion is necessary to be decided, in that situation the only option open to the Hon'ble Judge(s) is to direct the Registry to place the matter before the Hon'ble Chief Justice for appropriate directions or before the appropriate Hon'ble PIL Bench and, in any case, should not convert such a writ petition into a PIL.

24. It has been further observed in the aforesaid judgement that any order made beyond the scope of the matters assigned to an Hon'ble Judge as per Chapter V Rule 1 of the High Court Rules is an order without jurisdiction and void.

25. As such, as per the Constitution of Benches w.e.f. 02.01.24, the Hon'ble Court concerned did not possess the jurisdiction of PIL or Criminal Writs. The directions issued to the Director, J.T.R.I., to the State Legal Services Authority and to the Chief Judicial Magistrates all over the State are, thus, without jurisdiction.

26. Sri Umesh Verma, learned A.G.A. has argued on the basis of the judgement rendered in ***State of Maharashtra and others Vs. Balu 2023 (2) SCC (Cri) 788***, that in the said judgement the Supreme Court while dealing with the Criminal Appeal decided by the High Court of Bombay had set aside certain directions issued in the operative portion of such order of the High Court to each of the District Legal Services Authority and also to the High Court Legal Services Committee which provided for giving a copy of the detention order and grounds of arrest to the detenu and to give legal aid to the detenu on the day when such detention order is received.

27. The Supreme Court had observed that said observations made by the High Court while deciding the Criminal Appeal was absolutely unwarranted and not required and therefore set them aside while otherwise affirming the decision of the High Court on merits of the case.

28. It has been argued by Sri Umesh Verma, learned A.G.A. that under Section 372 of the Cr.P.C. as amended in 2009, a victim has a right to be heard against the order of acquittal and in case the observations made by the Division Bench at Allahabad in paragraph-7 of its order dated 18.01.2024 are to be given effect to by the Chief Judicial Magistrate, then all accused respondents shall have to be given bail even without giving notice to the victim. He has argued that the directions issued by the Division Bench in its order dated 18.01.2024 are even against the language of the the

statutory provisions as contained under Section 390 of the Cr.P.C.

29. It has been argued that in the case of Chawali Vs. State of U.P.; Habeas Corpus Writ Petition No.594 of 2012, reported in 2014 SCCOnLine All 12849, a Single Judge of the Allahabad High Court while dealing with the Habeas Corpus petition made certain directions which led to release of more than 350 female detenues from various State Protection Homes and the question was referred to the Larger Bench with regard to the powers to be exercised by a Hon'ble Single Judge while sitting in limited jurisdiction. The Larger Bench has observed that such directions were completely without jurisdiction and against the determination of roster by Hon'ble the Chief Justice.

30. On the other hand, Sri S.M. Singh Royekwar, Advocate, has argued that this Larger Bench exercises its power within the contours of Rule 6 of Chapter V and can only decide the questions of law that have been referred to it. The referral Court while referring such question, could have observed that since it does not agree with the directions made by the Division Bench in its orders dated 18.01.2024 and 19.01.2024, the Larger Bench may also consider the question of grant of interim relief. The Division Bench in its order dated 12.03.2024 while doubting the correctness of all the directions issued on 18.01.2024 by the Coordinate Bench at Allahabad did not think it appropriate to hold that the order dated 18.01.2024 being against the law settled by the Supreme Court in the case of *Poosu (supra)* should be ignored. It only made a request to the Hon'ble Chief Justice

for constitution of Larger Bench to decide questions framed by it, therefore, this Court sitting in limited jurisdiction to decide only questions that have been referred to it cannot as an interim measure stay the observations made by the Division Bench at Allahabad in its order dated 18.01.2024.

31. Sri S.M. Singh Royekwar, Advocate, has referred to the judgement of Hon'ble Supreme Court in the case of ***Union Territory of Ladakh and others Vs. Jammu and Kashmir National Conference and Another, 2023 SCC OnLine SC 1140*** and paragraph-35 thereof, where the Supreme Court has observed that later Coordinate Benches should follow law as settled by earlier Coordinate Benches and should not refuse deference only on the ground that another later Coordinate Bench has doubted the correctness of the earlier Coordinate Bench. The Supreme Court had made it specially clear that the High Courts will have to proceed to decide the matter on the basis of law as it stands. It is not open for them, unless specifically directed by the Supreme Court to await the outcome of the Reference or a Review Petition as the case may be. It is not open for the High Court to not follow the judgement while stating that it is doubted by later Coordinate Bench. In any case, when faced with conflicting judgements by Benches of equal strength of the Supreme Court, it is the earlier one which is to be followed by the High Courts.

32. It has been argued by Sri S.M. Singh Royekwar, that till such time that the directions issued by the Division Bench at Allahabad in its order dated 18.01.2024 and 19.01.2024 are not set aside in Appeal or are held to be not in accordance

with law by this Larger Bench, it would continue to be binding on all authorities including the Director, J.T.R.I., State Legal Services Authority and the Chief Judicial Magistrates concerned and they are bound to grant bail even if the High Court in its Appellate jurisdiction has issued non bailable warrant against the accused persons.

33. It has been argued by Sri S.M. Singh Royekwar that the power that has to be exercised by this Larger Bench is circumscribed by Chapter V Rule 6 of the Allahabad High Court Rules and is not akin to power under Article 226 and Article 227 of the Constitution and it is not a regular jurisdiction as per roster determined by Hon'ble Chief Justice.

34. It has also been argued that there is no immediate need to stay the directions of the Division Bench at Allahabad in its order dated 18.01.2024. Had there been any urgency on the part of the State and its assigns, they would certainly have moved an application for interim relief, which they have not done so far. Therefore, in the absence of any application for interim stay, of a judgement/ order whose correctness has been doubted by another Division Bench, the Larger Bench should not grant stay even if it is held to have power to do so.

35. This Court having heard the arguments of the counsel is, prima facie, of the opinion that the directions that have been issued by the Division Bench at Allahabad in its order dated 18.01.2024 and reiterated in its order dated 19.01.2024 are in ignorance of the law settled by a

Constitution Bench judgement rendered way back in 1976 and followed till date.

36. The procedure that is being followed under Section 390 of the Cr.P.C. for securing the presence of the accused respondents in Appeals against acquittal having been discussed in detail by the aforesaid Constitution Bench and it was also considered by the Full Bench of the Bombay High Court in *Balkrishna Mahadev Lad* (supra). The Division Bench at Allahabad has unfortunately misread the observations made by the Full Bench of the Bombay High Court.

37. The Division Bench at Allahabad in its orders dated 18.01.2024 and 19.01.2024 has not only issued directions with regard to the release of accused against whom non bailable warrants have been issued by the High Court in Appeal against acquittal, but similar directions have also been issued for release of convict/appellant who has filed an Appeal against his conviction. The Director, Judicial Training and Research Institute, Lucknow, has also been directed to hold an online seminar and address all the Chief Judicial Magistrates of the State of the legal position in the light of the order dated 18.01.2024. The orders passed by the Division Bench at Allahabad *prima facie* appears to be against the settled position of law (Ref: State of U.P. Vs. Poosu), and thus cannot be allowed to be taught to Judicial Officers in the interregnum while this Court decides the questions referred to it. We, therefore, think it appropriate to direct the J.T.R.I. to impress upon the Judicial Officers of the State, the law as laid down by Hon'ble Supreme Court in

State of U.P. Vs. Poosu, a Constitution Bench decision, which is binding on all authorities under Article 141 and Article 144 of the Constitution of India.

38. With regard to directions issued in paragraph-7(c) and (d), such directions have wide reaching impact not only on the administration of justice in the State, but also on the public exchequer and this Court, *prima facie*, is satisfied that when the correctness of such directions have been doubted and questions have been framed by a Coordinate Bench, which have been referred to us, including the question regarding as to whether such directions are in accordance with law, we possess all powers ancillary and incidental that may help us in deciding the issue.

39. The power to hold a decision to be in accordance with law also carries with it the power to stay its operation during the pendency of consideration of the issue to render the judgement which we would eventually give, effective and not meaningless.

40. We, therefore, find it appropriate to stay the directions issued by the Divisional Bench at Allahabad in its Judgement dated 18.01.2024 and 19.01.2024 to various State Authorities including the Director, J.T.R.I., State Legal Services Authority and the Chief Judicial Magistrates during the pendency of this Reference.

41. We direct the Registry to assign a different number to this Larger Bench Reference with a separate cause title as In Re: "**Procedure to be Followed in Hearing of Criminal Appeals**".

42. List this matter on 03.04.2024 for further hearing.

43. Whenever the case is next listed, the names of all the counsels, who have assisted this Court, shall be shown in the cause list.

Order Date :- 22.3.2024
Darpan/Rahul/M.V.S.

Court No.10

Case :- CRIMINAL APPEAL No. - 465 of 1999

Appellant :- Surednra Prasad Misra

Respondent :- State Of U.P. And Ors.

Counsel for Appellant :- Arun Sinha, Anurag Singh Chauhan, Brij Mohan Sahai

Counsel for Respondent :- G.A., Abhinandan Kumar Pandey

Hon'ble Mrs. Sangeeta Chandra, J.

Hon'ble Pankaj Bhatia, J.

Hon'ble Mohd. Faiz Alam Khan, J.

(Per: Pankaj Bhatia, J)

1. I had the occasion of perusing the draft order sent by Hon'ble Mrs. Justice Sangeeta Chandra, however, I am unable to persuade myself to agree with the view taken by her for the reasons, which are recorded hereinbelow:
2. The matter was referred before this Bench hearing the reference in terms of the directions contained in the order dated 12.03.2024 passed in the present Criminal Appeal No.465 of 1999 while deciding the Criminal Misc. Bail Application No.5 of 2023 (Second Bail).
3. While hearing the Criminal Appeal No.465 of 1999, a Division Bench of this Court, while considering the second bail application noticed the general directions given by this Court in the order dated 18.01.2024 passed in Government Appeal No.454 of 2022 (State of U.P. vs Geeta Devi and another) and in the order dated 19.01.2024 passed in Government Appeal No.2554 of 1981 (State of U.P. vs Shamshuddin Khan and others), wherein general directions were issued by the co-ordinate Division Bench with regard to the grant of bails in appeals filed against acquittal and in other appeals also.

4. The Division Bench hearing the Criminal Misc. Bail Application No.5 of 2023, doubted the nature of the guidelines issued and *prima facie* found the same to be in contradiction with the Constitution Bench judgment of the Hon'ble Supreme Court in the case of ***State of U.P. vs Poosu and another; (1976) 3 SCC 1.***
5. In view of the differences expressed in the order dated 12.03.2024, the matter was placed before Hon'ble the Chief Justice for referring the matter for consideration by a Larger Bench to be constituted in terms of the powers vested by virtue of Chapter V Rule 6 of the Allahabad High Court Rules, 1952. In terms of the said order, Hon'ble the Chief Justice in exercise of powers under Chapter 5 Rule 6 referred the following questions to be answered by the Larger Bench:

"(1) Whether the Chief Judicial Magistrate or any other Magistrate can enlarge an acquitted person or a person convicted of an offence on bail even in a case where in an appeal against acquittal or conviction, as the case may be, the High Court or any other appellate Court has issued non-bailable warrants for securing his presence without any such stipulation therein for release by the Court below, more so when such non-bailable warrant has been issued at a subsequent stage of appeal and not the admission stage?"

(2) Assuming the Magistrate has jurisdiction as referred in Question No. 1, whether a general direction of a mandatory nature can be issued by the High Court to the Magistrate for such release, as has been done vide order dated 18.01.2024 passed in Government Appeal No. 454 of 2022 and order dated 19.01.2024 passed in Government Appeal No. 2552 of 1981, does it not deprive the Magistrate of his discretion in this regard to consider such release on case to case basis in view of the law discussed?"

(3) Whether the observations and directions as contained in the order dated 18.01.2024 passed in Government Appeal No. 454 of 2022 (State of U.P. vs. Geeta Devi and another) and the directions dated 19.01.2024 in Government Appeal No. 2552 of 1981 (State of U.P. Vs.

Shamshuddin Khan and others) are in accordance with law?

(4) What are the modes prescribed in law for securing the presence of acquitted person or one who has been convicted, in an appeal before the High Court and what should be the course to be ordinarily adopted by the High Court in exercise of its appellate criminal jurisdiction for securing such presence to facilitate hearing of such appeals?

(5) Whether an appeal, either against acquittal or conviction, can be heard by appointing an Amicus Curiae for the accused-respondent or the convicted-appellant, as the case may be, in the event he is not appearing in the appellate proceedings though his presence can be secured, without his consent and without any intimation to him, if so, under what circumstances?"

6. In terms of the constitution of the Larger Bench, the matter came up for hearing on 21.03.2024. While hearing, a preliminary doubt was expressed, as to whether the reference Court, while hearing the questions referred to it, can exercise inherent/ancillary powers by passing any interim directions considering that the reference may take some time to be decided and to resolve the doubt regarding power to pass interim order, the matter was placed before this Bench today for enabling the Counsels to address on the preliminary question with regard to the power of the reference Court to pass any interim orders during the pendency of the reference.
7. In terms of the abovesaid directions, when the matter was heard today, two divergent arguments were raised by the Counsel. On the one hand, Sri Nadeem Murtaza, Sri Apoorva Tewari, Sri Naved Ali and Sri Vikas Vikram Singh canvassed before this Bench that while hearing reference, this Bench is empowered to pass any interim directions staying the earlier orders/ directions given by one of the Division Benches on 18.01.2024 and 19.01.2024, whereas, on the other hand, Sri S.M. Singh Royekwar, canvassed before this Bench that this

Bench, while hearing a reference, has to confine itself to answer the question referred before it and it does not have any inherent powers to decide or issue any interim directions especially staying the operation and effect of the directions given in the orders dated 18.01.2024 and 19.01.2024.

8. It is essential to refer to Chapter V Rule 6 of the Allahabad High Court Rules, which is as under:

“6. Reference to a larger Bench:- The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein.”

9. On the strength of the mandate and the scope of Rule 6 quoted above, it is argued that Hon’ble the Chief Justice by virtue of Rule 6 is empowered to constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case, thus, the said Rule has two limbs: first, when a ‘case’ is referred and second, when ‘questions formulated by a Bench’ are referred.
10. In the present case, Hon’ble the Chief Justice has constituted this Bench for deciding questions of law formulated by a Bench hearing a case. The second limb of the Rule 6, on a plain reading, provides that while deciding the question of law referred to a Bench, such Bench shall decide the questions so formulated and shall return to the Bench hearing the case which shall thereafter follow the decision on such questions and dispose off the case after deciding the remaining questions, if any, arising therein.
11. Sri Nadeem Murtaza, learned Advocate relies on the following judgments:

“1. State of Punjab vs Salil Sabhlok and others; (2013) 5 SCC 1,

2. Gopakumar B. Nair vs Central Bureau of Investigation and another; (2014) 5 SCC 800,

3. Maya Sanjay Khandare and another vs State of Maharashtra; 2021 SCC OnLine BOM 3,

4. Order dated 01.05.2023 and Order dated 12.05.2023 passed Special Leave Petition (Criminal) Diary No(s). 18272 of 2023: Directorate of Enforcement vs Manpreet Singh Talwar and

5. Sita Soren vs Union of India through CBI; 2014 SCC OnLine SC 1889”

12. Sri Nadeem Murtaza, learned Advocate extensively argues and draws our attention to the judgment of Hon’ble Supreme Court in the case of *State of Punjab vs Salil Sabhlok (Supra)*, wherein the power of a Larger Bench deciding a reference were summarized as under:

“Additional questions framed by the Full Bench:

137. The learned counsel supporting the appointment of Mr. Dhanda submitted that the Full Bench could not expand the scope of the reference made to it by the Division Bench, nor could it frame additional questions.

138. Generally speaking, they are right in their contention, but it also depends on the reference made.

139. The law on the subject has crystallized through a long line of decisions and it need not be reiterated again and again.

139. 1. The decisions include Kesho Nath Khurana vs Union of India, 1981 Supp SCC 38; 1981 SCC (Cri) 674]; (SCC p.39, para 1)

“1.... The Division Bench ought to have sent the appeal back to the Single Judge with the answer rendered by them to the question referred by the Single Judge and left it to

the Single Judge to dispose of the second appeal according to law.

139.2 *Kerala State Science & Technology Museum vs Rambal Co. [(206) 6 SCC 258]: (SCC p.262, para 8)*

“8. It is fairly well settled that when reference is made on a specific issue either by a learned Single Judge or Division Bench to a larger Bench i.e. Division Bench or Full Bench or Constitution Bench, as the case may be, the larger Bench cannot adjudicate upon an issue which is not the question referred to.”

139.3 *T.A. Hameed v. M. Viswanathan [(2008) 3 SCC 243]; (SCC p. 245, para 12)*

“12. ...Since, only reference was made to the Full Bench, the Full Bench should have answered the question referred to it and remitted the matter to the Division Bench for deciding the revision petition on merits.”

139.4. *And more recently, Saquib Abdul Hameed Nachan vs State of Maharashtra, (2010) 9 SCC 93: (2010) 3 SCC (Cri) 1146]: (SCC p.102, para 15)*

“15. ... Normally, after answering the reference by the larger Bench, it is for the Reference Court to decide the issue on merits on the basis of the answers given by the larger Bench.”

140. *There is no bar shown whereby a Bench is precluded from referring the entire case for decision by a larger Bench - it depends entirely on the reference made. In any event, that issue does not arise in this appeal and so nothing more need be said on the subject.*

....

145. *101. To this extent, learned counsel supporting the cause of Mr. Dhanda are right that the Full Bench overstepped its mandate. But where does this discussion lead us to? The two questions were fully argued in this Court for the purposes of obtaining a decision on them,*

and no suggestion was made that the decision of the Full Bench on these questions be set aside because of a jurisdictional error and the Division Bench be asked to decide them quite independently. Therefore, this issue is only of academic interest so far as this appeal is concerned notwithstanding the law that a larger Bench should decide only the questions referred to it. Of course, if a subsidiary question logically and unavoidably arises, the larger Bench cannot be dogmatic and refuse to answer it. A common sense approach must be taken on such occasions.”

13. In the light of the judgment cited above, from a plain reading of the judgment of the Hon’ble Supreme Court in the case of *State of Punjab vs Salil Sabhlok (Supra)* what emerges is that the Court on reference is duly empowered to frame additional questions over and above what are framed and referred to.
14. In the case of *T.A Hameed vs M. Viswanathan; 2008 (3) SCC 243*, the Hon’ble Supreme Court had observed that since only a reference was made to the Full Bench, the Full Bench should have answered the questions referred to it and remitted the matter to the Division Bench. The said judgment, in any event, does not adjudicate or decide categorically, whether the reference court, while hearing a reference, is empowered to pass any interim orders or not.
15. Similarly in the case of *Gopakumar B. Nair vs CBI and another (Supra)*, relied upon, the Hon’ble Supreme Court observed as under:

“12. Reference of a case to a larger Bench necessarily has to be for a reconsideration of the principle of law on which the case has been decided and not the merits of the decision. The decision rendered by any Bench is final inter-parte, subject to the power of review and the curative power. Any other view would have the effect of conferring some kind of an appellate power in a larger Bench of this Court which cannot be countenanced. However, the principle of law on which the decision based is open to reconsideration by a larger Bench in an appropriate case. ...”

16. While relying upon the third judgment in the case of Maya Sanjay Khandare (Supra), the learned Advocate invites out attention to the following observations:

“It is a settled position of law that a reference to a larger Bench is on a question/principle of law. The larger Bench has to take into consideration the appropriate principle of law that would be applicable and it is not concerned with the actual outcome of the proceedings that have led to the reference in question. In this context it would be apposite to refer to the observations in paragraphs 12 and 13 of the decision in Gopakumar B. Nair (Supra) while explaining the basis on which the larger Bench has to answer the reference as made.

...

It is thus clear that the larger Bench is necessarily concerned only with the principle of law or question of law referred to it for decision and it is not required to go into actual merits of the decision. It is one thing to say that there is disagreement with the principle of law on the basis of which an earlier decision was rendered and it is another thing to seek to examine if such principle of law has been correctly applied in the given case. Whether the principle of law/provision of law has been correctly applied in deciding a particular case or not would be the province of an appellate forum. Thus while taking note of the disagreement as expressed by the Division Bench in Maya Sanjay Khandare and another (APL No.709/2020) while referring the questions framed to a larger Bench, we do not find it necessary to individually examine the decisions rendered in Udhav Kisanrao Ghodse, Ajmatkhan Rahemathkhan and Shivaji Haribhau Jawanjil (supra) to determine whether the principles/parameters as set out in Gian Singh, Narinder Singh, Parbatbhai Aahir (supra) have been correctly applied or not.”

17. In terms of the further submission of Sri Nadeem Murtaza, while arguing that the Larger Bench on a reference has a power to interfere, argues that any question that logically arises cannot be refused to be answered by the Larger Bench.

18. Reliance has also been placed to an order dated 01.05.2023 passed in Special Leave Petition (Crl) Diary No.18272 of 2023, wherein an order was passed to list the matter before a Larger Bench and also the applications filed before any other court in respect of the judgment shall be deferred. The Court while referring the matter had clarified that the order of the Court referring the matter would not preclude any trial court or high court from considering an application for grant of default bail under Section 167. On the strength of the said order, it is proposed to be argued that this Bench can pass an interim order. Reliance is also placed on the order of the Hon'ble Supreme Court in the case of *Sita Soren vs Union of India (Supra)*, wherein the Hon'ble Supreme Court had passed the following order:

"2. Since the issue arises for consideration is substantial and of general public importance, we refer these matters to a larger Bench of three Hon'ble Judges to be constituted by Hon'ble the Chief Justice of India.

3. The petitioner shall be free to press his application for ad-interim stay before the larger Bench."

19. In the light of the above, in sum and substance, it is argued that this Court on a reference is empowered as an interim measure to keep the proceedings/ directions as given by the Division Bench in its orders dated 18.01.2024 and 19.01.2024 in abeyance, till decision on the main questions referred.
20. A somewhat similar argument was adopted by Sri Apoorva Tewari, who goes further to argue that power exercised by this reference Court would be akin to power vested in this Bench by virtue of Article 227 of the Constitution of India. He also places reliance on the judgment *Kantaru Rajeevaru vs Indian Young Lawyers Association; (2020) 9 SCC 121*. The relevant paras reads as under:

“24. The provision in the Supreme Court Rules, 2013 pertaining to reference to a larger Bench is Order VI Rule 2 which reads as:

"2. Where in the course of the hearing of any cause, appeal or other proceedings, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it."

25. Reference to a larger Bench can be made in any cause or appeal as well as in any "other proceeding". The term "proceeding" is a very comprehensive term and generally speaking, means a prescribed course of action for enforcing a legal right. It is a term giving the widest freedom to a court of law so that it may do justice to the parties in the case. There cannot be any doubt that the pending review petition falls within the purview of the expression "other proceeding ". The reference has been made in the course of pending review petition.

26. In addition, there is no fetter on the exercise of discretion of this Court in referring questions of law to a larger Bench in review petitions. Being a superior court of record, it is for this Court to consider whether any matter falls within its jurisdiction or not. Unlike a court of limited jurisdiction, the superior court of record is entitled to determine for itself questions about its own jurisdiction .

27. No matter is beyond the jurisdiction of a superior court of record unless it is expressly shown to be so, under the provisions of the Constitution. In the absence of any express provision in the Constitution, this Court being a superior court of record has jurisdiction in every matter and if there is any doubt, the Court has power to determine its jurisdiction 13. It is useful to reproduce from Halsbury's Laws of England, 4th Edn., Vol. 10, Para 713, relied upon in the aforementioned judgments, which states as follows:

"713.... Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court

unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court."

Undoubtedly there is no bar on the exercise of jurisdiction for referring questions of law in a pending review petition. Therefore, the reference cannot be said to be vitiated for lack of jurisdiction. This Court has acted well within its power in making the reference."

28. Furthermore, the reference can be supported by adverting to Article 142 of the Constitution of India which enables this Court to make any order as is necessary for doing complete justice in any cause or matter pending before it. The expression "cause or matter" would include any proceeding pending in Court and it would cover almost every kind of proceeding pending in this Court including civil or criminal proceedings. As such, the expression "cause or matter" surely covers review petitions without any doubt. Therefore, it is well within the province of this Court to refer questions of law in pending review petitions."

21. He argues that there is no bar created in a reference court for passing any interim directions, if the situations so warrants and while considering the necessity or otherwise of passing an interim order, the Court would be guided by the trinity principle of *prima facie* case, balance of convenience and irreparable hardship. He argues that in the present case, the directions given by the Division Bench in its two orders dated 18.01.2024 and 19.01.2024 would cause irreparable hardship as it directs the training on a point of law, which *prima facie* contrary to the Constitution Bench judgment in the case of *State of U.P. vs Poosu (supra)*.
22. Sri Vikas Vikram Singh, learned Advocate also supports the arguments raised by two counsel referred above and argues that once a

jurisdiction is vested in the reference court by virtue of a reference through questions of law formulated under Chapter V Rule 6 of the Allahabad High Court Rules, the same include all the powers incidental and ancillary, which includes the power to pass interim orders. He places reliance on the judgment of the Hon'ble Supreme Court in the case of *Income Tax Officer, Cannanore vs M.K. Mohammed Kunhi; 1968 SCC OnLine SC 71*.

23. He further argues that jurisdiction conferred on a reference court by virtue of Second part of Rule 6 must be interpreted in a manner to give meaning and purpose to exercise such jurisdiction including the power to pass appropriate interim orders. Arguing against the direction given by the Division Bench in the two orders dated 18.01.2024 and 19.01.2024, he argues that the court hearing any matter as per the determination assigned to it by Hon'ble the Chief Justice cannot overstep into the determination of any court and in case, if such an order is passed, the same would be without jurisdiction. He places reliance on the judgment of the this Court in the case of *Dinesh Kumar Singh @ Sonu vs State of U.P.; 2017 SCC OnLine All 42*. The relevant paras reads as under:

“9. In Maya Dixit, the Full Bench among others also considered the question, whether a Bench conferred/assigned a particular work in terms of Chapter V of the Allahabad High Court Rules, can hear matters assigned to another Bench, and in paragraphs 17 and 17-A, observed thus:

17. From the law as earlier quoted, it would be clear that the Division Bench assigned with a particular work can only do the work assigned and cannot do the work assigned to another Division Bench even in respect of earlier matter which it was hearing when the Chief Justice had assigned work to that Bench to take up the matter. After the assignment has changed, unless specifically ordered the

previous Bench cannot hear the matter. Even in respect of tied up matters, in terms of the rule quoted above, the matter may ordinarily be laid before the same Bench for disposal. The expression "ordinarily" would mean that the authority empowered to assigning matters must exercise that power to place the matter before the Bench, which earlier had heard the matter. This can be done in individual cases or by a general order. This rule is based on the principle that a Bench having substantially heard the matter and spent valuable judicial time, must be allowed to ordinarily hear and dispose of the matter. This power, therefore, could only be exercised by the Chief Justice who constitutes the Benches and not by the Registry of the Court, nor can a Bench hold that it can proceed with the matter as a part heard matter.

17.A. The order of the learned Bench in Noor Mohammad (supra) dated 06.03.2009 was the subject-matter of an SLP, which was disposed of on 06.04.2009 and a further clarification was issued on 28.08.2009, which reads as under:

"An application has been filed seeking clarification of our order dated 6.4.2009. By the said order the SLP filed by the petitioner was dismissed. While dismissing the SLP, we did not hold that the matter before the High Court was a PIL. We only stated that if the writ petition had been converted into a PIL by the impugned order, the Registry will do the needful by placing the matter before appropriate Bench dealing with PILs as per rules and guidelines. If the order of the High Court did not convert the writ petition into a PIL then obviously the said observation will not apply. If there was any doubt regarding posting, the matter ought to be placed before learned Chief Justice of the High Court. With the said observation, I.A. No. 3 is disposed of."

Thus, this would make it clear that even if a Bench was hearing a matter assigned to it as per the assignment and if in the course of hearing it proceeds to consider reliefs not sought in the petition, but which will fall within the PIL jurisdiction, then the Bench is bound to direct the Registry

to place the matter before the learned Chief Justice for appropriate directions or before the appropriate P.I.L Bench. In other words, if that Bench is not assigned PIL work, it cannot proceed to hear the matter."

15. In the present case, the Division Bench was dealing with a writ petition that was filed only for quashment of an FIR and, therefore, the scope was limited. The Division Bench, in our opinion, traveled beyond the scope of the writ petition and not only passed orders which were not within its determined roster but made unnecessary and unwarranted observations against those who were not even parties to the petition. The Division Bench virtually converted the writ petition for quashment of an FIR under Article 226 of the Constitution read with Section 482 of the Criminal Procedure Code, into a PIL when an independent PIL was pending before this Court wherein such questions could have been raised. In our opinion, the Bench, whether it is a Single Judge or a Division Bench, should observe some restraint while making observations, of the nature as made in the order dated 01.04.2014, which are wholly unconnected with the subject matter of the petition, in the nature of insinuations and/or remarks/observations against unconnected parties and the prayers made in the petition.

16. In the circumstances, we hold that a Judge of the High Court sitting alone or Judges sitting in a Division Bench, hearing any matter in his/their determination assigned by the Chief Justice, cannot overstep into the determination of another Judge sitting alone or in a Division Bench. If any such issue or question arises in the matter including a question in public interest which is not connected with the matter before him/them and which in his/their opinion is necessary to be decided, in that situation the only option open to the learned Judge or the Division Bench is to direct the Registry to place the matter before the Chief Justice for appropriate directions or before the appropriate PIL Bench and, in any case, should not convert such a writ petition into a PIL. The question is, thus, answered accordingly in the negative."

24. He further argues that directions given in the two orders dated 18.01.2024 and 19.01.2024 cannot be enforced, being without jurisdiction and thus are a nullity, should be interfered with at the interim stage itself. He also places reliance on the judgment in the case of ***Hasham Abbas Sayyad vs Usman Abbas Sayyad and others; (2007) 2 SCC 355.***
25. Sri Naved Ali, learned Advocate has placed a short note, wherein, he places reliance on the judgment of the Hon'ble Supreme Court in the case of ***Gopakumar B. Nair vs CBI and another; (2014) 5 SCC 800,*** wherein the Hon'ble Supreme Court held in para 12 as under:

“12. Reference of a case to a larger Bench necessarily has to be for a reconsideration of the principle of law on which the case has been decided and not the merits of the decision. The decision rendered by any Bench is final inter-parte, subject to the power of review and the curative power. Any other view would have the effect of conferring some kind of an appellate power in a larger Bench of this Court which cannot be countenanced.”

26. Sri Naved Ali further places reliance, while arguing that there is a power to issue interim direction/ stay and places reliance on an order dated 11.08.2015 passed by a three Judges Bench of the Hon'ble Supreme Court, while referring the matter to the Larger Bench, in the case of ***Justice KS. Puttaswamy (Retd.) and another vs Union of India and others: (2019) 1 SCC 1,*** wherein the directions were issued to the following effect while referred the matter to the Larger Bench:

“We will also make it clear that the Aadhaar card scheme is purely voluntary and it cannot be made mandatory till the matter is finally decided by this court one way or the other.”

27. Sri Naved Ali further argues on the strength of the judgment of the Hon'ble Supreme Court in the case of ***Chief Executive Officer and***

Vice-Chairman, Gujarat Maritime Board vs Haji Daud Haji Harun Abu; (1996) 11 SCC 23, wherein in para 10, the Hon'ble Supreme Court had held as under:

“It is well-settled that where a substantive power is conferred upon a court or tribunal, all incidental and ancillary powers necessary for an effective exercise of the substantive power have to be inferred. See Khyerbari Tea Company Limited and another vs State of Assam and others: A.I.R. (1964) S.C. 925 at 935. The rule as quoted in Craies is "one of the first principles of law with regard to the effect of an enabling act is that a legislature enables something to be done, it gives power at the same time by necessary implication to do everything which is indispensable for the purpose of carrying out the purpose in view.”

28. He further argues that on the strength of the observations made by the Hon'ble Supreme Court in para 35 of the judgment in the case of ***Union Territory of Ladakh and others vs Jammu and Kashmir National Conference and another; 2023 LiveLaw SC 749*** to the following effect:

“We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in National Insurance Company Limited vs Pranay Sethi; (2017) 16 SCC 6805. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it.”

29. He thus argues that on a conjoint reading of the submissions recorded above, the reference Court can very well issue any directions during the pendency of the decision on the questions referred to it. He further argues that there is a requirement to stay the directions as the same are

in ignorance of the judgment in the case of *State of U.P. vs Poosu (Supra)*.

30. Contrary to the submissions referred above, Sri S.M. Singh Royekwar, on the other hand, submits that when a reference is made by Hon'ble the Chief Justice in exercise of power under Chapter V Rule 6, specifically in terms of the second part of the said Rule, the power of the reference court is confined to the question referred before it and it is not technically, a court normally vested with the powers including the inherent and incidental powers and thus, this Bench can only answer the questions referred to it and remit the matter back to the court, which would be empowered to pass any orders that so arise before it in that particular appeal.
31. While deciding the issue, the following judgments also came into the light being a Full Bench decision of this court in ***Shriram Industrial Enterprises Limited vs The Union of India and others; 1994 SCC OnLine All 647***, wherein the Full Bench constituted in view of difference of opinion in the two judges sitting in a Division Bench before a Full Bench comprising of three Judges agreed on the question so answered, however, one of the Judges Hon'ble Mr. Justice G.P. Mathur, in addition to the agreement with the other two Hon'ble Judges recorded his finding as under:

“125. There is another aspect of the matter This Full Bench has been constituted under orders of Hon'ble the Chief Justice and as per the terms of the said order, it can only hear and give opinion on the point which has been referred to it. It is not open to this Bench to travel beyond the reference and hear and give opinion on questions which have not been referred to it or to rehear the whole case de novo. In *Kesho Nath Khurana v. Union of India, 1981 Supp SCC 38: AIR 1982 SC 1177*, it was held that where a question of law arising in a second appeal was referred by a single Judge to a Division Bench, the

Division Bench ought to have sent the matter back to learned single Judge, after deciding the question of law referred and it could not proceed to dispose it of on merit.

126. In view of what has been stated above, I am clearly of the opinion that the decisions given by Hon'ble Om Prakash, J. and Hon'ble R.R.K. Trivedi, J. on the question of competence of the State Legislature to enact U.P. Sheera Niyantaran Adhiniyam (Act No. 24 of 1964) were merely in the nature of opinion and the point of difference was rightly referred in accordance with Chapter VIII, Rule 3 of H.C. Rules. This Full Bench can only hear and decide the question which has been referred and other points on which there is unanimity of opinion between the two Hon'ble Judges are, therefore, not open to challenge.”

32. The Full Bench had also referred to a judgment in the case of ***Kesho Nath Khurana vs vs Union of India and o thers; 1981 (Supp) SCC 38***, wherein the Hon’ble Supreme Court recorded as under:

“ ... Now it is obvious that since only the aforesaid question of law was referred by the single Judge to the Division Bench, the Division Bench should have sent the matter back to the single Judge after deciding the question of law referred to them. But instead the Division Bench proceeded to dispose of the Second Appeal on merits and dismissed it with costs. We think that the Division Bench was in error in following this procedure. The Division Bench ought to have sent the appeal back to the single Judge with the answer rendered by them to the question referred by the single Judge and left it to the single Judge to dispose of the second appeal according to law.”

33. It is also essential to notice two other judgments of the Hon’ble Supreme Court, although not cited but are relevant for the present order. The first is the judgment of the Hon’ble Supreme Court in the case of ***Commissioner of Income Tax, Delhi vs Bansi Dhar and Sons; (1986) 1 SCC 523***, wherein the issue with regard to the grant of

interim powers in a reference made under the Income Tax Act came up for consideration before Hon'ble Supreme Court in view of there being no expressed powers vested. Although the said issue arose from the statutory sections of reference prescribed under the Income Tax Act, however, the Hon'ble Supreme Court had the occasion to consider the scope of powers as an appellate authority and the scope of powers vested in a reference court. Hon'ble Supreme Court has held as under:

“20. These observations, however, will have to be understood in the context in which the same were made. If there was jurisdiction to do certain matter then all powers to make that jurisdiction effective must be implied to the authority unless expressly prohibited. But in references under 1922 Act as well as 1961 Act the courts merely exercise an advisory or consultative jurisdiction while the appeals are kept pending before the tribunal, therefore, nothing should be implied as distracting from the jurisdiction of the tribunals. Power to grant stay is incidental and ancillary to the appellate jurisdiction. What was true of the appellate jurisdiction could not be predicated of the referential jurisdiction. - See the observations of the majority judgment of the Delhi High Court in Narula Trading Agency vs Commissioner of Sales Tax [1981] 47 S.T.C. p.45, though made in the context of different statutory provisions.

21. This decision of Andhra Pradesh High Court was noticed by this Court in Income Tax Officer, Cannanore vs M.K. Mohammed Kunhi 71 I.T.R. 815. That decision requires a little closer examination. This Court in that decision was dealing with Section 254 of the Act of 1961 which conferred on the Appellate Tribunal powers of the widest amplitude in dealing with appeals before it. This Court held that power granted by implication the power of doing all such acts, or employing such means, as were essentially necessary to its execution. The statutory power under Section 254 carried with it the duty in proper cases to make such orders for staying recovery proceedings

pending an appeal before the Tribunal, as would prevent the appeal, if successful, from being rendered nugatory. Section 254 carried with it the appellate powers of the Appellate Tribunal. This Court while interpreting that power referred to the Sutherland's Statutory Construction of third edition, articles 5401 and 5402., in Domat's Civil Law (Cushing's edition), Volume 1, at page 88, Maxwell on Interpretation of Statutes, eleventh edition, and came to the conclusion that where the power was given to an authority, incidental powers to discharge that authority were implied in the grant of that power. This Court noted that the Income-tax Appellate Tribunal was not a court but exercised judicial powers. The Court noted that there were certain decisions in which difficulties were felt that the Appellate Tribunal did not possess the power to stay recovery during the pendency of an appeal. Reference was made to a decision of the Andhra Pradesh High Court in the case of Vetcha Sreeamamurth vs The Income Tax Officer, Vizianagaram and another.; 30 I.T.R. 252, where Viswanatha Sastri, J. observed that there was no confinement of an express power of granting a stay of realisation of the tax, nor was there any power allowing the tax to be paid in instalments. The learned judge observed that neither the Appellate Assistant Commissioner nor the Appellate Tribunal was given the power to stay the collection of tax. Therefore, according to the learned judge, whether the law should not be made more liberal so as to enable an assessee who has preferred an appeal, to obtain from the appellate forum, a stay of collection of tax, either in whole or in part, on furnishing suitable security, was a matter for the legislature to consider. Referring to the decision in Pollietti Narayana Rao vs Commissioner Income Tax (supra), this Court made an observation to the effect that "the same High Court held that stay could be granted by it pending reference of a case by the Appellate Tribunal to the High Court. This power the High Court had under Section 151 of the Civil Procedure Code and under Section 227 of the Constitution". This passage in our opinion cannot be taken as approving the observations of the Andhra Pradesh High Court in Pollietti Narayana

Rao's case (supra). This Court was dealing with the power of the appellate authority i.e. the Appellate Tribunal. Therefore, that would be an entirely different question. The appellate authority must have the incidental power or inherent power- inherent for the disposal of an appeal to grant a stay or not to grant a stay."

34. The Hon'ble Supreme Court had the occasion to consider the scope of jurisdiction of a reference court specifically considering the powers vested by virtue of Article 227 as raised in the present case by Sri Apoorva Tewari, learned Advocate and recorded above and referred to a Calcutta High Court decision to the following effect:

"33. The Allahabad High Court in Sridhar vs Commissioner of Wealth-Tax, 153 I.T.R. 543 at 547, observed that only power that High Court could exercise under Section 27 of the Wealth-Tax Act, 1957 was similar to Section 66 of 1922 Act i.e. to give opinion about the questions referred to it in an advisory capacity by answering the questions in favour of the assessee or the revenue, as the case might be. Even while hearing a reference under a taxing statute, the High Court has certain inherent powers. But the extent and scope of the inherent power which can be exercised by an appellate or revisional court cannot be the extent and scope of the inherent power of the High Court while exercising an advisory jurisdiction such as is conferred by Section 27 of the Act. The inherent power which the High Court can exercise while hearing a reference under Section 27 must be confined to the procedure about the hearing of a reference and to passing such orders as are ancillary or incidental to the advice which the High Court proposes to give while answering the questions. While hearing a reference under Section 27, the Allahabad High Court further held that the High Court did not have the further inherent power to pass interim orders restraining the orders of AAC or by the Tribunal being given effect to. It was further held that what the High Court could not do at the time of passing the final order, it could certainly not

do as an interim measure in the purported exercise of its inherent power.

38. The Calcutta High Court in the case of Dwarka Prasad Baja vs Commissioner of Income Tax, West Bengal-I 126 I.T.R. 219, observed that in exercising its Jurisdiction under Section 256 of the Income-Tax Act, 1961, the High Court did not act as a court of appeal, as the Income-tax Appellate Tribunal does under Section 254 of the Act. The High Court, in disposing of the reference, could only answer the questions actually referred and could not raise any question by itself. The findings of fact by the Tribunal were final so far as the High Court was concerned and only on limited grounds such findings of fact could be challenged. After the judgment of the High Court is delivered, the Tribunal has to pass necessary orders to dispose of the case in conformity with the judgment under Section 260 of the Act. The High Court exercised a very limited jurisdiction. It did not dispose of the entire matter but its decision was confined only to the questions of law as arise from the order of the Tribunal. Therefore, it could not be said that the High Court exercised its general jurisdiction under Article 227 of the Constitution in dealing with a reference. If the High Court could in such case exercise its powers under equity jurisdiction and grant a temporary injunction or a stay it would have to ascertain and to go into facts for which the Income Tax Act, 1961 did not make any provision. Moreover, issuance of orders permitting collection or recovery of tax or staying such collection or recovery if made under exercise of inherent power would result in extension of the jurisdiction of the High Court under Section 256 of the Act of 1961. The Calcutta High Court, further, was of the view that a court could not vest itself with such additional jurisdiction by invoking its inherent powers. Hence, the Court, in seisin of a reference under the I.T. Act could not issue an order of temporary injunction, according to the Calcutta High Court, or stay of proceedings which was an injunction in an indirect manner in respect of recovery of taxes.

39. In an appropriate case, if the assessee feels that a stay of recovery pending disposal of the reference is necessary or is in the interest of justice, then the assessee is entitled to apply before the appellate authority to grant a stay until disposal of reference by the High Court or until such time as the appellate authority thought fit. But in case the appellate authority acted without jurisdiction or in excess jurisdiction or in improper exercise of the jurisdiction, then decision of such appellate authority can be corrected by the High Courts by issuing appropriate writs under Article 226 and 227 of the Constitution.

*40. It has to be borne in mind that in answering questions or disposing of references either under Section 66 of 1922 Act or Section 256 of 1961 Act, the High Courts do not exercise any jurisdiction conferred upon them by the Code of Civil Procedure or the Charters or by the Acts establishing respective High Courts. In respect of certain matters jurisdictions exercised by the High Court, must be kept separate from the concept of inherent powers or incidental powers in exercising jurisdiction under Section 66 of 1922 Act or 256 of 1961 Act. Section 66 of Income-Tax Act of 1922 or Section 256 of Income-Tax Act of 1961 is a special jurisdiction of a limited nature conferred not by the Code of Civil Procedure or by the Charters or by the special Acts constituting such High Courts but by the special provisions of Income Tax Act, 1922 or 1961 for limited purpose of obtaining High Court's opinion on questions of law. In giving that opinion properly if any question of incidental or ancillary power arises such as giving an opportunity or restoring a reference dismissed without hearing or giving some additional time to file paper book, such powers inhere to the Jurisdiction conferred upon it. But such incidental powers can not be so construed as to confer the power of stay of recovery of taxes pending a reference which lie in the domain of an appellate authority. Therefore, the concept of granting stay in a reference *ex debito justitiae* does not arise. That concept might arise in case of the appellate authority exercising its power to grant stay where there is not*

express provision. Ex debito justitiae is to do justice between the parties.”

35. It is also essential to refer to the judgment in the case of ***Dr. Jaishri Laxmanrao Patil vs State of Maharashtra through Chief Minister and another; (2021) 2SCC 785***, wherein the Hon’ble Supreme Court has observed as under:

“12. The orders relied upon by the learned counsel for the State of Maharashtra no doubt reveal that in those cases, the grant of interim relief was left open for consideration by the larger Bench. But there is no bar per se for the referring Bench to pass interim orders while sending matters to a larger Bench. In Ashoka Kumar Thakur (8) v. Union of India; (2007) 4 SCC 361, K.S. Puttaswamy (Aadhaar/Privacy-3 J.) v. Union of India; (2015) 8 SCC 735, M. Nagaraj v. Union of India; (2021) 2 SCC 789, S.V. Joshi v. State of Karnataka; (2012) 7 SCC 41, P.A. Inamdar v. State of Maharashtra (2004) 8 SCC 139 and Modern d Dental College & Research Institute v. State of M.P. (2004) 8 SCC 213, this Court passed interim orders while referring the matters to a larger Bench.”

36. In the light of the said two judgments what clearly emerges is that ancillary/ inherent powers can be exercised by a Court as an appellate power or when the entire case is referred, whereas, the same cannot be exercised while discharging the obligations in exercise of a jurisdiction of giving advice, however, it is clear that a Court while referring a question has a power to grant any interim measure as it may deem fit in the facts of the present case, as duly explained in the case of *Dr. Jaishri Laxmanrao Patil (Supra)*.
37. In my view, on a plain reading of the judgments referred to, by the respective counsels, the issue with regard to the availability of powers to pass interim orders is available to the reference court or not, depends on the nature of the reference order. In the event, a ‘case’

referred for decision by Hon'ble the Chief Justice, which are traceable to the First part of Rule 6, there is no doubt that a court on reference has a power to decide the entire case and in that event, the reference court or a larger court constituted by Hon'ble the Chief Justice would be well and duly empowered to decide the case and while doing so, would be inherently having all the powers to pass any orders, which are so required in the interest of justice, however, when the question of law formulated or referred to before a Bench of two or more Judges by Hon'ble the Chief Justice, as are traceable to the Second part of Rule 6, the powers are circumscribed by the later part of Rule 6, which, restricts the power and confines it only for the decision on the question so formulated and thereafter, mandates that the matter be returned to the Bench which had referred the matter for disposing of the case on the questions that arise. To that effect as the observations of the Full Bench of this Court in the case of *Shriram Industrial Enterprises Limited (Supra)*.

38. There is one more aspect, which is to be considered by this Bench, while giving the directions as are recorded in the two orders dated 18.01.2024 and 19.01.2024, a Division Bench of this Court had directed the Director, Judicial Training and Research Institute, Lucknow (JTRI) to take Online seminar to all the Chief Judicial Magistrate and the Secretary, District Legal Services Authority (DLSA) for compliance of the directions given by the said Court. Further directions were given holding that in case, the orders are not complied, the Court will impose a cost of Rs.50,000/- to be paid by the DLSA.
39. It is argued that if the order is so complied with, it may send a wrong signal, which would also be contrary to the law as settled in the case of *State of U.P. vs Poosu (Supra)*. The said order was passed on 18.01.2024 and there was no challenge to the said order till the same

was doubted by the Division Bench in the order dated 12.03.2024 and continued to hold the field even till today. Thus, it is one thing to say whether there is a power to grant interim order or not but it is quite another to say that this Bench should grant interim order, even if, the need exists or not.

40. In the present case, there is no application/ material on record either by the JTRI/ by State or by the DLSA that an immediate and interim intervention is required and there is no cogent material before this Bench either at the behest of the State or anyone else, to persuade the Bench to exercise and pass an interim order as was argued by the Counsels today.
41. In the entire record before the reference Court, apart from the reference order and the record of Government Appeal No.465 of 1999, no other material was placed, thus, I have no hesitation in holding that while exercising the power of answering the question so formulated and referred to a Larger Bench, the reference Court is confined only to answering the question so referred and cannot go beyond answering the questions referred except after framing the questions which so arise in the facts of any case. It is not a 'Court' vested with the powers of ancillary and inherent powers and scope of the power of reference Court is confined to the questions so referred. The reference court has no power to pass any interim order specially staying the directions/ order of one of the Division Benches.
42. In the present case, even otherwise there is no material before the Court to argue or suggest that any exigency so exists to exercise the power at an interim stage, thus the issue is answered accordingly.

Order Date:-22.03.2024

akverma

(Pankaj Bhatia, J)