

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 29th January, 2014

+ LPA 548/2013, CMs No.11737/2013 (for stay), 11739/2013 & 11740/2013 (both for condonation of delay)

VIPUL GUPTA

..... Appellant

Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Gurpreet Singh, Mr. Nitish
Jain & Mr. Jatin Sethi, Advs.

Versus

STATE & ORS

..... Respondents

Through: Ms. Zubeda Begum, Standing
Counsel for GNCT for R-1,3 to 5.
Mr. Aman Lekhi, Sr. Adv. with
Ms. Bina Gupta, Mr. Harish
Pandey & Mr. Anuj Dhir, Advs.
for complainant.

AND

+ LPA 567/2013, CMs No.11963/2013 (for stay), 11965/2013 & 11966/2013 (both for condonation of delay)

PRADEEP DHINGRA

..... Appellant

Through: Mr. Rakesh Tikku, Sr. Adv. with
Mr. Gurpreet Singh, Mr. Nitish and
Mr. Jatin Sethi, Advs.

Versus

STATE & ORS

..... Respondents

Through: Mr. Aman Lekhi, Sr. Adv. with
Ms. Bina Gupta, Mr. Harish
Pandey & Mr. Anuj Dhir, Advs.
for complainant.
Mr. Rajiv Nanda, Adv. for R-
3,4&6.

AND

+ **LPA 569/2013, CMs No.11973/2013 (for stay) & 11975/2013 & 11976/2013 (both for condonation of delay)**

VIPUL GUPTA

..... Appellant

Through: Mr. Gurpreet Singh & Mr. Jatin Sethi, Advs.

Versus

STATE & ORS

.....Respondents

Through: Mr. Aman Lekhi, Sr. Adv. with Ms. Bina Gupta, Mr. Harish Pandey & Mr. Anuj Dhir, Advs. for complainant.
Mr. Rajiv Nanda, Adv. for R-3,4&6.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. These intra-court appeals impugn the common judgment dated 14th June, 2012 of a learned Single Judge of this Court of dismissal of W.P.(C) Nos.3470/2012, 3471/2012 & 3472/2012 preferred by the appellants respectively. The said writ petitions were filed by the respective appellants assailing, i) the communication dated 13th December, 2011 of the Director of Prosecution, Delhi to the Principal Secretary (Home), seeking instructions whether the concerned Additional Public Prosecutor (APP) has to press the application filed before the Court of the learned Additional Chief Metropolitan Magistrate (ACMM), Delhi under Section 321 of the Code of

Criminal Procedure, 1973 (Cr.P.C.) for withdrawal from prosecution in case FIRs No.90/2000, 99/20002 and 148/2002 registered at police station Connaught Place and Defence Colony; and, ii) the order dated 15th December, 2011 of Hon'ble the Lieutenant Governor, Delhi agreeing with the proposal in the said communication dated 13th December, 2011 not to press the applications for withdrawal of the aforesaid cases and to allow the trial thereof to proceed on merits.

2. These appeals are accompanied with applications for condonation of 340 days delay in re-filing thereof. Notice of the said applications only was issued. A detailed reply opposing the condonation of delay has been filed by the original complainant at whose instance the appellants were being prosecuted.

3. The matters came up before us on 16th January, 2014 when, without prejudice to the aspect of delay, and in the light of the judgment of the full Bench of this Court in *C.S. Agarwal Vs. State* (2011) ILR 6 Delhi 701, we asked the counsel for the appellants to satisfy us as to the maintainability of these appeals. On the request of the counsel for the appellants, the matter was adjourned for hearing on this aspect. We have heard the senior counsels

for the appellants as well as the senior counsel for the original complainant on the aspect of delay as well as of maintainability of these appeals.

4. The Full Bench of this Court, in **C.S. Agarwal** supra, was constituted to answer the following reference:

"Whether the writ petition filed under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure for quashing a FIR amount to invoking 'original jurisdiction' or these proceedings are to be treated as invoking 'criminal jurisdiction'"

5. The aforesaid question assumed importance because, if the writ petitions had invoked original jurisdiction, the Letters Patent Appeal (LPA) would be competent; on the other hand if the writ petitions were to be treated as invoking criminal jurisdiction, then the intra-court appeal under the Letters Patent of this Court was not maintainable.

6. The Full Bench, after examining a number of precedents, held:

"19. No doubt, as per the aforesaid pronouncements explaining the nature of power conferred under Article 226 of the Constitution, the High court in such proceedings exercises original jurisdiction. At the same time, it is also clarified that the said jurisdiction is not to be confused with the "original civil

jurisdiction" of the High Court. Further, proceedings under Article 226 of the Constitution would be treated as original civil proceedings only when it concerns civil rights. A fortiori, if it concerns a criminal matter, then such proceedings would be original criminal proceedings. Letters Patent would lie when the Single Judge decides the writ petition in proceedings concerning civil rights. On the other hand, if these proceedings are concerned with rights in criminal law domain, then it can be said that the Single Judge was exercising his 'criminal jurisdiction' while dealing with such a petition filed under Article 226 of the Constitution.

20. *For this reason, we cannot agree with the extreme position taken by the Appellants that the exercise of powers under Article 226 of the Constitution would never tantamount to exercising criminal jurisdiction, irrespective of the nature of proceedings. We, further, are of the opinion that if such a petition relates to criminal proceedings while dealing with this petition under Article 226 of the Constitution, the Court would be exercising "criminal jurisdiction". In this context, it would be relevant to refer to the judgment of the Supreme Court in **S.A.L. Narayan Row And Anr. v. Ishwarlal Bhagwandas and Anr.** AIR 1965 SC 1818. In that case, proceedings were initiated under the Income Tax Act, 1922. At the conclusion of proceedings before the High Court under Article 226, a certificate for fitness was sought under Article 131(1)(c) read with Article 132(1) of the Constitution. The*

question before the Apex Court was as to whether the proceedings before the High Court under Article 226 are "civil proceedings". The Constitution Bench opined that whether the proceedings are civil or not depends upon the nature of the right violated and the appropriate relief which may be claimed and not upon the nature of the Tribunal which is invested with authority to grant relief. In the process, following pertinent observations were made which are apposite in our context:

“A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property.”

The Court was, thus, categorical that even in a petition under Article 226 of the Constitution when the High Court is exercising extraordinary jurisdiction, the nature of proceedings, whether civil or criminal, would depend upon the nature of right violated and the nature of relief sought in the said petition.

29. *It would be necessary to clarify here that it cannot be said that in any of the cases under Article 226 of the Constitution, the Court is exercising 'criminal jurisdiction'. It would depend upon the rights sought to be enforced and the nature of relief which the Petitioner seeks in such proceedings. For example, if a writ petition seeking writ of habeas corpus is filed, while dealing with such a petition, the Court is not exercising criminal jurisdiction as*

no criminal proceedings are pending. In fact, the order of preventive detention is made without any trial under the criminal law. Likewise, when a person is convicted and sentenced after the conclusion of criminal trial and such an order of conviction has attained finality and he files writ petition under Article 226 of the Constitution challenging the orders of the Government refusing to grant parole while dealing with such a petition, the Single Judge is not exercising criminal jurisdiction, as no criminal proceedings are pending.

32. The test, thus, is whether criminal proceedings are pending or not and the petition under Article 226 of the Constitution is preferred concerning those criminal proceedings which could result in conviction and order of sentence.

33. When viewed from this angle, it is clear that if the FIR is not quashed, it may lead to filing of Challan by the investigating agency; framing of charge; and can result in conviction or order of sentence. Writ of this nature filed under Article 226 of the Constitution seeking quashing of such an FIR would therefore be "criminal proceedings" and while dealing with such proceedings, the High Court exercises its "criminal jurisdiction".

7. Having noticed the law as laid down by the Full Bench of this Court, we now proceed to determine whether the writ petitions from which these appeals arise, were filed invoking the “criminal jurisdiction” of this Court

and in which case these appeals would not be maintainable or the “original jurisdiction” of this Court, and in which case these appeals would be maintainable.

8. The case of the appellants / writ petitioners, in the writ petitions from which these appeals arise, was:

- (a) that each of the appellants / writ petitioners had been arrayed as accused in the FIRs aforesaid under Sections 420/406/409/468/471/477A/120B of the Indian Penal Code, 1860 (IPC);
- (b) during investigation in the FIRs, the appellants / writ petitioners had submitted various representations before the Investigating Officer and to his superior officers regarding the *mala fide* intention of M/s V.L.C. Finance Ltd. at whose instance the FIRs aforesaid had been registered and that a civil dispute had been converted into a criminal case with malicious intentions;
- (c) that the Investigating Officer however, without considering the said representations, filed the charge sheet;

- (d) on further representations from the appellants / writ petitioners, a Committee constituted by the Government of National Capital Territory of Delhi (GNCTD), recommended withdrawal of prosecution in the aforesaid three FIRs;
- (e) that Hon'ble the Lieutenant Governor of Delhi after receiving the recommendation of the Committee aforesaid ordered withdrawal of prosecution;
- (f) that the APP accordingly filed applications for withdrawal of the cases in the three FIRs aforesaid;
- (g) however before a decision could be taken on the aforesaid applications, the Director of Prosecution vide letters aforesaid opined that there was sufficient evidence on record against the accused i.e. the appellants / writ petitioners and requested for necessary orders and directions whether the APP has to press the aforesaid applications or not; and,
- (h) that Hon'ble the Lieutenant Governor vide order dated 15th December, 2011 in a hush manner accepted the proposal for

continuation of the prosecution and for revocation of the earlier decision for withdrawal from prosecution.

The writ petitions were thus filed impugning *inter alia* the order dated 15th December, 2011 of Hon'ble the Lieutenant Governor of Delhi.

9. The learned Single Judge, in the impugned judgment, for reasons which are not relevant for present purposes, has upheld the decision of Hon'ble the Lieutenant Governor of revoking the earlier decision for withdrawal of the prosecution and for continuation with the prosecution.

10. We have thus enquired from the senior counsels for the appellants, whether not the writ petitions, from which these appeals arise, in the facts and circumstances aforesaid, i) concerned a criminal matter; ii) were concerning rights in criminal law; iii) related to criminal proceedings which were at the time of institution of the writ petitions pending; and iv) whether not non grant of relief in the writ petitions may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property.

11. The senior counsels for the appellants have contended that the challenge in the writ petitions was not to the FIRs but to the administrative decision revoking the earlier decision for withdrawal of the prosecution and to continue with the prosecution. It is further contended that questioning the said decision is distinct from questioning the criminal proceedings. Reliance in this regard is placed on *Sheonandan Paswan Vs. State of Bihar* (1983) 1 SCC 438. It is further contended that the writ petitions questioned an administrative order and not any order of the Court in exercise of criminal jurisdiction. It is yet further contended that the learned Single Judge in deciding the writ petitions has not exercised any criminal jurisdiction. It is yet yet further contended that since non availability of LPA in writs pertaining to criminal matters amounts to ouster of jurisdiction, “criminal matters” have to be strictly construed. It is yet yet further contended that the consequences flowing from the challenge to the administrative order would not be determinative.

12. Per contra, the senior counsel for the complainant has argued that the premise that an administrative act can never be of criminal nature is itself wrong and the consequences flowing from an administrative act would be relevant to determine the nature of the proceedings. He has further, besides

relying on the judgment aforesaid of the Full Bench, contended that the executive functions of the prosecutor are in the realm of criminal law and concern criminal law and has invited attention to the prayer made in these appeals also to contend that the effect thereof would be to avoid consequences of criminal proceedings.

13. The senior counsel for the complainant has also invited attention to the applications filed for condonation of delay of 340 days in re-filing the appeal, giving the reason of pendency of revision petitions preferred by the appellants to the Sessions Court against the order passed by ACMM and has argued that the appellants having elected to pursue the revision petitions and not these appeals, had exercised a choice and are deemed to have abandoned the remedy by way of present appeals. It is contended that even the applications for condonation of delay have been filed in a cavalier manner with even the number of days of delay having been left blank and having been filled subsequently in hand. It is yet further argued that the appellants previously took a stand that the papers of these appeals upon being returned with objections, had been misplaced and which again shows the *mala fides* of the appellants and the appellants for this reason alone are not entitled to exercise of any discretion in their favour.

14. We have considered the rival contentions. Though undoubtedly the writ petitions were not filed for quashing of FIR, as in *C.S. Agarwal* supra and were also not with respect to any order in prosecution cases against the appellants but the test laid down by the Full Bench in the judgment supra to determine whether the writ petition is invoking “original jurisdiction” or “criminal jurisdiction” is very wide, as the language of the passages of the judgment of the Full Bench quoted by us hereinabove would show and the senior counsels for the appellants have not been able to satisfy us as to how the writ petitions preferred by the appellants would not fall within the ambit of the said language. Even though the challenge in the writ petitions was to a decision of Hon’ble the Lieutenant Governor but the said decision was relating to the prosecution already underway of the appellants and the direct effect of the dismissal of the writ petitions is of continuation of the prosecution which may result in imposition of sentences such as death, imprisonment, fine or forfeiture of property, of the appellants. We are thus of the view that this Court while dealing with the writ petitions was exercising its criminal jurisdiction. It cannot be also lost sight of that the writ petitions were intended to avoid the consequences of criminal proceedings initiated under the Code of Criminal Procedure and concerned

with rights in criminal law domain. We have thus no doubt that the learned Single Judge, in dealing with the writ petitions was exercising “criminal jurisdiction” and these Letters Patent Appeals are not maintainable.

15. Though in view of the aforesaid, there is no need to adjudicate the applications for condonation of 340 days delay in re-filing the appeal but for the sake of completeness, we proceed to consider the same. This Court is ordinarily liberal in condoning delays, particularly in re-filing but it pains us to note that the appellants have indulged in falsehood in giving the reasons for condonation of delay. Though in the applications filed before us for condonation of delay, the reason given is of the appellants having preferred revision petitions before the Sessions Court against the order of the ACMM, the complainant along with its reply has filed a copy of the application for condonation of delay supplied by the appellants to the respondents in which the reason given for condonation of delay is of the files having been mistakenly tied with a different set of files. The appellants have not denied having supplied such applications to the counsel for the complainants. It is thus evident that the appellants have been giving out reasons as per their convenience and neither of which is true. There is also merit in the contention of the senior counsel for the complainant, of the appellants, as per

the reason now given by them, having abandoned the reliefs claimed in the writ petition. The revision petitions which the appellants opted to pursue in preference to these appeals, were not connected with the grounds on which the reliefs were claimed in the writ petitions. When a litigant has several remedies and opts to, after invoking two or more of those, to pursue any one, he cannot, without any justification, at his whim and fancy be permitted to pursue the remedy which he had given up. We thus do not find any sufficient cause for condonation of delay in refiling the appealing

16. The appeals are thus dismissed, as not maintainable as well as barred by time, leaving the parties to bear their own costs.

CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J

JANUARY 29, 2014

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