

R E V I S E D (APPEARANCE)

ITEM NO.42 Court 11 (Video Conferencing) SECTION II-B

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal(Crl.) Nos. 2669-2670/2021

(Arising out of impugned final judgment and order dated 05-03-2021 in WPA(P) No. 67/2021 05-03-2021 in WPA(P) No. 68/2021 passed by the High Court At Calcutta)

THE STATE OF WEST BENGAL & ORS. Petitioner(s)

VERSUS

DIPAK MISHRA Respondent(s)

([ONLY CONNECTED MATTER I.E. DIARY NO. 8430/2021 TO BE LISTED AT THE END OF THE BOARD])

WITH

Diary No(s). 8430/2021 (II-B)

(FOR ADMISSION and I.R. and IA No.45633/2021-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.45634/2021-EXEMPTION FROM FILING AFFIDAVIT and IA No.45632/2021-PERMISSION TO FILE PETITION (SLP/TP/WP/...))

Date : 26-03-2021 These petitions were called on for hearing today.

CORAM : HON'BLE MS. JUSTICE INDIRA BANERJEE
 HON'BLE MR. JUSTICE KRISHNA MURARI

For Petitioner(s) Mr. Vikas Singh, Sr. Adv.
 Mr. Sunil Fernandes, AOR
 Ms. Nupur Kumar, Adv.
 Ms. Deepeika Kalia, Adv.
 Mr. Kapish Seth, Adv.
 Mr. Mrityujai Singh, Adv.
 Mr. Prastut Dalvi, Adv.

Dr. A.M. Singhvi, Sr. Adv.
Mr. Sidharth Luthra, Sr. Adv.
Mr. Suhaan Mukerji, Adv.
Mrs. Liz Mathew, Adv.
Mr. Amit Bhandari, Adv.
Mr. Vishal Prasad, Adv.
Ms. Chitralekha Das, Adv.
Mr. Nikhil Parikshit, Adv.
Mr. Abhishek Manchanda, Adv.
Mr. Pankaj Singhal, Adv.

for Ms. Shubhangni Jain, Adv.
Mr. Sayandeep Pahari, Adv.
M/S. PLR Chambers And Co., AOR

For Respondent(s) Mr. Mukul Rohtagi, Sr. Adv.

Mr. Ankur Chawla, Adv.

Mr. Rajdeep Majumdar, Adv.

Mr. Jayant Mohan, Adv.

Mr. Moyukh Mukherjee, Adv.

Mr. Siddhartha Chowdhury, AOR

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

The Special Leave Petition(Crl.) Nos. 2669-2670 of 2021 (State of West Bengal vs. Dipak Mishra) and connected Diary No. 8430 of 2021 titled SK Supian vs. Dipak Mishra & Others Etc. were assigned to this Bench at lunch break today i.e. 26-03-2021, after the same was mentioned before the Bench presided over by Hon'ble the Chief Justice of India.

The papers in connection with Diary No. 8430 of 2021 titled SK Supian vs. Dipak Mishra & Others Etc. have been forwarded to this Bench, but, not the papers in connection with S.L.P.(C) Nos. 2669-2670 of 2021 (State of West Bengal vs. Dipak Mishra). We, therefore, take up only Diary No. 8430 of 2021 titled SK Supian vs. Dipak Mishra & Others Etc.

Diary No. 8430 of 2021

Permission to file the Special Leave Petitions are granted.

Heard the learned Counsel for the parties.

These Special Leave Petitions are against a common order dated 5th March, 2021 passed by a Division Bench of Calcutta High Court, in two writ petitions filed as Public Interest Litigation (PIL) being WPA(P) No. 68 of 2021 (*Nilanjan Adhikary v. The State of West*

Bengal and Others) and WPA(P) No.67 of 2021 (Dipak Mishra v. The State of West Bengal and Others) whereby an order dated 10th February, 2020 passed by the Additional Chief Judicial Magistrate discharging the petitioner from Criminal Case No. 368 of 2007 and other similar orders passed on diverse dates, discharging various persons accused from criminal cases against them, have been stayed and the concerned Courts have been directed to take note of the orders of stay and to deal with the Criminal Cases accordingly.

Learned Counsel appearing on behalf of the petitioner has argued that even though the persons who had been discharged from the Criminal Cases were directed to be impleaded in the writ petition, the orders of discharge impugned in the writ petition were stayed without hearing the discharged persons including the petitioner herein.

Learned Counsel appearing on behalf of the petitioner as also Counsel appearing on behalf of the State submitted that the Public Interest Litigations were initiated by persons belonging to a political party for oblique reasons. The Public Interest Litigations should not, therefore, have been entertained.

While it is true that the Court is required to examine whether a litigation is really in public interest or to advance some other interest in the garb of public interest, at the same time, a Public Interest Litigation cannot be thrown out only because the petitioner belongs to a rival political party. Persons with political affiliations are, as much entitled to file a public interest litigation as any other person. Whether the litigation is

bona fide or not is a different issue which has to be examined by the Court on a case to case basis, having regard to the nature of the complaint before it.

Learned Counsel also adverted to Section 321 of the Criminal Procedure Code to argue that the Public Prosecutor or Assistant Public Prosecutor in charge of a case might, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person, either generally, or in respect of any one or more of the offences for which he is tried.

In Rajender Kumar Jain v. State through Special Police Establishment and Ors. Etc. Etc. reported in (1980) 3 SCC 435 cited by the Counsel, this Court held :

"14. Thus, from the precedents of this Court, we gather:

"1. Under the scheme of the Code, prosecution of an offender for a serious offence is primarily the responsibility of the executive.

2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.

3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.

4. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.

5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes sans Tammany Hall enterprises.

6. The Public Prosecutor is an officer of the court and responsible to the court.

7. The court performs a supervisory function in granting its consent to the withdrawal.

8. The court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The court has a special duty in this regard as it

is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

15. *We may add it shall be the duty of the Public Prosecutor to inform the court and it shall be the duty of the court to apprise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its "Minister of Justice". Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the executive by resort to the provisions of Section 361 of the Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the court, the court and its officers alone must have control over the case and decide what is to be done in each case.*

16. *We have referred to the precedents of this Court where it has been said that paucity of evidence is not the only ground on which the public prosecutor may withdraw from the prosecution. In the past, we have often known how expedient and necessary it is in the public interest for the public prosecutor to withdraw from prosecutions arising out of mass agitations, communal riots, regional disputes, industrial conflicts, student unrest etc. Wherever issues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from prosecutions in order to restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the calm which may follow the storm. To persist with prosecutions where emotive issues are involved in the name of vindicating the law may even be utterly counter-productive. An elected Government, sensitive and responsive to the feelings and emotions of the people, will be amply justified if for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing a calm which has descended it decides not to prosecute the offenders involved or not to proceed further with prosecution already launched. In such matters who but the Government can and should decide, in the first instance, whether it should be baneful or beneficial to launch or continue prosecutions. If the Government decides that it would be in the public interest to withdraw from prosecutions, how is the Government to go about this task?*

17. *Under the Code of Criminal Procedure it is the Public Prosecutor that has to withdraw from the prosecution and it is the court that has to give its consent to such withdrawal. Rightly too, because the independence of the judiciary so requires it, as we have already mentioned. Now the Public Prosecutor is an officer of the court. He sets the criminal law in motion in the court. He conducts the prosecution in the court for the people. So it is he that is entrusted with the task of initiating the proceeding for withdrawal from the prosecution. But, where such large and sensitive issues of public policy are involved, he must, if he is right-minded, seek advice and guidance from the policy-makers. His sources of information and resources are of a very limited nature unlike those of the policy-makers. If the policy-makers themselves move in the*

matter in the first instance, as indeed it is proper that they should where matters of momentous public policy are involved, and if they advise the Public Prosecutor to withdraw from the prosecution, it is not for the court to say that the initiative comes from the Government and therefore the Public Prosecutor cannot be said to have exercised a free mind. Nor can there be any quibbling over words. If ill informed but well meaning bureaucrats choose to use expressions like "the Public Prosecutor is directed" or "the Public Prosecutor is instructed", the court will not on that ground alone stultify the larger issue of public policy by refusing its consent on the ground that the Public Prosecutor did not act as a free agent when he sought withdrawal from the prosecution. What is at stake is not the language of the letter or the prestige of the Public Prosecutor but a wider question of policy. The court, in such a situation is to make an effort to elicit the reasons for withdrawal and satisfy itself, that the Public Prosecutor too was satisfied that he should withdraw from the prosecution for good and relevant reasons."

Our attention has also been drawn to *V.L.S. Finance Limited v. S.P. Gupta and Anr.* reported in (2016) 3 SCC 736 where this Court held :

*"41. In this context, reference to a two-Judge Bench decision in *Vijaykumar Baldev Mishra v. State of Maharashtra*[*Vijaykumar Baldev Mishra v. State of Maharashtra*, (2007) 12 SCC 687 : (2008) 3 SCC (Cri) 362] would be fruitful. In the said case, the Court held that Section 321 CrPC provides for withdrawal from prosecution at the instance of the Public Prosecutor or Assistant Public Prosecutor. Indisputably, therefore, the consent of the Court is necessary. Application of mind on the part of the Court, therefore, is necessary in regard to the grounds for withdrawal from the prosecution in respect of any one or more of the offences for which the appellant is tried. The Public Prosecutor in terms of the statutory scheme laid down under CrPC plays an important role. He is supposed to be an independent person. While filing such an application, the Public Prosecutor also is required to apply his own mind and the effect thereof on the society in the event such permission is granted."*

At this stage we need not go into the question of whether the Public Prosecutor/Assistant Prosecutor concerned applied his mind to the charges against the accused persons or whether the facts and circumstances of the case warranted discharge of the accused. Suffice it to mention that as argued by the learned Counsel for the

petitioner, though the High Court has directed that the petitioner and others similarly circumstanced be impleaded, the order of discharge of the petitioner has been stayed without hearing the petitioner. Since the order affects the petitioner adversely, the petitioner should have been heard, more so since the order of discharge of the petitioner impugned in the writ petition had been passed over a year before the writ petition was filed.

Mr. Rohatgi appearing on behalf of the respondent-writ petitioner argued at length questioning the propriety of the decision of the State as *mala fide* and against public interest.

The writ petitions are pending in the High Court and have been appearing in the cause list. We expect that the Division Bench of the High Court will take up the writ petitions and finally decide the same within a week or two. It will be open to the respective parties to raise all contentions before the High Court.

However, since the order which affects the petitioner, herein, has been passed without hearing the petitioner, we deem it appropriate to pass an order staying the operation of the order dated 05-03-2021, only insofar as it pertains to the petitioner viz. SK Supian, for a period of two weeks till date or until further orders of the Division Bench of the High Court, whichever, is earlier.

The Special Leave Petitions are, accordingly, disposed of.

S.L.P.(C) Nos. 2669-2670 of 2021

The Registry is directed to list these Special Leave Petitions

before the Regular Bench on 05-04-2021.

(MANISH ISSRANI)
COURT MASTER(SH)

(MATHEW ABRAHAM)
COURT MASTER(NSH)