Krishnakant Tamrakar vs The State Of Madhya Pradesh on 28 March, 2018

Equivalent citations: AIR 2018 SUPREME COURT 3635, AIR 2018 SC(CRI) 1062, (2018) 71 OCR 249, (2018) 5 SCALE 248, (2018) 188 ALLINDCAS 161 (SC), (2018) 104 ALLCRIC 696, (2018) 126 CUT LT 150, (2018) 2 CRIMES 254, (2018) 2 CURCRIR 141

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Bench: Uday Umesh Lalit, Adarsh Kumar Goel

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 470 OF 2018
(ARISING OUT OF SPECIAL LEAVE PETITION (CRL.)NO.9393 OF 2017)

KRISHNAKANT TAMRAKAR …APPELLANT

VERSUS

THE STATE OF MADHYA PRADESH ...RESPONDE

JUDGMENT

ADARSH KUMAR GOEL, J.

1. Leave granted. This appeal has been preferred against the order dated 3rd May, 2017 of the High Court of Madhya Pradesh in CRA No.1823 of 2009 whereby prayer for bail, pending disposal of criminal appeal against life sentence has been declined though the appellant has been in custody for more than ten years.

2. The appellant stands convicted under Sections 148, 302/149 IPC and sentenced to life imprisonment, apart from other sentences. According to the prosecution, on 23 rd June, 2005 at 11.30 A.M., the appellant along with the co-accused caused the Reason:

> murder of one Shahid. In view of evidence in support of the charge, the trial Court convicted and sentenced the appellant. The appellant applied for bail pending

consideration of appeal before the High Court. After the said prayer was rejected, another application was filed. The High Court rejected the second bail application with the observation that the evidence on record did not warrant grant of bail.

3. In this appeal, the order of the High Court is challenged mainly on the ground that the appellant had been in custody for more than ten years and the remedy of appeal will be meaningless if he has to remain in custody for the full term of sentence. Reliance has been placed on the judgment of this Court in Kashmira Singh versus State of Punjab1.

THE ISSUE

4. When the matter came up for consideration before this Court, following order was passed :

"The grievance of the petitioner is that he has been in custody for more than ten years. He has neither been granted bail nor his appeal is heard. It is stated that there is no likelihood of the appeal being heard before the High Court in the near future.

While we are not inclined to grant bail, we issue notice confined to the question as to how the situation can be remedied ensuring that the appeal 1 (1977) 4 SCC 291 is heard within a reasonable time at the appellate forum.

Issue notice. Notice be also issued to the Convenor, National Mission for Justice Delivery and Legal Reforms i.e. the Secretary Justice – Union of India and also the Attorney General of India.

Shri Gopal Subramanium, learned senior counsel who is present in the Court is requested to assist the Court as amicus."

5. Accordingly, we have heard learned Attorney General and the learned amicus on the question as to how the problem of delay in hearing of the appeals can be remedied.

SUBMISSIONS OF THE LEARNED AMICUS

6. Learned Amicus submitted that timely justice is essential for the Rule of Law. Access to justice is a fundamental right under the Constitution of India. It is also recognized under Article 10 of the Universal Declaration of Human Rights as well as Articles 9 and 14 of the International Convention on Civil and Political Rights. There is, thus, dire need to find practical, effective and achievable system for speedy disposal of appeals. In its 245 th Report in the year 2014, the Law Commission of India made analysis for method of computing adequate judge-strength and recommended increase of number of judges on that basis. In Vineet Narayan versus Union of India2, this Court held that the Government agencies 2 (1996) 2 SCC 199 must perform their legal obligations as per mandate of Article 14 of the Constitution. In Prakash Singh versus Union of India 3, this Court directed police reforms to be brought about for scientific, speedy and quality investigation. The United States Speedy Trial Act, 1974 provides timelines for steps in justice delivery. Timeline provided in different

statutes in India, such as filing of charge sheets under Section 167 Cr.P.C. is required to be implemented. Project of National Arrears Grid was required to be implemented. The Woolf Report of 1996 emphasized generation of accurate judicial statistics on a daily basis. The Grid should help identify the steps for dispensation of justice concerning the poor and the underprivileged. Case Management practices should be implemented. In its report titled 'Delaying Justice is Denying Justice' the Candian Standing Senate Committee on Legal and Constitutional Affairs stated "the lack of robust case and case flow management is perhaps the most significant factor contributing to delays". In England and Wales, pre-trial case management is rigorously followed in all criminal cases at both the trial and the appellate levels. Active case management includes:

"(i) The early identification of the real issues;

3 (2006) 8 SCC 1

(ii) Achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;

(iii) Monitoring the progress of the case and compliance with directions;

(iv) Discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;

(v) Encouraging the participants to co-operate in the progression of the case, and

(vi) Making use of technology."

7. Reference was also made to Case Management Criminal Procedure in England and Wales.

8. Learned Amicus further submitted that in appeals against acquittal efforts should be made to weed out unmeritorious appeals. Competent Government advocates should be appointed by a fair and transparent mechanism as laid down in State of Punjab versus Brijeshwar Singh4.

9. Vacancies of the High Court Judges should be filled up well before the date a judge demits the office. Ad hoc judges should be appointed to deal with the pending appeals.

4 (2016) 6 SCC 1

10. Wherever there is higher pendency of appeals, the same can be transferred to the courts of concurrent jurisdiction of other States. Technology ought to be used to facilitate speedy conduct of trials and disposal of appeals. Electronic copy of all papers should be served as soon as a charge sheet is filed. The technology can be used for speedy and summary disposal of certain cases such as the traffic offences. Evidence can be recorded by video conferencing, especially for Doctors and investigating officers who may be on outstation job and engaged in official duties which suffer if they have to physically come to the court. There must be change in the work culture amongst the

members of the bar as well as the police. Efforts should be made to avoid adjournments. Time table should be laid down for hearing of appeals which should be strictly adhered to. SUBMISSIONS OF LEARNED ATTORNEY GENERAL

11. Learned Attorney General submitted that the Government has adopted a coordinated approach to assist the judiciary for liquidation of arrears and pendency by providing better infrastructure for courts including computerization, increase in strength of judges, policy and legislative measures in the areas prone to excessive litigation and emphasis on human resource development. ECourts Mission Mode Project has been introduced. Computerized courts have been increased to 16,089. Cost of Rs.1,670 crores has been approved for the purpose. Video Conferencing facility has been operationalised in 500 courts and prisons. Natinal Judicial Data Grid has information regarding 6.36 crores decided and 2.5 crores pending cases. 5.24 crores orders/judgments are available. Steps have been taken to fill up vacancies in Supreme Court and High Courts. Appointment of Judges and judicial officers in district and subordinate courts is within the domain of the High Courts and the State Governments. A total of Rs.5956 crores have been released under Centrally Sponsored Scheme (CSS) for Development of Infrastructure facilities for the Judiciary. 17,576 Court Halls and 14,363 Residential Accommodations are available for the Judges/Judicial Officers of District and Subordinate Courts. In addition, 2,852 Court Halls and 1,622 houses are under construction. 14 th Finance Commission has endorsed the proposal to strengthen the judicial system by establishing 1800 Fast Track Courts (FTCs) for five years for specified offences at a cost of 4,144 crores. As per resolution of the Joint Conference of Chief Justices and Chief Ministers, the Government has requested the State Governments to strengthen institutional mechanism between the State and the Judiciary. Steps have been taken for timely completion of infrastructure and eCourts Mission Mode project. There is need to implement Section 436A Cr.P.C. and ensure periodic monitoring of under-trial Review Committee Mechanism. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act, 2015 has been notified to streamline the conduct of cases in Commercial Division and Commercial Courts. Amendments have been made in the Arbitration and Conciliation Act, 1996 and the Negotiable Instruments Act, 1881. In pursuance of resolution of Chief Justices' Conference held in April, 2015, Arrears Committees have been set up to clear backlog of cases pending from more than five years. The Supreme Court has also constituted Arrears Committee to formulate steps and reduce pendency of cases in High Courts and district courts. National Legal Services Authority provides mechanisms for access to justice for the poor. Lok Adalats have been held resulting in disposal of number of cases on the basis of compromise not requiring adjudication, apart from adjudication in public utility Lok Adalats. The Government has approved scheme for engaging Nyaya Mitras to assist the litigants.

12. Learned Attorney General submitted that delay in disposal of appeals can be tackled by appointing more judges and by better coordination and planning. It was also submitted that by proper scrutiny, application for leave to appeal or even appeals can be summarily disposed of which will reduce the burden of the courts.

13. We place on record our gratitude for the learned Amicus and learned Attorney General for their valuable assistance rendered. CONSIDERATION OF THE ISSUE

14. Even though initially notice was issued to consider the issue of remedying the situation of delay in hearing of the criminal appeals before the High Courts, learned amicus and learned Attorney General addressed the Court generally on the issue of speedy justice at all levels. We consider it appropriate to reflect on some important aspects of speedy justice as these aspects are integral to the issue of delay in hearing of criminal appeals by the High Courts. First question which we take up for consideration is whether, having regard to the nature of jurisdiction of the High Court and the present volume of the work, the expectation for speedy disposal of criminal appeals is realistic or there is need for re-engineering of the judicial structure. Secondly, when speedy justice is directly linked to timely appointment of best talent, whether there is need to revisit the existing system of appointment of judges at all levels. Thirdly, what can be the mechanism to plan and oversee the best management practices, including employment of technology, for optimum performance and righteous conduct. Fourth, how uncalled for frequent strikes obstructs access to justice and what steps are required to remedy the situation.

15. We are conscious that the above issues are primarily policy matters. The subject matter of restructuring of courts and administration of justice is a matter to be gone into by the executive and the legislature. However, since the subject affects fundamental right of speedy justice, this Court cannot refuse to look into the problem repeatedly presented to it with a view to draw attention of all concerned, leaving to the concerned authorities to consider and act in the matter.

16. There can be no dispute that access to speedy justice is part of fundamental right under Articles 14 and 21 of the Constitution. The National Commission to Review Working of the Constitution recommended that access to speedy justice may be incorporated as an express fundamental right5.

5 Anita Kushwaha v. Pushap Sudan (2016) 8 SCC 509, para 31

17. The matter has been subject of consideration in several decisions. In Imtiaz Ahmad versus State of U.P.6 the issue taken up for consideration was delay in disposal of criminal cases where stay was granted by the High Court. On consideration of a report, the Court noted:

> "(a) As high as 9% of the cases have completed more than twenty years since the date of stay order.
>
> (b) Roughly 21% of the cases have completed more than ten years.
>
> (c) Average pendency per case (counted from the date of stay order till 26-7-2010) works out to be around 7.4 years.
>
> (d) Charge-sheet was found to be the most prominent stage where the cases were stayed with almost 32% of the cases falling under this category. The next two prominent stages are found to be 'appearance' and 'summons', with each comprising 19% of the total number of cases. If 'appearance' and 'summons' are considered interchangeable, then they would collectively account for the maximum of stay orders."

18. This Court directed the Law Commission to examine the matter with a view to set up additional courts to eliminate delays.

19. Accordingly, Law Commission examined the matter in its 245 th Report given in July, 2014 and recommended review of cadre 6 (2012) 2 SCC 688 strength. The Commission noted that the system was unable to deliver timely justice because of huge backlog for which the judge strength was inadequate. It noted that mandatory time frames were provided in some countries. In P. Ramchandra Rao versus State of Karnataka7, this Court was not in favour of mandatory time limit. Non binding directory guidelines could be adopted. 14 th Report of the Law Commission suggested time frame which was reiterated in subsequent Law Commission reports. The Malimath Committee recommended use of two year time frame as the norm by which delay and arrears in the system should be measured. Case specific time tables are adopted to meet the object of individualized timely justice. The Commission observed that all cases pending for more than one year be categorized as backlogged. All cases backlogged in three years and current cases be decided within one year. The Commission considered various methods for fixing the judge strength so as to meet current institution of cases within the expected time frame as well as also to clear the arrears within the targeted time. One of the problems noticed was huge vacancies and failure in timely filling up of vacancies. Delay and arrears was a concern not only in the trial courts but throughout the judicial system. If the disposal in trial courts increased, the matter 7 (2002) 4 SCC 578 may be held up in the higher courts. Adequate infrastructure and support staff was also of importance. Good Judicial management practices such as timeliness and performance bench marks were also discussed. It was observed that the High Courts are already backlogged and not able to keep pace with new filings. It was observed that there was need to establish non-mandatory timeframe for different types of cases. Unless judges and litigants have clear expectations, there will be little accountability for delays.

20. Thereafter, the matter was considered in Imtiyaz Ahmad versus State of Uttar Pradesh and Ors. 8. This Court gave directions for review of cadre strength in terms of principles laid down therein. However, the said judgment appears to have dealt with the issue of fixing up of strength of judges for the subordinate judiciary and infrastructure for the district judiciary9.

Possibility of decision of five year old cases pending in the High Courts particularly the criminal appeals within the existing system – Need to consider decongestion of Constitutional Courts.

21. In Akhtari Bi versus State of M.P.10, this Court requested the Chief Justices of the High Courts to take immediate effective 8 (2017) 3 SCC 658 9 Para 43 10 (2001) 4 SCC 355 steps for disposal of criminal appeals pending for more than five years.

22. The matter was considered by the Joint Conference of Chief Ministers and the Chief Justices held in April, 2016 and it was resolved:

"8. DELAY AND ARREARS COMMITTEE:

xxx xxx xxx Resolved that

(i) all High Courts shall assign topmost priority for disposal of cases which are pending for more than five years;

(ii) High Courts where arrears of cases pending for more than five years are concentrated shall facilitate their disposal in mission mode;

(iii) High Courts shall progressively thereafter set a target of disposing of cases pending for more than four years;

(iv) while prioritising the disposal of cases pending in the District Courts for more than five years, additional incentives for the Judges of the District Judiciary be considered where feasible; and

(v) efforts be made for strengthening case-flow management rules."

23. The available figures11 show that long pendency, particularly of more than five years remains a serious challenge. In High Courts, 11 Please refer to Court News – October-December, 2016 in Supreme Court Website (www.supremecourtofindia.nic.in) or (http://supremecourtofindia.nic.in/pdf/CourtNews/COURT_NEWS_Vol_XI_Issue_No4_October_to_December_2016.pdf) 16.29 lakhs cases were more than five years old. 7.43 lakh cases were more than 10 years old. Since current disposal itself was less than the institution of fresh cases, there was no likelihood of old cases being decided in a reasonable time. There could not be increase of strength of High Court Judges beyond a limit. The system could not be top heavy. Volume of work in the High Court was likely to further increase on account of increased disposal of cases in subordinate courts with the increased strength of judges, infrastructure and other steps being taken. Disposal of cases in subordinate courts is not enough if the same are thereafter held up in the High Courts. New laws are being enacted providing statutory remedies before the High Courts. Moreover, oversight mechanism for judges of the Constitutional Courts is not the same as for other Judges12. While, there can be no doubt about need for such protection, appointment of large number of such judges can be counter productive. If number of Constitutional Courts is to be increased to match the volume of work being entrusted to such Courts, it may have its implication unless it is possible to find 12 (1997) 3 SCC 261 – para 78 " … …The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. …" sufficient number of suitable persons. The fact

that there are large number of vacancies in such Courts shows the difficulty in identifying adequate number of suitable persons for Constitutional Courts. Needless to say that nature of work before the Constitutional Courts particularly laying down of law is time consuming. Such Courts cannot be overburdened.

24. The Arrears Committee of this Court considered the issue of filling up of vacancies in subordinate courts and the issue of arrears. It was noted that while better monitoring, better management and other steps such as the Central Selection may help speedy disposal in subordinate courts, the working of constitutional courts stands on different footing. There being mismatch in pendency and disposal, the Committee recommended an interaction with the stakeholders to explore the issues of judicial reforms including reengineering of structure of administration of justice and the legislative changes necessary for the constitutional goal of speedy justice 13. Accordingly, a meeting with the stakeholders was held on 8 th April, 2017. The issues considered were:

“i) Decongestion of Supreme Court and High Courts from civil and criminal appeals.

13 Minutes of the meeting of the Arrears Committee held on 23rd March, 2017

ii) Performance of Tribunals in contribution to decongestion of cases in Supreme Court and High Courts.

iii) Central Selection Mechanism
vacancies in subordinate courts.

iv) Video recording and conferencing in Courts &

video investigation by investigating authorities.

v) Reforms in Legal Profession.

vi) Issue of granting Bail and under Trials.”

25. In the said meeting, it was noticed that in most of the High Courts disposal was less than the institution. This called for reengineering of structure of administration of justice. One of the suggestions was that statutory remedies provided before the constitutional courts may be shifted to alternative fora. It was suggested that Courts of Appeals may be set up higher to the District Courts but below the High Court. Such Courts of Appeals could comprise more than one member, partly drawn from the senior district judges and partly recruited directly from the Bar through a Central Selection Mechanism 14. If above proposal is 14 Relevant extract from the minutes of meeting of the Arrears Committee held on 8th April, 2017:

> “Reference to the available statistics shows that pendency of more than five year old cases in the High Courts was more than 40% of the total pendency in the High Courts

and figures of five year old cases were on the increase. Criminal Appeals in most of the High Courts were pending for more than five years and there was no possibility of such appeals being taken up for hearing to satiate the aspirations of the common litigant of speedy justice. In most of the High Courts disposal of Criminal Appeals was less than the institution. Delay in decision of criminal cases, particularly in category of serious cases where granting bail was not safe, was not a satisfactory situation. Unless there was an alternative to ensure speedy disposal for criminal cases in the High Courts, search for structural alternative was the imperative need of the hour. There are other areas of appellate jurisdiction in the High Court including second appeals, matrimonial matters, accidental claim cases, land acquisition cases which also require prompt disposal, but the same get considered, pending appeals before the High Court could be transferred to such Benches whose decisions will be final.

26. An enabling statute could be enacted whereby the State could, in consultation with the High Courts, transfer all or certain categories of appeals or other statutory proceedings from the High Courts to the alternative fora. Constitutional remedies will remain intact. It was explained that this would not be creating one extra forum resulting in longer duration of litigation instead of speedy disposal. The constitutional remedy under Article 227 was different from statutory appeal15.

27. Suggestions considered in the meeting also include restructuring of the Tribunals, reforms in legal profession, online grievance redressal mechanism against administrative decisions with specified time limits at par with the Right to Information Act clogged at the High Court level because of the high pendency of the cases in the High Courts and time taken in decision of such appeals. The statistics show that in most of the High Courts the disposal was less than the institution and as many as 16.29 lakh cases were more than five years old. Figure of 10 year old cases is 7.43 lakhs in the High Courts and more than 20 lakhs in the subordinate courts.

Thus, there is need for re-engineering of the structure of administration of justice by which the Supreme Court and the High Courts may discharge only core constitutional functions while the statutory appeals or other statutory functions can be dealt with by an alternative mechanism by courts of appeal which, in hierarchy will be higher to the district judges but below the High Court. Such cadre may comprise of members drawn partly by selection from the Higher Judicial Service and partly from the Bar through Centralised Recruitment Mechanism. It may be possible to lay down disposal norms/targets to be achieved by such benches and in light thereof number of benches within the jurisdiction of each High Court may be assessed. Pending appeals or at least certain categories of appeals can be transferred to such Benches. Based on performance, integrity and suitability, members of the appellate benches may be considered for elevation to the High Courts. Remedy to move the High Court under Articles 226/227 will remain intact. Apprehension was expressed by some of the participants that creating another Appellate Forum may not necessarily result in reducing the 4 docket load of the High Courts and Supreme Court. Because, going by the present trend there is a tendency of every litigation being carried to the higher Forum and at least

till the High Court if not the Supreme Court. However, the scope of interference in constitutional jurisdiction of the High Courts under Article 226/227 is circumscribed and not the same as deciding appeals on facts and law." 15 Radhey Shyam versus Chhabi Nath (2015) 5 SCC 423; Sita Ram versus State of U.P. (1979)2 SCC 656 (RTI), summary procedures for civil and criminal disputes of certain categories16. The matter was also considered thereafter in the meeting of Arrears Committee of the Supreme Court with the Arrears Committees of the High Courts17.

28. In 124th Report of the Law Commission of India (1988) titled "High Court Arrears – A Fresh Look", the Law Commission observed that wherever possible, proliferating appellate and wide original jurisdiction should be controlled and curtailed without impairing the quality of justice. It was observed that the approach of the Law Commission is to reduce number of appeals, set up specialist courts/tribunals to reduce the inflow of work to the High courts.

29. Desirability of amending provisions of direct appeal to this Court was also considered in Gujarat Urja Vikas Nigam Limited versus Essar Power Limited18. Therein, this Court considered the unique role of the highest court and observed that overburdening of Constitutional Courts was undesirable for functioning of the Constitution. Heavy work of routine nature before Constitutional Courts affected their assigned core role. Law Commission was asked to look into the matter.

16 Minutes of the interaction of the Arrears Committee for Supreme Court & High Courts held on 8th April, 2017 17 Minutes of the interaction of the Arrears Committee for Supreme Court & High Courts held on 22nd April, 2017 18 (2016)9 SCC 103

30. In 272nd report, the Law Commission observed that the forum for challenging the order of tribunal should be appellate tribunals, which decision should be final. No statutory appeal should be provided before the High Courts or Supreme Court in routine manner19. No action appears to have been taken on the said recommendations.

31. Since one trial and one appeal are considered to be components of fair system of administration of justice in criminal cases of serious nature20, adjudication at the original forum and at one appellate forum must be within reasonable time which should not normally exceed one to two years, as noted by the Law Commission and the Malimath Commission. At the same time, multiple layers of remedies need to be eliminated. Article 227 remedy, as earlier observed, is meant primarily against perversity or patent error in a judgment.

32. From the data available it is clear that all the steps taken by the Central Government so far have not significantly improved the situation of speedy disposal of criminal appeals. The steps taken are set off by increased volume of work or otherwise. 19 8.23 of the Law Commission Report 20 Dadu alias Tulsidas versus State of Maharashtra (2000) 8 SCC 437, para 17

33. Accordingly, we are of the view that the Union of India ought to consider whether it is viable to have criminal appeals and other matters before the High Courts decided within reasonable time as per existing system. If not, whether it is possible to provide any other suitable forum for such appeals so as to ensure enforcement of fundamental right of speedy justice or how else the situation

can be remedied. The issue of non-viability of providing routine statutory appeals to Constitutional Courts as observed in Gujarat Urja (supra) may also need to be considered.

Filling up of vacancies at all levels with the best available talent

34. Apart from the above, the steps which need immediate consideration include timely filling up of vacancies at all levels with the best available talent. The 14th Law Commission in its Report in the year 1958 examined the issue of having best talent for subordinate judiciary. It suggested selection by all India level competition and constitution of All India Judicial Service. In All India Judges' Association versus Union of India 21 this Court observed that the Union of India should take steps in the matter as early as possible. This Court also directed vacancies at all levels be 21 (1992) 1 SCC 119 – para 12 filled up in a time bound manner 22. The uniform method of recruitment was directed to be followed by amending the applicable rules23.

35. Relying upon the minutes of the Arrears Committee of this Court dated 8th April, 2017 that a central selection mechanism may be introduced to timely fill up all the vacancies with the best available talent, the Department of Justice, Government of India vide letter dated 28th April, 2017, addressed to the Secretary General of this Court, stated that the idea of Central Selection Mechanism ought to be considered. The said letter was treated by the then Chief Justice of India as Suo Motu Writ (Civil)No. 1 of 2017 (In Re: Central Selection Mechanism for Subordinate Judiciary versus Union of India & Ors) and notices were issued. Learned amicus gave a note on the Central Selection Mechanism which was circulated to all the States and the High Courts vide order dated 28th July, 201724. The matter is, however, 22 (2008) 17 SCC 703 – Malik Mazhar Sultan (3) and Anr. Versus UP Public Service Commn & Ors – para 7 23 (2002) 4 SCC 247– All India Judges' Association versus UOI, para 27 24 "1. We are tentatively of the view, that the objections raised by a few of the High Courts for centralization of the selection process of Subordinate Judges, have been suitably dealt with in our order dated 10.7.2017. It however seems, that some confusion still persists. This obviously is out of a possible mis-communication. We therefore, consider it just and appropriate to request Mr. Arvind P. Datar, learned Amicus Curiae, to prepare a 'Concept Note', highlighting the various aspects of our order dated 10.7.2017 and indicating how the objections raised stand satisfied. The 'Concept Note' shall be placed on the record of this case, and circulated amongst learned counsel representing the States or the High Courts, before the next date of hearing.

2. List again on 4.8.2017, at 3.00 p.m" still pending. We refrain from expressing any view on the judicial order to be passed. Needless to say that setting up of Central Selection Mechanism will go a long way in having timely appointments of best available talent. Steps in this regard may be taken by the concerned authorities25 without delay so that timely and quality appointments can be ensured.

36. Appointment to constitutional courts is governed by the Collegium system as laid down in judgments of this Court in Supreme Court Advocates-on-Record Association versus Union of India26 and Special President Reference under Article 143(1) Relating to Judges Transfer and Appointment27. Vide 99th Amendment to the Constitution, the said system was sought to be replaced by the National Judicial Appointment Commission (NJAC). The said Amendment was struck down by this Court in Supreme Court Advocates-on-Record Association versus Union of

India28. However, it was observed that the functioning of Collegium System needed to be improved29.

25 See Entry 11A, List III, Seventh Schedule to the Constitution 26 (1993) 4 SCC 441, para 478(13), paras 480, 486 27 (1998) 7 SCC 739, para 44 28 (2016) 5 SCC 1 – para 1255 29 (2016) 5 SCC 1 – Chelameswar, J – Para 1236; Lokur, J – para 969; Kurian, J. – para 990; Goel, J. – para 1111 :

> 1236.....The abovementioned two are not the only cases where the system failed. It is a matter of public record that in the last 20 years, after the advent of the Collegium System, a number of recommendations made by the Collegia of the High Courts came to be rejected by the Collegium of the Supreme Court. There are also cases where the Accordingly, while upholding the Amendment, the Court vide order dated 16th October, 2015 directed:
>
> "5. To consider introduction of appropriate measures, if any, for an improved working of the "Collegium System", list on 3-11-2015".
>
> Collegium of this Court quickly retraced its steps having rejected the recommendations of a particular name made by the High Court Collegium giving scope for a great deal of speculation as to the factors which must have weighed with the Collegium to make such a quick volte face. Such decisions may be justified in some cases and may not in other cases. There is no accountability in this regard. The records are absolutely beyond the reach of any person including the Judges of this Court who are not lucky enough to become the Chief Justice of India. Such a state of affairs does not either enhance the credibility of the institution or good for the people of this country.
>
> 969. The result of this declaration is that the "Collegium System" postulated by the Second Judges case [(1993) 7 SCC 441] and the Third Judges case [Spl. Ref.1 of 1998, In Re.1998 7 SCC 739] gets revived. However, the procedure for appointment of Judges as laid down in these decisions read with the (Revised) Memorandum of Procedure definitely needs fine tuning. We had requested the learned counsel, on the close of submissions, to give suggestions on the basis that the petitions are dismissed and on the basis that the petitions are allowed. Unfortunately, we received no response, or at best a lukewarm response.
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> 990. All told, all was and is not well. To that extent, I agree with Chelameswar, J. that the present Collegium System lacks transparency, accountability and objectivity. The trust deficit has affected the credibility of the Collegium System, as sometimes observed by the civic society. Quite often, very serious allegations and many a time not unfounded too, have been raised that its approach has been highly subjective. Deserving persons have been ignored wholly for subjective reasons, social and other national realities were overlooked, certain appointments were purposely delayed so as either to benefit vested choices or to deny such benefits to the less patronised,

> selection of patronised or favoured persons were made in blatant violation of the guidelines resulting in unmerited, if not, bad appointments, the dictatorial attitude of the Collegium seriously affecting the self-respect and dignity, if not, independence of Judges, the court, particularly the Supreme Court, often being styled as the Court of the Collegium, the looking forward syndrome affecting impartial assessment, etc., have been some of the other allegations in the air for quite some time. These allegations certainly call for a deep introspection as to whether the institutional trusteeship has kept up the expectations of the Framers of the Constitution. Though one would not like to go into a detailed analysis of the reasons, I feel that it is not the trusteeship that failed, but the frailties of the trustees and the collaborators which failed the system. To me, it is a curable situation yet.

1111. Since the system existing prior to the amendment will stand revived on the 99th Amendment being struck down and grievances have been expressed about its functioning, I am of the view that such grievances ought to be considered. It is made clear that grievances have not been expressed by the petitioners about the existence of the pre- existing system of appointment but about its functioning in practice. It has been argued that this Court can go into this aspect without revisiting the earlier decisions of the larger Benches. I am of the view that such grievances ought to be gone into for which the matter needs to be listed for hearing.

37. After due consideration of various suggestions, this aspect of the matter was dealt with vide order dated 16 th December, 2015 as follows:

> "1255. In view of the above, the Government of India may finalise the existing Memorandum of Procedure by supplementing it in consultation with the Chief Justice of India. The Chief Justice of India will take a decision based on the unanimous view of the Collegium comprising the four seniormost puisne Judges of the Supreme Court. They shall take the following factors into consideration:
>
> 1256.1. Eligibility criteria: The Memorandum of Procedure may indicate the eligibility criteria, such as the minimum age, for the guidance of the Collegium (both at the level of the High Court and the Supreme Court) for the appointment of Judges, after inviting and taking into consideration the views of the State Government and the Government of India (as the case may be) from time to time.
>
> 1256.2.Transparency in the appointment process: The eligibility criteria and the procedure as detailed in the Memorandum of Procedure for the appointment of Judges ought to be made available on the website of the Court concerned and on the website of the Department of Justice of the Government of India. The Memorandum of Procedure may provide for an appropriate procedure for minuting the discussion including recording the dissenting opinion of the Judges in the Collegium while making provision for the confidentiality of the minutes consistent with the requirement of transparency in the system of appointment of Judges.

1256.3. Secretariat: In the interest of better management of the system of appointment of Judges, the Memorandum of Procedure may provide for the establishment of a Secretariat for each High Court and the Supreme Court and prescribe its functions, duties and responsibilities.

1256.4. Complaints: The Memorandum of Procedure may provide for an appropriate mechanism and procedure for dealing with complaints against anyone who is being considered for appointment as a Judge.

1256.5. Miscellaneous: The Memorandum of Procedure may provide for any other matter considered appropriate for ensuring transparency and accountability including interaction with the recommendee(s) by the Collegium of the Supreme Court, without sacrificing the confidentiality of the appointment process."

38. Improvement contemplated in the above judgment does not seem to have seen the light of the day. In Re: Sri Justice C.S. Karnan30 observations have been made as to the need to revisit the process of appointments and to set up mechanism for corrective measures other than impeachment against conduct of an erring Judge. 30 (2017) 7 SCC 1 – paras 77-78:

"77. This case, in our opinion, has importance extending beyond the immediate problem. This case highlights two things:

(1) the need to revisit the process of selection and appointment of Judges to the constitutional courts, for that matter any member of the judiciary at all levels; and (2) the need to set up appropriate legal regime to deal with situations where the conduct of a Judge of a constitutional court requires corrective measures—other than impeachment—to be taken.

78. .... What appropriate mechanism would be suitable for assessing the personality of the candidate who is being considered for appointment to be a member of a constitutional court is a matter which is to be identified after an appropriate debate by all concerned—the Bar, the Bench, the State and civil society. But the need appears to be unquestionable."

39. We make it clear that we are in no manner deviating from the law laid down by this Court that primacy in appointment of Constitutional Courts is to be of the Chief Justice of India. At the same time, even without affecting such primacy improvement in working of Collegium is a felt necessity as held above. Five Judge Bench of this Court directed setting up of the Secretariat and also to incorporate other factors for improved and effective working of the collegiums system. This apart, corrective measures against post appointment conduct or inadequate performance or failure to uphold righteous conduct need to be evolved. These aspects require urgent attention of concerned authorities.

40. We may particularly note that if a High Court remains without a permanent Chief Justice, process of speedy justice certainly suffers. In spite of timeline in the MOP for appointments in pursuance of Judgement of this Court in Supreme Court Advocates-on-Record Association and Ors. versus Union of India 31 that there will be no Acting Chief Justice for more than one month32, timely appointments of Chief Justices is not taking place. Appointment of a Chief Justice for few days for a High Court other than the place where the candidate is already working serves no purpose of the system. The Central Government must take all steps to 31 (1993)4 SCC 441, para 478 32 Para 5 of the 'Memorandum showing the Procedure for Appointment and Transfer of Chief Justices and Judges of High Courts' (MOP).

"5. Initiation of the proposal for the appointment of Chief Justice of a High Court would be by the Chief Justice of India. The process of appointment must be initiated well in time to ensure the completion at least one month prior to the date of anticipated vacancy for the Chief Justice of the High Court. The Chief Justice of India would ensure that when a Chief Justice is transferred from one High Court to another simultaneous appointment of his successor in his office should be made and ordinarily the arrangement of appointment of an acting Chief Justice should not be made for more than one month." ensure such appointments as per prescribed timeline. Even if it may not be possible to make initial appointments to High Courts till suitable candidates are identified, appointment of Chief Justices may stand on different footing as selection is to be made out of available candidates. To speedily identify such candidates, availability of data and involvement of persons who can spend time may be needed. The process may require thinking, planning and acting on a continuous basis. Primacy with the judiciary is necessary but for the job of such onerous nature, effective assistance is a must. Felt needs of time must be addressed. The system cannot remain static or unconcerned even when problems are patent. As already noted there appears to be dire need to strengthen the system of timely appointment of Judges, particularly Chief Justices. Identification of candidates, scrutiny, evaluation and post appointment performance measurements and conduct are time consuming processes and at least some independent full time experts are required, if timely and best appointments are to be ensured and requisite in-house oversight is to be a reality. A full time body consistent with independence of judiciary appears to be immediate need for the system. Absence thereof contributes to denial of justice. The Central Government must also ensure that MOP in pursuance of order of this Court in NJAC case dated 16 th December, 2015 brings about the improvements in working of the collegiums as stipulated.

Accountability in terms of Performance Measurement and Righteous of Conduct at all levels of judicial hierarchy including Constitutional Courts

41. There is also a need for mechanism to evaluate and compile performance of the judicial system as per observations in 245 th Report of the Law Commission so that there is non-mandatory timeline for decision of cases and accountability consistent with the right of speedy justice. Such mechanism may provide norms for performance measurement for all judges in the hierarchy. The same has to be done without affecting independence of judiciary. There is also need for an in-house mechanism manned by experts but with safeguards consistent with independence of judiciary for measures against erring Judges other than impeachment as observed in Re:

Shri Justice CS Karnan (supra).

Reforms in the legal profession – remedying uncalled for strikes.

42. We may also deal with another important aspect of speedy justice. It is well known that at some places there are frequent strikes, seriously obstructing access to justice. Even cases of persons languishing in custody are delayed on that account. By every strike, irreversible damage is suffered by the judicial system, particularly consumers of justice. They are denied access to justice. Tax payers' money is lost on account of judicial and public time being lost. Nobody is accountable for such loss and harassment.

43. Dr. Ambedkar in his famous speech on 25 th November, 1949 had warned :

> "The first thing in my judgement we must do is to hold fast to constitutional methods of achieving our social and economic objectives. It means we must abandon the bloody methods of revolution.
>
> It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us."

44. The above warning of the Constitution maker needs to be adhered to at least by the legal fraternity. The Bar has the tradition of placing their professional duty of assisting the access to justice above every other consideration. How is the situation to be tackled. Competent authorities may take a final call.

45. In Ex-Capt. Harish Uppal versus Union of India and Anr.33, this Court held that lawyers have no right to go on strike or to give a call for boycott of courts nor can they abstain from the Courts. Calls given by Bar Association or Bar Council for such purpose cannot require the court to adjourn the matters. Strike or abstaining from court is unprofessional. Even though more than 15 years have passed after the said judgment was rendered, the judgment of this Court is repeatedly flouted and no remedial measures have been adopted. Regulation of right of appearance in courts is within the jurisdiction of the courts. This Court also asked the Law Commission to suggest appropriate changes in the regulatory framework for the legal profession 34. The Law Commission has submitted 266th Report. The problem continues seriously affecting the rule of law.

46. In Mahipal Singh Rana (supra), this court noted that the High Courts can frame rules to lay down conditions on which Advocates can be permitted to practise in Courts. An Advocate can be debarred from appearing in Court even if the disciplinary jurisdiction for misconduct is vested with the Bar Councils 35. This 33 (2003) 2 SCC 45 34 (2016)8 SCC 335 - Mahipal Singh Rana versus State of Uttar Pradesh 35 Paras 20, 30 to 35 Court requested the Law Commission to look into all

relevant aspects relating to regulation of legal profession 36.

47. The Law Commission, accordingly, examined the relevant aspects relating to regulation of the legal profession. The Law Commission in its 266th Report found that such conduct of the advocates affects functioning of courts and particularly it contributes to pendency of cases. It analyzed the data on loss of working days on account of call of strikes. The analysis is as follows :

> "7.2. In the State of Uttarakhand, the information sent by the High Court for the years 2012-2016 shows that in Dehradun District, the Advocates were on strike for 455 days during 2012- 2016 (on an average, 91 days per year). In Haridwar District, 515 days (103 days a year) were wasted on account of strike.

7.3 In the case of the State of Rajasthan, the High Court of Judicature at Jodhpur saw 142 days of strike during 2012- 2016, while the figure stood at 30 for the Jaipur Bench. In Ajmer District courts, strikes remained for 118 days in the year 2014 alone, while in Jhalawar, 146 days were lost in 2012 on account of strike.

7.4 The case of Uttar Pradesh appears to be the worst. The figures of strike for the years 2011-2016 in the subordinate courts are alarmingly high. In the State of Uttar Pradesh, the District courts have to work for 265 days in a year. The period of strike in five years period in worst affected districts has been as - Muzaffarnagar (791 days), Faizabad (689 days), Sultanpur (594 days), Varanasi (547 days), Chandauli (529 days), Ambedkar 36 Para 58 Nagar (511 days), Saharanpur (506 days) and Jaunpur (510 days). The average number of days of strike in eight worst affected districts comes to 115 days a year. Thus, it is evident that the courts referred to hereinabove could work on an average for 150 days only in a year.

7.5 In this regard, the situation in subordinate courts in Tamil Nadu had by no means, been better. The High Court of Tamil Nadu has reported that there are 220 working days in a year for the courts in the State. During the period 2011-2016, districts like Kancheepuram, 687 days (137.4 days per year); Kanyakumari, 585 days (117 days per year); Madurai, 577 days (115.4 days per year); Cuddalore, 461 days (92.2 days per year); and Sivagangai, 408 days (81.6 days per year), were the most affected by strike called by advocates.

7.6 As per the responses received from the High Courts of Madhya Pradesh and Odisha, the picture does not emerge to be satisfactory.

7.7 The Commission noted that the strike by advocates or their abstinence from the court were hardly for any justifiable reasons. It could not find any convincing reasons for which the advocates resorted to strike or boycott of work in the courts. The reasons for strike call or abstinence from work varied from local, national to international issues, having no relevance to the working of the courts. To mention a few, bomb blast in Pakistan school, amendments to Sri Lanka's Constitution, interstate river water disputes, attack on / murder of advocate, earthquake in Nepal, to condole the death of their near relatives, to show solidarity to advocates of other State Bar Associations, moral support to movements by social activists, heavy rains, or on some religious occasions such as

shraadh, Agrasen Jayanti, etc. or even for kavi sammelan.

7.8 The Commission is of the view that unless there are compelling circumstances and the approval for a symbolic strike of one day is obtained from the Bar Council concerned, the advocates shall not resort to strike or abstention from the court work."

48. Thereafter, the Law Commission referred to observations in the judgment of this Court in Ex-Capt. Harish Uppal case (supra) that there should be no strikes by the Bar except in rarest of rare situations which should also not exceed one day. The Bar Councils were called upon to take appropriate action in the matter. The Law Commission noted that the strikes were continuing and causing great obstruction to the access to justice. It was observed :

> "8.3 In spite of all these, the strikes have continued unabated. The dispensation of justice must not stop for any reason. The strike by lawyers have lowered the image of the courts in the eyes of the general public. The Supreme Court has held that right to speedy justice is included in article 21 of the Constitution. In Hussainara Khatoon v. Home Secy., State of Bihar; and in some other cases, it was held that the litigant has a right to speedy justice. The lawyers' strike, however, result in denial of these rights to the citizens in the State.
>
> 8.4 Recently, the Supreme Court while disposing off the Criminal Appeal of Hussain & Anr. v. Union of India (2017) 5 SCC 702 deprecated the practice of boycotting the Court observing that:
>
> "One other aspect pointed out is the obstruction of Court proceedings by uncalled for strikes/abstaining of work by lawyers or frequent suspension of court work after condolence references. In view of judgment of this Court in Ex. Captain Harish Uppal versus Union of India, such suspension of work or strikes are clearly illegal and it is high time that the legal fraternity realizes its duty to the society which is the foremost. Condolence references can be once in a while periodically say once in two/three months and not frequently. Hardship faced by witnesses if their evidence is not recorded on the day they are summoned or impact of delay on under trials in custody on account of such avoidable interruptions of court proceedings is a matter of concern for any responsible body of professionals and they must take appropriate steps. In any case, this needs attention of all concerned authorities – the Central Government/State Governments/Bar Councils/Bar Associations as well as the High Courts and ways and means ought to be found out to tackle this menace.
>
> Consistent with the above judgment, the High Courts must monitor this aspect strictly and take stringent measures as may be required in the interests of administration of justice." 8.5 In Ramon Services Pvt. Ltd. v. Subhash Kapoor (2001)1 SCC 118, the apex Court observed that if any advocate claims that his right to strike must be without any loss to him, but the loss must only be borne by his innocent client, such a claim is repugnant to any principle of fair play and canons of

> ethics. Therefore, when he opts to strike or boycott the Court he must as well be prepared to bear at least the pecuniary loss suffered by the litigant client who entrusted his brief to that advocate with all confidence that his cause would be safe in the hands of that advocate."

49. Examining other aspects of the regulation of legal profession, the Law Commission recommended review of regulatory mechanism of the Advocates Act as follows:

> "17.1 There is a dire necessity of reviewing the regulatory mechanism of the Advocates Act, not only in matters of discipline and misconduct of the advocates, but in other areas as well, keeping in view the wide expanse of the legal profession being involved in almost all areas of life. The very constitution of the Bar Councils and their functions also require the introduction of a few provisions in order to consolidate the function of the bar councils in its internal matters as well."

50. Since the strikes are in violation of law laid down by this Court, the same amount to contempt and at least the office bearers of the associations who give call for the strikes cannot disown their liability for contempt. Every resolution to go on strike and abstain from work is per se contempt. Even if proceedings are not initiated individually against such contemnors by the court concerned or by the Bar Council concerned for the misconduct, it is necessary to provide for some mechanism to enforce the law laid down by this Court, pending a legislation to remedy the situation.

51. Accordingly, we consider it necessary, with a view to enforce fundamental right of speedy access to justice under Articles 14 and 21 and law laid by this Court, to direct the Ministry of Law and Justice to present at least a quarterly report on strikes/abstaining from work, loss caused and action proposed. The matter can thereafter be considered in its contempt or inherent jurisdiction of this Court. The Court may, having regard to the fact situation, hold that the office bearers of the Bar Association/Bar Council who passed the resolution for strike or abstaining from work, are liable to be restrained from appearing before any court for a specified period or until such time as they purge themselves of contempt to the satisfaction of the Chief Justice of the concerned High Court based on an appropriate undertaking/conditions. They may also be liable to be removed from the position of office bearers of the Bar Association forthwith until the Chief Justice of the concerned High Court so permits on an appropriate undertaking being filed by them. This may be in addition to any other action that may be taken for the said illegal acts of obstructing access to justice. The matter may also be considered by this Court on receipt of a report from the High Courts in this regard. This does not debar report/petition from any other source even before the end of a quarter, if situation so warrants.

52. We may now sum up our conclusions :

> (i) In the light of 124th and 272nd Reports of the Law Commission of India, judgment of this Court in Gujarat Urja (supra), the Minutes of the Arrears Committee of Supreme Court dated 8th April, 2017 and all other relevant considerations, the concerned authorities may examine whether there is need for any changes in the

judicial structure by creating appropriate fora to decongest the Constitutional Courts so as to realistically achieve the constitutional goal of speedy justice.

(ii) In view of 14th Report of the Law Commission of India, judgment of this Court in All India Judges' Association versus Union of India37, the Minutes of the Arrears Committee of this Court dated 8th April, 2017, and the experience on the subject, pending consideration of issue of All India Judicial Service, there is need to consider the proposal for central selection mechanism for filling up vacancies in courts other than the Constitutional Courts and also to consider as to how to supplement inadequacies in the present system of appointment of judges to the Constitutional Courts at all levels.

(iii) There is need to consider in the light of observations hereinabove and all other relevant considerations whether there should be a body of full time experts without affecting independence of judiciary, to assist in identifying, scrutinizing and evaluating candidates at pre-appointment stage and to evaluate performance post appointment. The Government may also consider what changes are required in the process of 37 (1992) 1 SCC 119 evaluation of candidates at its level so that no wrong candidate is appointed. What steps are required for ensuring righteous conduct of Judges at later stage is also an issue for consideration.

(iv) Pending legislative measures to check the malady of frequent uncalled for strikes obstructing access to justice, the Ministry of Law and Justice may compile information and present a quarterly report on strikes/abstaining from work, loss caused and action proposed. The matter can thereafter be considered in the contempt or inherent jurisdiction of this Court. The Court may direct having regard to a fact situation, that the office bearers of the Bar Association/Bar Council who passed the resolution for strikes or abstaining from work or took other steps in that direction are liable to be restrained from appearing before any court for a specified period or till they purge themselves of contempt to the satisfaction of the Chief Justice of the concerned High Court based on an appropriate undertaking/conditions. They may also be liable to be removed from the position of office bearers of the Bar Association forthwith until the Chief Justice of the concerned High Court so permits on an appropriate undertaking being filed by them. This may be in addition to any other action that may be taken for the said illegal acts of obstructing access to justice. The matter may also be considered by this Court on receipt of a report from the High Courts in this regard. This does not debar report/petition from any other source even before the end of a quarter, if situation so warrants.

53. Accordingly, we dispose of this appeal in above terms. We direct the Union of India to file an affidavit in the light of the above observations within three months. First report in terms of para 52(iv) may be filed by June 30, 2018. The matter may be listed for consideration of the above affidavit on Wednesday, the 4 th July, 2018 before the appropriate Bench.

.....J. [ADARSH KUMAR GOEL] .....J. [UDAY UMESH LALIT] NEW DELHI;

MARCH 28, 2018.