Allahabad High Court
Raisa Begum And Ors. vs State Of U.P. And Ors. on 6 May, 1994
Equivalent citations: 1995 CriLJ 1067
Author: K Narayan
Bench: K Narayan, V Saran
ORDER K. Narayan, J.

1. Criminal Misc. Writ Petition No. 7616 of 1993, Raisa Begam v. State of U.P., had been brought by eight persons with a prayer for issue a writ of certiorari quashing the first information report dated 28-11-1992 and consequent, investigation in the matter of Case Crime No. 6119 of" 1992, under Section 498A I.P.C. and 3/4 of the Prohibition of Dowry Act. Without meaning to go into merits of the respective claims, it may be mentioned that according to the two first information reports filed by the petitioners there appear as a fact that a girl of one family has been married in the family of the other and another girl of the other family has been married in the family of the petitioners. There have been counter first information reports conveying certain allegations which could constitute an offence under Section 498A I.P.C. and 3/4 of the Prohibition of Dowry Act. There are, thus counter cases. At the same time it cannot be said that they are based only on malice as the actions too might have been getting aggravated as a matter of retaliation by one or the other.

2-3. In the other set of the writ petitions of Sindhuja Prasad Singh, Rajendra Prasad Verma, it appears that a number of first information reports, if they could be so called were lodged by the police conveying the formation of a group for the purposes of carrying out foregery, impersonation and falsification of documents sometime also relating to courts. The matter was desired by the informant to be examined by the police and possibly they are proceeding. In the mean while the petitioners have moved this petition for writ of certiorari quashing the said first information report and investigation consequent under Sections 420, 467 and 168 120B I. P.C. They have also desired a mandamus directing the police not to arrest them.

4. After having heard learned Counsel for the petitioners and having perused the first information report of the respective cases along with the affidavits filed by the petitioners it is concluded that it could not be said that offence of cognizable nature is disclosed. We do not mean to say that any offence has also been made out by the evidence or not but that its not to be decided by this court. The mere fact that the allegations or informations contained in the first information reports could constitute and lead to a cognizable offence. Would invite the application in the decision of the Supreme Court in the cases of State of Bihar v. P.P. Sharma AIR 1991 SC 1260 : 1991 Cri LJ 1438; State of Haryana v. Bhajan Lal AIR 1992 SC 604 : 1992 Cri LJ 527 and State of West Bengal v. Swapna Kumar Guha AIR 1982 SC 949 : 1982 Cri LJ 819. Consequently, the petition for a writ of certiorari quashing the first information report or the investigation shall not be maintainable.

5. In face of the above situation learned Counsel for the petitioners has prayed that a direction be made to the trial court to consider the bail application of the petitioner the same day or to admit him to the temporary bail on personal bond only till his bail application is finally disposed of. Brother Virendra Saran, is inclined to grant this relief but I find myself unable to agree with him except to a little extent. I am in full agreement with learned brother Saran, in so far as the authority of the court

considering the matter is concerned and that any authority which can consider the bail application can take a decision for a temporary bail and on such terms as it may deem proper. There can be no doubt that a person who surrenders by himself, in court on getting a smell of prosecution, may easily abscond and if he has to abscond, it can be safely said that cases of jumping bails are not unknown to the legal world. The possibility of a person getting a wrong information and approaching the court for surrender may also not be denied and it may not be legally proper to detain a person in custody simply because he wants a shelter, without ascertaining if he is really wanted by the law or not. However, I would not dialate upon this aspect as that is not the matter in issue here. It may also be mentioned that it has been stated at the bar that there have been Division Bench Decisions of this Court in the cases of Noor Mohammad Khan v. State of U.P.. Lucknow Bench, Writ Petition No. 919 (m.b.)of 1992, on 14-5-92 (Hon. J. K. Mathurand Hon. K. L. Sharma, JJ.) and Dr. Hidayat Husain Khan v. State of U.P. in Cri Misc writ petition No. 16259 of 1992 also dated 14-5-1992 : (Reported in 1992 Cri LJ 3534 (All)). Hon. S. K. Mookerji. J. and Hon. A. N. Gupta. J. and there is a conflict in the decision on the question of Jurisdiction of the courts below to release accused on personal bond. We were also informed that the matter has already been referred to a larger bench. Thus, despite the law of precedent we have to follow one or the other and we are inclined as stated above with the impression that the lower courts have authority to grant temporary bails on personal bond. It was also stated at the Bar that a reference in this behalf to a larger bench has also been made and, therefore, for myself I wish to put some more reasons in record in support of my impression.

6. However, before these reasons should find place, the contention of Sri Tapan Ghosh, Advocate, that he could not see any reason from a perusal of Sections 437 and 439 Cr. P. C. for the impression of bail on personal bond after surrender. I am afraid if that authority does not vest in the courts concerned, may be of Magistrate or Sessions, it was not well be created by an order of the High Court under Article 226 of the Constitution of India either, as the Article does not authorise the High Court to legislate. There is a differents between legislation by the court when there is no law, a decision on the interpretation of existing law both of which will be precedent and Judge made law, and a direction which has not been provided by the law. The mandamus can direct a person to do what he is bound to do or not to do what he should not do but it cannot direct a person or authority much less a court to do what it should not do.

7. Reverting to my reasoning for the temporary bail can be granted by the courts of Magistrate and sessions, I will like to refer to both Sections 437 and 439 Cr. P.C.

8. The first aspect to be considered is that I am dealing at present with the case of persons who have "appeared" as used in Section 437. It is true that the word is missing in Section 439 Cr.P.C, yet it does not mean that a person cannot appear there by way of surrender. The person, once he appears, obtains a particular colour for himself and is different from a person who has been detained by the police officer or has been arrested without .warrant. The person who are detained, arrested and produced before the Magistrate, are bound to have an escort and an officer carrying the reasons or summary of evidence etc. as required by Section 167 Cr. P.C. and other provisions of law and even Magistrate what to say of sessions court, is supposed to look into them. The discretion after the production of the accused before him is that of the Magistrate, whether to detain him any further or

not, of course it is a judicial discretion and has to be exercised with reference to "may" in Section 167(2) Cr. P.C. and, Section 437(1)(b), Cr. P.C. The Magistrate can grant him bail if he can judicially and judiciously record that there does not appear any reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life and that he has not been a previous convict. What I wish to say for the present is that, when a person is brought to him under arrest or detention, he is seized of the version of the prosecution. However, when a person appears by himself, the situation is just the reverse. There is nothing before the court except the own averment of the applicant to show that he is really wanted or not. He may be person who had come to the town and desires to get some shelter. Why should he had given that facility at the cost of people's funds. Usually a report is desired in such cases, and if that is in the nature of affirmation from the police, the report has to be completed and then either the bail matter can be disposed by the court concerned or he can take a decision that it may be postponed for any reason. If there is insufficiency of material with the prosecution, the accused has earned the facility of temporary bail, if there is paucity of time with the court, he equally should get benefit and if he is himself at fault for any reason he has to handover his fate to the discretion of the court. There are reasons in addition to what has been laid down in the case of Rajendra v. State of U.P. 1989 Judicial Interpretation or Crimes 207.

All that need be said here is the fact that it is always expected that as and when a particular person surrenders and makes an application for bail in the court below, the bail application should be considered by the courts concerned on the same day. If the court below has to adjourn the decision on the bail application to enable the Public Prosecutor to obtain instructions then in that case the court below should direct the applicant to appear again on a date fixed by the said court for disposal of the bail application with a further direction to the police not to arrest such an applicant till his bail application has been disposed of by the court below. This practice should be universally adopted both by the courts of the Sessions as also by Courts of the Magistrate.

9. The issue of jurisdiction of the court has to be taken up next. Both the Magistrate having jurisdiction to take cognizance of the case and the court of Session have jurisdiction to entertain bail application. The appeal for bail can be rejected by both. However, there is difference in the exercise of the authority and that is limited in the cases relating to offences punishable with death and imprisonment for life in the case Magistrate and he cannot grant it unless the abovesaid conclusion can be validly arrived at. Even if it is wrongly arrived at, the bail can be cancelled by the superior courts. However there is no such restriction for the court of sessions and the jurisdiction to grant bail with the court of sessions is thus unfettered and with the Magistrate is limited depending upon the nature of the case and available material, and the availability of material will decide the temporary bail and conditions for the same. The court which has authority to try an issue and grant a relief has authority and jurisdiction to consider and dispose of all incidental questions pertaining to it. If a court has authority to decide the bail matter, it has authority to consider a temporary bail or parole also and there can be no reason why a court may consider the bail and it should have no authority to deal with custody of the accused and manner of it till the required material is collected. If a man appears before a court of his own motion, he has an edge over the other and even if he fails to appear later and forfeit the personal bond, the courts are not rendered impotent for obtaining and securing his appearance.

10. In this behalf reference was made to two decisions namely Sheo Moorat v. State 1991 All Cri R 284 and Brahmanand Singh v. State 1991 All Cri R 794 both rendered by Hon. Ganguly. In the former his lordship declined to give any direction observing that the relevant law may be brought to the notice of court concerned and in the later his lordship directed that the bail application shall be disposed of on the date of surrender and if it could not be done, the reasons shall be recorded. Both are orders under Section 482 Cr. P.C. and apart from that do not lay down any law as shall be discussed below. Again in the case of Sant Lal v. State 1990 All Cri R 409 a devision bench of this Hon'ble Court declined to issue any such directions; though of course no principle of law seems to have been laid down. In yet another case Mahendra Pal Singh v. State of U.P. 1989 All Cri R 770 this Court took notice of the fact that bail applications for taking a long time for disposal. Their Lordships consequently recorded observations for quick disposal of the applications and directed that the bail application of the particular petitioner shall be disposed of the same day. This too does not lay down any law which may be said to have been heard and decided, with profound respects, for brother Mal viya and Verma, J.I. I will also take leave to say that it could not be a cure for the malady. If there is a general and real delay, it has to be looked into on the administrative side and proper step for remedy taken, if need be even by laying down certain direction of supervisory nature under Article 227 of the Constitution. A direction in a single case may not cure the malady. I may mention that in the courts of sessions applications are not made to the court but are presented to the Munsarim till (sic) p.m. and the judge takes them up later. All these factors can be taken into account only after a proper discussion in administrative side only.

11. What I wish to observe and adjudicate is whether such directions for consideration of bail same day and to admit applicant to bail on personal bond only can be made by the High Court or not and even if they can be made, should they be made, merely for the asking of the petitioner simply because provisions relating anticipatory bails are not available in the State. And whether the courts should function with a mind that the public servants, may they be police officers or the presiding officers of the trial courts have no bona fides and if the petitioner approaches the High Court, directions in the nature of procedure in each case be made to the authorities concerned.

12. The first thing that I would like to mention is the contention put forward by the learned Counsel for the petitioner that this type of direction has been issued in various cases by different benches of this Court.

13. The law of precedence as enshrined in Article 141 the Constitution of India simply directs that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Sri Tapan Gosh had also referred to the decisions in cases of Eknath Shankarrao Mukawar v. State of Maharashtra AIR 1977 SC 1177 : 1977 Cri LJ 964 Ram Jivan v. Smt. Phoola AIR 1976 SC 844, Jaisri Sahu v. Raj Dcwan Dubey AIR 1962 SC 83 and Mehadeo v. Administrator AIR 1960 SC 936. There can be no two opinions that the ratio of these decisions is that a single judge should not try to overrule the laws laid down by Division Bench but that is also not being attempted. The decisions mentioned above are not precedents and law laid down in the two decisions of 14-5-1992 are both by Division Benches and are already subject of reference. I do not see any irrgularity or judicial impropriety in joining the reference with some more observation. A precedent is not what has been done by one court but is always of a law declared by one court or the other. Any number of action

and direction would not create any estoppel so far as discharge of function of court is concerned. The controversy is not as to what would be proper or improper to direct but the question of law is as to whether the court has jurisdiction to do it or not and this being a question of law, will have to be have been heard and decided before it can be said to have gained the status of a precedent. I may also refer to the direction of the Supreme Court "A decision is available to precedent only if it decides a question of law. State of Punjab v. Surender Kumar AIR 1992 SC 1593. Of course, if there has been a single finding after hearing on the issue as to whether such directions could be made or not, that would have its own force.

14. It has been urged on behalf of the petitioner that this Court is the protector of life and personal liberty of an individual citizen under Article 21 of the Constitution of India and for that matter, can issue writs under Articles 226 of the Constitution of India. The court is not the protector of the liberty but is custodian of the Constitution and the two are poles apart from each other. If the courts were to act as protectors of the rights, there would be no duty left for all other functionaries and public servants in the State. The respect of the Constitution is the primary requirement and if that is trodden upon by any functionary, the citizen has a right to approach the court but that would not mean that whatever law should have been enacted, shall be enacted by the court and the legislation will be reduced to non functionary. The provisions of the Constitution have recognised the fundamental rights, which of course as suggested by Sri. A.D. Giri, Senior Advocate, are basic to the life and existed from before, though were some what dormant due to foreign rule. ' However, these are not absolute as absolute independence is not possible when a person lives in society. The rights of others are also to be recognised and no one can deny them to others and claim them for himself alone. That is the picture behind the words "except according to procedure established by law" in Article 21 of the Constitution. The Constitution has to be read as a whole and if any authority is denied to act as a functionary under the Constitution by and it will be worse than a disrespect to the Constitution itself. If there is something where a right guaranteed by the Constitution is taken away, the court may come forward to the use of various writs and undo the action of the person who might be disrespecting the guarantees rendered in various (sic) of the Constitution of India. For that purpose, without going into the various liberties and interpretation of personal libery, it could be said that the authority of the court would be limited by provisions for the writs and the court would not go beyond the jurisdiction conferred upon it by the constitution itself, and also let the other Constitutional authorities discharge their own functions. The Constitution of India being a written and a rigid one, interpretation of Municipal Laws may be made to make them in consonance with the provisions of the Constitution but nothing can be read it between the lines nor the court can draft laws and enforce them in the face of already existing laws even if there be certain omissions in the existing laws of procedure. I will clarify it a little bit more.

15. Article 226 of the Constitution of India authorises every High Court, to issue, to any person or authority, including any Government in appropriate cases within those territories, directions, orders or writs including writs in the nature of (i) Habeas Corpus, (ii) mandamus, (iii) Prohibition (iv) quo warrant and (v) certiorari or any of them "for the enforcement of (he rights conferrred by Part III and for any other purpose." The question is whether this Court can while observing that the petition has no force to say that a particular method shall be adopted in dealing with an individual case or client. The authority given to Courts under this article has to be exercised with restraint and it is not

supposed that the power would be exercised for any fenciful purpose according to the whims of any individual. It may be that the limitations in this behalf cannot be defined but it is quite evident that the power should not be exercised arbitrarily, capriciously or indiscriminately. The limitation can to some extent be summarized with reference to the cases of Olga Tellis v. Bombay Corporation AIR 1986 SC 180 para 31 and AIR 1967 SC para 17. Naresh v. State of Maharashtra and AIR 1951 SC 217 : 52 Cri LJ 736; Janardhan Reddy v. State of Hyderabad (c).

16. The jurisdiction of the Supreme Court under Article 32 or of a High Court under Article 226 to enforce a fundamental right arises where a fundamental right of the petitioner has been affected by an Act or order or in one of the following cases:

(a) Where the action has been taken under a Statute which is ultra-vires of the Constitution.

(b) Where the statute is intra-vires but the action taken is without jurisdiction.

(c) Where action taken is procedurally ultra-vires. (Naresh v. State of Maharashtra AIR 1967 SC 1, para 17).

(d) Where the authority, being under an obligation to act judicially passes an order which is in violation of the principles of natural justice.

17. All these pre-suppose existence of some act or order and are not based on the mere supposition that the court concerned will not be exercising due diligence in the matter and there should be a whip or a control from the High Court before hand.

18. Of course, there can not be an exhaustive list where after the authority shall cease but one thing is certain that there should be a wrong or may be an expected wrong against the law and not a mere apprehension of an act which though not pleasant for an individual may not be illegal that can give rise to a cause for issuance of a writ. A reference here to the law laid down in AIR 1985 SC 1289, Slate of Rajasthan v. Swaika Property, will be worthwhile and it can be summarised as though the powers of the High Court under Article 226 are far and wide and the judges must ever be vigilent to protect the citizen, the judges have a constructive role and, therefore, they must always use such extensive powers with due circumspection and self ordained restraint in the larger public interest. It may be added here that in all matters of offences, there is also another person, complainant Informant of People (State) who is equally entitled to protection of his right from the court.

19. In order to see the development of law from time to time, in the matter of fundamental rights and personal liberty, a simple reference to para 6 of the judgment of Bhagwati, J. in the case of Menka Gandhi v. Union of India 1978 (1) SCC 248 : AIR 1978 SC 597 (at p. 614) will serve the end.

the law must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it, abridges or takes away any fundamental right under Article 19 would have to meet the

challenge of that article.

20. Again in para 7 it; was observed" in fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while other to the whim and caprice of an absolute monarch. "The courts are no exception to this principle and there can be no guarantee in respect of them ever except an approach independant, unbiased and without prejudices; and even these are not for or against individuals but even a presumption against the State or acts of public servants should not be allowed to weigh while dispensing justice. The touch stone will be "if it would be right, just a2nd fair. The applicability of the principles of natural justice even to the administrative law cannot be denied and any denial in this behalf will be the beginning of injustice but the law on anvil in the case of Maneka Gandhi was the. Passports Act 1963 and not the Code of Criminal Procedure. The validity of the Cr.P.C. has not even been challenged here on any ground. Though, I mention as a guess from the observations of my learned brother Saran, J. that the situation of deletion of Section 438 Cr. P.C. in application to this State is sad. But so long as the petition challenging the validity of law in that behalf are not denied, the provisions can not be read. It, will be equally frustrating to substitute the deleted law by making some direction in individual cases. Even the judge made law, may be, by way of judicial decisions, common law or directions superintendence under article 227 of the Constitution should not be individual of their application. Laying down law or direction for individual will be against the basic concept of equality before law as well as fair play in action which is the soul of natural justice.

21. Though the vires of the Cr. P.C. any of its existing provisions have not been assailed before us, I will like to say a little about the scheme of this law in brief. In every wrong there is infringement of some right and with every right there is a corresponding duty for others which may generally be called society. The wrongs in this behalf are sometimes termed as offences and they have been made punishable in order to keep the respect for the rights of others. Some of these considered to be more valuable and important have been made congnizable offences and there have been made a burden of the State, as called it in India possibly because of the history and succession of authority from the foreign rule in due course. We have placed State for crown and Rex in due course. The same authority in U.S.A. is named as "People". That is to say that alleged infringement of right of another by an individual is an offence against all the remaining individual citizens of the

22. The words "except according to procedure established by law" in Article 21 of the Constitution are not for mere luxary. They have a purpose, Of course, as observed the procedure has to stand the test of judicial scrutiny because the constitution has to be read as whole and a law will not be a law merely because it has been given this term by legislation but has to be limited within the parameters fixed by the Constitution and within the competence of the legislature concerned, not infringing the fundamental rights enshrined in the Constitution and may be in future, not against the principles of human rights.

23. The reasonableness of the laws of Preventive Detention arc to be weighed in scales different from those for providing the justice and infringement of rights. The principles of natural justice are already taken note of by the legislature and the procedure is not one of whims of executive functionaries. The code as it is, proceeds in a gradual manner. It does provide for arrest by a police

officer (Section 41) out limits it by Sections 169, 170 and 171 in various ways. The law does provide that at the time of arrest, the person concerned will be informed of the reasons for the action and naturally it follows that he can say against it and explain. Not only that, the law proceeds gradually in the matter of time for detention police officer is not authorised to detain the individual for more than 24 hours irrespective of the other limitations, placed on his action by Sections 157, 169 and 170 Cr. P.C. He has to be produced before a Magistrate who again takes stock of the situation and has to authorize the detention for limited period subject to the condition that there is material against the individual, then some (sic) the provisions of bail and trial. To think that the police officers concoct a case or even to think in individual case that it has been concocted by the police cannot be justified. They are all public servants, they have been given authority by a law enacted by the Parliament or Legislation of the-State. There has to be a limit where the persons are to be relied upon and it will be too much, to think that except the accused or his pairokar who has generally half heartedly sworn an affidavit, the entire system is devoid of good faith. There has to be a risk in every action of state or People. Of course, there is presumption of innocence of an immunity with every accused but it is a presumption to trial and weight of evidence and not of an immunity from state action. If it is to be taken to that extent, the law should be that no body shall be detained at all till he has been held guilty finally by the court of appeal also as the element of mistake cannot be denied till the decision has become final. Since the law is otherwise it has to be respected and different public servants invested with different authorities have to be allowed to function in their own legal ways. Of course, acting against the law of procedure is not to be tolerated and it be the duty of all courts, may it be by way of writs or damages in torts to decry it and if justified, to compensate for it.

24. In AIR 1985 SC 330, Asstt. Collector Central Excise v. Dunlop India Ltd. it has been observed that the law presumes that public authorities function properly and bonafide with due regard to the public interest, a court must be circumspect in granting interim orders. Causing administrative burdens and inconvenience -- Prudence, discretion and circumspection are needed.

25. The principle of self-restraint was relied upon as back as 1951, in the case reported in AIR 1951 SC 217 : 52 Cri LJ 736 Janardhan Reddy v. State of Hyderabad in the form "The power given to the Supreme Court under this Provision is a large one, but it has to be exercised in accordance with well established principles. The writs under the article must obviously be correlated to one or more of the fundamental rights conferred by Part III of the Constitution and can be made only for the enforcement of these rights. 'Similarly' such orders for any other purpose' is also not be utilised except in exceptional cases. (In the matter of Anandan, AIR 1952 Mad 117). This authority has to be exercised in accordance with well established principles as observed by the Supreme Court in the case of Janardhan Reddy AIR 1951 SC : 52 Cri LJ 736.

26. The same principle was recognised in the case 'Jalab Haji Husain v. Madhukar Purshottam Mendkar AIR 1958 SC 376 in the words 'Inherent power conferred on High Courts under Section 561-A Cr. P.C. has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself.

27. In the case of Dr. Raghubir Saran v. State of Bihar AIR 1964 SC 1 : 1964 (1) Cri LJ 489 the Supreme Court after referring to a number of decisions of various courts and the High Court

concluded : 'High Court as the highest court exercising criminal jurisdiction in a state has inherent power to make any order for the purpose of securing the ends of justice. Being an extraordinary power it will, however, not be pressed in except for remedying a flagrant abuse by a subordinate court of its powers.' The principle also seems to have been recognised in Pampapathy v. State of Mysore AIR 1967 SC 286 : 1967 Cri LJ 287; Madhu Limaye v. State of Maharashtra AIR 1978 SC 47 : 1978 Cri LJ 733; Khushi Ram v. Hashim AIR 1959 SC 542 : 1959 Cri LJ 658 and State of Orissa v. Ram Chandra Agarwal AIR 1979 SC 87 : 1979 Cri LJ 33.

The distinction must always be drawn between absence of legal evidence and absence of reliable evidence. It could be said with justification that there was no legal evidence at all in support of the prosecution case, it may lead to the inference that the commitment was bad in that it was not based on any legal evidence at all. But on the other hand, where circumstances are relied upon to show that the evidence may perhaps not be delivered, they do not lead to the inference that there is no legal evidence on the record.

28. The Supreme Court after referring to the above laws, has observed in para 137 of the judgment in the case of Janta Dal v. H.S. Chowdhary 1993 SCC (Cri) 36 : 1993 Cri LJ 600 (at p. 631):

"This inherent power conferred by Section 482 Cr. P.C. should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a premature decision in a case wherein the entire facts are extremely incomplete, and hazy, more so when the evidence has not been collected and produced before the Court and the issue involved whether actual or legal are of great magnitute and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to the case in which High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.

29. A reference to the case of Bhajan Lal, (1992 Cri LJ 1042) (SC) will also be required here as certain aspects have been left by their lordships since they had already been taken up in the case of State of Haryana v. Bhajan Lal 1992 SC (Crl) 426 : 1993 Cri LJ 1042. A reference to the Bhajan Lal's case will also be required to meet a situation of law laid down during hearing of a Criminal appeal and effect upon the decision in. writ jurisdiction and, miscellaneous matter but Bhajan Lal' s case seems to be an appeal in the writ jurisdiction. The fact of the matter is that whether law has been laid down by the Supreme Court in any jurisdiction, has to be respected by courts in India in view of Article 141 of the Constitution. The difference in the jurisdictions also has no effect on the binding nature of decisions even if it is within two benches of the same High Court as indicated in the case of Ram Jivan v. Smt. Phoola AIR 1976 SC 844.

30. That apart, the Hon'ble Supreme Court in Bhajan Lal, (1993 Cri LJ 1042) has laid down, though not exhaustively, the parameters wherein the first information report can be quashed as under:

(1) Where the allegations made in the first information report are in complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Whether the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence; justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar c. grafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

31. I am not refering to above to finish the list of an exhaustive one, as in the present case, the issue is about the direction, restraining the arrest or bail before submission or after of the charge sheet. The arrest in such case generally is a part of the investigation and it becomes an affair concerned with the court only when the accused is brought before the court under arrest or appears and in both events the submissions of the charge-sheet (Report u/s 173 Cr. P.C.), the matter is only of investigation. The judicial system comes in operation only after the receipt of report under Section 173 Cr. P.C. whereafter it has either to try the offence with a chargesheet or enquire into the deliberate after action of police on a final report, where the evidence is not found after a notice to the informant etc. What I wish to indicate is that till this stage the arrest is an incident of investigation and though it is limited by, in addition to the good faith of the police officer, the judicial review of the judicial authority, it cannot be said to be a judicial set, of the police so as to be subject to the law relating to writ of certiorari, or any action as a preventive measure.

32. It will be worthwhile to refer in this behalf to the law laid down by the Supreme Court in the case of Eastern Spinning Mills Sri Virendra Kumar Sharda v. Rajiv Poddar AIR 1985 SC 1668 : 1985 Cri LJ 1858 where interference by High Court in the matter of investigation has been observed to be permissible only if non interference would result in miscarriage of justice. I will better quote a part of the judgment:

We consider it absolutely unnecessary to make reference to the decision of this Court and they are legion which have laid down-that save in exceptional case where non-interference would result in mis-carriage of justice, the court and the judicial process should not interfere at the stage of investigation.

33. I will now revert back to the Janta Dal Case, (1993 Cri LJ 600) (SC) and quote some more parts of it with respects (at pp. 632, 633, 634):

144. The inherent power of a High Court to stay proceedings has been repeatedly debated in many English Courts and a majority of the judgments stressed that the power of staying proceedings should be reserved only for exceptional cases. We are not inclined to refer to all those English decisions except a few.

147. Most of the decisions of the English cases laid down the dictum that only in cases where there is substantial amount of delay or potential abuse of process or vexatious prosecution or the proceedings are tainted with malice etc. alone the court can step in by exercise of the inherent power.

148. The Privy Council in Emperor v. Khwaja Nazir Ahmad (1945) 46 Cri LJ 413 examined the question of the inherent power of the High Court in interfering with the statutory investigation of the police and laid down the following dictum.

Just as it is essential that every one accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with police in matters which are within their province and into which the law imposes upon them the duty of enquiry, In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordship think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function. Always, of course, subject to the right of the court to intervene in an appropriate case when moved under Section 484 Criminal Procedure Code, to give directions in the nature of habeas corpus. In such a case as the present, however, the courts functions begin when a charge is preferred before it and not until then. It has some times been thought that Section 561 -A has given increased powers to (he court which it did not possess before that Section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure code, and that no inherent power had survived the passing of that Act. No doubt, if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation.

149. Lord Denning in R. V. Metropolitan Police Commissioner (1968) 1 All LR 763 has observed thus :

Although the Chief Officers of Police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police or the chief constable, as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made or a prosecution brought. It must be for him to decide (sic) the disposition of this force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter.

150. This court in Jehan Singh v. Delhi Administration 1974 Cri LJ 802 (SC) held that when the first information report discloses the commission of a cognizable offence, the statutory power of the police to investigate the cognizable offence cannot be interfered with in exercise of the inherent power of the Court.

151. Chandrachud, J. (as he then was) in Kurukshetra University v. State of Haryana 1
"Inherent powers do not confer an arbitrary jurisdiction on the High Court to act acco

152. Desai, J. articulating for the Bench in State of Bihar v. J.A.C. Saldanha 1980 Cr
"Investigation of an offence is the field exclusively reserved for the executive throu

153. In Eastern Spinning Mills and Virendra Kumar Sharda V. Rajiv Poddar 1985 Cri LJ 1
"We consider it absolutely unnecessary to make reference to decisions of his court and

In State of Haryana v. Ch. Bhajan Lal 1990 (3) Supp. SCR 259 we had an occasion to exami

"Then sum and substance of the above deliberation result in a conclusion that the investigation of an offence is the field exclusively reserved for the police officers whose powers in that field arc unfettered so long as the power to investigate into the cognizable offences is legitimately exercised in strict compliance with the provisions falling under Chapter XII of the Code and the courts are not justified in obliterating the track of investigation when the investigating agencies are well within their legal bounds as aforementioned. Indeed, a noticeable feature of the scheme under Chapter XIV of the Code is that a Magistrate is kept in the picture at all stages of the police investigation but he is not authorised to interfere with the actual investigation or to direct the police how that investigation is to be conducted. But if a police officer tansgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provision causing serious prejudice to the personal liberty and also property of a citizen, then the court of being approached by the person aggrieved for the redress of any grievance has to consider the nature and extent of the breach and pass appropriate orders as may be called for, without leaving the citizens to the mercy of police echelons since huma dignity is a dear value of our constitution.

156. Sawant, J. in his submission note in Kekoo, J. Maneckji v. Union of India has expressed his opinion thus (1980 Cri LJ 258 Bom):

"This is admittedly a stage where the prosecuting agency is still investigating the offences and collecting evidence against the accused. The petitioner, who is the accused, has therefore, no locus standi at this stage to question the manner in which the evidence should be collected. The law of this country does not give any right to the accused to control, or interfere with, the collection of evidence.

The seven Judges Full Bench of the Allahabad High Court dealt into matter very exhaustively in Ram Lal Yadav v. State of U.P. 1989 Cri LJ 1013 and held that "the power of the police to investigate into a report which discloses the commission of a cognizable offence is unfettered and can not be interfered with by the High Court in exercise of its inherent powers under Section 482 Criminal P. Code." This decision has overruled two earlier decisions of that court in Prashant Gaur v. State of U.P. 1988 All WC 828 and Puttan Singh v. State of U.P. 1987 All LJ 599.

158. After the proposition of law enunciated by this Court in a series of decisions relating to exercise of the extraordinary power under Article 226 of the Constitution of the inherent powers under Section 482 of the Code in Bhajan Lal's case, we have given certain category of cases by way of illustrations wherein the power of quashing could be exercised either for preventing abuse of process of any court or otherwise to secure the ends of justice stating that it may not be possible to lay down any precise, clearly defined and sufficient channelised infrangible guidelines and rigid formula to give an exhaustive list of various kinds of cases wherein such power should be exercised. We do not like to prolong the discussion on this point any more. However, it has become necessary at least to deal with the first alleged illegality. We are constrained to do so because of the assertion of the High Court, that being "that the first information report on the face of it does not disclose any offence.

34. The maintainability of a writ petition is correlated to the existence of fundamental right, (AIR 1981 SC 344) The words "or directions have to be read along with the various kinds of writs mentioned in the Article itself and not divorced of it. There has to be a distinction between letters of a person in authority to his subordinates and a direction from a court Which is not only a court of record but which has to function with utmost caution to maintain that it has acted in accordance with the principles of natural justice. Any direction deviation from the ordinary course of law of procedure will need at least a hearing of the other party and that other party is not a mere representative of State as public prosecutor but to be a person well posted with the facts of each individual (sic) that is an advocate properly instructed and not mere retainer.

35. A direction of order of this Court cannot be against the specific laws of procedure and any such direction in individual cases, may mean a fresh procedure for each case ignoring the validity of established law of procedure rendered by the Parliament. We arc living in an atmosphere of justice through enforcement of law and not that of 'a kings will, be the justice and the law is to subserve it.' Any interference of this manner will be against equality before law enshrined in the Constitution and even the directions by the superior court may keep varying from case to case, individual to individual and person to person "where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are forbidden." AIR 1936 PC 253 (2) : 37 Cri LJ 897, Nazeer Ahmad v. Crown).

36. Taking the matter of remedy of various writs separately, the first difficulty would be that none of them is available at this stage during the pendency of investigation only. In the matter of habeas corpus the first requirement is that the man is in illegal custody. I would not go into the question as to whether the validity of the law itself has to be gone into or not as it would be immaterial for the purpose of the proceedings of the present nature and it will be sufficient to say that it may be that where the Act of legislature directing the detention is hit by any provision or fetters in the Constitution the detention may be illegal but the mere thought that an arrest will lower the person in general esteem may not justify the striking of the provisions for arrest etc. in Code of Criminal Procedure. However, since the vires of those provisions have not been assailed, this need not be gone into in detail. In the petitions of the present nature the man has not yet been taken into custody. Various decisions referred to at the bar specially in the case of Isha v. State referred to are based on the concept that in the State of U. P. the provisions of anticipatory bail have been wrongly withdrawn. I am afraid it is not for the courts to consider as to what the law should be, or it is for the courts to say that because a particular type of law has been suspended or withdrawn in the State, the purpose should be achieved by making some commanding orders. If all Judges of all courts were to frame orders for achieving the end, which has been denied by the Legislation, it may very well give rise to a chaos. The High Court, of course, can strike down certain laws if they are not within the frame work of the Constitution but to think that a legislation indirectly can be made by way of judicial decisions to achieve what has already been denied by the legislation, cannot be justified at least in so far as Article 226 of the Constitution is concerned. I will not dialate upon this aspect as the availability of this jurisdiction of the writ of habeas corpus stands itself barred by the factor that the petitioner is still to be taken into custody and is not in legal or illegal custody so far.

A mere moral restraint is not sufficient as observed by Belli in his Book on Habeas corpus in Volume -1 page 15 and 16. There has to be some kind of restraint on the liberty or movement of a person in order that this writ may be pursued. It may be that actual physical confinement may not be necessary but control and custody at least have to be there to make habeas corpus writ available to the person concerned: In the case reported in AIR 1974 SC 510 : (1974 Cri LJ 465), it was observed that habeas corpus could not be granted when the finding was that the person was committed to jail custody by the competent order of a competent court, which prima facie was neither without jurisdiction nor illegal. The observation that the petition does, not, disclose any occasion for interference presupposes that the action in furtherance of the first information report or investigation is not illegal and thereafter making the order for the same day bail or anything like that cannot be said to be justified as an order of habeas corpus, or even a direction.

37. A writ of mandamus is issued to do an act in accordance with the law. In order to have a cause of action for mandamus, there has to be some order or statutory duty which may be considered to be not in accordance with law or demurable or pendency of an action before a public authority where he may not be disposing it of where an inaction or omission may be demurable. In the cases of the present nature, none of the two is available. Where first information report or even the" material of investigation discloses an offence, the investigation has to go on and it will be too much to think that because the investigation is going on, the mandamus should be issued to stop it. A mandamus pre-supposes orders which are illegal, void or wholly without jurisdiction AIR 1977 SC 456 Geep Flashlight v. Union 1976 Lab IC 1242 (Ker) and unless some public authority has jumped over the

law, there can be no occasion to approach the court. The court may have to correct the public servants in the case of breach of law or constitutional rights but by no sense has to dictate and advise any public servant muchless a subordinate court. A mandamus cannot be issued where there is a dispute about facts; the informant making certain allegations and the petitioner denying them here. There is forum for every thing and it has to be done with proper stages and by proper authority.

There is no presumption in law that whatever has been said in the first information report must be a white lie. If there has been a wrong, it is the authority and business of the investigating agency to investigate the same and bring proper material before the courts authorised to take cognizance thereof. The accused in those cases are to be dealt with according to the provisions of law contained in the Code of Criminal Procedure and other analogous special laws. The entire Administration is not to be run by the High Courts on the basis of affidavits much less the affidavit of petitioner only. Above all, the mandamus, if it may issue in the cases of the present nature will be assuming a shape or direction to a public servant to do and discharge his function in a particular fashion according to the direction of the High Court while he has not yet exercised his discretion. That will amount to correction of wrongs which have yet to occur or may not occur at all. Certainly they cannot be for laying down principles of procedure to be adopted in individual cases, that may be looked upon only as an unhealthy encroachment upon the authority of lower courts.

38. In the cases 'Tukram v. R.N. Shukla (1969) ISCA 139 : AIR 1968 SC 1050 : 1968 Cri LJ 1234, it has been held that there can be no mandamus to control exercise of discretion. Whether to arrest or not is the authority of the police officer under the Code of Criminal Procedure and it cannot be exercised through the High Court by way of direction under Article 226 of the Constitution of India. Similarly arrangement of work and order of precedence is the discretion of each court. The presiding Judge of each court is supposed to be holding in view the entire work for the day, and that should not in my opinion be controlled by this Court by making a preference to one over the other. As to how a person who has surrendered, is to be dealt with till his bail matter is disposed off is also discretion of that court and not that of this Court. This court can lay down and in my opinion rightly as a piece of law for general that the court concerned has jurisdiction to admit him to a temporary bail on personal bond only but there cannot be direction from this Court as that will be controlling the discretion, of the authority or the court concerned.

39. The principles of procedure to be adopted are laid down in legislative Acts. They may be interpreted by the courts and may even in certain cases be struck down for being violative of the provisions of the Constitution but certainly cannot be enacted by the Courts.

The High Courts cannot do so, for the court can merely interpret the section; it cannot rewrite, re-cast or re-design the section. In interpreting the provisions, the exercise undertaken by the court is to make explicit the intention of the Legislature which enacted the legislation. It is not for the court to reframe the legislation for very good reason that the powers to legislate have not been conferred on the court.

It was so laid down in the case of State of Kerala v. Mathai Varghese AIR 1987 SC 33 : 1987 Cri LJ 308 Even where the court finds that something ought to have been provided in the law but has not been so provided, it cannot supply the provisions only interpreting the law.

There is no scope for importing into the Statute words which are not there. Such -importation would be not to construe, but to amend the statute. Even if there be casus-omissus, the defect can be remedied only by legislation and not by judicial interpretation. (Tarulata Syam v. Income Tax Commissioner AIR 1977 SC 1802 : 1977 Tax LR 989.

40. The writ of certiorari issues out of a superior court and is directed to the judge or other officer or an inferior court of record. It may be extended in certain cases to the functions of other Tribunals but in no case can it cover the investigation and actions of a police officer. An error of jurisdiction in atleast a quasi judicial function is the first requirement and, therefore, it may not be available in the matters of investigation by the police. Even if there has been some unauthorised action on the part of the police and arrest thereon it may give rise to habeas corpus and not certiorari. The police never acts in quasi judicial manner.

41. One of the fundamental principles in regard to the issue of a writ of certiorari is that the writ can be availed of only to remove or adjudicate on the validity of judicial act. In this behalf the law laid down in the case of T. C. Basappa v. T. Nagappa AIR 1954 SC 440 is clear.

42. Certain conditions have to be satisfied before a writ of mandamus is issued. The petitioner for a writ of mandamus must show that he has a legal right to compel the respondent to do or abstrain from doing something. There must be in the petitioner a right to compel the performance of some duty cast on the respondents. The duty sought to be enforced must have three qualities. It must be a duty of public nature created by the provisions of the constitution or of a statute or some rule of common law. The remedy of a writ of mandamus is not intended to supersede completely the modes of obtaining relief by an action in a Civil Court or to deny defence legitimately open in such actions. The power to issue a writ of mandamus is a discretionary power. It is sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a Civil Court and to refuse to issue a writ of mandamus. A writ of mandamus is not a writ of course or a writ of right but is, as a rule a matter for the discretion of the court. In petitions for a writ of mandamus, the Supreme Court and the High Courts do not act as a court of appeal and examine the facts for themselves. It is not the function of the court to substitute its wisdom and discretion for that of the person to whom the judgment in the matter in question was entrusted by law. The Supreme Court does not issue a writ of mandamus except at the instance of a party whose fundamental rights are directly and substantially invaded or are in imminent danger of being so invaded. A writ of mandamus is not issued to settle private disputes or to enforce private rights. A writ of mandamus cannot be issued against the President of India or the Governor of State. In an application for a writ of mandamus, it must be mentioned that a demand for justice had already been made and refused. The petitioner must not be guilty of laches. A writ will not be issued unless the court is certain that its command will be carried out. The court must not issue a futile writ. This writ does not lie to a State Legislature restraining it from considering a bill which is alleged to be in violation of the Constitution.

43. Lastly though not the least important, is the question as to whether there is any accepted bundle of facts before the High Court in such cases so far even the investigation has not ended and the version of defence can be available only at proper stage. There has to be difference between the two and in writ jurisdiction, the High Court will not sit to decide the disputed questions of fact to dispose of the matter. The rival allegations can be only thought of at the preliminary stage but are decreed to be relied upon and weighed by the Supreme Court in the case of State of Haryana v. Bhajan Lal AIR 1992 SC 604 : 1992 Cri LJ 527. It is too well settled as a law that the disputed questions of fact arc not to be gone into in writ petitions.

44. The impression that this relief should be given otherwise a wrong will occur to him is presupposition in the absence of an order of the concerned authority. The impression that the petition will become infructuous if remedy is not provided at the earliest stage, would also not obtain as the nature of petition would not admit of it. It is a matter between the two balances. If the interim relief is granted, petition becomes exhausted and if it is not granted it becomes infructuous. Should it give rise to a situation that forgetting the principles of natural justice and the limitations of the law for issue of writs the relief should be granted without hearing the parties by which I mean not only the representative in the form of standing counsel but the person who might be well posted with the facts as well. No law will apply in absence of facts. In view of the law discussed in the case of State of Jammu and Kashmir Mohd. Yaqoob Khan (1992) 4 SCC 167, such an order may not be justified.

45. Lastly I would also refer the law laid down by the Supreme Court in the case of Union of India v. Deoki Nandan Agarwal AIR 1992 SC 96. The relevant portion may be better quoted:--(at P. 101) It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Courts cannot add words to a statute or read words into it which are not there. Assuming there is a defect of an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalties.

46. A reference was also made during arguments to Paras 48, 49, 5 1 and 53 in the judgment of Hon'ble Supreme Court in the case of M. V. Elisabeth v. Harwan Investment and Trading Pvt. Ltd. reported in Judgment today 1992(2) SC 65 These observations were referred to for the purpose of substantiating the proposition that the Courts could also lay down the law where there was no statutory law, in accordance with the principles of equity, good conscience and justice. There can be no two opinions about it and this principle has been the basis of common law, both in England as well as in India, However, the matters of procedure, specially the provisions in law wherein the actions of the executive persons are laid down in the Codes are enacted for our purpose, Code of Criminal Procedure in the matter of cases of the present nature. They themeselves cover a broad ground and as discussed above, there are definite provisions, which cannot be said to be

unreasonable at this stage. There would, therefore, be no occasion for formulating any other rule or procedure.

47. Admiralty being more close to International Law, to expect a statutory law in that behalf will itself be against the hope itself.

48. I was also referred to another decision of this Court-Lucknow Bench- in the matter of Ganesh Shankar Pandey v. State of U.P. reported in 1992 LCR R 172, where the said Bench had in similar circumstances dismissed the petition for a relief of quashing the first information report etc. but awarded relief, almost granting bail to the petitioners on the conditions laid down in the said order. It appears that the State had shown inclination to go in special appeal. It is not known whether there was any such appeal or not. In any event, for the reasons already mentioned above, it cannot be said to be a binding precedent and it will be more so when issue in all probabilties is a subject of another reference to Full Bench.

49. In view of the discussions recorded above, I am of the opinion that the petitions for quashing the FIR should fail and no further order need be made in the matter of arrest as the same will be against the spirit of the law laid down by the Supreme Court in various cases.

Virendra Saran, J.

50. I have gone through the judgment of brother K. Narain, J. It is not necessary to reproduce the facts of each writ petition. Considering the entire facts and circumstances of the cases I am of the opinion that no ground is made out for quashing of the FIR in either of the writ petitions. However, I am of the opinion (sic) under Article 226 of the Constitution this Court has jurisdiction to make a direction that the bail application of the petitioners may be considered and disposed of the same day and to further direct that pending disposal of the bail application the accused be released on personal bonds. However, it is not necessary to go into this question further as the matter is being considered by Full Bench of this Court.

51. I would however, observe that in writ petition No. 1616 of 1993 petitioner No. 1 Smt. Raisa Begum alias Rais Fatma, petitioner No. 2 Smt. Malka Sultana, petitioner No. 3 Smt. Rahila Bibi and petitioner No. 4 Smt. Najma Sultana arc women and entitled to the benefit of proviso to Section 437,.Cr. P. C. Needless to say that the courts below shall take the above fact into account.

52. With the above observations these writ petitions are dismissed.

ORDER

53. For the reasons discussed in our separate judgments above, the petitions are dismissed.