

YAKUB ABDUL RAZAK MEMON

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v.

STATE OF MAHARASHTRA, THR. THE SECRETARY,
HOME DEPARTMENT AND ORS.

B

(Writ Petition (CRL.) No. 129 of 2015)

JULY 28, 2015

[ANIL R. DAVE AND KURIAN JOSEPH, JJ.]

Supreme Court Rules, 2013: Order XLVIII, Rules 4(1) and (2) – Curative petition – 1993 Bombay bomb blasts – Conviction and death sentence – Question in the instant writ petition arose as to whether the curative petition was decided in accordance with law – Held: Anil R. Dave, J.: The review petition and curative petition were dismissed – Applications for pardon were rejected by the President of India and the Governor of Maharashtra. One more application for pardon is still pending – It is open to the Governor to dispose of the said application before execution date – In the circumstances, writ petition is dismissed – Kurian Joseph, J.: Rules 4(1) and (2) state that curative petition has to be circulated to a Bench of three senior-most judges and the Judges who passed the judgment complained of, if available – Order dismissing curative petition was considered by Bench of three senior-most judges of the Supreme Court – The curative petition was circulated to three senior-most judges only and not to other judges who passed the judgment complained of – Thus order passed in curative petition was not as per the procedure prescribed under the Rules – Curative petition to be considered afresh in terms of mandatory requirement u/r. 4 of Order XLVIII – Death warrant is stayed – In the matter of protection of life, even if a point or ground is not raised in a petition, it is the duty of the court to consider the issue – Law is not helpless and court is not powerless – In view of

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A *difference of opinion, matter referred to Three-Judge Bench.*

CRIMINAL ORIGINAL JURISDICTION: Writ Petition
(Criminal) No. 129 of 2015

Under Article 32 of the Constitution of India.

B Mukul Rohatgi, AG, Raju Ramchandran, T. R.
Andhyarujina, Ms. Vibha Dutta Makhija and Anand Grover, Sr.
Advs., Faisal Farook, Shubail Farook, Ms. Mythily Vijay Kr.
Thallam, Vikram Aditya Narayan, Mohd. Izhar Alam, Mrs. Priya
C Puri, Ranjan Dubey, Nishant R. Katneshwarkar, Mahaling
Pandarge, Mrs. Devanshi Singh, Ms. Ranjeeta Rohtagi, Somit
Khosla, Gurmehar Sistani, Arpit Rai, Rajiv Nanda (for B. V.
Balram Das), Rahul Narayan, Ms. Lubhyathi Rangarajan,
D Nishant Gokhale, Mohit Singh, Ms. Shreya Rastogi (for Rahul
Narayan), for the appearing parties.

The Judgments of the Court were delivered by

ANIL R. DAVE, J. Heard the learned senior counsel
appearing for both the sides at length.

E It is a fact that the conviction of the petitioner has been
confirmed by this Court and the Review Petition as well as the
Curative Petition filed by the petitioner have also been
dismissed by this Court. Moreover, His Excellency Hon'ble
F The President of India and His Excellency The Governor of
Maharashtra have also rejected applications for pardon made
by the petitioner, possibly because of the gravity of the offence
committed by the petitioner.

G It has been submitted by the learned counsel appearing
for the petitioner that one more application made to His
Excellency The Governor of Maharashtra is still pending.

H If it is so, it would be open to His Excellency The Governor
of Maharashtra to dispose of the said application before the

date on which the sentence is to be executed, if His Excellency wants to favour the petitioner. A

Submissions made about the Curative Petition do not appeal to me as they are irrelevant and there is no substance in them. B

In these circumstances, the Writ Petition is dismissed.

KURIAN JOSEPH, J. I regret my inability to agree with my learned brother. C

During the course of admission hearing of the petition under Article 32 of the Constitution of India, a question arose as to whether the Curative Petition in this case has been decided in accordance with law. The matter was partly heard yesterday and the arguments were deferred for today on this issue. D

Heard Mr. Raju Ramachandran, Mr. T.R.Andhyarujina and Mr. Anand Grover, learned senior counsel and Mr.Mukul Rohtagi, learned Attorney General, at length. E

Article 21 of the Constitution of India guarantees life to a person and the person shall be deprived of his life only in accordance with the procedure established by law. The Curative Petition in Order XLVIII of the Supreme Court Rules, 2013 is one procedure regarding the remedy available to a person even after the Review Petition is dismissed. F

The synopsis portion of the Curative Petition reads as follows :- G

"The present Curative Petition under Article 142 of the Constitution of India arises in an exceptional case as grave injustice has been caused to the petitioner whereby his fundamental rights as guaranteed to him under Articles 14 and 21 of the Constitution of India H

A *have been completely violated. Hence, the petitioner most humbly beseeches this Hon'ble Court to kindly reconsider its order dated 9.4.2015, in terms whereof, the Review Petition of the petitioner seeking reconsideration of its Order/Judgment dated 21.3.2013 in Criminal Appeal No. 1728 of 2007 (reported in (2013) 13 SCC 1) was dismissed.*

(emphasis supplied)

The prayers in the Curative Petition read as follows:-

- C *(a) Allow the present curative petition filed against the order dated 9.4.2015 in Review Petition (Criminal) No. 474 of 2013;*
- D *(b) Consequently, restore Criminal Appeal No. 1728 of 2007 decided on 21.3.2013 for hearing; and*
- (c) Pass any other or further order(s) as this Hon'ble Court may deem fit in the facts and circumstances of the present case and in the interest of justice and equity."*

E The order passed in the Curative Petition is made available for perusal in the paperbook of the Writ Petition. It is seen that the order dated 21.07.2015 dismissing the Curative Petition has been considered by a Bench of three senior-most Judges of this Court.

F Order XLVIII of the Supreme Court Rules, 2013 deals with Curative Petition and Rule 4(1) and (2) read as follows :-

- G *"4(1) The curative petition shall be first circulated to a Bench of the three senior-most judges and the judges who passed the judgment complained of, if available.*
- (2) Unless otherwise ordered by the Court, a curative petition shall be disposed of by circulation, without any oral arguments but the petitioner may supplement his petition by additional written arguments."*

H (Emphasis supplied)

'Judgment' is defined under the Supreme Court Rules, 2013 under Order I Rule 2(k) as follows :- A

"judgment' includes decree, order, sentence or determination of any Court, Tribunal, Judge or Judicial Officer." B

Therefore, in terms of the Judgment as defined under the Rules, a Curative Petition has to be circulated to a Bench of three senior-most Judges of this Hon'ble Court and the Judges who passed the Judgment complained of, if available. C

In the instant case, the Judgment complained of (be it the order passed in the Review Petition) is passed by a Bench of three Judges comprising of Hon'ble Sh. Anil R. Dave, J., Hon'ble Sh. J. Chelameswar, J. and myself, but the Curative Petition is circulated only to the three senior-most Judges. D

It may not also be totally out of context to note that the order dated 09.04.2015 in the Review Petition is captioned as a Judgment, apparently, in terms of the definition of 'judgment' under the Supreme Court Rules. Thus, it is found that the procedure prescribed under the law has been violated while dealing with the Curative Petition and that too, dealing with life of a person. There is an error apparent on the face of the order in the Curative Petition. The mandatory procedure prescribed under law has not been followed. E F

Though the learned senior counsel and the learned Attorney General referred to various grounds available in a Curative Petition, in the nature of the view I have taken in the matter that the Curative Petition itself has not been decided in accordance with the Rules prescribed by this Court, that defect needs to be cured first. Otherwise, there is a clear violation of Article 21 of the Constitution of India in the instant case. G

The learned Attorney General, *inter alia*, contended that H

A this is not an issue raised in the writ proceedings. I do not think that such a technicality should stand in the way of justice being done. When this Court as the protector of the life of the persons under the Constitution has come to take note of a situation where a procedure established by law has not been followed while depriving the life of a person, no technicality shall stand in the way of justice being done. After all, law is for man and law is never helpless and the Court particularly the repository of such high constitutional powers like Supreme Court shall not be rendered powerless.

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In the above circumstances, I find that the order dated 21.07.2015 passed in the Curative Petition is not as per the procedure prescribed under the Rules. Hence, the Curative Petition has to be considered afresh in terms of the mandatory

D requirement under Rule 4 of Order XLVIII of the Supreme Court Rules, 2013.

E In that view of the matter, the death warrant issued pursuant to the Judgment of the TADA Court dated 12.09.2006, as confirmed by this Court by its Judgment dated 21.03.2013, of which the Review Petition has been dismissed on 09.04.2015, is stayed till a decision afresh in accordance with law is taken in the Curative Petition.

F After a decision is taken on the matter, as abovesaid, the Writ Petition be placed for consideration before the Court.

ORDER

G In view of the disagreement between us, the Registry is directed to place the papers before Hon'ble The Chief Justice of India, preferably today, so that an appropriate Bench could be constituted and the matter can be heard on merits as soon as possible, preferably tomorrow i.e. on 29.07.2015.

H Devika Gujral

Matter referred to larger bench.