
(2015) 10 MAD CK 0061

In the Madras High Court

Case No : Reference Case (MD) No. 1 of 2015 in CrI. M.P.[Sr] No. 0009843 of 2015

Esakkiammal

APPELLANT

Vs

State by Inspector of Police, CB CID

RESPONDENT

Date of Decision : 26-10-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 142, 144, 162
Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 156(3), 157, 158
Madras Revenue Enquiries Act, 1893 — Section 2
Oaths Act, 1873 — Section 4

Citation : (2016) 1 CTC 726 : (2016) 1 LW(Cri) 170 : (2016) 1 MLJ(Cri) 168

Hon'ble Judges : S. Nagamuthu and V.S. Ravi, JJ.

Bench : Division Bench

Judgement

S. Nagamuthu, J.—This reference has been made by the learned Principal Sessions Judge, Tirunelveli, under Section 395(2) of the Code of Criminal Procedure, 1973, raising as many as five questions of law for a decision by this court. Before going into the said questions, let us have a quick look into the back ground of the reference.

2. This is a case of death in a police encounter. The victim of the encounter was one Mr. Kittu @ Kittappa. The occurrence was on 13.06.2015. The police team was headed by a Sub Inspector of Police. He used a fire arm in the encounter. The said Sub Inspector of Police made a report about the occurrence upon which a case was registered under Section 174 of the Code of Criminal Procedure in Crime No. 119/2015 on the file of Suthamalli Police Station in Tirunelveli District. The said case was initially investigated by one Mr. N. Krishnaraj, the Inspector of Police, Suthamalli Police Station, Tirunelveli District. On his intimation, Mr. M.K. Mayakrishnan, the learned Judicial Magistrate cum District Munsif, Cheranmadevi, held inquiry under Section 176(1A) of the Code of Criminal Procedure and his report is awaited. The Inspector of Police during investigation seized the pistol along with four live rounds from Mr. Sivaramakrishnan, Sub-

Inspector of Police. He recorded the statements of all the members of the police team. The body was sent for post-mortem and the final opinion is awaited. At that stage, on the orders of the Director General of Police, by his proceedings in Rc. No. 095613/Crime3(2)/2015, dated 22.06.2015, the case was transferred to the Crime Branch Crime Investigation Department (CBCID). The Inspector of Police, CBCID, Tirunelveli, was nominated as Investigating Officer. He has already examined 40 witnesses during the investigation, including the family members of the deceased Kittu @ Kittappa. The wound certificates for the injured police personnel and the vehicle damage report were obtained. The pistol and the empty case were sent to Ballistic Analysis through court. The Forensic Science report, the report of the judicial Magistrate under Section 176(1A) of the Code, the Post-Mortem Certificate and the final opinion of the Doctor regarding the cause of death are yet to be received.

3. At that juncture, the wife of the deceased Kittu @ Kittappa, by name, Mrs. Esakkiammal, filed a complaint before the learned Principal Sessions Judge, Tirunelveli, seeking various directions from the said Court to the Police in respect of the investigation. According to her, it was a cold blooded murder by the police. The main reliefs sought for in the complaint were to transfer the investigation to some other investigating agency and for an order for compensation. The said complaint was made in exercise of the right declared by the Hon"ble Supreme Court in People's Union for Civil Liberties Vs. State of Maharashtra, [hereinafter will be referred to in short as "PUCL case"]. In Paragraph No. 31.16 of the said Judgment, the Hon"ble Supreme Court has declared as follows:--

"If the family of the victim finds that the above procedure has not been followed or there exists a pattern of abuse or lack of independent investigation or impartiality by any of the functionaries as above mentioned, it may make a complaint to the Sessions Judge having territorial jurisdiction over the place of incident. Upon such complaint being made, the concerned Sessions Judge shall look into the merits of the complaint and address the grievances raised therein...."

4. The learned Principal Sessions Judge, by order dated 14.07.2015, returned the complaint, by raising certain fundamental doubts about his power to grant the reliefs as sought for in the complaint. Mrs. Esakkiammal re-presented the complaint explaining as to how the reliefs sought for by her could be granted by the Sessions Judge as per the Judgement of the Hon"ble Supreme Court in PUCL case.

5. After hearing the counsel for Mrs. Esakkiammal and after having gone through the records, the learned Principal Sessions Judge, found that there were as many as five questions of law touching upon his jurisdiction to grant the reliefs which require decision of this Court. That is how, he has referred the following questions to this Court for determination.

"(1) Whether the word "address" referred in Paragraph No. 31(16) in the

judgement of the Honourable Supreme Court is dealing with the judicial power of the Sessions Judge or the administrative action of the Sessions Judge?

(2) If it is held to be a Judicial Power, any address made by the Sessions Judge is disobeyed what would be the enforcement mechanism for the Principal Sessions Judge to enforce the direction/Address?

(3) How the Sessions Judge can act in compliance with the directions of the Honourable Supreme Court without deviating the other pronouncement of the Honourable Supreme Court in the case of People's Union for Civil Liberties Vs. State of Maharashtra, in respect of non-interference in the investigation and without deviating provision of The Criminal Procedure Code in a Harmonious manner?

(4) Whether the petition purported to be filed under Section 193 of Cr.P.C. can be made to the Sessions Judge, who has no right to take direct cognizance of any offence?

(5) Whether the Sessions Judge while addressing the grievances as per the dictum of the Judgement of the Honourable Supreme Court can pass the order for transfer the investigation of I.P.S. Officer with regard to the appointment of officers as prayed for in the petition."

On the orders of the Hon"ble Administrative Judge of this Bench, the reference has been placed before this Bench for decision on the above questions of law.

6. Considering the importance of the questions of law involved in this matter, we appointed a leading Member of the Bar and the Former President of the Madurai Bench of Madras High Court Bar Association - Mr. Isaac Mohanlal as Amicus Curiae. We also issued notice to various Bar Associations to provide them opportunity to assist the Court on these important questions of law. We have heard the submissions of Mr. M. Jagadeesh Pandiyan, the learned counsel appearing for the petitioner before the Lower Court; Mr. S. Shanmugavelayudham, the learned Public Prosecutor appearing for the State; Mr. M. Subash Babu, Mrs. J. Nizha Banu Mr. C.M. Arumugam, the learned counsel representing various Bar Associations and Mr. Isaac Mohanlal, the learned Amicus Curiae.

7. There are two types of inquiries contemplated in Section 176 of the Code of Criminal Procedure that is one by the Executive Magistrate under sub-section (1) of 176 and the other by the jurisdictional Judicial Magistrate under sub-section (1A) of Section 176 of the Code of Criminal Procedure. Obviously, they operate in two different situations. In the instant case, admittedly, it is pure and simple, a case of police encounter governed by the inquiry contemplated under sub-section (1) of Section 176 of the Code by an Executive Magistrate. But, it is reported that the inquiry in this case is held by the jurisdictional Judicial Magistrate under sub-section (1A) of Section 176 of the Code of Criminal Procedure and not by an Executive Magistrate under sub-section (1) of Section 176 of the Code. It seems

that there is some confusion in the minds of the stakeholders in balancing these two provisions. The questions under reference herein have got a proximate bearing on these provisions. Therefore, we venture to deal with these two provisions elaborately to obviate any possible confusion in future.

8. At the first instance, let us look back at the history of the legislation. In this State, the Subordinate Judiciary was completely separated from the Executive only in the year 1955. Until then, in certain matters, the Subordinate Judiciary was treated as part and parcel of the Executive. Before 1955, with regard to an inquiry into the charge of torture or of causing death or grievous hurt against a police official, as per Police Standing Order (PSO) No. 157 (old), the Sub-Divisional Executive Magistrate concerned was to take cognizance of the offence under the relevant Clause of Sub-section (1) of Section 190 of the Criminal Procedure Code, 1898 and thereafter inquire into the case and dispose of it according to the provisions of the same Code. Thus, the Sub-Divisional Executive Magistrate was empowered to hold inquiry, which was judicial in character. He had power to summon the witnesses, to compel the production of documents or things and to examine the witnesses on oath. After the judiciary was separated from the Executive, the inquiry under PSO 157(Old) had lost its judicial character. The revised PSO 157 issued under G.O. Ms. No. 2854, Home, dated 12-10-1955, contemplated an inquiry of a non-judicial character by the Revenue Divisional Officer who should arrive at a finding on the point whether there were grounds for launching a criminal prosecution against the police officials and report his findings to the District Collector. From the said report, if any prosecution was considered necessary, the District Collector should issue instructions to the Revenue Divisional Officer for laying a formal complaint before the appropriate Judicial Magistrate. So far as the City of Chennai is concerned, the inquiry into the charges of police torture were conducted by Presidency Magistrates. From his report, if it was decided to prosecute the police official concerned, the Commissioner of Police would be directed to lay a formal complaint in a Court of a Presidency Magistrate other than the Magistrate who held the inquiry under PSO 157 (old).

9. The inquiry contemplated as per the revised PSO was essentially a non-judicial one. Therefore, neither the Presidency Magistrate nor the Revenue Divisional Officer had the power to compel the attendance of witnesses before him or take evidence on oath during inquiry. This practically caused some difficulties for the Revenue Divisional Officers and the Presidency Magistrates to hold inquiries. In order to remedy this drawback, the Government decided to invest Presidency Magistrates and Revenue Divisional Officers with powers under Section 2 of "The Madras Revenue Inquiries Act, 1893". As per the powers thus conferred, the Presidency Magistrates and Revenue Divisional Officers gained authority to receive evidence whenever they proceeded to conduct an inquiry under PSO 157 (old). The authority to receive evidence also carried with it ipso facto the authority to administer oath, by virtue of Section 4 of the Indian Oaths Act, 1873. Such inquiry held by the Executive Magistrate or Presidency Magistrate

was undoubtedly governed by S. 176 of the old Code.

10. The object of Section 176 of the Old Code was that an inquiry into a suspicious death should not depend merely upon the opinion, the police may form, but, that there should be a further check by enabling a Magistrate to hold an independent inquiry. Similarly, the object of Section 174 of the old Code was merely to ascertain the apparent cause of death and hence the inquiry under that section should be confined to that purpose only and should not be extended for the purpose of finding out the persons who caused the death.

11. When the legal position on the above subject was so fluid, an issue relating to Section 176 of the Old Code and PSO 157 (Old) came up for consideration before a Division Bench of this Court in *P. Rajangam, Sub-Inspector of Police and Others Vs. State of Madras and Others*, . Mr. M.K. Nambiar, a Doen of the Madras Bar, contended in the said case that P.S.O. No. 157 was violative of the fundamental rights guaranteed under Articles 14 , 20(3) and 21 of The Constitution of India and thus proceedings before a Presidency Magistrate was a nullity. Both the contentions were negated by the Division Bench. The Division Bench, after making a thorough survey of a number of judgements and the legal provisions relating to Section 176 and Section 174 of the Code and PSO 157 held that after the separation of the Judiciary from the Executive, an inquiry held under Section 176 of the Old Code either by Presidency Magistrate in the City of Madras or by an Executive Magistrate in any other areas, does not par take the character of a judicial inquiry. After "The Revenue Inquiry Act" was made applicable, in such inquiries, though the statements were recorded on oath, still, the said statements were not to be used in evidence in any future proceedings. It was also held that the nature of the inquiry was only that of a fact finding inquiry to ascertain the cause of the death and such report would not amount to a decision or determination of the rights of the parties. Thus, prior to the separation of the Judiciary from the Executive, the inquiry was judicial in character and after the separation, the inquiry was pure and simple non judicial in character.

12. Now, let us examine the position after the introduction of the Code of Criminal Procedure 1973. Originally, Section 176 of the Code of Criminal Procedure, 1973, stood as follows:--

"176. Inquiry by Magistrate into cause of death. - (1) When the case is of the nature referred to in clause (i) or clause (ii) of subsection (3) of Section 174 , the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in sub-section (1) of Section 174 , any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence."

13. Here, we need to notice that sub-section (1) of Section 176 of the code was

amended by Amendment Act 46 of 1983 by which the words "when any person dies while in the custody of the police" were inserted as opening words of sub-section (1). Thus, prior to 25.12.1983, under the Code of Criminal Procedure, 1973, the inquiry by an Executive Magistrate into the cause of death was not extended to the death of a person while in the custody of the police. After the Amendment Act 46 of 1983, the inquiry by an Executive Magistrate into the cause of death of a person while in the custody of the police was also covered.

14. However, the legislature once again amended sub-section (1) of Section 176 of the Code, by Amendment Act 25 of 2005, by which, the opening words "when any person dies while in the custody of the police" were omitted. Thus, as of now, an inquiry by an Executive Magistrate into the cause of death as provided under Section 176(1) of the Code does not extend to the death of a person while in the custody of the police. Simultaneously, while amending sub-section (1) of Section 176 of the Code, by the same Amendment Act 25 of 2005, the legislature introduced a new sub-section, that is, (1A) to Section 176 of the Code which reads as follows:--

"176. Inquiry by Magistrate into cause of death.

(1).....

(1A) Where,-

(a) any person dies or disappears, or

(b) rape is alleged to have been committed on any woman, while such person or woman is in the custody of the police or in any other custody authorized by the Magistrate or the Court, under this Code in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed."

Thus, post Amendment Act 25 of 2005, in respect of an inquiry into the cause of the death or disappearance of a person or rape while such person or woman was in custody of the police or in any other custody authorized by the Magistrate or court, the power has now been conferred upon the Judicial Magistrate or Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed.

15. Sub-section (5) of Section 176 of the Code was also amended by the same Amendment Act. Sub-sections (2) to (5) of Section 176 of the Code, as amended, read as follows:--

"176. Inquiry by Magistrate into cause of death. - (1).....

(2) The Magistrate holding such inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case.

(3) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the causes of his death, the Magistrate may cause the body to be disinterred and examined.

(4) Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry.

(5) The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case may be, under subsection (1A) shall, within twenty-four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical man appointed in this behalf by the State Government, unless it is not possible to do so for reasons to be recorded in writing.

Explanation: In this section, the expression relative means parents, children, brothers, sisters and spouse."

16. Now, a comparison of the language used in sub-section (1) and sub-section (1A) of Section 176 of the Code would go to show that so far as Section 176(1) of the Code is concerned, the inquiry is confined only to the cause of the death. Therefore, the Executive Magistrate cannot travel beyond the cause of death to give any other finding or opinion on the disputed facts. As it has been held by the Division Bench in P. Rajangam's case, cited supra, the inquiry relates only to the cause of death and not as to the manner in which the injuries were caused and the persons responsible for the same etc. This inquiry is non-judicial in character.

17. But, in sub-section (1A) a different language has been consciously used by the legislature. Here the legislature has not confined the inquiry only into the cause of the death or cause for the disappearance or cause for rape while in custody of the police. The qualifying words like inquiry "into the cause of the death", as found in sub-section (1) of Section 176 of the Code have been consciously omitted in sub-section (1A) of Section 176 of the Code thereby indicating that the inquiry by a Judicial Magistrate under sub-section (1A) is not confined only to the cause of death or cause for the disappearance or cause for rape. Thus, this inquiry has got a wider scope. As per sub-section (2) of Section 176 of the Code, the Magistrates, both the Executive Magistrate as well as the Judicial Magistrates/Metropolitan Magistrates, shall record evidence on oath.

18. After the introduction of sub-section (1A) of Section 176 of the Code of Criminal Procedure, 1973, in this State, some Metropolitan/Judicial Magistrates holding inquiries under Section 176(1A) were not certain as to what is the scope of the said inquiry and how the report shall be drawn and as to how the same shall be used in any judicial proceedings. These questions were debated often in many forums including the Tamil Nadu State Judicial Academy. Precisely, these questions came up for consideration in a case of custodial death in Tmt. R. Kasthuri Vs. State--> . In that case, the Judgment of the Hon'ble Supreme

Court in PUCL's case [now under consideration] was also taken note of. Eventually, this court in R. Kasthuri's case cited supra, held as follows:--

"40. To sum up, the conclusions are as follows:--

(1) Any information relating to the death or disappearance of any person or rape of a woman while such person or woman was in the custody of the police or in any other custody authorized by a Magistrate or Court, shall be registered as a case under Section 154 of the Code.

(2) Soon after the registration of the case, the Station House Officer shall forward the FIR to the jurisdictional Judicial Magistrate/Metropolitan Magistrate.

(3) The jurisdictional Magistrate shall thereafter hold an inquiry under Section 176(1A) of the Code.

(4) During such inquiry under Section 176 (1A) of the Code the Judicial Magistrate/Metropolitan Magistrate shall have power to record evidence on oath.

(5) On completing the inquiry the Judicial Magistrate/Metropolitan Magistrate shall draw a report and keep the statements of the witnesses, documents collected and the report drawn by him as part of case records.

(6) The Judicial Magistrate/Metropolitan Magistrate shall furnish copies of the statements of the witnesses recorded during inquiry under Section 176(1A) of the Code, the documents collected and the report drawn by him to the investigating police officer without delay.

(7) The investigating police officer shall, without being hindered by the inquiry by the Judicial Magistrate/Metropolitan Magistrate, conduct investigation under Chapter XII of the Code thoroughly and submit a final report to the jurisdictional Magistrate/Court under Section 173 of the Code.

(8) If the case relates to police encounter, as directed by the Hon''ble Supreme Court in People's Union for Civil Liberties Vs. State of Maharashtra, , the investigation shall be entrusted to either CB CID or a police team of another police station under the supervision of a senior police officer (at least a level above the head of the police party engaged in the encounter).

(9) The Judicial Magistrate/Metropolitan Magistrate shall not forward the original records of the inquiry under Section 176(1A) of the Code either to the District Collector or to the Government."

19. The above Judgment in R. Kasthuri's case is all about death or disappearance of any person or rape of a woman while such person or woman was in custody of the police or in any other custody authorised by a Magistrate or Court.

20. The PUCL's case, now under discussion for the purpose of this reference, is all about the procedure to be followed in investigating the police encounters. This is indicated by the Hon''ble Supreme Court in the opening paragraph of the

judgement, wherein the Hon''ble Supreme Court has formulated the question as follows:--

"On 03.09.2014, the arguments were heard on the question of the procedure to be followed in investigating police encounters. The present order is confined to the above question."

Therefore, it is crystal clear that the law declared by the Hon''ble Supreme Court in PUCL's case cited supra, has got nothing to do with the death or disappearance of any person or rape of a woman while such person or woman was in the custody of the police or in any other custody authorised by the Magistrate or the Court under the Code. The directions issued in PUCL's case are only in respect of police encounters. It needs further clarification that in the event the police encounter takes place while the victim of the said encounter is in the custody of the police, then, the procedure contemplated in sub-section (1A) of Section 176 of the Code should be followed as explained by this Court in R. Kathuri's case cited supra.

21. In Paragraph No. 31 of the Judgment, the Hon''ble Supreme Court, has declared the following requirements to be followed in the matter of investigating police encounters as the standard procedure for a thorough, effective and independent investigation. The relevant paragraphs of the above said judgement are extracted hereunder:--

"31. In light of the above discussion and having regard to the directions issued by the Bombay High Court, guidelines issued by NHRC, suggestions of the appellant - PUCL, amicus curiae and the affidavits filed by the Union of India, State Governments and the Union Territories, we think it appropriate to issue the following requirements to be followed in the matters of investigating police encounters in the cases of death as the standard procedure for thorough, effective and independent investigation:

(1) Whenever the police is in receipt of any intelligence or tip-off regarding criminal movements or activities pertaining to the commission of grave criminal offence, it shall be reduced into writing in some form (preferably into case diary) or in some electronic form. Such recording need not reveal details of the suspect or the location to which the party is headed. If such intelligence or tip-off is received by a higher authority, the same may be noted in some form without revealing details of the suspect or the location.

(2) If pursuant to the tip-off or receipt of any intelligence, as above, encounter takes place and firearm is used by the police party and as a result of that, death occurs, an FIR to that effect shall be registered and the same shall be forwarded to the court under Section 157 of the Code without any delay. While forwarding the report under Section 157 of the Code, the procedure prescribed under Section 158 of the Code shall be followed.

(3) An independent investigation into the incident/encounter shall be conducted

by the CID or police team of another police station under the supervision of a senior officer (at least a level above the head of the police party engaged in the encounter). The team conducting inquiry/investigation shall, at a minimum, seek:

- (a) To identify the victim; colour photographs of the victim should be taken;
- (b) To recover and preserve evidentiary material, including blood-stained earth, hair, fibers and threads, etc., related to the death;
- (c) To identify scene witnesses with complete names, addresses and telephone numbers and obtain their statements (including the statements of police personnel involved) concerning the death;
- (d) To determine the cause, manner, location (including preparation of rough sketch of topography of the scene and, if possible, photo/video of the scene and any physical evidence) and time of death as well as any pattern or practice that may have brought about the death;
- (e) It must be ensured that intact fingerprints of deceased are sent for chemical analysis. Any other fingerprints should be located, developed, lifted and sent for chemical analysis;
- (f) Post-mortem must be conducted by two doctors in the District Hospital, one of them, as far as possible, should be Incharge/Head of the District Hospital. Postmortem shall be videographed and preserved;
- (g) Any evidence of weapons, such as guns, projectiles, bullets and cartridge cases, should be taken and preserved. Wherever applicable, tests for gunshot residue and trace metal detection should be performed.
- (h) The cause of death should be found out, whether it was natural death, accidental death, suicide or homicide. (4) A Magisterial inquiry under Section 176 of the Code must invariably be held in all cases of death which occur in the course of police firing and a report thereof must be sent to Judicial Magistrate having jurisdiction under Section 190 of the Code.
- (5) The involvement of NHRC is not necessary unless there is serious doubt about independent and impartial investigation. However, the information of the incident without any delay must be sent to NHRC or the State Human Rights Commission, as the case may be.
- (6) The injured criminal/victim should be provided medical aid and his/her statement recorded by the Magistrate or Medical Officer with certificate of fitness.
- (7) It should be ensured that there is no delay in sending FIR, diary entries, panchnamas, sketch, etc., to the concerned Court.
- (8) After full investigation into the incident, the report should be sent to the competent court under Section 173 of the Code. The trial, pursuant to the charge sheet submitted by the Investigating Officer, must be concluded expeditiously.

(9) In the event of death, the next of kin of the alleged criminal/victim must be informed at the earliest.

(10) Six monthly statements of all cases where deaths have occurred in police firing must be sent to NHRC by DGPs. It must be ensured that the six monthly statements reach to NHRC by 15th day of January and July, respectively. The statements may be sent in the following format along with postmortem, inquest and, wherever available, the inquiry reports:

(i) Date and place of occurrence.

(ii) Police Station, District.

(iii) Circumstances leading to deaths:

(a) Self defence in encounter.

(b) In the course of dispersal of unlawful assembly.

(c) In the course of affecting arrest.

(iv) Brief facts of the incident.

(v) Criminal Case No.

(vi) Investigating Agency.

(vii) Findings of the Magisterial Inquiry/Inquiry by Senior Officers:

(a) disclosing, in particular, names and designation of police officials, if found responsible for the death; and

(b) whether use of force was justified and action taken was lawful.

(11) If on the conclusion of investigation the materials/evidence having come on record show that death had occurred by use of firearm amounting to offence under the IPC, disciplinary action against such officer must be promptly initiated and he be placed under suspension.

(12) As regards compensation to be granted to the dependants of the victim who suffered death in a police encounter, the scheme provided under Section 357-A of the Code must be applied.

(13) The police officer(s) concerned must surrender his/her weapons for forensic and ballistic analysis, including any other material, as required by the investigating team, subject to the rights under Article 20 of the Constitution.

(14) An intimation about the incident must also be sent to the police officer's family and should the family need services of a lawyer/counselling, same must be offered.

(15) No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs

that such rewards are given/recommended only when the gallantry of the concerned officers is established beyond doubt.

(16) If the family of the victim finds that the above procedure has not been followed or there exists a pattern of abuse or lack of independent investigation or impartiality by any of the functionaries as above mentioned, it may make a complaint to the Sessions Judge having territorial jurisdiction over the place of incident. Upon such complaint being made, the concerned Sessions Judge shall look into the merits of the complaint and address the grievances raised therein.

32. The above guidelines will also be applicable to grievous injury cases in police encounter, as far as possible."

22. A thorough reading of the above said Judgement of the Hon"ble Supreme Court, more particularly, Paragraph Nos. 31 and 32, would go to show that they do not relate to death in police custody, unless the death is in a police encounter. If it is a police encounter when the victim was not in the custody of the police, the magisterial inquiry to be held is under sub section (1) of Section 176 of the Code by an Executive Magistrate and not by a Judicial Magistrate. To put it simply, this Judgment relates only to the police encounter. While declaring the above requirements, in respect of investigation of police encounters, the Hon"ble Supreme Court, in Paragraph No. 33, has directed as follows:--

"33. Accordingly, we direct that the above requirements/norms must be strictly observed in all cases of death and grievous injury in police encounters by treating them as law declared under Article 141 of the Constitution of India."

23. Keeping in mind the above history of the legislation, the circumstances, under which and the purpose for which these directions were issued by the Hon"ble Supreme Court, now, let us go into the questions of law under reference for the decision of this Bench.

Question No. 1:-- "Whether the word "address" referred to in Paragraph No. 31(16) in the Judgement of the Honourable Supreme Court is dealing with the judicial power of the Sessions Judge or the administrative action of the Sessions Judge"?

24. The learned Sessions Judge, appreciably, has analysed the entire Judgement of the Hon"ble Supreme Court, which is obvious from the discussions he has made in the order of reference. But, while framing the questions, the learned Sessions Judge, we apprehend, has emphasized few words from the Judgement and has tried to give legal meaning to those words. For example, under Question No. 1, the learned Sessions Judge has taken the word "address" as employed in Paragraph No. 31(16) of the Judgement and from out of the said word, the learned Sessions Judge has made an attempt to understand as to whether it denotes judicial power or administrative action on the part of the Sessions Judge. In H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, , the Hon"ble Supreme Court has stated

that it is not proper to regard a word, a clause or a sentence occurring in a Judgment of the Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in the said judgement. In *Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd.*, , the Hon''ble Supreme Court has observed that it is neither proper nor permissible to pick out a word or a sentence from the Judgment of the Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by the Supreme Court. The judgement must be read as a whole and the observations in the Judgment have to be considered, in the light of the questions, which were before the Supreme Court. The decision on the question involved in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of the Court and not to pick out words or sentences from the Judgment, divorced from the context of the questions under consideration by the Court.

25. In view of the above settled position of law, in order to understand the safeguards as standard procedure laid down by the Hon''ble Supreme Court in PUCL's case, we have to consider the whole Judgment, including the observations made therein. We cannot afford to look for dictionary or statutory meaning of the words "address" and "complaint" and the other expressions, employed in Paragraph No. 31.16 of the Judgment. As we have already extracted, the single question before the Hon''ble Supreme Court for consideration in PUCL's case was regarding the safeguards to be followed in investigating the police encounters. After having analyzed Chapter XII of the Code of Criminal Procedure and various other provisions, the Hon''ble Supreme Court had felt that while investigating the cases relating to police encounters, additional safeguards should be followed. The Hon''ble Supreme Court has obviously felt that the existing procedure contemplated for investigation of any crime by the police under Chapter XII of the Code of Criminal Procedure has, in the past, proved to be inadequate to investigate police encounter cases effectively for want of sufficient safeguards. The Legislature also did not make any special law in respect of investigation of police encounters, though fake police encounters were reported often. Therefore, the Hon''ble Supreme Court has evolved additional safeguards to be followed for investigating police encounters and has also created a monitoring mechanism.

26. There are ample powers conferred by Article 32 r/w Article 142 of the Constitution of India to make orders, which have the effect of law by virtue of Article 141 and there is a mandate to all authorities to act in aid of the order of the Hon''ble Supreme Court, as provided in Article 144 of the Constitution of India. In a catena of decisions of the Hon''ble Supreme Court, this power has been asserted and exercised, according to the needs, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role, [vide *Vineeth Narain v. Union of India*, 1998 (1) SC 226]. In the same Judgment, the Hon''ble Supreme Court has

further held as follows:

"In exercise of the powers of this Court under Article 32 read with 142, guidelines and directions have been issued in a large number of cases and a brief reference to a few of them is sufficient. In *Erach Sam Kanga etc. v. Union of India & Anr.* (Writ Petition No. 2632 of 1978 etc. etc.) decided on 20th march, 1979, the Constitution Bench laid down certain guidelines relating to the Emigration Act. In *Lakshmi Kant Pandey Vs. Union of India (UOI)*, , guidelines for adoption of minor children by foreigners were laid down. Similarly in *State of West Bengal and Others Vs. Sampat Lal and Others*, , *K. Veeraswami Vs. Union of India (UOI) and Others*, , guidelines were laid down having the effect of law, requiring rigid compliance. In *Supreme Court Advocates-on-Record Association and another Vs. Union of India*, , a 9-Judge Bench laid down guidelines and norms for the appointment and transfer of Judges which are being rigidly followed in the matter of appointments of High Court and Supreme Court Judges and transfer of High Court Judges. More recently in *Vishaka and others Vs. State of Rajasthan and Others*, , elaborate guidelines have been laid down for observance in work places relating to sexual harassment of working women. Thus, an exercise of this kind by the Hon"ble Supreme Court is now a well settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field."

27. As pointed out in *Vineet Narain's* case, cited supra, it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligation under the aforesaid provisions to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field.

28. In this regard, we may also have a look into a Constitution Bench Judgment of the Hon"ble Supreme Court in *Nand Kishore Vs. State of Punjab*, , wherein in Paragraph No. 17, the Hon"ble Supreme Court has held as follows:--

"17..... When this Court strikes down a statutory provision holding it to be unconstitutional, it derives its authority to do so under the Constitution. Under Article 141 , the law declared by it is of a binding character and as commandful as the law made by a legislative body or an authorised delegate of such body. The Court is thus a "competent authority" within the scope of the words above emphasised. On the other hand the majority view expressed in the Full Bench decision that "the Courts of record including the Supreme Court only interpret the law as it stands but do not purport to amend the same. Their Lordship's decisions declare the existing law but do not enact any fresh law", is not in keeping with the plenary function of the Supreme Court under Article 141 of the Constitution, for the Court is not merely the interpreter of the law as existing but much beyond that. The Court as a wing of the State is by itself a source of law.

The law is what the Court says it is..... "

[Emphasis Supplied]

29. In All India Reporter Karamchari Sangh and Others Vs. All India Reporter Limited and Others, , in Paragraph No. 11, the Hon"ble Supreme Court has held as follows:--

"11..... Article 141 of the Constitution provides that the law declared by Supreme Court shall be binding on all courts within the territory of India. Even apart from Article 141 of the Constitution the decisions of the Supreme Court, which is a court of record, constitute a source of law as they are the judicial precedents of the highest court of the land. They are binding on all the courts throughout India. Similarly the decisions of every High Court being judicial precedents are binding on all courts situated in the territory over which the High Court exercises jurisdiction. Those decisions also carry persuasive value before courts which are not situated within its territory. The decisions of the Supreme Court and of the High Courts are almost as important as statutes, rules and regulations passed by the competent legislatures and other bodies since they affect the public generally. It is well- known that the decisions of the superior courts while they settle the disputes between the parties to the proceedings in which they are given they are the sources of law in so far as all others are concerned."

[Emphasis Supplied]

30. From the above Judgments, it is manifestly clear that the source of law, in general, is the legislature. For any reason, if the legislature fails to make a law on a specific area of a subject, under Article 162 of the Constitution of India, the Executive Power of the State should be exercised by the State to make a law. If neither the legislature nor the executive makes a law and leaves a vacuum, then, as held by the Hon"ble Supreme Court in the above Judgments, being the Constitutional Court, it becomes necessary for the Hon"ble Supreme Court to declare a law under Article 141 of the Constitution of India. so as to fill the vacuum. Thus, the Hon"ble Supreme Court itself is the source of law and such law declared by the Hon"ble Supreme Court under Article 141 of the Constitution of India should be treated on par with a law made by the legislature or the executive. In view of this well settled position of law, we have no hesitation to hold that the directions issued by the Hon"ble Supreme Court in PUCL's case, cited supra, constitute a law, like an Act of Parliament and the same should be scrupulously followed.

31. The above legal position was later on doubted in University of Kerala v. Council of Principals of Colleges, Kerala reported in 2010 (1) SCC 353, by a Division Bench of the Hon"ble Supreme Court. In that case, few important questions arose as to "Whether under our Constitution the judiciary can legislate, and if so, what is the permissible limits of judicial legislation?" "Will judicial legislation not violate the principle of separation of powers broadly envisaged by

our Constitution?" "Whether the judiciary can legislate when in its opinion there is a pressing social problem of public interest or it can only make a recommendation to the legislature or concerned authority in this connection?" and "What is the scope of Articles 141 and 142 of the Constitution? Do they permit the judiciary to legislate and/or perform functions of the executive wing of the State." The Supreme Court took note of the above judgements. Hon"ble Justice Markandey Katju presiding over the Bench had a doubt about the power of the Supreme Court on the above questions and therefore referred the matter to a Constitution Bench. Hon"ble Justice A.K. Ganguly, a member of the said Bench, while agreeing with Hon"ble Justice Markandey Katju that the questions formulated by him should be referred to a Constitution Bench for an authoritative pronouncement, in his separate order added his perception on those questions which may be a shade at a variance with the perception of Hon"ble Justice Markandey Katju. After having extensively referred to the judgements in Vishaka and others Vs. State of Rajasthan and Others, , Vellore Citizens' Forum v. Union of India, [1996) 5 SCC 647] and Vineet Narain and Others Vs. Union of India (UOI) and Another, , he has said:

"34. For the reasons discussed above, I am humbly of the view that the questions formulated by Justice Katju may be considered by the Constitution Bench in the background of the inherent power of this Court under Article 141 and Article 142 . Both these powers are unique and possibly in no other jurisprudence has the highest Court been empowered by such provisions. That is why it has been observed that the Supreme Court itself has been a source of law in as much as this Court held:--

"Their Lordships decisions declare the existing law but do not enact any fresh law, is not in keeping with the plenary function of the Supreme Court under Article 141 of the Constitution, for the Court is not merely the interpreter of the law as existing but much beyond that. The Court as a wing of the State is by itself a source of law. The law is what the Court says it is. Patently the High Court fell into an error in its appreciation of the role of this Court." [Nand Kishore Vs. State of Punjab,]"

The said matter is still pending for a decision before a Constitution Bench of the Hon"ble Supreme Court. Therefore, as of now, Nand Kishore v. State of Punjab and Vineet Naraian"s cases hold the field.

32. The learned Sessions Judge has raised a doubt as to whether the said power to entertain a complaint by a Sessions Judge and to issue direction to address the grievance is judicial or administrative power. In Kartar Singh Vs. State of Punjab, , the Hon"ble Supreme Court has held thus:--

"Judicial power, therefore, means the judicial power which every authority i.e. courts i.e. High Court and subordinate judiciary, established under Chapters V and VI of Part VI and the Union Judiciary constituted in Chapter IV in Part V, "the Supreme Court of India" must of necessity have to decide controversies between

citizen and the citizen, and the State or the States inter se, whether the rights relate to life, liberty or property. The courts have power and authority to declare the law, apply the law and give a binding and authoritative decision between the parties before it and carry it into effect."

33. In Union of India (UOI) Vs. R. Gandhi, , a Constitution Bench of the Hon"ble Supreme Court had occasion to distinguish a "court" from a "tribunal". In that case, the Hon"ble Supreme Court took note of the word "judicial" and observed that the said word itself is capable of two meanings. The Hon"ble Supreme Court referred to the judgment reported in Royal Aquarium and Summer and Winter Garden Society v. Parkinson [1892] 1 Q.B. 431 wherein Lopes, L.J., has held as follows:--

"The word "judicial" has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to being to bear a judicial mind -that is, a mind to determine what is fair and just in respect of the matters under consideration."

Following the said view of Lopes, L.J., the Hon"ble Supreme Court has held, "court and tribunal act judicially in both senses." In the light of what is stated in the above judgments, we have no semblance of doubt to say that the power of the Sessions Judge as per the PUCL case is not an administrative power at all. Here we need to note as to what makes a judicial power distinct from an administrative power. Wherever a power is conferred upon the judicial authority empowering the authority to resolve the dispute between the parties, undoubtedly, it is a judicial power. Similarly, when there is application of judicial mind into materials placed in order to satisfy the judicial conscience of the court, there also the power is judicial in character. For illustration, the power of a Judicial Magistrate to take cognizance of an offence by applying his judicial mind is a judicial power. When the power involves the appreciation or sifting of evidence or formulation of any decision, which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any court, then, the said power shall be, undoubtedly, a judicial power. Where the power is purely administrative, where there is no appreciation or sifting of evidence or formulation of any decision such as granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they are administrative or executive power. [Vide subsection (4) of Section 3 of the Code of Criminal Procedure, 1973]. In short, the power, which is pure and simple an administrative power, is non-legislative and non- adjudicative in nature. The central case of judicial function is the final resolution of the disputes as to facts and as to existence or the scope of legal rights or duties by means of finding facts deciding what the law is and applying the law to the facts.

34. In Paragraph No. 31.16 of the Judgement in PUCL case, the Hon"ble Supreme Court has held that the Sessions Judge shall look into the merits of the

complaint and address the grievance raised therein. Here the expression "address" means "to direct". Before arriving at a prima facie conclusion on the merits of the complaint, the Sessions Judge may call for the case diary from the police and the connected records, hear the aggrieved and the investigating officer, by holding a summary inquiry, and if he finds that the procedure stated in the PUCL's case has not been followed or there exists a pattern or abuse or lack of independent investigation or lack of impartiality, the Sessions Judge may pass appropriate order. We wish to add that such inquiry is purely summary and the same shall not be a prolonged one, as loss of time on this count may result in disappearance or obliteration of evidence. Thus, the Sessions Judge shall take a decision at the quickest possible time. The nature of the summary inquiry held by him would clearly go to indicate that there is an element of formulation of a decision on the merits of the complaint to address the grievance by issuing appropriate direction. Therefore, such power cannot be stated to be an administrative power. Besides that, the learned Sessions Judge has no administrative control over the police. In this respect, we may draw an analogy from sub-section (3) of Section 156 of the Code of Criminal Procedure. Under the said provision, a magistrate looks into the complaint and if he finds that the complaint makes out a cognizable offence warranting investigation, he makes an order for investigation. Similarly, when a Sessions Judge receives a complaint as per PUCL's case, he looks into the merits of the complaint and addresses the same by issuing necessary directions. Undoubtedly, the power of the Magistrate under Section 156(3) of the Code of Criminal Procedure is a judicial power. Like the power under Section 156(3) of the Code of Criminal Procedure which is a judicial power, the power of the learned Sessions Judge declared by the Hon'ble Supreme Court in PUCL's case is also a judicial power. Therefore, we hold that the power of the Sessions Judge, as declared in Paragraph No. 31.16 is a judicial power. Accordingly, we answer the first question.

Question No. 2:-- "If it is held to be a Judicial Power, if any address made by the Sessions Judge is disobeyed what would be the enforcement mechanism for the Principal Sessions Judge to enforce the direction/Address"?

35. Since we have answered the Question No. 1 holding that the power of the Sessions Judge is a judicial power, then, the enforcement mechanism should be found in the Code of Criminal Procedure, 1973 itself. Like any other judicial order, which is enforced under the Code, the order made by the Sessions Judge in the given case should also be enforced. If there is any disobedience, the provisions of Chapter XXIV of the Code may be resorted to by the Sessions Judge, Accordingly, the second question is answered.

Question No. 3:-- "How the Sessions Judge can act in compliance with the directions of the Honourable Supreme Court without deviating the other pronouncement of the Honourable Supreme Court in the case of People's Union for Civil Liberties Vs. State of Maharashtra, in respect of non interference in the investigation and without deviating provision of The Criminal Procedure Code in a

Harmonious manner"?

36. While issuing directions as per the judgement of the Hon''ble Supreme Court in PUCL's case, absolutely, there is no scope for interference with the investigation by the police. The Sessions Judge only carries out the directions of the Hon''ble Supreme Court in PUCL's case to rectify the defects or shortcomings brought to the notice of the Court of Sessions by the complainant. Since there is no effective monitoring mechanism under the Code of Criminal Procedure in respect of investigation relating to police encounter cases, the Hon''ble Supreme Court has made the Sessions Judge, in a way, as a Monitoring Authority and therefore, any direction to be issued by the learned Sessions Judge, as per the Judgement in PUCL's case, would not amount to interference with the investigation. Having said this, we cannot stop without cautioning the Sessions Judges that the said power should not be exercised in a casual manner so as to interfere with the investigation by the police. We wish to reiterate that their power is confined only to ensure that the safeguards evolved by the Hon''ble Supreme Court in PUCL case are adhered to strictly and not beyond that. Accordingly, this question is answered.

Question No. 4: - "Whether the petition purported to be filed under Section 193 of Cr.P.C. can be made to the Sessions Judge who has no right to take direct cognizance of any offence"?.

37. Under Section 193 of the Code of Criminal Procedure, the Sessions Judge cannot take cognizance of any offence as a Court of original jurisdiction, unless the case is committed to him. Thus, the Sessions Judge gets original jurisdiction to take cognizance only on the case being committed to the said court. In *Dharam Pal and Others Vs. State of Haryana and Another*, , the Hon''ble Supreme Court has elaborately dealt with the scope of the power of the Sessions Judge to take cognizance of any offence as a Court of original jurisdiction. In the reference, the learned Sessions Judge probably, we apprehend, has understood the term "complaint" equating the same to a complaint made before a Judicial Magistrate under Section 190 and Section 200 of the Code. The term "complaint", as employed in Paragraph No. 31.16 of the Judgement cannot be misconstrued as though the Hon''ble Supreme Court has meant the same to be a complaint, as defined in Section 2 of the Code. Here, the term "complaint" has been used by the Hon''ble Supreme Court in its ordinary sense, which should be understood to mean either as "a representation" or "a petition" and not as a complaint in stricto sensu, as defined in Section 2 of the Code. On receiving the said representation [complaint], the learned Sessions Judge cannot take cognizance of any offence, [vide Section 193 of the Code of Criminal Procedure], but, what he has to do is to issue appropriate judicial direction to redress the grievances. Accordingly, this question is answered.

Question No. 5:-- "Whether the Sessions Judge while addressing the grievances as per the dictum of the Judgment of the Honourable Supreme Court can pass the order to transfer the investigation of I.P.S. Officer with regard to the

appointment of officers as prayed for in the petition?".

38. The learned Sessions Judge has got power to issue a direction to the Head of the Department of the Police to transfer the investigation to any competent officer irrespective of his cadre as the Head of the Police Department may deem fit. But, such officer to whom the investigation is transferred shall be higher in rank than the officer, who had headed the police party, which was involved in the encounter. This question is answered accordingly.

39. Before parting with this order, we would like to state the following: Rule of law is an inalienable essential feature of the basic structure of our Constitution. One of the elements of Rule of law is the certainty of the laws. Uncertainty in interpreting, understanding and enforcing the laws, be it a statute or a Judge made law, may result in utter confusion and chaos in the society. Whenever any such uncertainty, either big or small, is noticed, the Constitutional Courts of this Country make the law and its enforceability certain by judicial interpretation. Section 395 of the Code of Criminal Procedure plays an important role towards the said end enabling the Subordinate Judiciary to make references to this Court on legal issues enumerated therein. But, in reality, such references are made rarely. In the instant case, we need to appreciate the learned Sessions Judge Thiru. M. Nazir Ahamed for having made this reference to this Court, highlighting the doubts on the legal questions under reference. We are sure that by answering the questions under reference, we have ensured certainty in understanding the safeguards evolved in PUCL case. We are hopeful that the Sessions Judges shall carry forward the directions of the Hon''ble Supreme Court scrupulously without a semblance of confusion or doubt.

40. We place on record our deep appreciation for the excellent assistance rendered by the Amicus Curiae - Mr. Isaac Mohanlal, Mr. S. Shanmugavelayutham, the State Public Prosecutor, Mr. M. Subash Babu, Mrs. J. Nisha Banu and the other Advocates.