

(2019) 03 J&K CK 0030

In the Jammu And Kashmir High Court

Case No : Civil Transfer Application (CTA) No. 01, 02 Of 2018

Muhammad Yaseen Malik & Ors

APPELLANT

Vs

State Of Jammu & Kashmir & Anr

RESPONDENT

Date of Decision : 13-03-2019

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 34, 109, 120B, 302, 307, 364, 368

Delhi Special Police Establishment Act, 1946 — Section 5, 6

Terrorist And Disruptive Activities (Prevention) Act, 1987 — Section 3, 3(1), 4, 11(2)

Arms Act, 1959 — Section 25, 27

Jammu & Kashmir High Court Rules 1999 — Rule 5, 8, 23

Citation : (2019) 03 J&K CK 0030

Hon'ble Judges : Gita Mittal, CJ

Bench : Single Bench

Advocate : T.M. Shamsi, Z.A. Shah, I.A. Sofi, Z.A. Qureshi, Rehana

Final Decision : Disposed Off

Judgement

1. By this order, I propose to decide two applications being CTA No.01/2018 and CTA No.02/2018 which have been filed by the Central Bureau of Investigation (CBI), seeking transfer of OWP Nos.431/2009 and 432/2009 respectively both titled Muhammad Yaseen Malik & Ors. v. State of J&K and another, respectively, to the Jammu Wing of the High Court of Jammu & Kashmir as well as vacation of the interim order dated 26th November, 2009 passed in both the writ petitions.

2. Both these applications have been filed in similar circumstances and fact situations and raise identical questions of law, therefore, they are being taken up together for consideration.

3. I have heard Mr T. M. Shamsi, learned ASGI for the applicants, Mr Z. A. Shah, Sr. Advocate and Mr Z. A. Qureshi, Sr. Advocate, for the non-applicants. The record of the writ petitions OWP No.431/2009 and 432/2009 was requisitioned and perused.

Factual background

4. Firstly, the few essential facts giving rise to the filing of these applications;

CTA No.01/2018(Reg: OWP No.431/2009)

5. With regard to an incident which occurred in the morning of 25th January, 1990 at about 7:30 AM involving Air Force employees at Rawalpura, Srinagar, were fired upon by terrorists, FIR No.22 came to be registered by Police Station Saddar, Srinagar, under Sections 302/307 of Ranbir Penal Code (RPC), 3(1) Terrorist and Descriptive Activities (Prevention) Act, 1987 (TADA) and 3/25 Indian Arms Act, against unknown persons. In this firing 40 Air Force employees including a lady received serious injuries while two Air Force Personnel were killed on the spot.

6. A notification came to be issued thereafter by the Government of Jammu & Kashmir on 22nd of February, 1990 under Section 6 of the Delhi Special Police Establishment Act, 1946 (DSPE hereinafter) as well as a notification dated 1st March, 1990 was issued by the Government of India under Section 5 of the DSPE Act resulting in the investigation of the case being taken over by the Central Bureau of Investigation ('CBI' hereafter). The case was registered by the CBI as RC 1(S)/1990/SIU.V/SC-II).

7. On completion of investigation, a charge sheet was filed on 31st August, 1990 in the case by the CBI under Section 120-B read with Section 302 RPC of RPC, Section 3 and 4 of TADA Act and Section 27 of the Arms Act against Muhammad Yaseen Malik and five others, before the designated TADA Court at Jammu which was the third Additional Sessions Judge, Jammu.

8. During the pendency of the trial before the court of 3rd Additional Sessions Judge (TADA) Jammu, a petition dated 25th October, 2008 came to be filed on behalf of the accused persons under SRO 168 dated 01.05.1990 read with SRO 70 dated 05.02.1991 seeking transfer of the case to the designated court at Srinagar. The CBI filed objections and opposed the application which came to be rejected by an order dated 20.04.2009.

CTA No.02/2018 (Reg: OWP No.432/2009)

9. This case related to the incident when Dr. Rubiya Syed, was kidnapped while she was going in a Tata Mini Bus from Lala-Ded Hospital, Srinagar, to her house at Nowgam, and taken to some unknown place by some unknown terrorists travelling in the same mini bus who threatened to kill her in case their illegal demands were not met and created terror amongst all the passengers by showing gun and pistols to them.

10. In this regard FIR No.339 was registered on 8th December, 1989 by Police Station Saddar, under Sections 364, 368 RPC, Section 3(1) TADA Act and 25 Indian Arms Act, against unknown persons.

11. Investigation in this case was also assigned to the CBI on the basis of

notification issued by the Jammu & Kashmir Government on 22nd of February, 1990 under Section 6 of the Delhi Special Police Establishment Act, 1946 (DSPE hereinafter) as well as a notification dated 1st March, 1990 issued by the Government of India under Section 5 of the DSPE Act. The case was registered by the CBI as RC 07 (S)/1990/SIU. V/SC-II).

12. After completion of the investigation in the case, the charge sheet in this case was filed by the CBI on 18.09.1990 under Section 120-B read with Section 364, 368, 109 and 34 RPC, Section 3(1) TADA and Section 27 of Arms Act, before the designated court under the TADA Act being the court of 3rd Additional Sessions Judge (TADA Cases) Jammu.

13. During the pendency of trial in this case as well, on 25th October, 2010, an application was filed by the accused persons under SRO 168 dated 01.05.1990 read with SRO 70 dated 05.02.1991 seeking transfer of the case to the designated TADA court at Srinagar. CBI filed objections and opposed the application which came to be rejected by the order dated 20.04.2009.

14. Aggrieved by the orders dated 20.04.2009, the writ petitioners/non-applicants filed two identical applications before the Chief Justice of the High Court of J&K seeking permission to file two writ petitions against the order dated 20 th April, 2009 in the two cases before the Srinagar Wing of the High Court. For expediency, relevant extract of the application filed in the writ petition relating to FIR No.22/2009 is set out here under:

"In the matter of :-Application for permitting the petitioners to file the aforesaid writ petition in Srinagar Wing of the Hon'ble Court.

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7. That the petitioners have presented the writ petition before the Registry of this Hon'ble Court which may be also ordered to be listed today.

It is accordingly prayed that the writ petitioners be permitted to file the writ petition before Srinagar Wing of the Hon'ble Court."

(Emphasis supplied)

An identical application was filed in respect of the other writ petition relating to FIR No.339/1989

15. On consideration of the applications, the then Chief Justice passed the following order on 4th of May, 2009 on both the applications:

"Permission as sought for is granted.

Sd/-

4.05.09."

16. Permission having thus been granted, two writ petitions being OWP

Nos.431/2009 and 432/2009 against the orders dated 20.04.2009 passed by the trial court being the TADA Court, Jammu, were filed on 4th May, 2009 before the Srinagar Wing of the High Court of Jammu & Kashmir.

17. While issuing notice in OWP No.432/2009, it was directed by the writ court that this writ petition be listed along with OWP No.431/2009. Common orders have therefore been recorded in both the writ petitions, which orders have all been placed on the record of OWP No.431/2009.

18. It is noteworthy that by a common order dated 26th November, 2009, passed in both the writ petitions i.e., OWP Nos.431/2009 and 432/2009 the writ court directed that the proceedings before the trial court shall remain in abeyance.

19. The writ petitions have remained pending ever since and the trial stands interdicted since 26th November, 2009.

20. In this factual background, the present transfer applications (CTA No.01/2018 and CTA No.02/2018) have been filed by CBI seeking transfer of OWP Nos. 431/2009 and 432/1009, respectively, to the Jammu Wing of the High Court for disposal under law.

Applicants Contentions

21. In support of the prayer made in the applications, Mr T. M. Shamsi, learned ASGI, has pressed the following grounds:

(i) that the matters pertain to charge sheets which have been filed before the Designated TADA Court, Jammu, and that the orders impugned in the writ petitions have been passed by the said Court. As such, the matter falls entirely within the jurisdiction of Jammu Wing of the Court which alone has the jurisdiction to adjudicate upon the subject matter.

(ii) that entire records of the case are located at Jammu and expediency demands that the matters are heard and decided at Jammu.

(iii) that the writ petitioners are influential persons who were able to delay the trial for a decade (from 1990 to 2009) and then the proceedings before the writ court after having obtained an interim order on 26th November, 2009 of stay of the trials.

(iv) that so far as the transfer of cases under the TADA Act from one jurisdiction to another is concerned, the same can be done only in compliance with the procedure provided under Section 11(2) of the TADA Act, which is the only provision which is enabling transfer of cases.

Contentions on behalf of the non-applicants/ writ petitioners

22. The applications have been stanchly opposed by Mr Z. A. Shah, learned senior counsel appearing on behalf of the non-applicants. It has been contended that:

(i) the writ petitions were filed in the Srinagar Wing of the Jammu & Kashmir High Court after permission was obtained on 4th May, 2009 from the then Chief Justice of the Court.

(ii) that in view thereof, the prayer made in these applications tantamounts to review of the order dated 4th of May, 2009 of the Chief Justice which is legally impermissible.

(iii) that permission for filing the writ petitions in Srinagar Wing was granted in the year 2009 and that CBI has acquiesced in the maintainability of the writ petition before the Srinagar Wing inasmuch as no transfer application was filed for nine years till 2018.

(iv) that even in the reply which has been filed to the writ petitions by the applicant, no objection regarding maintainability of the proceedings has been taken.

(v) that the writ petitions are listed on 14th March, 2019 at item no.28 and that it would be improper to transfer the cases to Jammu Wing of the High Court at this stage.

23. Mr Shah also contests the contention of Mr Shamsi that the order of stay of the trials granted in favour of the writ petitioners was an exparte order.

No additional submissions were pressed on behalf of other writ petitioners.

Applicable statutory provision and the Circular 6 of 2010

24. So far as the power to transfer cases which arise under the TADA Act are concerned, Mr Shamsi, learned ASGI, has placed reliance on the provisions of Section 11(2) of the Statute which for expediency is reproduced hereunder:

"11. Jurisdiction of Designated Courts. -

(1) xxxxxxxxxxxxxxxxxxxx

(2) If, having regard to the exigencies of the situation prevailing in a State, the Central Government is of the opinion that, -

(a) the situation prevailing in such State is not conducive to a fair, impartial or speedy trial, or

(b) it is not likely to be feasible without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor and the Judge of the Designated Court or any of them, or

(c) it is not otherwise in the interests of justice,

It may, with the concurrence of the Chief Justice of India (such concurrence to be obtained on a motion moved in that behalf by the Attorney-General), transfer any case pending before a Designated Court in that State to any other Designated Court within that State or in any other State.

25. So far as the exercise of jurisdiction by the two wings of the Jammu & Kashmir High Court i.e., Jammu Wing and Srinagar Wing, are concerned, the same is circumscribed by the stipulations under Circular 6 of 2010, which reads as follows: -

"Circular No.6 of 2010, dated 18-12-2010 High Court of Jammu and Kashmir at Jammu.

All Writ Petitions/ Public Interest Litigations/ Appeals/ Arbitration Applications/ Misc. Applications etc. related to Jammu Wing of the High Court shall be filed, heard and decided at Jammu Wing. Similarly, such matters related to Srinagar Wing shall be filed, heard and decided at Srinagar Wing.

Provided that in exceptional cases or if it is not practicable to file such a matter pertaining to a particular Wing at that Wing, it may be filed at the other Wing with the leave of Hon'ble Chief Justice or in his absence, [1] [the senior most available Hon'ble Judge of the Court].

This order shall take effect immediately and supersede all earlier orders in this regard."

26. It is noteworthy that Circular 6 was issued by the Chief Justice in exercise of the powers conferred under Rule 5 of the Jammu & Kashmir High Court Rules 1999 which provides as follows:

"5. (i) The Chief Justice shall issue appropriate orders/ instructions to supplement these rules relating to subjects or matters provided for in these rules for the proper discharge of functions of the Court.

(ii) Chief Justice shall have the residuary power to issue orders, directions or guidelines on the matters not specifically provided for or dealt with by these rules, pertaining to the procedure of the Court or the Registry or to carry out the purpose of these Rules."

Discussion

27. Right at the outset, it is essential to note that so far as the consideration of these applications is concerned, the same turns on the impact of the orders dated 04.05.2009 passed by the then Chief Justice exercising jurisdiction under the powers conferred by the proviso to the Circular 6 of 2010 dated 18.12.2010. In my opinion adjudication of the issue does not necessitate examination of the factual background giving rise to the cases. Even otherwise, the issues relating to merits of the cases lie within the jurisdiction of the writ court and it would not be appropriate for me to adjudicate or to make any comments thereon. It is, therefore, made clear that nothing herein contained is an expression of opinion on the factual background giving rise to the registration of the cases or any aspect of the trial. The writ court and the trial court shall proceed in the matter uninfluenced by observations recorded in this order.

28. So far as the writ petitions which relate to the Jammu Wing of the High Court

are concerned, the same are required to be filed and decided at the Jammu Wing of the High Court in terms of Circular 6 of 2010. The only exception which can be found is contained in the proviso to Circular 6 of 2010, which states that in "exceptional cases" or if it is "not practicable to file such a matter" pertaining to a particular Wing at that Wing, it may be "filed at the other Wing" with the "leave of Hon'ble Chief Justice" or in his absence, the senior most available Hon'ble Judge of the Court.

29. I find that at the time of filing of the writ petitions i.e., OWP No.431/2009 and OWP 432/2009, the petitioners have admitted that the writ petitions were ordinarily required to be filed in Jammu Wing of the High Court. This admission is contained in the applications (as extracted above) which were filed by the writ petitioners at the time of institution of the writ petitions seeking permission of the Chief Justice to file at Srinagar. The averments in the applications as well as the prayers made in the applications, leave no manner of doubt that the writ petitioners were conscious that the challenge, if any, to the orders dated 20th April, 2009 of the trial court had to be laid before the Jammu Wing of the High Court.

30. The writ petitioners have taken advantage of the exercise of discretion of the Chief Justice under the proviso to Circular 6 of 2010 which enabled them to file the writ petitions relating to the Jammu Wing in the Srinagar Wing. The writ petitioners have thereby also admitted themselves as bound by the discipline under Circular 6. Today, therefore, it cannot be held, as contended by Mr Shah that, as the Jammu and Srinagar Wings of the High Court are part of one High Court, therefore, it did not matter as to which Wing entertains the writ petition.

31. Having said so, it now becomes necessary to consider the impact of the permissions, both dated 04.05.2009 granted by the Chief Justice, which enabled only filing of OWP Nos. 431/2009 and 432/2009 before the Srinagar Wing. Did the permission to file the writ petitions confer jurisdiction on the Srinagar Wing to adjudicate as well? I consider the impact of these permissions which were granted on the basis of proviso to Circular 6 of 2010 hereafter.

Impact of the permission granted by the Chief Justice

under the proviso to Circular 6 of 2010.

32. This very issue has not been raised before me for the first time in these applications under consideration. Identical issues relating to the powers of the Chief Justice and impact of the permission under the proviso to Circular 6 of 2010 were raised in CTA No.38/2018 and IA No.01/2018 titled Kulwant Singh Johal & Ors. v. Mrs Masooda Jabeen & Ors., which was decided by a detailed order dated 29th November, 2018.

It needs to be noted that the order dated 29th November, 2018 passed in the said transfer application, was not assailed by the parties and has attained finality.

33. It would be useful to notice the issues which arose for consideration in CTA

No.38/2018 and have been noted in para 9.16 of the said judgment in the following terms:

"9.16 So far as the present case is concerned, it would appear that there are four aspects of the matter: the first relates to filing of a case and the competence of the Chief Justice to permit the filing of a case, which ought to be filed in a particular Wing, in the other Wing of the High Court. The second aspect relates to construction of the Circular 6 of 2010-that is as to whether the expression 'may be filed' as mentioned in the proviso thereof would include 'heard' and 'decided' as mentioned in the substantive part of the Circular? That is, to say, as to whether the permission to file the case in a Wing other than that to which the subject matter relates in accordance with proviso to Circular no.6 of 2010 encompasses jurisdiction to hear and decide by the Wing in which the filing has been permitted. The third aspect is that, if a case has been filed, or permitted to be filed, as in the present case, in one Wing of the High Court, would the Chief Justice have the power to transfer the case to the other Wing of the High Court? This aspect encompasses consideration of the scope of jurisdiction under Rule 23 of the Jammu and Kashmir High Court Rules 1999, which would be treated as the fourth aspect."

(Emphasis supplied)

34. In the present case, I am concerned with the second aspect of the case noted above. An elaborate discussion of the second aspect has been made in the aforesaid judgment *Kulwant Singh Johal & Ors. v. Mrs Masooda Jabeen & Ors*, from paras 9.18 to 9.21, 9.23, 9.24 and 9.29 to 9.37, which for expediency as well as to avoid repetition of the consideration are also extracted hereunder: -

"9.18 I now come to the construction of Circular no.6 of 2010, i.e. the second issue.

9.19 Circular no.6 of 2010, as extracted above, prescribes that, inter-alia, appeals which relate to the Jammu Wing of the Court 'shall be filed, heard and decided at Jammu Wing'. A bare perusal of the Circular would show that the main provision and the proviso stand crafted very carefully. Whereas the main provision clearly states that 'allappeals relate to the Jammu Wing of the High Court shall

be filed, heard and decided at the Jammu Wing', so far as the proviso is concerned, it stipulates that only in 'exceptional cases' or 'if it is not practicable to file such a matter pertaining to a particular Wing at that Wing', it may be 'filed at the other Wing with the leave of the Hon'ble Chief Justice'

9.20 Filing or receipt of a filed pleading does not entail any application of mind. When a case is presented at the Registry of the Court, it does not entail any intervention by the Court or any judicial orders to be passed. It is only a matter of procedure.

9.21 A procedural or a mechanical act not involving the exercise of judgment/

discretion is generally considered a ministerial act.

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9.23 Clearly in the light of the above, now it is clear that filing of a case in a Registry does not entail any adjudication and has to be treated as a ministerial function. Therefore, it is inherent in above stipulation as contained in the Circular 6 of 2010 that the 'other wing' (i.e., the Wing other than that to which the case relates), would stand conferred with the power only to receive the case for filing and nothing beyond.

9.24 Significantly, the main part of the Circular unequivocally notes the three stages of a case, being its filing, hearing and decision making, that is, all the stages of adjudication. As against this clear stipulation, the proviso confers the limited discretion to only permit filing of a matter pertaining to a particular Wing at the other Wing. The proviso does not permit hearing and decision making by a Wing other than the Wing to which the matter relates. The power conferred upon the Chief Justice by the proviso is restricted to permitting a matter only to be 'filed' at the other Wing and nothing more.

9.29 In the present case, the main part of the Circular 6 is clear and unequivocal. There is no ambiguity with regard to the powers conferred. In view of the above discussion, it is evident that after receiving the case at the filing counter by virtue of Circular No.6 of 2010, the same would require to be placed before the Wing to which it relates for hearing and decision.

9.30 I had put a query to Mr M. A. Qayoom, learned counsel for the non-applicant, as to how could the inconvenience caused to the other party by filing of the case in the other i.e. the Wing other than that to which the case relates, be addressed.

9.31 I had also put a question to learned counsel that if the matter had to be heard and decided in the 'other wing', why the party against whom such order was passed is not heard before the order so permitting is passed?

The only response to these queries was that there was no such practice of hearing the other side before such request for filing before other Wing was being considered.

9.32 This response fortifies the view I have taken that the power conferred the power of the Chief Justice under the proviso in Circular 6 of 2010 is restricted only to permit filing of a case in a Wing of the High Court other than to which it relates, and nothing more.

9.33 xxxxxxxxxxxxxxxxxxxxx

9.34 xxxxxxxxxxxxxxxxxxxxx

9.35 I was informed that it has been a practice not to issue notice to the opposite side so far as memos seeking permission under Circular 6 of 2010 are

concerned. This was the reason that order dated 16th August, 2018 was passed on the administrative side permitting Ms. Masooda Jabeen to file an appeal in Srinagar Wing.

9.36 For this reason as well, the use of the expression 'filing' in the proviso cannot be extended to include 'heard' and 'decide' as have been mentioned in the main part of the circular.

9.37 The position which, therefore, emerges is that so far as Circular no.6 of 2010 is concerned, it mandates a writ, appeal, etc., can be filed only in the Wing to which the matter relates. The only exception permitted to this mandate by the proviso is that in case of exceptional hardship, or impracticability to file the case in a particular Wing, a party is permitted to submit a request which has to be placed before the Chief Justice who may permit only 'filing' of the case in the Wing other than to which the case relates."

(Emphasis supplied)

35. There is yet another aspect of the matter which deserves to be considered. What will happen to the case after it has been permitted to be filed in the other wing? How is the case which has been so filed in a Wing other than to which it relates, be dealt with after working out of the permission of filing? This issue was raised and also answered in paras 10.1 to 10.3 in the order dated 29th November, 2018 in Kulwant Singh Johal & Ors. v. Mrs Masooda Jabeen & Ors, in the following manner:

"10.1 The question which remains to be answered is what will happen to the case after it has been permitted to be filed in the other Wing?

10.2 Here the distinction between permission to file a case in another Wing and an order transferring case for hearing and decision from one Wing of the High Court to the other Wing assumes importance, and has to be borne in mind.

10.3 So far as filing of a petition is concerned, it entails only the ministerial act of presenting a paper book (which could be paper book of writ petition, appeal etc.,) before the Registry of the Court which would scrutinize the same and, if in order, cause its registration and assignment of formal registration number as on the date of its filing. Hearing of a case takes place when the case is shown in the cause list before a Bench to whom the subject matter stands assigned as per the roster framed by the Chief Justice of the Court.

It would, therefore, appear that, upon exercise of discretion under the proviso of Circular 6 of 2010, after the case has been permitted to be so filed and received in the 'other' Wing of the High Court, it would have to be sent to the Wing to which the matter relates."

36. I have also noted very important facts and developments after 18.12.2010 when the Circular 6 was issued by the Chief Justice which I have recorded in paras 11.3 to 11.5 of the aforesaid judgment in CTA No.38/2018 as under:

"11.3 A very robust e-programme was put in place by the Court and very effective video-conferencing facilities stand made fully functional in both the Wings, that is, Jammu Wing and Srinagar Wing of this court. This has enabled even Full Court deliberations and meetings of the Court Committee on Video link without necessitating movement of the concerned Judges. On 22nd February, 2018, the first case was heard on video conferencing between the two Wings.

11.4 So far as the record of cases is concerned, all necessary records stand digitized. So even if a case is filed in one Wing, it can be heard at the other Wing without physical movement of its records. The same can be accessed by the electronic mode in the other Wing as well.

11.5 In a short span of less than a year, there are several instances of cases/applications filed in one Wing, being routinely heard by it a Bench of the other Wing. There are also instances when lawyers in two different Wings, are heard by a Bench in one Wing without any difficulty. Therefore, the difficulties expressed by litigants because of unavoidable compulsions in pursuing litigation in a particular Wing because of the jurisdictional requirements, under law, are obviated on account of the fact that both the Wings of the High Court are able to facilitate hearing of party located in Srinagar in the Jammu Wing or vice versa."

(Emphasis supplied)

37. In the present cases, the Chief Justice was conscious of the limitations of the discretion conferred upon him by the proviso to Circular 6 of 2010 when, by the orders dated 4th May, 2009, the prayers in the two applications for permission to file the writ petitions in the Srinagar Wing were granted. The applications seeking permission to file the writ petitions at Srinagar neither sought nor orders were passed thereon directing or permitting that the writ petitions could be heard and decided at the Srinagar Wing. In this background, OWP Nos. 431 and 432 of 2009 were only permitted to be filed in the Srinagar Wing and cannot be heard and adjudicated in the Srinagar Wing that is to say, in a Wing other than the Wing to which the matter relates.

38. As noted in the order dated 29th November, 2018 in CTA No.38/2018 titled Kulwant Singh Johal & Ors. v. Mrs Masooda Jabeen & Ors, (supra), overlooking the limited permission which is granted by the Chief Justice on the administrative side under the proviso to Circular 6 of 2010, the Registry and the parties had treated such permission as conferring the right of audience as well as adjudication to the parties at the Wing other than the Wing to which the case related.

39. I may note that Registry of the High Court in both Wings is thereafter working all matters strictly in compliance with the order dated 29th November, 2018.

40. In the background of the confusion which subsisted regarding the working of circular 6 and in the light of the order dated 29th November, 2018 in CTA

No.38/2018 titled Kulwant Singh Johal & Ors. v. Mrs Masooda Jabeen & Ors., Guideline no.94 stands issued on the 7th December, 2018. These Guidelines contain nothing new but really reinforce the existing position in respect of working of the permission granted under proviso to Circular 6 of 2010 dated 18th December, 2010. The Guideline No.94 reads as follows:

"In pursuance of Order dated 29.11.2018 passed by the Hon'ble High Court in CTA No.38/2018 IA No.01/2018 titled Kulwant Singh Johal & Ors Vs. Mrs. Masooda Jabeen & Ors. and for clarification/ proper implementation of Circular No.6 dated 18.12.2010 (Annexure-A), the following guidelines are issued:-

(i) Whenever permission to file a case pertaining to one Wing of the High Court in the other wing of the High Court is granted in accordance with the proviso to Circular No.6 dated 18.12.2010, the Registrar Judicial concerned shall, after entering it in a Register maintained for the purpose, send the record of the case to the Wing to which the matter relates, where it would be given a proper registration number with reference to the classification of the case.

(ii) In a case of above nature in which urgent ex-parte relief is being sought, the Registrar Judicial of the concerned Wing, where the case is received, shall digitally convey the records of the case to the Wing to which the matter relates for its hearing through video conference by the concerned Court as per the Roster. In this regard, the Registrars of the two Wings shall proactively engage to ensure expeditious hearing to the party seeking the same.

(iii) The party in whose favour permission for filing under the proviso to Circular 6 of 2010 has been granted shall be at liberty to make a separate or composite application under Rule 23 of the Jammu & Kashmir High Court Rules, 1999 seeking transfer of the case to the other Wing which shall be placed before Hon'ble the Chief Justice for its hearing (including through video conference) in accordance with the law.

By Order"

Whether the present applications seek review
of the permission granted on 4th May, 2009?

41. I now turn to examination of the submission of Mr Z. A. Shah, learned senior counsel appearing for the non-applicants, that the Chief Justice has no power to review the order of the Chief Justice granting the permission to file the writ petition in the Wing other than to which it relates.

42. In view of the above discussion and also the fact that petitioners in both the writ petitions were permitted only to file the writ petitions in Srinagar Wing and nothing more and the writ petitions having been so filed, the permissions dated 04.05.2009 have already worked themselves out and no review is necessary.

43. The manner in which the writ petitions ought to have been dealt with or proceeded with, however, has to be strictly in consonance with the limited

permissions which were granted. That is the aspect which alone has to be and has been considered.

Acquiescence by CBI, if at all, to the maintainability of the proceedings at the Srinagar Wing:

44. It has been vehemently contended by Mr Shah on behalf of the non-applicants that CBI has acquiesced in the orders granting permission and no application was filed for nine years. These applications ought therefore to be rejected.

45. My attention stands drawn to the counter affidavits to the writ petitions which were filed as back as on 23rd March, 2010. Mr Shamsi, learned ASGI, has pointed out the specific objection taken by the CBI in its responses to the writ petitions with regard to the maintainability of the writ petition.

46. It is trite that no jurisdiction can be conferred on a court which does not have jurisdiction over the case in law by consent of parties or acquiescence of any party. The delay in filing the applications is, therefore, inconsequential.

47. In the present case, the admitted position is that the records of the case are at Jammu.

48. It has been submitted by Mr Shamsi, learned ASGI, that after the interim stay, no proceedings at all have taken place in the writ petitions. I have been taken through the writ records. The matters have been simply adjourned without any proceedings at all for almost ten years. In this background, the listing of the writ petition on 14th of March, 2019 is of no relevance at all.

Power of the Chief Justice to transfer a case from one Wing of the High Court to another:

49. Before parting with this order, I may also advert to the power of the Chief Justice to transfer cases from one Wing to another.

50. This issue also stands elaborately considered by me in the order dated 29th November, 2018 in CTA No.38/2018 when my attention stood drawn to the Division Bench pronouncement reported at 1994 KLJ 304: AIR 1995 J&K 7 : H. S. Rainal v. Union of India and others. It was held by me as follows:

"9.10 This judgment, therefore, unequivocally declares the legal position that apart from the powers on the judicial side, the Chief Justice has wide administrative powers as conferred under the Constitution and under the rules of the Court. It has also been specifically held that under Rule 8 of the Jammu & Kashmir High Court Rules, 1999, the Chief Justice has the power to allot work to the judges and that "allotment" would include shifting of a case from one Wing of the High Court and allotting it to a judge at the other Wing of the Court.

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9.15 Lastly, my attention has been drawn by Mr M. A. Qayoom, learned counsel for the non-applicant, to the judgment reported at 2006 (II) SLJ 439 : Ghulam Nabi Shaida v. Chandan Mitra & anr. This judgment was concerned with an application for transfer of a private complaint from the Jammu Wing to the Srinagar Wing of this Court. Placing reliance on the enunciation of the law in H. S. Rainal, in para-4 of the order, the court had observed on the Cr.TA No.43/2005 as follows:

"4. The first issue would not detain us because it is no more *res integra*, The Chief Justice enjoys the requisite power to transfer a "case" from one Wing to the other Wing of the Court and vice-versa on the strength of power conferred on him by Rule 23 of Jammu & Kashmir High Court Rules, 1999 (new Rules) corresponding to old Rule 8 of the J&K High Court Rules, 1975. The legal position in this regard stands already settled by a Division Bench judgment of this Court in H.S. Rainal v. Union of India 1994 KLJ 304, holding broadly that the Chief Justice possesses the power to transfer cases from one Wing of the High Court to the other in terms of powers conferred on him under Rule 8 (old Rules) corresponding to new Rule 23 of the High Court Rules."

(Emphasis supplied)

Thus, so far as, Rule 23 is concerned, it cannot be disputed that it also empowers and enables the Chief Justice to assign work amongst the judges and also to transfer cases from one Wing of the High Court to the other and is not concerned with fresh filing by a party in a Wing other than the Wing of the High Court which has the jurisdiction to entertain a particular case."

51. Therefore, it is settled position that by virtue of Rule 23 of the Jammu and Kashmir High Court Rules, 1999, the Chief Justice of this High Court is amply empowered to transfer cases from one Wing of the Court to another. This power, as held by me in CTA No.38/2018, would be exercisable in a case after it stands filed in the Wing to which it relates, with notice and opportunity of hearing to the other side.

52. It cannot be denied that TADA is a special enactment and the statute has to be strictly followed. Power of transfer of cases would have to abide by the applicable statutes. However, for the view that I am taking it is not necessary for me to consider the prayer in the present applications for transfer of the petitions and these submissions.

53. Before me it is an admitted position that trial of the cases was pending before the court of competent jurisdiction which has been assigned the powers to try the cases under the TADA Act by virtue of a specific delegation and assignment. The petitioners were aggrieved by the two orders both dated 20th April, 2009 passed by the Designated TADA court at Jammu.

54. This aspect is left open for consideration, if, and when an application for transfer is brought and has to be adjudicated.

55. Conclusions

I. The proviso to Circular 6 of 2010 has a limited purpose of enabling filing the proceedings in a Wing of the High Court other than to which it relates. All other steps including hearing, consideration and decision has to be by the Wing to which it relates. The petitioners have accepted this when applications seeking permission to file the writ petitions relating to the Jammu Wing at the Srinagar Wing was sought.

II. The writ petitions have admittedly arisen out of the criminal proceedings at Jammu which were admittedly within the jurisdiction of the Jammu Wing of the High Court.

III. The permission granted by the Chief Justice under the Circular 6 of 2010 was on the administrative side, which permission was given *ex parte* without hearing the other side.

IV. Even if the CBI in the present case could be held to have recorded its consent or acquiesced to hearing of the writ petitions by the Srinagar Wing, such proceedings in this Wing would be by a court which does not have the jurisdiction to do so. The adjudication would be without authority of law and completely without jurisdiction.

V. The writ petitions can be heard and decided only by the Wing to which the matters relate i.e., the Jammu Wing.

VI. In view of the limited scope of the permissions under the proviso to Circular 6 of 2010 granted on 4th May, 2009, no orders of transfer of the writ petitions to the Jammu Wing to which the matters relate are required.

VII. There is no ambiguity at all to proviso to Circular 6 dated 18.12.2010 or the limited permission which was granted by the Chief Justice by the order dated 4th May, 2009. The writ petitions 431/2009 and 432/2009 cannot be taken up for consideration at Srinagar Wing and have to be sent to the Jammu Wing for hearing and decision in accordance with Circular 6 dated 18.12.2010 and Guideline 94 dated 7th December, 2018.

Result

56. The records of the writ petitions OWP No.431/2009 and OWP No.432/2009 would require to be forthwith sent to the Jammu Wing of the High Court of Jammu and Kashmir for hearing and decision in terms of Circular 6 of 2010 dated 18.12.2010.

57. The Registrar Judicial, Srinagar, shall take immediate steps in the matter for conveying the records to the Jammu Wing in terms of Circular/ Guidelines No.94 dated 07.12.2018 ensuring that no delay results in the hearing of the matters.

58. The Registrar Judicial, Jammu, shall inform counsels for the parties in the writ petitions regarding the listing of the case.

59. These applications are disposed of in the above terms.