

**IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR.JUSTICE C.S.DIAS**

Monday, the 14th day of October 2024 / 22nd Aswina, 1946
IA.NO.4/2024 IN WP(CRL.) NO. 445 OF 2022(S)

PETITIONER:

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RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY, GOVERNMENT OF KERALA, SECRETARIAT, TRIVANDRUM-695 001.
2. SECRETARY TO GOVERNMENT, HOME DEPARTMENT, GOVERNMENT OF KERALA, SECRETARIAT, TRIVANDRUM-695 501.
3. DIRECTOR GENERAL OF POLICE, KERALA, POLICE HEAD QUARTERS, TRIVANDRUM-695 010.
4. ADDITIONAL DIRECTOR GENERAL OF POLICE (CRIMES), POLICE HEAD QUARTERS, TRIVANDRUM-695 010.
5. INVESTIGATING OFFICER, DEPUTY SUPERINTENDENT OF POLICE, CRIME BRANCH, ALAPPUZHA-688 012.
6. STATE FORENSIC SCIENCE LABORATORY, REPRESENTED BY ITS DIRECTOR, THIRUVANANTHAPURAM-695 001.
7. ADDL.R7:P. GOPALAKRISHNAN @ DILEEP, PADMA SAROVARAM HOUSE, KOTTARAKADAVU, ALUVA, ERNAKULAM DISTRICT.

Application praying that in the circumstances stated in the affidavit filed therewith the High Court be pleased to set aside/quash the inquiry report 08/01/2024 submitted by the Hon'ble District and Session Judge, Ernakulam in respect of the inquiry conducted as per the directions of the Hon'ble High Court of Kerala in the judgment dated 07/12/2023 in W.P (Crl) No. 445 of 2022 and further to order an inquiry/investigation into the unauthorised access made to the memory card and pen drive while it is in the custody of Judicial Magistrate of First Class Angamali, Principal Session Judge Ernakulam and Special Judge (SPE/CBI) III Ernakulam in connection with crime No.297 of 2017 and which is pending trial as SC 118/2018 now before the Principal Session Judge, Ernakulam by a Special Investigation Team to be constituted by the Kerala State Police Chief headed by an officer not below the rank of an Inspector General of Police by registering appropriate crimes as per the provisions of the code of Criminal Procedure 1973 under the supervision of the Hon'ble Court by filing periodical reports before this Hon'ble Court by the investigating team regarding the progress of investigation within the time limit fixed by this Hon'ble Court for the ends of justice and to maintain the purity of Judicial System and Majesty of law.

P.T.O.

This Application coming on for orders upon perusing the application and the affidavit filed in support thereof, this Court's judgment dated 07/12/2023 & order dated 05/08/2024 in IA 4/2024 and upon hearing the arguments of M/S.T.B.MINI, GAURAV AGRAWAL & C.GEORGE THOMAS, Advocates for the applicant in IA/petitioner in WP(Crl.), SRI. T.A. SHAJI, DIRECTOR GENERAL OF PROSECUTION & SRI.P. NARAYANAN, ADDITIONAL PUBLIC PROSECUTOR for R1 to R5 in IA/WP(Crl.) and of SRI.B.RAMAN PILLAI (SENIOR ADVOCATE) along with M/S. PHILIP T.VARGHESE, THOMAS T.VARGHESE, ACHU SUBHA ABRAHAM, V.T.LITHA, K.R.MONISHA & NITYA R, Advocates for Addl.R7 in IA/WP(Crl.), the court passed the following:

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C.S.DIAS,J

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Dated this the 14th day of October, 2024

ORDER

The application is filed seeking the following reliefs:

“For the reasons stated in the accompanying affidavit it is most humbly prayed that this Hon’ble Court may be pleased to set aside/quash the inquiry report 8.1.2024 submitted by the Hon’ble District and Sessions Judge, Ernakulam in respect of the inquiry conducted as per the directions of the Hon’ble High Court of Kerala in the judgment dated 7.12.2023 in WP(Crl) No.445/2022 and further to order an inquiry/investigation into the unauthorised access made to the memory card and pen drive while it was in the custody of Judicial Magistrate of First Class, Angamali, Principal Sessions Judge, Ernakulam and Special Judge (SPE/CBI) III Ernakulam in connection with Crime No.297/2017 and which is pending trial as SC 118/2018 now before the Principal Sessions Judge, Ernakulam, by a Special Investigation Team to be constituted by the Kerala State Police Chief headed by an officer not below the rank of an Inspector General of Police by registering appropriate crimes as per the provisions of the Code of Criminal Procedure 1973 under the supervision of the Hon’ble Court by filing periodical

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reports before this Hon'ble Court by the investigating team regarding the progress of investigation within the time limit fixed by this Hon'ble Court for the ends of justice and to maintain the purity of Judicial System and Majesty of law.”

2. The applicant, who was the writ petitioner, has in the affidavit in support of the application, inter alia, contended that she had filed the writ petition to direct an investigation to be conducted into the unauthorised and illegal access of the memory card containing the visuals of the sexual assault on her as a result of the criminal conspiracy that was hatched by the accused persons in SC No.118/2018. Pursuant to the judgment of this Court in O.P.(Criminal) No.257/2022, it has come to light that the memory card containing the visuals was illegally accessed on 9.1.2018, while it was in the safe custody

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of the Judicial First-Class Magistrate, Angamali, on 13.12.2018, while it was in the safe custody of the Principal Sessions Judge, Ernakulam and, after committal, on 19.7.2021, while it was in the safe custody of the Court of Special Judge (SPE/CBI)-III, Ernakulam. There is every possibility of the viewing, copying and transmission of the visuals of the sexual assault on the applicant. The illegal access and transmission of the visuals violate the applicant's right to privacy and right to live with dignity guaranteed under Article 21 of the Constitution of India. This Court found that there was a failure to protect the applicant's fundamental right to privacy and accordingly allowed the writ petition. The District and Sessions Judge

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Ernakulam (Inquiry Authority) was directed to conduct a fact-finding inquiry regarding the alleged unauthorised access of the memory card, its copying and the transmission of its contents. The Inquiry Authority was permitted to seek any agency's assistance, including the Police, to conduct the inquiry and with the applicant's participation. Even though there was no direction to conduct the inquiry 'in camera' or 'in secrecy', the Inquiry Authority conducted the inquiry in high secrecy without complying with the directions of this Court. The applicant was denied an opportunity to participate in the inquiry. The applicant was also not given any information about the inquiry. The inquiry was conducted without the involvement of any competent

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agency, which would have afforded effective assistance to the Inquiry Authority in unveiling the truth. The applicant was not even served with a copy of the inquiry report. After this Court allowed I.A. No.1/2024 in the present writ petition, a copy of the inquiry report was given to the applicant. The applicant was shocked and surprised to read the inquiry report. The applicant's request for copies of the statements of the witnesses was also rejected. The inquiry report is legally and factually unsustainable in law. The inquiry has been conducted in violation of the directions of this Court. The basic principles and legal norms have not been observed in the fact-finding inquiry. The Inquiry Authority has not understood the nature, object and

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purpose of the fact-finding inquiry. This Court had not directed the District and Sessions Judge, Ernakulam, to conduct the fact-finding inquiry. The Inquiry Authority is only a 'persona designata' functioning as District and Sessions Judge. The Inquiry Authority styled herself as 'this Court' to empower herself to unauthorisedly use the evidence collected in S.C.No.118/2018 recorded by the Court of Session, Ernakulam. By borrowing evidence from S.C.No.118/2018, the Inquiry Authority has committed grave illegality and has become disqualified under law from continuing the trial in S.C.No.118/2018. The Inquiry Authority should have proceeded with the inquiry only after disclosing her interest, which was not done. Neither the applicant nor

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this Court knew when the inquiry was entrusted to the present Inquiry Authority. The Inquiry Authority has conducted the inquiry in a perfunctory manner to safeguard the culprits who had illegally obtained the pen drive and memory card, which have been used for a long time as toys. The findings in the inquiry report are baseless. The findings are solely based on believing the alleged confessions of the culprits without collecting any scientific evidence to ascertain the truth. The intentional avoidance of expertise agencies and the Police was deliberate. The findings in the inquiry report are perverse, illegal and based on assumptions, presumptions, surmises and conjectures. In a nutshell, the findings of the Inquiry Authority are wrong.

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Therefore, a de novo inquiry/investigation is necessary.

An investigation may be ordered by a Special Investigation Team of the State Police Chief, Kerala State, under the supervision of this Court. Hence, the application.

3. On 12.04.2024, this Court posted the present application for hearing on the question of maintainability. Therefore, the question is whether the application is maintainable.

4. Heard; Sri. Gaurav Agrawal, the learned Senior Counsel appearing for the applicant, Sri. C.S Hrithwik, the learned Senior Public Prosecutor and Sri. Philip T. Varghese, the learned counsel appearing for the additional seventh respondent.

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5. The learned Senior Counsel appearing for the applicant reiterated the contentions in the application. He contended that the application is maintainable because the Inquiry Authority has not complied with the directions of this Court. The applicant has only sought ancillary and incidental directions to implement the judgment in its letter and spirit. It would not have been necessary for the applicant to approach this Court if the Inquiry Authority had acted as per the judgment. This Court has to visualise the plight of the applicant, who has no other remedy but to approach this Court. The application is maintainable because this Court is dealing with the violation of fundamental rights, unlike a civil suit or criminal trial where the strict rules of

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procedure are applicable. The Honourable Supreme Court has held in many cases that strict rules of procedure are not applicable in writ proceedings dealing with violation of fundamental rights. The learned Senior Counsel relied on the decision of the Honourable Supreme Court in **State of Punjab and another v. Shamlal Murari and another** [(1976) 1 SCC 719] to support his contention that an application in a disposed writ petition is maintainable.

6. The learned Public Prosecutor submitted that the State Government has no submissions to be made, but will comply with any direction that is passed by this Court.

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7. The learned counsel appearing for the additional 7th respondent contended that the application is not maintainable in law. He submitted that the applicant had filed the writ petition seeking six reliefs. The applicant's request to conduct a free, fair and complete investigation regarding the alleged illegal access, tampering and transmission of the memory card's contents was disallowed by this Court. The judgment has become final. The Inquiry Authority has completed the fact-finding inquiry. The present application is an indirect and veiled attempt to challenge the inquiry report and resurrect the disallowed prayer No. (i) in the writ petition, which is impermissible in law. If the applicant is aggrieved by the fact-finding report, her

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remedy is to challenge the same independently in the right royal manner, and, if she has a case that the Inquiry Authority has failed to comply with the directions of this Court, her remedy is to file a contempt of court case. The affidavit supporting the application runs into 51 pages, which establishes that it is not an application for ancillary reliefs. No document, including the fact-finding report, is produced to support the application. The reliefs sought in the application are independent, distinct, and arise from a new cause of action. The reliefs sought in the application are unsustainable in law as they are filed in a disposed writ petition (criminal). This Court has become functus officio. The learned counsel relied on the decisions of the Honourable

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Supreme Court in **Nazma v. Javed alias Anjum** [(2013) 1 SCC 376], **State of Uttar Pradesh v. Brahm Datt Sharma and another** [(1987 2 SCC 179], **Hari Singh Mann v. Harbhajan Sing Bajwa and others** [(2001) 1 SCC 169] and a Bench decision of this Court in **State of Kerala v. Govindan Nair** [1980 KLT 186] to bolster his contentions.



8. The applicant had filed the writ petition seeking the following reliefs:

“i) To issue a writ of mandamus, order or direction directing the respondents 4 and 5 to do a free, fair and complete further investigation in Crime No.297/2017 of Nedumbassery Police Station pending trial as SC No.118/2018 before the Additional Special Sessions Court (CBI/SPE-III, Ernakulam) inclusive of the illegal access, tampering and transmission of the contents of the memory card while it was in the safe custody of the trial court and also tampering made in the mobile phones surrendered by the accused No.8 as per the direction of this Hon’ble Court and to monitor said investigation by this Hon’ble Court or

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any other authority as fixed by this Hon'ble Court without any illegal interference from any course by calling upon periodical report regarding the progress of the investigation till further final report is submitted before the court below;

(ii) To issue a writ of mandamus, order or directions directing the 2nd respondent conduct a thorough investigation on the change of hash value of the memory card (sandisk 8 GB Micro SD Card seized by K.G Babukumar, Dy.S.P, Aluva on 20.2.2017 and kept in the safe custody of the trial court (Principal Sessions Judge, Ernakulam) under the supervision of this Hon'ble Court.

(iii) To direct the Investigating Officer to produce the report from the FSL, which was seized by him with regard to the change of hash value of memory card during the same was in judicial custody along with the statement of the FSL, authorities;

(iv) To issue a writ of mandamus, order or direction by this Hon'ble Court initiating stringent action against the persons who are allegedly involved in the tampering of memory card in the judicial custody and direct the second respondent to register a crime if so required with regard to tampering of memory card in the judicial custody and to investigate the same either under the new crime or as part of the further investigation in Crime No.297/2017 of Nedumbassery Police Station [SC 118/2028 of the Addl.Special Court (CBI/SPE III, Ernakulam)].

(v) To issue an order or direction directing the Additional Special Sessions Court (CBI/SPE-III, Ernakulam) to forward Ext P1 application submitted by the Investigating Officer in Crime No.297/2017 filed before the Additional Special Sessions Court (CBI/SPE-III, Ernakulam) on 4.4.2022 along with the memory card to the 6th respondent

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for examination and to furnish details as specified in Ext P1.

(vi) To issue such other order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case”.

9. This Court disposed of the writ petition by issuing the following directions:

“61. Therefore, the following directions are issued:

(i) The District and Sessions Judge, Ernakulam, shall conduct a fact-finding inquiry on the allegations of unauthorized access to the memory card and copying and transmitting its contents.

(ii) The District and Sessions Judge is at liberty to seek the assistance of any agency, including the Police for conducting the inquiry.

(iii) The petitioner is at liberty to present written submissions before the District and Sessions Judge.

(iv) In the inquiry, if the commission of any offence is disclosed, the District and Sessions Judge shall proceed as provided in the Code of Criminal Procedure, 1973.

(v) The District and Sessions Judge shall see that the inquiry does not affect the trial of the Sessions Case No.118/2018.

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(vi) The District and Sessions Judge shall complete the inquiry within one month from this day.”

10. By order dated 21.02.2024, this Court directed the Inquiry Authority to provide the applicant with a copy of the inquiry report.

11. Subsequently, the applicant filed I.A.No.3 of 2024 for directing the Inquiry Authority to issue certified copies of the statements of the persons examined in the inquiry and I.A.No.4 of 2024, the instant application. By order dated 12.04.2024, this Court allowed I.A.No.3 of 2024 by directing the Inquiry Authority to issue the certified copies of the statements of the witnesses and posted the instant application for hearing on the question of maintainability.

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12. The additional 7th respondent had challenged the order in I.A. No.3 of 2024 by filing W.A.No.581/2024 before this Court. By judgment dated 16.04.2024, the writ appeal was dismissed.

13. The major contentions in the application are: (i) the Inquiry Authority has not conducted the fact-finding inquiry as directed by this Court, (ii) the Inquiry Authority has not sought the assistance of any agency, including the Police, (iii) the Inquiry Authority has not proceeded under the Code of Criminal Procedure as directed by this Court, (iv) the Inquiry Authority had assumed that it was the District and Sessions Judge, Ernakulam, especially when there was no direction that the inquiry has to be conducted by the Principal District

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Court or the Court of the Principal Sessions Judge, (v) the Inquiry Authority has styled herself as 'this Court' and has unauthorizedly conducted the inquiry and made use of the evidence in S.C No.118 of 2018, (vi) the findings in the inquiry report are unsustainable in law, (vii) the Inquiry Authority has conducted the inquiry in a perfunctory manner to safeguard the culprits, (viii) the Inquiry Authority has arrived at the findings in the inquiry report solely based on the confessions of the culprits, (ix) the Inquiry Authority has deliberately avoided expert agencies to collect reliable evidence. For the above reasons, the fact-finding report has to be set aside and an investigation into the unauthorised access of the contents of the memory card and pen

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drive have to be conducted by a Special Investigation Team.

14. On analysing the contentions and the reliefs in the application, it is apparent that the second relief in the application is almost identical to the first relief in the writ petition, which was disallowed by this Court, and the District and Sessions Judge Ernakulam was directed to conduct a fact-finding inquiry on the allegations of unauthorised access of the contents of the memory card and its copying and transmission. Admittedly, the Inquiry Authority has conducted the fact-finding inquiry.

15. Now, the question is whether this Court can decide the legality and correctness of the fact-finding

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report, set aside the same, and appoint a Special Investigation Team to investigate into the alleged unauthorised access of the contents of the memory card in a disposed writ petition, by way of an interlocutory application.

16. In almost an identical situation in **Nazma's** case (supra), the Honourable Supreme Court has deprecated the practice of the High Courts entertaining miscellaneous applications in disposed writ petitions and has laid down the following principles of law, which reads as under:

“8. We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7-1-1999, there was no lis pending in the High Court wherein the respondent could have filed any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of

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the Code of Criminal Procedure or the rules of the court, cannot be resorted to as a substitute of fresh litigation. The record of the proceedings produced before us shows that directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because Respondent 1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side. The impugned orders dated 30-4-1999 and 21-7-1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. **The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court.”** We are sorry to note that in spite of the clear pronouncement of law by this Court, still, the High Courts are passing the similar orders, which practice has to be deprecated in the strongest terms. Of late, we notice that the High Courts are entertaining writ petitions under Articles 226 and 227 of the Constitution, so also under Section 482 CrPC and passing and interfering with various orders granting or rejecting request for bail, which is the function of ordinary Criminal Court. The jurisdiction vested on the High Court under Articles 226 and 227 of the Constitution as well as Section 482 CrPC are all exceptional in nature and to be used in most exceptional cases. The jurisdiction under Section 439 CrPC is also discretionary and it is required to be exercised with great care and caution.

12. We are of the view that the High Court has committed a grave error in not only entertaining the criminal miscellaneous application in a disposed of writ petition, but also passing an order not to arrest the 1st respondent till the conclusion of the trial. Grant of bail or

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not to grant, is within the powers of the regular Criminal Court and the High Court, in its inherent jurisdiction, not justified in usurping their powers. Once the criminal writ petition has been disposed of, the High Court becomes functus officio and cannot entertain review petitions or miscellaneous applications except for carrying out typographical or clerical errors. In the instant case, the High Court has entertained a petition in a disposed of criminal writ petition and granted reliefs, which is impermissible in law”.

(highlighted)

17. In **State of Uttar Pradesh vs. Brahm Datt Sharma and another** [supra], the Honourable Supreme Court has held as follows:

“10. The High Court's order is not sustainable for yet another reason. Respondents' writ petition challenging the order of dismissal had been finally disposed of on 10.8.1984, thereafter nothing remained pending before the High Court. No miscellaneous application could be filed in the writ petition to revive proceedings in respect of subsequent events after two years. If the respondent was aggrieved by the notice dated 29.1.86 he could have filed a separate petition under Art. 226 of the Constitution challenging the validity of the notice as it provided a separate cause of action to him. The respondent was not entitled to assail validity of the notice before the High Court by means of a miscellaneous application in the writ petition which had already been decided. The High Court had

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no jurisdiction to entertain the application as no proceedings were pending before it. The High Court committed error in entertaining the respondent's application which was founded on a separate cause of action. **When proceedings stand terminated by final disposal of writ petition it is not open to the Court to reopen the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action. If this principle is not followed there would be confusion and chaos and the finality of proceedings would cease to have any meaning**".

(highlighted)

18. In **State of Kerala v. Govindan Nair** (supra), a Division Bench of this Court has observed thus:

"2. We need not, and do not propose to, consider whether Ext. A2 order, passed by the Director of Public Instruction was in violation of the judgment of this Court in OP. No. 1546 of 1976. Assuming this was so, was the said order liable to be quashed in a miscellaneous petition? Could a direction, for reconsideration and fresh orders issue on such petition? **We think the respondent is not entitled to have the order quashed or set aside in effect, on a mere CMP for directions. To encourage that to be done, would, we are afraid, flood this Court with miscellaneous petitions claiming substantive relief. It was inappropriate that the**

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learned Judge proceeded in effect to set aside Ext. A2 order on such a petition. The learned Judge himself has noted that ordinarily the petitioner could raise such question only by filing a fresh writ petition or by initiating other appropriate proceedings such as an application for contempt of Court. But the learned Judge was unhesitatingly of the view that this Court could entertain such a petition for direction and grant relief by way of quashing Ext. A2 order in exercise of the inherent powers of this Court. We are unable to accept or to agree with this proposition as thus stated by the learned Judge. The learned Judge's judgment in effect amounts to quashing Ext A2 order, as there was a direction to the Director of Public Instruction to pass fresh orders taking due note of the directions given in the judgment and pointing out that the judgment in OP No. 1546 of 1976 had clearly and unhesitatingly expressed the view that twelve years service irrespective of whether it was as High School Assistant or not would count for the purpose of getting the higher grade. While we are at one with the learned Judge that Courts of law are there to do justice, we cannot countenance their breaking the cordon of procedural shackles. We allow this appeal and set aside the judgment of the learned Judge and direct that CMP. No. 5286 of 1978 will stand dismissed. We make it clear that nothing contained in this judgment will preclude the respondent from taking appropriate proceedings in accordance with law for the purpose of vindicating his rights. No order as to costs."

(highlighted)

19. The decision in the **State of Punjab and another v. Shamlal Murari and another** (supra), relied

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on by the learned Senior Counsel for the applicant, is not applicable to the facts of the case on hand because that was a case in which the Honourable Supreme Court considered Rule 3 of the High Court Rules and Orders (Punjab and Haryana) and held that failure to produce three copies of the memorandum of appeal is not an irregularity.



20. On an overall consideration of the facts of the case and the exposition of the law in precedents cited above, I am of the definite view that the reliefs sought in the present application are substantive in nature and arise from a fresh and independent cause of action, and

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are not ancillary in nature. Hence, I hold that the application is not maintainable in law.

Consequentially, the application is dismissed, without precluding the applicant's right to initiate appropriate proceedings in accordance with law.

sks/5.10.2024



sd/-

C.S.DIAS, JUDGE