IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

TUESDAY, THE 22ND DAY OF MAY 2018 / 1ST JYAISHTA, 1940

WA.No. 625 of 2018 IN WPC. 5522/2018

AGAINST THE JUDGMENT IN WP(C) 5522/2018 DATED 6.3.2018 OF
HIGH COURT OF KERALA

APPELLANT/5TH RESPONDENT IN W.P(C):

FR. SEBASTIAN VADAKKUMPADAN
AGED 75 YEARS, S/O.LATE V.T THOMAS, (PRO-VICAR GENERAL)
ARCH BISHOP'S HOUSE,
BROADWAY, ERNAKULAM, KOCHI 682 031

BY ADVS.SRI.VARGHESE C.KURIAKOSE
SRI.P.J.JOSE
SRI.K.O.MANUEL (KOPRAMB)
SMT.SEENU SADIQUE
SRI.VINCENT RAPHAEL
SRI.V.P.POULOSE

RESPONDENTS/RESPONDENTS/PETITIONER & RESPONDENTS NO.1 TO 4 AND 6 IN W.P(C) NO
5522/2018:

1. SHINE VARGHESE
S/O. VARGHESE, AGED 37 YEARS, NJARACKAVELI HOUSE,
CHERTHALA P.O, PIN 688 524
MOBILE NO 8281084231

2. STATION HOUSE OFFICER
CENTRAL POLICE STATION,
ERNAKULAM 682 031

3. THE COMMISSIONER OF POLICE
KOCHI CITY,ERNAKULAM,
KOCHI 682 031

4. MAR GEORGE ALANCHERRY
S/O. LATE PHILIPOSE, AGED 70
MAJOR ARCH BISHOP OF THE SYRO MALABAR CHURCH,
ARCH BISHOP HOUSE, BROADWAY, ERNAKULAM 682 031

5. FR.JOSHY PUTHUVA,
PRO-VICAR, ST. JOHN'S CHURCH, UNIVERSITY CENTRE,
CUSAT,KOCHI 682 032

6. SAJU VARGHESE(PAN AYRPS8036K)
(AADHAAR NO 5274 2282 0711)
AGED 39 YEARS, RESIDING AT PADAMUGHAL
GOLDEN OAK VILLA,
VAZHAKALA VILLAGE, KANAYANNUR TALUK,
KAKKANADU P.O, KOCHI 682 030

7. STATE OF KERALA
REP. BY ITS SECRETARY, DEPT. OF HOME,
TRIVANDRUM 695 001.

R2-R3& R7 BY ADV. SRI.SUMAN CHAKRAVARTHY, SR. GOVT.PLEADER
R5 BY ADV. SRI.ISSAC M.PERUMPILLIL
R5 BY ADV. SRI.JIJO PAUL KALLOOKKARAN
R1 BY ADV. SRI.JOBY CYRIAC
R1 BY ADV. SRI.B.RAMAN PILLAI (SR.)
R6 BY SRI. K.V.SABU
R BY ADV.SRI THOMAS GEORGE MEVADA (SR)
R BY SRI.AMAL GEORGE
R BY SRI.N.A.MURALEEDHARAN
R4 BY ADV.SRI JOHN VARGHESE
R5 BY ADV.S.RAJEEV

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 3.4.2018 ALONG WITH W.A.No.626/2018 & CONN.CASES,THE COURT ON 22.5.2018 DELIVERED THE FOLLOWING:

Antony Dominic, C.J. & Dama Seshadri Naidu, J.

W.A. Nos.625, 626, 632, 638 & 642 of 2018

Dated this the 22nd day of May 2018

JUDGMENT

Dama Seshadri Naidu, J.

Introduction:

T*he* LORD *saw that the wickedness of man was great in the earth, and that every intention of the thoughts of his heart was only evil continually.* Genesis 6:5

Whose wickedness is it any way? We shall see.

1. A Diocese, a district under the pastoral care of a bishop in the Christian Church, combines its spiritual and secular affairs. It decides to sell some of its property. Authorised, a couple of office bearers sells the property, but faces allegations of misappropriation. A few members of the congregation complain:

at least four of them approach either the police or the court. Acting on such complaint, a competent criminal court takes cognizance and decides to try the matter. But others persist with police complaints.

2. When the police allegedly refused to register a crime, they approached this Court. They contend that only police could unravel the crime. A learned Single Judge allows the writ petition; the police act on the judicial directive and register a crime. In the appeal, the aggrieved office bearers question that direction.

3. Can the impugned judgment be sustained? Do the complainants have any efficacious alternative remedies available to them, for the public-law remedy is the last resort in private affairs?

Facts in Brief:

(a) W.P. (C) No.5522 of 2018

4. Shine Varghese is a member of Ernakulam-Angamaly Arch Diocese, which conducts its affairs, Shine claims, as per the Code of Canons of the Eastern Churches, ("the Code of Canons") and its bye-laws. Those Cannons and bye-laws also cover the ecclesiastical elements –church's properties.

5. Diocese's Arch Bishop is Mar George Alancherry; its finance officer is Fr. Joshy Puthuva, a priest; and one of the Pro-Vicar Generals is Fr. Sebastian Vadakkumpadan.

6. A couple of years ago, the Diocese wanted to establish a medical college. For that purpose, in 2015, it purchased five pieces of land for Rs.58,78,25,930/, most of which it borrowed from banks. The proposal not fructifying and the debt mounting, the Diocese wanted to sell away some of its other properties. In March 2016 the Diocese's Finance Council entrusted the task to Fr. Joshy and Fr. Sebastian. Later, the Consulters' Forum, another administrative wing, after accepting the Finance Committee's proposal, wanted those two persons to sell the land subject to, among other things, these conditions: (i) The land must be sold at "an average price of Rs.9,00,000/- per cent"; (ii) all the five properties must be sold as a single lot.

7. In sum, the Diocese decided to sell 301.76 cents for an expected Rs. Rs.27,15,84,000/-. The sale thus decided, then entered the commercial considerations and the attendant temporal travails and evils. Now the allegations pour forth in a torrent.

8. Shine alleges that even before the Consulters' Forum consented to sell the property, the Arch Bishop, Fr. Joshy and Fr. Sebastian had hatched a criminal conspiracy to gain illegally; so they authorized one Ajas to sell the property at Rs.9,05,000/- per cent. Later, they further conspired and replaced Ajas with Saju Varghese, a realtor. They schemed, the allegation goes, to misappropriate a substantial part of the sale money.

9. Between August 2016 and September 2017, the Arch Bishop and the other two priests, according to Shine, divided the property into 36 plots and executed 36 sale deeds for Rs.13,51,44,260/-. Even out of that amount, the Diocese received only Rs.9,13,36,600/-, which also included Rs.1,14,00,000/- received from “unknown persons.”

10. In this frenzy of sales involving tiny extents, Saju himself purchased 60.29 cents for Rs.6,62,962/- for cent though its market value is Rs.28,00,000/- per cent. Shine’s “enquiries” revealed that out of Rs.3,99,70,000/- shown in one document, the Diocese received from Saju only Rs.14,00,000/-. Though Saju had not paid the balance amount, the two priests entrusted with selling the land issued a false receipt.

11. In brief, Shine alleges that the Arch Bishop and the two priests violated the Consulters Forum's mandate and sold the property for a throw-away price. They realised less than half the expected sale price. And Fr Joshy admitted before the Financial Council on 13.09.2017 that he had received Rs.26 crores, but credited to the Diocese's account Rs.8,00,00,000/- only.

12. With the allegations of criminal breach of trust and misappropriation breaking out in the open, Fr Joshy was constrained to appoint an in-house inquiry committee. The committee, asserts Shine, conducted a detailed inquiry and unearthed the misdeeds of the Arch Bishop, the two priests and Saju, the realtor: those misdeeds are offences under sections 120B, 406 and 415 IPC.

13. Damning as the report had been, the Diocese did not, Shine alleges, desire to bring the culprits to book. So Shine, a parishioner, took upon himself the task of prosecuting the perpetrators: he filed the Ext.P1 complaint before the Station House Officer, Central Police Station, Ernakulam. But the SHO refused to register a crime, nor did he issue a receipt, his refrain being that "he had instructions from higher-ups" not to register any crime concerning "Syro-Malabar

Church Land-deal issue." Even the Commissioner of Police, Kochi, has not entertained Shine's request. So Shine filed WP (C) No.5522 of 2018, seeking mandamus to the police officials to register a crime and to investigate it.

(b) W.P. (C) No.5997 of 2018:

14. As Shine Varghese did, Martin Payyappilly, another parishioner, too, complained to the police about the same alleged offence. He suspected that the police had not acted on his complaint because Saju Varghese had been interfering and influencing. Meanwhile, Martin came to know that Original Petition (Crl.) No.64 of 2018, at the behest of another parishioner, was pending before this Court. And it dealt with the same issue. So he filed W.P. (C) No.5997 of 2018, complaining that the police's refusal to register a crime and this Court's delay in dealing with the OP (Crl.) will defeat the ends of justice.

The Impugned Judgments:

15. The learned Single Judge, on 6th March 2018, allowed W.P (C) No.5522 of 2018: the SHO, Central Police Station, Ernakulam, must register a crime and "investigate the crime properly and impartially."

16. On the same day, the learned Single Judge disposed of W.P. (C) No.5997 of 2018, "based on the same observations" as made in W.P. (C) No5522 of 2018.

Appeals:

17. Mar George Alancherry, the Arch Bishop, filed WA No.626 of 2018; Saju Varghese filed WA Nos.632 and 638 of 2018; Fr Sebastian WA No.625 of 2018; and Fr Joshua WA No.642 of 2018.

18. Saju Varghese, the realtor, also filed WA No.632 of 2018; that appeal arises out of WP (C) No.5997 of 2018, filed by Martin Payyappilly, another parishioner.

Submissions:

Appellants':

19. Shri K. V. Viswanathan, the learned Senior Counsel, appearing for the appellants in WA Nos.626 and 642 of 2018, has led the arguments. Succinctly stated, the learned Senior Counsel has submitted that recourse to Article 226 must be under exceptional circumstances, for this court's power of judicial review is an extraordinary remedy unavailable for the mere asking. Shri Viswanathan has drawn our attention to sections 156 (3) and 190 of

the Criminal Procedure Code ("Code"), to contend that any complainant, alleging of a cognizable offence, has efficacious, alternative remedies available, when the police refuse to register a crime.

20. Underlining the enormous impact of any criminal proceedings on a person's life, liberty and reputation, Shri Viswanathan has submitted that the impugned judgment has gone far beyond making mere *prima facie* observations about the police officer's refusing to register a crime, despite the allegations making out a cognizable offence. Besides referring to copious caselaws, the learned Senior Counsel has asserted that *Lalita Kumari v. State of UP*[1] has not done away with the settled principles of law that the police refusing to register a crime, the complainant must take recourse to other provisions of the criminal procedure code, rather than rushing to the High Court. According to him, *Lalita Kumari* deals with an entirely different issue: have the police got any discretion to indulge in a preliminary enquiry, without registering a crime even if the complaint *prima facie* reveals a cognizable offence?

1[0] (2014) 2 SCC 1

21. On the technical front, Shri Viswanathan stressed on issue estoppel. He pointed out that before Shine, three others had lodged similar complaints and raised identical issues: that the appellants have committed a crime. The circumstances are the same, the allegations are identical, and the accused, too, are the same. According to him, in one instance, a competent criminal court has ruled that the matter is of "civil in nature." So issue estoppel, he asserts, applies on all fours. In the end, Shri Viswanathan has summed up his submission and urged us to allow the writ appeals for, according to him, the impugned judgement could not be sustained on the touchstone of established legal principles.

22. The other learned counsel appearing for the remaining appellants, besides adopting his arguments, have supplemented with their own, supplying what they felt to be further justification to have the impugned judgment nullified.

The Respondents':

The Public Prosecutor:

23. The learned Public Prosecutor has submitted that the complainant approached the police on 16th January 2018, submitted a

compliant, but never bothered even to collect the receipt. Instead, he rushed to the High Court on the very same day and filed the writ petition, within a couple of hours of his submitting the complaint. He argues that the entire allegation that the police refused to register a crime or the insinuation that the police have been acting under any political pressure has no basis. According to him, the complainant's action reeks of *mala fides*.

The Complainant's/Respondent's:

24. Shri B. Raman Pillai, the learned Senior Counsel, appearing for Shine Varghese, the complainant, submitted that Shine has no personal axe to grind; in fact, he has complained against an offence involving public interest. As a practising Christian, and as being a member of the diocese, Shine did all he could to persuade the police to register a crime. Only when they refused to act on his complaint, was he constrained to approach this Court.

25. Shri Raman Pillai has, first, submitted that the appeal is not maintainable. According to him, this Court cannot entertain an intra-court appeal once the primary adjudication, even under Article 226, involves a criminal matter. He has, in the alternative, also submitted

that the impugned judgment has considered every legal nuance and allowed the writ petition, especially, after drawing precedential support from the decision of a Constitution Bench: *Lalita Kumari*. The learned Senior Counsel emphasised that the impugned judgment has only referred to the appellants' admissions in the in-house enquiry. That is, the impugned judgment observed nothing travelling beyond the brief, much less affecting the appellants' interests, or disturbing the presumption of their innocence.

26. In the end, the learned Senior Counsel has submitted that the appellants, as the accused, have a multitier-protection and could assail the investigation, the enquiry, and the trial of the crime as well, whenever they find justifiable grounds.

27. Heard Shri K. V. Visvanathan, the learned Senior Counsel for the appellants in WA Nos.626 and 642 of 2018, Shri K. V. Sabu, the learned counsel for the appellant in WA Nos.632 and 638 of 2018, Shri Varghese C. Kuriakose, the learned counsel for the appellant in WA No.625 of 2018; the learned Public Prosecutor; and Shri B. Raman Pillai, the learned Senior Counsel for the complainant, besides perusing the record.

Analyses:

What is the Grievance?

28. A member of a Christian congregation, a Diocese, complains to the police about the office bearers' alleged misdeeds amounting to cognizable offences. On the very same day or the next day, he files a writ petition. He alleges that the police have refused to register an FIR. So he wants this Court to direct the police to register a crime and investigate it.

The Issues:

29. (I) This Court, per a learned Single Judge, entertained the writ petition under Article 226 of the Constitution; a learned Single Judge rendered the impugned judgment, undoubtedly, by exercising "criminal jurisdiction." In the face of Clause 10 of the Letters Patent, does an intra-court appeal lie against that judgment?

(II) Other parishioners earlier filed similar complaints against the same set of people that they had committed cognizable crimes. In one instance, a competent court has held that the allegations are of civil nature. This finding remaining unaffected, does the principle of *issue estoppel*, first and foremost, affect the writ petition?

(III) The public law remedy under Art.226 of the Constitution of India permits the Constitutional Courts to judicially review the decisions, among others, of officials. The police, as officials, are amenable to judicial review. Their alleged refusal to act—to register a crime—is sought to be challenged under Article 226. But the Criminal Procedure Code provides for statutory remedies if the police refuse, say, to register a crime. Then, can a complainant disregard those remedies and insist on a writ remedy?

(IV) We have a collateral issue, too, to be answered: Does the Supreme Court in *Lalita Kumari* permit a complainant to do away with the statutory remedies and, instead, take a straight recourse to judicial review?

Discussion:

Issue No.I:

Is the writ appeal maintainable?

30. Indeed, Shri Raman Pillai has strenuously contended that an intra-court appeal is not maintainable if the decision, in the first instance rendered by a learned Single Judge, even under Article 226, falls under criminal jurisdiction. In such cases, Clause-10 of the Letters

Patent is unavailable. To support his contention he has relied on *Ram Kishan Fauji v. State of Haryana*.[2]

31. A three-Judge Bench of the Supreme Court in *Ram Kishan Fauji* has held that the nomenclature of a writ petition is not the governing factor; "what is relevant is what is eventually being sought to be enforced." If the High Court adjudicates, in the first instance, under Article 226, "in the exercise of criminal jurisdiction" it cannot entertain an intra-court appeal, which stands prohibited under Clause 10 of the Letters Patent.

32. But this objection cannot detain us for long. Recently, a Division Bench, to which one of us (Antony Dominic, C.J.) being a party, elaborately considered the issue in *State of Kerala v Mohammed*[3]: It has examined Clause 10 of the Letters Patent vis-à-vis Kerala High Court Act, and has held that the Division Bench has examined *Ram Kishan Fouji* in which the Supreme Court considered clause-10 of the Letters Patent as applicable to the erstwhile Punjab & Lahore High Courts. The Bench has also observed that clause-10 is in

2(2017)5SCC533

3 Order dated 23.3.2018 in W.A.No.628 of 2018

para materia with clause-15 of the letters patent as applicable to Madras High Court. Eventually, the Division Bench has examined clause-15 of the letters patent of the Madras High Court vis-à-vis Section 5 of the Kerala High Court Act.

Section 5 of the Kerala High Court Act mandates that an appeal shall lie to a bench of two judges from "(i) a judgment or order of a Single Judge in exercise of original jurisdiction), and (ii) a judgment of a Single Judge in exercise of appellate jurisdiction in respect of a decree or order made in exercise of original jurisdiction by a subordinate court." Thereafter, drawing parallels between clause-15 of Letters Patent and Section 5 of Kerala High Court Act, the Division Bench has held that the restrictions contained in clause-15 of the Letters Patent are deliberately not incorporated in Section 5 of the Kerala High Court Act; therefore, "there is no exclusion of the orders passed by a learned Single Judge in exercise of a criminal jurisdiction." Pertinently, as was observed in the order, earlier the same line of reasoning was advanced and accepted in *Rugmini Ammal v. Narayana*

Reddiar[4] and that conclusion later stood affirmed by the Supreme Court in *Narayana Reddiar v Rugmini Ammal*[5].

33. Given the emphatic enunciation of law by a co-equal Bench of this Court, we reckon—nay, we are bound to hold—that the intra-court appeal is eminently maintainable.

Issue No. II:

Does the principle of issue estoppel*, first and foremost, affect the writ petition?*

34. Factually, before Shine could complain, others had taken up the issue: in one instance, a criminal court took cognizance of the matter; in another, a competent Magistrate found the dispute "of civil nature". That finding has attained finality. So, in the face of that finding involving the same issue and the same respondents or accused, can another person, answer the same description as the other person did—a parishioner—once again complain?

4 2000(2) KLJ 394

5 2007(12) SCC 611

35. Issue estoppel is a species of *res judicata*. It may arise, observes *Halsbury's Laws of England*,[6] where a plea of *res judicata* could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which, having once been distinctively put in issue, has been solemnly and with certainty determined against him. *Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies.* This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law. (italics supplied)

36. *Black's Law Dictionary*[7] puts it more pithily: An affirmative defence barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.

64th ed., vol. 16, p. 1030, ¶1530

77th Ed. (defining it under "collateral estoppel" and providing its synonyms: issue preclusion, issue estoppel, direct estoppel, estoppel by judgment, estoppel by record, estoppel by verdict, cause-of-action estoppel, estoppel *per rem judication*.)

37. Lord Diplock, in *Mills v Cooper*,[8] has noted that an "issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation. That general rule applies also to criminal proceedings, but in a form modified by the distinctive character of criminal as compared with civil litigation. Here it takes the form of the rule against double jeopardy... ."

38. The issue of estoppel stands merged, as observed by the Supreme Court,[9] in the principles of *Autrefois acquit* and *Autrefois convict,* both of which find enshrined in article 20(2) and section 300 Cr.PC. Indeed, issue estoppel, a common law doctrine, has been well-entrenched and oft-applied to criminal proceedings. The courts in India, too, have applied this principle at all levels—Apex to trial courts.

39. That said, we ought to necessarily observe that given our finding on maintainability in the next few paragraphs, this issue becomes academic. And academic issues need no adjudication. So we reckon that our finding on the threshold issue—alternative remedy—obviates an answer to this issue.

8(1967) 2 Q.B., 459

9State of Jharkhand v. Lalu Prasad Yadav, (2017) 8 SCC 1

Issue No.III:

Does the Supreme Court in Lalita Kumari permit a complainant to do away with the statutory remedies and, instead, take a straight recourse to judicial review? Pithily put, what is the holding of Lalitha Kumari?

40. The complainants, faced with a specific procedure under the Code on how to maintain a criminal complaint, have nevertheless anchored their arguments on what they felt to be the definitive dictum of *Lalita Kumari.* They assert that this decision of a Constitution Bench has effaced all the statutory constraints a complainant otherwise would face to directly approach the High Court. So, before we could go deeper on the issue, it pays to examine *Lalita Kumari.*

(a) Facts:

41. His daughter kidnapped, a distraught father approached the police. But the SHO refused to act on his written complaint and register a crime. Then, the father approached the Superintendent of Police, on whose direction the SHO registered a complaint. Yet the police took no further steps; they neither arrested the offenders nor rescued the kidnapped girl. Pushed to the wall, the father invoked

Art.32 of the Constitution of India and approached the Supreme Court.

(b) Issue:

42. Thus, the issue before the Supreme Court was this: is a police officer bound to register an FIR under section 154 of Cr.P.C., upon receiving any information relating to the commission of a cognizable offence or has he got the power to conduct a preliminary inquiry to test the veracity of such information before registering the crime?

(c) Ratio:

43. A Constitution Bench of the Supreme Court has held that the FIR is a pertinent document in our country's criminal law procedure, and its main object from the informant's viewpoint is to set the criminal law in motion. From the investigating authorities' viewpoint, it is to obtain information about the alleged criminal activity to be able to try to trace and to bring to book the guilty. From sections 154, 156, and 157 of the Code, it becomes clear that the investigation begins with the police officer's recording the first information about a cognizable offence. The Court has held that section 154 of the Code is mandatory, and the officer concerned must

register the case if the information discloses cognizable offence. If the police have latitude, an option or discretion in registering an FIR, that latitude will entail serious consequences affecting the public order, besides hurting the victim's rights. For sure, reasonableness or credibility of the information is not a condition precedent for the police to register a case.

44. *Lalita Kumari* equally emphasises the prompt, timely investigation by the police. Though the registration of FIR is compulsory, the immediate arrest of the accused is not. Yet *Lalita Kumari* recognizes exceptions to the mandatory crime-registration. In certain cases the police may hold a preliminary inquiry before their registering an FIR. The categories of cases requiring preliminary inquiry (to be completed in a week's time) are—not exhaustive, though —these: (a) Matrimonial disputes/ family disputes; (b) Commercial offences; (c) Medical negligence cases; (d) Corruption cases; (e) Cases where there is abnormal delay/laches in initiating criminal prosecution; for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for the delay.

(d) Holding:

45. Thus, distinguished from its *ratio* (covering many counts and issues), *Lalita Kumari's* holding is simple and straight: If an aggrieved person approached the police complaining of a cognizable offence, they must register an FIR and promptly enquire into the crime, the arrest of the accused not being an essential step in that process.

(e) Ratio v. Obiter v. Holding:

46. Mostly we use both *ratio* and *holding* interchangeably, if not indiscriminately. But there exists a discernible difference. *Ratio* or *ratio decidendi* is the reason for a decision. It is a pure principle of law. Observing that it is an ambiguous expression, *Black's Law Dictionary* describes it as a "general rule without which a case must have been decided otherwise." Nevertheless, it is central to the decision making. On the other hand, *obiter dictum* (something said in passing) is a peripheral judicial comment, unnecessary for the case adjudication. It can be incidental, clarificatory, collateral, illustrative, or merely rhetorical, parading the alternative assertions: an extra-judicial expression, so to say.

47. *Holding* emerges when the *ratio*—the pure principle of law—is applied to the facts of a particular case. That is, a *holding* is what the court actually decides after combining the facts of a case with the legal principles it deduces in the context of that case. In a recent commentary on *stare decisis*—The Law of Judicial Precedent[10]—Bryan A. Garner, et al., have elaborately treated this principle.

48. A near-synonym for *holding* is the fuzzy Latinism *ratio decidendi*— often shortened to *ratio*. The Latin phrase literally means "reason for deciding." Whereas *holding* might be thought to equate more nearly with the court's determination of the concrete problem before it, *ratio decidendi* is normally seen as a genus-proposition of which the concrete holding is one species or instance. So the *ratio decidendi* is a more generalised statement of the holding—more generalised, typically, than one finds in the decision or opinion itself. The distinction is a fine one for those who observe it.[11]

49. *Ratio* requires adherence to the extent possible, but the *holding* compels compliance fully. *Stare decisis* admits of no exception to a case-holding in the adjudicatory hierarchy.

10⁰ 2016, pp.46-47

11⁰ Id.

(f) ***Lalita Kumari* – Are there any issues *sub silentio?***

50. One of the age-old maxims of organic law is that "[w]hat is not judicially presented cannot be judicially considered, decided, or adjudged."[12]

51. As seen above, *Lalita Kumari* concerns the statutory compulsion on the police to register an FIR if they are presented with a written complaint making out a cognizable offence. It does not, at any rate, mandate that the aggrieved complainant could rush to High Court on the police's refusing to register a crime. Much less has it enabled the suitors to ignore the other statutory safeguards available to them and insist on a public-law remedy—especially a remedy under Art.226, at that.

52. In other words, that issue—what are the courses open to a complainant if the police refuse to register an FIR?—has neither been raised nor answered in *Lalita Kumari*. Granted, *sub silentio* is an established legal doctrine in ascertaining the precedential value of a decision. But, unless the court left undecided an issue that ought to have been decided, this doctrine has no place.

12(0) Id.

53. Once an issue, though present by implication, has not been expressly dealt with and pronounced upon, the judgment on that issue remains *sub silentio*. Any issue, thus, rendered *sub silentio* cannot be treated as a precedent.

54. The concept of *sub silentio* has been explained by *Salmond on Jurisprudence*, 12th Edn. as follows:

> 11. [A] decision passes *sub silentio*, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of Point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided Point B in his favour; but Point B was not argued or considered by the Court. In such circumstances, although Point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on Point B. Point B is said to pass *sub silentio*.

55. In *B. Shama Rao* v. *UT of Pondicherry*[13], the Supreme Court has observed that a decision is binding not because of its conclusions but because of "its ratio and the principles, laid down therein". In *Arnit Das (1)* v. *State of Bihar*,[14] the Supreme Court has further observed that a decision not expressed, not accompanied by reasons,

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13[0] AIR 1967 SC 1480

14[0] (2000) 5 SCC 488

and not based on conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the *ratio decidendi*. And this is the rule of *sub silentio*.

56. *Lalita Kumari*, however, had no occasion to consider the issue we have now been confronted with: The alternative statutory remedies available to a complainant after the police's refusing to register an FIR. So we may safely conclude that *Lalita Kumari* does not obliterate, as it were, the alternative statutory remedies available to the aggrieved complainant.

Issue Nos.III:

Can a complainant disregard the alternative remedies provided under, say, the Criminal Procedure Code and, instead, insist on a writ remedy?

The Statutory Scheme & The Complainant's Remedies:

57. Section 154[*], in Chapter XII, of the Code deals with "Information to the Police and their Powers to Investigate". Any person

[*] Section 154. Information in cognizable cases.:(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under Sub-section (1) shall be given forthwith, free of cost, to the informant.

may present to the police a signed complaint or an oral one about a cognizable offence. If the information is oral, the police must reduce it to writing, read it over, and get it signed by the complainant. Then, a police officer must record the substance of the complaint in the book kept for that purpose. And the officer must supply a copy of the recorded information to the complainant, as well.

58. Sub-Section (3) provides for the remedial action the complainant can take if the police refuse to register his complainant: he may send the information about the cognizable offence, by post, to the Superintendent of Police concerned. If that officer, after receiving it, finds that the complaint discloses a cognizable offence, he must either investigate the case himself or direct one of his subordinate officers to do it under the Code.

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(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub- Section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

59. Further, section 156[**] of the Code deals with the "police officer's power to investigate cognizable cases." If the offence is cognizable, the police officer does not need the Magistrate's prior order to investigate. Nor can the investigation be interdicted or interfered with on the premise that the officer lacks the power to probe. Indeed, a Magistrate, acting under section 190, too, can order an investigation.

60. Sub-Section (3) employs the expression "may order such an investigation as above- mentioned." The words "as abovementioned" obviously refer to Section 156(1), which contemplates investigation by the officer in charge of the Police Station. Section 156(3) provides for, holds the Supreme Court in *Sakiri Vasu vs. State of U.P.*,[(15)] a check by the Magistrate on the police performing their duties under Chapter XII Cr.P.C. If the Magistrate finds that the police have not investigated the case at all, or have not done it satisfactorily, she can issue a direction to the police to investigate the crime properly and can monitor it, too. *Sakiri Vasu* also observes that the Magistrate's power to order further

**[**] Section 156. (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this Section to investigate.
(3) Any Magistrate empowered under Section 190 may order such an investigation as above- mentioned.

15[)] (2008) 2 SCC 409

investigation under section 156(3) is an independent power and does not affect the investigating officer's power to further investigate the case even after his submitting the report under section 173(8) of the Code.

61. If the police, at any level, refuses to act, the complainant can act under section 190*** read with section 200**** of the Code: he can complain in writing to the jurisdictional Magistrate. The Magistrate, in turn, will enquire into the complaint as provided in Chapter XV of the Code. If the Magistrate, "after recording evidence, finds a prima facie

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***[***] Section 190. (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon hi s own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within hi s competence to inquire into or try.

****[****] Section 200. Examination of Complaint: A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses—

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

case"; instead of issuing process to the accused, she can direct the police to investigate the offence under Chapter XII of the Code and to submit a report. On the other hand, if the Magistrate finds that the complaint discloses no offence, she may dismiss the complaint under Section 203 of the Code.

A Cacophony of Complaints:

(a) First Complaint:

62. The Diocese has many members and, of them, Shine is one. There has already been a handful of complaints filed by the faithful, and Shine's is one. To begin with, Joshi Varghese, another member of the Diocese, complained on identical lines as did Shine Varghese. He wanted the JFCM Court-VIII, Ernakulam, to forward the matter to police under section 156 (3) of the Code. Instead, the Magistrate took it up, as is permissible, under sections 190 and 200 of the Code.

63. True, ultimately it is the Magistrate that decides on the accused's guilt. But, pre-trial, the police's registering a crime and their investigating it adds colour to the controversy, a sting to the scheme of prosecution. That missing, the complainant filed O.P (Crl) No.64 of 2018 before this Court. He assailed the Magistrate's action of taking

cognizance without reference to police as improper and ineffective. Perhaps, he felt what should happen ultimately should not happen early. The police investigation prolonged and the trial tarried, the complainant, in some cases, is satisfied. Here, too, some parishioners persisted that police should investigate. But this Court played the spoil-sport! It dismissed the OP. At this stage, we need not go into the logomachy of 'inquiry' and 'investigation', much less 'trial'. Suffice it to say that the first complaint has been very much pending and progressing.

(b) Second Complaint:

64. One Polachan Puduppara filed another complaint, said to be identical, on 20th January 2018. It was dismissed on 2nd February 2018.

(c) Third Complaint:

65. Martin Payyappilly lodged another complaint. He took the route as Shine did: he filed W.P. (C) No.5997 of 2018, complaining against the alleged police inaction. And that writ petition was disposed of on the same lines of Shine's. But the record reveals that, soon after Martin lodging the complaint, the police recorded his statement on 5.2.2018. He did not reveal that in the writ petition. In fact, the

learned Public Prosecutor produced before the learned Single Judge a copy of Martin's statement recorded by the police. And that statement's veracity remains unrebutted.

65(a). Despite the police's recording his statement, Martin nowhere mentioned about it. It brooks no contradiction that a writ petition is essentially an exercise in equity. And the suitor coming to the court with clean hands is a sine qua non. Suppression of material facts, trite to observe, sounds the death knell of any writ petition. Martin's is no exception.

66. Despite the repeated attempts of some members failing to bring the police to the Church's door, Shine maintains that one complaint pending before the Magistrate does not affect his right to maintain another one on his own. In *Pramatha Nath Taluqdar vs. Saroj Ranjan Sarkar*[16], a three-Judge Bench of the Supreme Court has held that that there is nothing in the law prohibiting a second complaint on the same allegations when a previous complaint had been dismissed under s. 203 of the Code of Criminal Procedure.

16[0] AIR 1962 SC 876

Indeed, *Pramatha Nath* deals with the second complaint by the same person upon having the first one dismissed. It does not apply here.

67. Despite *Pramatha Nath* not applying here, we will, for a while, buy Shine's argument that he could maintain his complainant, for he asserts that the other complainants did not have the advantage of the "In-House Committee Report" with confessions galore. Let us see, then, what happens. Regrettably, it comes back to square one and confronts us with the fundamental question: is the writ petition maintainable in the face of an efficacious alternative remedy?

How Has the Impugned Judgment Proceeded?

68. The impugned judgment, to begin with, sets for itself the jurisdictional bounds: that this Court should consider whether the complaint *prima facie* discloses any cognizable offence. It also wonders whether the Diocese's office bearers are amenable to the law of the land or left to the discretion of the 'Pope'* of Vatican.

69. The judgment distinguishes *Divine Retreat Centre v. State of Kerala*[17] and holds that here the allegation are clear and cogent. About the pending case, the judgement notes that "it is a private complaint

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* Emphasis original

17 2008 (2) KLT 1042

filed by a different person. It is not permissible under law for the petitioner to intrude into the said private complaint."

70. Finally, relying on *Lalita Kumari*, the impugned judgment holds that when a complaint reveals a cognizable offence, "the police officer has no other go than to register a crime." The judgment further holds that any other decision before *Lalita Kumari* on this issue survives no longer.

71. We have already discussed *Lalita Kumari* and extracted its holding. We have also held that *Lalita Kumari* has not dealt with the remedies available to an aggrieved person on whose complaint about a cognizable offence the police have not acted. In fact, *Lalita Kumari* has only dealt with the issue whether the police could exercise their discretion and indulge in any preliminary enquiry before they register a crime. Therefore, the precedents speaking on a complainant's alternative remedies have not been set at naught. They still hold the field. That said, we must now examine the precedential position on that issue.

Refusal to Register a Crime-the Alternative Remedies:

72. Given the statutory scheme, in *Aleque Padamsee v. Union of India*[18], the Supreme Court, after referring to its many earlier decisions, has observed that whenever the police receives any information about the alleged commission of a cognizable offence, they must register an FIR. The Court emphasised: "There can be no dispute on that score." Then, it went on to answer an identical question as is before us now: Can a writ be issued to the police authorities to register the crime? In other words, what course should a court adopt if a person petitions that the police have not acted on his complaint? Quoting with approval *All India Institute of Medical Sciences*[19] *Gangadhar*[20], *Aleque Padamsee* has held that "the remedy available is . . . by filing a complaint before the Magistrate." Then, it noted the seeming judicial cleavage between two sets of its own decisions and, finally, reiterated that "the police officials ought to register the FIR whenever facts brought to its notice show that cognizable offence has been made out. In case the police officials fail

18((2007) 6 SCC 1

19() All India Institute of Medical Sciences Employees' Union (Reg) through its President v. Union of India (1996)11SCC582 .

20() Gangadhar Janardan Mhatre v. State of Maharashtra 2004 CriLJ 4623 (SC)

to do so, the modalities to be adopted are as set out in Sections 190 read with Section 200 of the Code."

73. In *Sudhir Bhaskarrao Tambe v. Hemant Yashwant Dhage*[21], the Supreme Court has referred to *Sakiri Vasu* and held that if a person has a grievance that the police have not registered his complaint, or having registered it, they have not investigated it properly, then the aggrieved person's remedy "is not to go to the High Court Under Article 226 of the Constitution of India, but to approach the Magistrate concerned under section 156(3) of the Code." Thus, if the complainant approaches the Magistrate, and if she is *prima facie* satisfied, she can direct the police to register an F.I.R. Even if the police have already registered the crime, the Magistrate can direct proper investigation, which includes in her discretion recommending a change of the investigating officer, as well.

74. *Sudhir Bhaskarrao Tambe*, in fact, tellingly comments on the complainants' ubiquitous tendency to rush to the High Court, by invoking Art.226 of the Constitution, to obtain directions to the police

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21[0] (2016) 6 SCC 277

either to register a crime or to investigate it properly. This tendency encouraged, it floods the High Court and chokes the system:

> "*[W]hat we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation. We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions.* Hence, we have held that the complainant must avail of his alternate remedy to approach the concerned Magistrate Under Section 156(3), Code of Criminal Procedure, and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation."
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> (italics supplied)

75. The writ court can only play a corrective role to ensure that the integrity of the investigation is not compromised. The writ court, however, will not initiate an investigation. That function clearly lies in the domain of the executive, and it is up to the investigating agencies themselves to decide whether the material produced before them provides a sufficient basis to launch an investigation. It must also be borne in mind that there are provisions in the Code of Criminal Procedure which empower the courts of the first instance to exercise a certain degree of control over ongoing investigations. So held a three-

Judge Bench of the Supreme Court in *Kunga Nima Lepcha v. State of Sikkim.*[22]

76. Clear and compelling are the judicial directions vis-à-vis an aggrieved person's approaching the High Court. But, disregarding the efficacious alternative-remedies under the Code, the complainants insisted that in *Lalitha Kumari,* a Constitution Bench has cleared the complainant's path of all statutory hurdles to approach the High Court, straight away.

76 (a). That apart, on facts, Shine's conduct leaves much to be desired. The record reveals that he complained in writing to the police on 15th January 2018; he filed the writ petition on 16th January, the next day. In fact, the learned Public Prosecutor maintains that Shine approached the police only on 16th January, the complaint bearing the date of 15th January notwithstanding. Without waiting even for the receipt, the Public Prosecutor further contends, Shine rushed to the Court.

76 (b) Shine, however, counters the Public Prosecutor's assertion. He insists that he had approached the police on 15th January and that

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22[0] (2010) 4 SCC 513

they refused to acknowledge his complaint. So Shine would have us view his approaching the Court the next day as perfectly justified—not to be taken amiss. Elementary is the legal principle that for a writ of mandamus to be maintained, the suitor must establish before the Court these: (a) that there existed a right; (b) that it has been infringed or threatened to be infringed; (c) that the person aggrieved complained to an authority; and (d) that the authority concerned refused to act.

76. (c) Here, Shine seemed to have rushed to the Court post-haste, before the ink dried on the paper, as if it were. So, we find it hard to believe that there was proper demand and refusal, the essential elements for a mandamus.

Conclusion:

77. Authoritative as *Lalita Kumari* is, it has not disturbed the proposition of law that this Court while exercising its jurisdiction under Article 226 does ensure that the suitor has no other efficacious, alternative remedy. So the precedential value of *Aleque Padamsee, All India Institute of Medical Sciences, Gangadhar, Sudhir Bhaskarrao Tambe, Sakiri Vasu, Kunga Nima Lepcha,* just to list out a few, remains undisturbed and undiminished.

78. The impugned judgment seems to have placed heavy reliance on the Diocese's enquiry report and concluded—*prima facie*, though—that a cognizable offence is made out. But, regrettably, it has missed out on the fundamental jurisdictional issue. It has failed to notice the unseemly haste Shine showed: no sooner had he submitted his complaint than he rushed to the Court—in 24 hours.

79. To conclude, we may observe that Shine Varghese has faltered at the first hurdle—the alternative remedy, which he has on more than one count. That is, the impugned judgment suffers from legal infirmity and deserves to be set aside. And we do so.

80. Martin Payyappilly's writ petition, too, suffers on the count of alternative remedy, as does Shine's. That apart, his writ petition also suffers from another fatality: the suppression of material fact. Despite the police recording Martin's statement after his complaint, he did not choose to disclose this fact before the Court until that fact was irrefutably brought before the Court by the prosecution. So the judgment in W.P. (C) No.5997 of 2018 is set aside, and writ petition dismissed.

81. As we pronounced on the threshold issue, we have not addressed the other issues–including the one about *prima facie* case or a single crime attracting more than one complaint.

82. Let the complainants take comfort that the race is not always to the swift, nor the battle to the strong . . . but time and chance happeneth to them all.[23] If there be truth in what they allege, the long arm of the law will surely reach whatever recess the crime lurks in. Their swift race to the High Court alone do we interdict here. Nothing more.

Result:

The impugned judgments are set aside; so all the writ appeals are allowed. No order on costs.

sd/-Antony Dominic
Chief Justice

sd/- Dama Seshadri Naidu
Judge

css/

23[0] Ecclesiastes, 9:11