IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL WRIT PETITION NO. 39 OF 2021

1) Angel Click, through proprietor
Mr. Mohan Mahadeorao Daf,
Aged 40 years, Occu. - Business,
R/o. Ganesh Nagar, Sharda Chowk,
Nagpur.

2) M/s. Nahata Trading Company,
through proprietor
Mr. Anand Lalchand Nahata,
Aged 50 years, Occu. Business,
R/o. Kesriya Anand Society,
Nikalas Mandir Road, Sarafa Bazar,
Nagpur.

.... **PETITIONERS**

// **VERSUS** //

1) State of Karnataka, through
Police Station Officer,
Town Police Station, Gangavathi,
Tq. Gangavathi, District Koppal,
(Karnataka State)

2) ~~Principal Civil Judge & J.M.F.C.~~,
~~Gangavathi, Tq. Gangavathi~~,
~~District Koppal, (Karnataka State)~~
Deleted as per Court order dt.14.01.2021.

3) State of Maharashtra,
through Police Station Officer,
Police Station, Pardi, Nagpur,

4) State of Maharashtra,
through Police Station Officer,
Police Station, Kamptee, Nagpur.

5) Sangam Enterprises, through its
proprietor, Mr. Prakashchandra
Kanaiyyalal Chopda,
Aged 62 years, Occu. Business,

Having its office behind Bus Stand,
Vivekanand Colony, Gangavathi,
Tq. Gangavathi, Dist. Koppal,
Karnataka and also at CBS GUNG,
Gangavathi, Dist. Koppal,
Karnataka.

.... RESPONDENTS

Shri R. M. Bhangde, Advocate for the petitioners.
Shri S. V. Sirpurkar, Advocate for the respondent No.1.
Shri A. S. Fulzele, Addl.P.P. for the respondent Nos.3 and 4.
Shri D. V. Chauhan, Advocate for the respondent No.5.

CORAM : SUNIL B. SHUKRE AND
AVINASH G. GHAROTE, JJ.

DATE OF RESERVING THE JUDGMENT : 26.02.2021.

DATE OF PRONOUNCING THE JUDGMENT : 07.05.2021.

ORAL JUDGMENT : (Per Sunil B. Shukre, J.)

1. Heard. **Rule**. Rule made returnable forthwith.

2. Heard finally by consent of the learned counsel appearing for the parties.

3. The petitioners are the traders carrying on business of sale and purchase of rice from their respective offices situated within the city of Nagpur. Their case is that the petitioner No.1 had purchased rice and broken rice of Heritage brand from M/s. S. R. Enterprises and V. K. Traders on various dates and had kept some of the rice bags in a

godown situated at Umiya Industrial Area, Tarodi-Kapsi, Nagpur. Some of the rice so purchased by petitioner No.1 was sold by him to the petitioner No.2, who stored the rice bags in his godown situated at Lihigaon, Kamptee, Nagpur. On 24.12.2020, respondent No.1 armed with a warrant of search and seizure dated 22.12.2020 issued by the learned Judicial Magistrate, First Class, Gangavathi, District Koppal, Karnataka raided these godowns with the aid of respondent Nos.3 and 4 and seized the rice bags stored therein. From the godown of petitioner No.1, 6140 bags of Heritage brand rice and from the godown of the petitioner No.2, 999 bags of Heritage brand rice were seized by the respondent No.1, in execution of the warrant of Search and Seizure. Receipts for seizure of these bags were issued by the respondent No.1. The petitioners made a detailed representation in protest to the Commissioner of Police, Nagpur on 30.12.2020 and requested him to take appropriate action against the said seizure of rice bags made by respondent No.1, which according to the petitioners was illegal and without following due process of law. The petitioners also succeeded later on in procuring a copy of the First Information Report filed by respondent No.5 with Police Station, Gangavathi, on the basis of which offences punishable under Sections 406 and 420 were registered against five accused persons named therein. The petitioners noticed that they were not named as accused in the F.I.R. and yet, as the petitioners submit, the rice bags lawfully purchased by them on

making of full payment were directed to be seized by the learned Magistrate at Gangavathi.

4. It is the case of the petitioners that no search and seizure warrant under Section 93 read with Section 105 of the Code of Criminal Procedure (for short 'Cr.P.C.') could have been issued by the learned Magistrate, Gangavathi as the petitioners played no role whatsoever in the alleged acts of criminal breach of trust and cheating and that the warrant could not have been executed by respondent No.1 at the places situated within the territorial jurisdiction of a Court at Nagpur without following the procedure prescribed in Section 101 read with Section 105 of the Cr.P.C. According to the petitioners, this action is illegal and therefore, they are before this Court seeking the reliefs of grant of declaration that the action of search and seizure conducted by the respondent No.1 within the territorial limits of Nagpur Court is arbitrary and illegal and return of the seized goods to the petitioners. The petitioners have also sought quashing and setting aside of the impugned warrant of search and seizure.

5. Shri Bhangde, learned counsel for the petitioners submits that as the petitioners names have not been mentioned in the F.I.R. and the petitioners being the bonafide purchasers of goods, having no transaction whatsoever with respondent No.5, could not have been

subjected to action of search and seizure by the learned Judicial Magistrate at Gangavathi. He submits that the petitioners are the owners of the rice bags seized from their godowns which they have purchased lawfully and on payment of price of the goods and therefore, these rice bags could not have been directed to be seized by the learned Magistrate, Gangavathi. He further submits that the learned Magistrate, Gangavathi did not follow the procedure prescribed in Sections 105 and 101 of the Cr.P.C., which is mandatory in nature and, therefore, the whole action of search and seizure carried out in the present case has been vitiated.

6. Shri Sirpurkar and Shri Chauhan, learned counsel respectively appearing for the respondent Nos.1 and 5 have strongly opposed the petition. They submit that this Court does not have any jurisdiction to entertain this petition and in any case, all the grounds of objection taken by the petitioners could also have been taken by them before the Courts situated within Karnataka and therefore, this Court must not entertain this petition. They place reliance upon the view taken by this Court in its decision in the case of *Sunil Ratnakar Gutte Vs. State of Maharashtra, through Police Station Officer and Ors.,* ***2021 SCC OnLine Bom 36***. It is their contention that there is a difference between substantive provisions of law and procedural provisions of law and that non-compliance in the former case would vitiate the whole action while it would not be so in the latter case. They contend that

this is because of the settled principle of law that procedure is a handmaiden of substantive justice. Reliance is placed by them upon the law laid down in this regard in the case of *State represented by Inspector of Police, Central Bureau of Investigation Vs. M. Subrahmanyam* ***(2019) 6 SCC 357***. They further submit that even if it is assumed, just for the sake of argument and without admitting anything, that some procedural mistakes have occurred in the present case, they by themselves would not make the search and seizure of the goods illegal. They further submit that the rice bags seized by respondent No.1 were produced by him before the jurisdictional Magistrate and the jurisdictional Magistrate has not noted any illegality or irregularities in the action so carried out by respondent No.1. Even otherwise, they submit that release of the seized goods on execution of bond could also be sought for by the petitioners by making an application under Section 451 to Gangavathi Court, which they have not done so far. Therefore, it is urged, that this petition is liable to be dismissed.

7. Before dealing with the grounds of challenge raised in this petition, consideration of the preliminary objection raised by respondent No.1 and 5 would be necessary. Learned counsel for the respondent Nos.1 and 5 contend in support of their preliminary objection that the entire cause of action comprising the registration of the offences, investigation into the offences and the issuance of search

warrant having arisen in the State of Karnataka, this Court cannot entertain this petition. Shri Bhangde, learned counsel for the petitioner, however, would disagree, arguing that part of the cause of action has indeed arisen within the limits of District Nagpur, which area is subject to territorial jurisdiction of this Court. He relies upon the law laid down by the Supreme Court in the case of *Navinchandra N. Majithia Vs. State of Maharashtra and Ors.,* ***(2000) 7 SCC 640***.

8. Upon consideration of the facts of the case, we would not but agree with the contention of the learned counsel for the petitioners. It is true that the crime has been registered at Gangavathi, the investigation is being made by the Police Station, Gangavathi and search warrant has also been issued by Court of Judicial Magistrate, First Class, Gangavathi, situated within the State of Karnataka. But, the search warrant so issued has been executed at two places situated within the limits of District Nagpur, State of Maharashtra and, therefore, a part of the cause of action relating to the entire question of search warrant has arisen at the places situated within the territorial jurisdiction of this Court. Even as regards registration of crime in the present case, we are of the opinion that part of the cause of action has also arisen within the territorial jurisdiction of this Court for the reason that the alleged fraudulent transactions consisted of different parts and some of those parts had their happenings in Nagpur.

9. The law regarding the power and authority of a High Court to issue directions, orders or writs to any Government, Authority or any person is clear. It suggests that such power of a High Court includes the power to issue directions, orders or writs to a Government or Authority or a person situated outside its territorial jurisdiction, if the cause of action for filing a petition under Article 226 of the Constitution of India arises, wholly or in part, within its territorial jurisdiction. This power of the High Court originates from Clause 2 of Article 226 of the Constitution of India. Initially, such power was not to be found in Article 226, as it originally stood. Even then, some of the decisions rendered by different High Courts liberally interpreted the power and held that a High Court can exercise it's power under Article 226 also in respect of Tribunals or Authorities situated outside the territorial limits of its jurisdiction, if such Tribunal or Authority exercised its jurisdiction or power in such a manner as to affect the fundamental rights of persons residing or carrying on business within the jurisdiction of the High Court issuing writ. However, a Constitution Bench of the Apex Court interpreting Article 226, as framed originally, in the case of *Election Commission, India Vs. Saka Venkata Subba Rao,* ***AIR 1953 SC 210***, held that the power of the High Court to issue writs under Article 226 of the Constitution was subject to two-fold limitation that such writs cannot run beyond the territories subject to its jurisdiction and the person or authority to whom the High Court was empowered

to issue the writs must be amenable to the jurisdiction of the High Court either by residence or location within the territories subject to its jurisdiction.

10. In the case of *Navinchandra N. Majithia* (supra), in a concurring decision, Hon'ble Shri Justice Thomas observed that it was the decision of the Constitution Bench in the case of *Saka Venkata Suba Rao* (supra) which made Parliament bring the Fifteenth Amendment to the Constitution by which Clause (1-A) was added to Article 226, which clause subsequently was, by the 42nd Constitutional amendment, renumbered as Clause (2). It was in this background that Clause (2) of Article 226 was examined in the said concurring judgment and it was held that the power conferred on a High Court under Article 226 could also be exercised by it in relation to the territories outside its territorial jurisdiction, if the cause of action arose, wholly or partly, within its jurisdiction. Relevant observations appearing in paragraph No.37 of the judgment are reproduced thus :-

> "***37****. The object of the amendment by inserting clause (2) in the article was to supersede the decision of the Supreme Court in Election Commission Vs. Saka Venkata Subba Rao AIR 1953 SC 210 and to restore the view held by the High Courts in the decisions cited above. Thus the power conferred on the High Courts under Article 226 could as well be exercised by any High Court exercising jurisdiction in relation to the territories within which "the cause of action, wholly or in part, arises" and it is no*

> *matter that the seat of the authority concerned is outside the territorial limits of the jurisdiction of that High Court. The amendment is thus aimed at widening the width of the area for reaching the writs issued by different High Courts.*"

Hon'ble Shri Justice Mohapatra authored a separate judgment in the same case of *Navinchandra N. Majithia* (supra). His Lordship held that from the provisions made in Clause (2) of Article 226, it is clear that maintainability or otherwise of a writ petition in the High Court would be determined by the fact as to where the cause of action for filing a writ petition has arisen and if it is found that the cause of action has wholly or in part, arisen within the territorial jurisdiction of the High Court, that High Court would also have the power to issue the writ going beyond its territorial jurisdiction. The expression "*cause of action*" was also considered and elaborated in this judgment. It was held that "*cause of action*" would mean the bundle of facts which the petitioner must, if traversed, prove to entitle him to a judgment in his favour by the Court. It was also observed that the expression "*cause of action*" must be understood in the light of the pleadings and averments in the petition and not by taking into consideration the defence of the respondent and if it is found that the cause of action, wholly or partly, has arisen within the territorial jurisdiction of the High Court, it could exercise its power under Article 226(2) to issue a writ to an Authority situated beyond its territorial

jurisdiction. Observations made in paragraph Nos.17 and 21 of this judgment are relevant and their reproduction here would enable us to better understand the law governing the issue at hand. They read as under :-

> *"**17**. From the provision in clause (2) of Article 226 it is clear that the maintainability or otherwise of the writ petition in the High Court depends on whether the cause of action for filing the same arose, wholly or in part, within the territorial jurisdiction of the Court.*
>
> ***21**. A Bench of three learned Judges of this Court in the case of Oil and Natural Gas Commission v. Utpal Kumar Basu (1994) 4 SCC 711 considered at length the question of territorial jurisdiction under Article 226(2) of the Constitution of India. Some of the relevant observations made in the judgment are extracted hereunder : (SCC pp.716-17, paras 5-6)*
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> > *"5. Clause (1) of Article 226 begins with a non obstante clause - notwithstanding anything in Article 32 – and provides that every High Court shall have power 'throughout the territories in relation to which it exercises jurisdiction', to issue to any person or authority, including in appropriate cases, any Government, 'within those territories' directions, orders or writs, for the enforcement of any of the rights conferred by Part III or for any other purpose. Under clause (2) of Article 226 the High Court may exercise its power conferred by clause (1) if the cause of action, wholly or in part, had arisen within the territory over which it exercises jurisdiction,*

notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. On a plain reading of the aforesaid two clauses of Article 226 of the Constitution it becomes clear that a High Court can exercise the power to issue directions, orders or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action, wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories. In order to confer jurisdiction on the High Court of Calcutta, NICCO must show that at least a part of the cause of action had arisen within the territorial jurisdiction of that Court. This is at best its cause in the writ petition.

6. It is well settled that the expression 'cause of action' means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the court. In Chand Kour v. Partab Singh ILR (1889) 16 Cal 98 Lord Watson said:

'… the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the ground set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour'.

> *Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an inquiry as to the correctness or otherwise of the said facts. In other words the question whether a High Court has territorial jurisdiction to entertain a writ petition must be answered on the basis of the averments made in the petition, the truth or otherwise whereof being immaterial. To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the petition. Therefore, the question whether in the instant case the Calcutta High Court had jurisdiction to entertain and decide the writ petition in question even on the facts alleged must depend upon whether the averments made in paragraphs 5, 7, 18, 22, 26 and 43 are sufficient in law to establish that a part of the cause of action had arisen within the jurisdiction of the Calcutta High Court,"*

11. In the case of *Sunil Ratnakar Gutte* (supra) relied upon by learned counsel for respondent No.1 and respondent No.5, the view that we took was in deference to the law laid down in above said case of *Navinchandra N. Majithia* (Supra) and thus we found, on facts, that no part of cause of action had arisen in Nagpur, requiring invocation of jurisdiction of this Court under Article 226.

12. In the present case, we have already found that a part of the cause of action has indeed arisen within the territorial jurisdiction

of this Court. Then, there are also specific pleadings made in this regard in paragraph Nos.11 to 21 of the petition. We therefore, find that this petition could be entertained and heard by us.

13. There is an argument that petitioners have an alternate remedy under Section 451 and, therefore, they should knock at the doors of Karnataka Criminal Court. As such, it is further argued that this Court need not hear the petitioners. We must say it here that the question raised here is about jurisdiction of this Court, which we have found to exist. Then it would follow that just because an application under Section 451 of the Cr.P.C. can be made before Gangavathi Court and all these objections can be raised before a Court in Karnataka, such possibility still does not divest this Court of it's jurisdiction, which comes from law and not by choice of the parties. The law is neither dependent on choice of parties nor gets it's validity from acts of the parties, rather it makes the choice and acts of the parties meaningful. At the same time, we may add, we also need to consider and determine the periphery within which we would confine ourselves while entertaining this petition as the major part of the cause of action denoted by registration and investigation of the crime has arisen in the State of Karnataka.

14. About the major part of cause of action, indicated in the earlier paragraph, we have to say that it would be the courts in

Karnataka which would have facility and equipment better than this Court to under take scrutiny of the claim of the petitioners based upon the merits of the case, and so we are not inclined to entertain this petition to that extent. We would explain it further.

15. This petition is grounded in two objections. The first refers to absence of any criminality of the petitioners making their entitlement to custody of the goods seized sound. The second objection emphises upon the procedural aspect. Petitioners submit that procedure prescribed in Sections 101 and 105 being mandatory has not been followed by respondent No.1 while executing the search warrant and, therefore, the seizure of rice bags has been vitiated thereby entitling the petitioners to have the seized goods restored to their custody. The first objection is merit-oriented and though we have jurisdiction to hear it, we would not do so in our discretion. Reason being that Court in Karnataka is better placed than us to consider and decide such objection, with the registration of the crime and it's investigation being done in Karnataka. Then if an application for interim custody is to be granted under Section 451 of the Cr.P.C. not only the merits of the claim require consideration other relevant factors such as possibility and practicability of goods being conveniently produced in Court during trial, if directed, conditions to be imposed and so on, also need to be borne in mind. Karnataka Court; in our view, is well suited to apply itself to these factors. But, for the claim

originating from the procedural aspect, this Court is eminently suited to hear it as the part of the cause of action arising from execution of the warrant issued by Gangavathi Court has sprouted up within the territorial jurisdiction of this Court, which is evident from seizure of the goods from places situated within the limits of Nagpur District under the territorial jurisdiction of this Court. Added to it is the grievance that mandatory procedure prescribed by Sections 101 and 105 of the Cr.P.C. has been violated.

16. Now, we would proceed to examine the issue involved in this petition from the angle of procedural requirements, as prescribed by Sections 101 and 105 of the Cr.P.C. This would take us to the provisions contained in Sections 101 and 105 of the Cr.P.C. and, therefore, it would be useful for us to reproduce these provisions of law here. They go as under :-

> *"101. **Disposal of things found in search beyond jurisdiction**.—When, in the execution of a search-warrant at any place beyond the local jurisdiction of the Court which issued the same, any of the things for which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate; and, unless there be good cause to the contrary, such Magistrate shall make an order authorising them to be taken to such Court.*

105. Reciprocal arrangements regarding processes.—

(1) Where a Court in the territories to which this Code extends (hereafter in this section referred to as the said territories) desires that—

(a) a summons to an accused person, or
(b) a warrant for the arrest of an accused person, or
(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it, or
(d) a search-warrant,
[issued by it shall be served or executed at any place, —

(i)within the local jurisdiction of a Court in any State or area in India outside the said territories, it may send such summons or warrant in duplicate by post or otherwise, to the presiding officer of that Court to be served or executed; and where any summons referred to in clause (a) or clause (c) has been so served, the provisions of section 68 shall apply in relation to such summons as if the presiding officer of the Court to whom it is sent were a Magistrate in the said territories;

(ii)in any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country or place for service or execution of summons or warrant in relation to criminal matters (hereafter in this section referred to as the contracting State), it may send such summons or warrant in duplicate in such form, directed to such Court, Judge or Magistrate, and send to such authority for transmission, as the Central Government may, by notification, specify in this behalf.]

(2) Where a Court in the said territories has received for service or execution—

(a) a summons to an accused person, or
(b) a warrant for the arrest of an accused person, or
(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it, or
(d) a search-warrant,
[issued by—

> *(i) a Court in any State or area in India outside the said territories;*
>
> *(ii) a Court, Judge or Magistrate in a contracting State, it shall cause the same to be served or executed] as if it were a summons or warrant received by it from another Court in the said territories for service or execution within its local jurisdiction; and where—*
>
> *(i) a warrant of arrest has been executed, the person arrested shall, so far as possible, be dealt with in accordance with the procedure prescribed by sections 80 and 81,*
>
> *(ii)a search-warrant has been executed, the things found in the search shall, so far as possible, be dealt with in accordance with the procedure prescribed by section 101:*
>
> *[Provided that in a case where a summons or search-warrant received from a contracting State has been executed, the documents or things produced or things found in the search shall be forwarded to the Court issuing the summons or search-warrant through such authority as the Central Government may, by notification, specify in this behalf.]*

17. On reading the provisions made in Section 105 and Section 101, it would become clear that they lay down an elaborate procedure for service or execution of summons or arrest warrant or search warrant issued by it at a place situated outside it's territorial jurisdiction. In this case, we are concerned with the question relating to execution of search warrant issued by one jurisdictional Court at a place situated within the local limits of another jurisdictional Court. We would, therefore, only consider those provisions as would impact the execution of search warrant issued by one Court at a place situated outside it's jurisdiction.

18. Shri Bhangde, learned counsel for the petitioners submits that even though a Court in one territory can issue a search warrant to be executed in another territory, he must do so by sending the warrant in duplicate by post or otherwise to the Presiding Officer of a Court within whose local jurisdiction it may be executed. He submits that this requirement of law is mandatory and the words *"may send said summons or warrant in duplicate by post or otherwise to the Presiding Officer of that Court"* employed in Section 105(1)(i) of the Cr.P.C. connote mandate of the legislature and, therefore, the word *"may"* must be read as *"shall"*. He further submits that there is also a requirement stated in Sub-section 2(ii) of Section 105 of the Cr.P.C. that the things found in the search shall, so far as possible, be dealt with in accordance with procedure prescribed in Section 101. According to him, when the legislature mandated that after execution of the search warrant, the things seized in the search be dealt with as per the procedure laid down in Section 101, it indicated a purpose for which the legislature thought it fit to apply the procedure of Section 101 upon seizure of the articles and, therefore, in spite of the use of the words *"so far as possible"* an officer executing the search warrant cannot escape from the rigor of the procedure laid down in Section 101, except in a very rare case. From this view point, he submits, the command contained in Section 105 to follow procedure of Section 101 is mandatory. According to him, the purpose is to prevent any wrong

search being made and/or wrong articles being seized and also to give opportunity of hearing to a person whose place has been searched so that there is no abuse of power by police.

19. Shri Bhangde, learned counsel for the petitioners further submits that in the present case, Gangavathi Magistrate did not follow the procedure of Section 105, by sending the search warrant for its execution to the Presiding Officer of jurisdictional Court at Nagpur and the police officer who executed the warrant also ignored the procedure laid down in Section 101. He submits that these procedural requirements being mandatory in nature ought to have been strictly followed and as there has been a breach committed in respect of these requirements, the whole search and seizure operation conducted at Nagpur by Karnataka Police under the search warrant issued by Gangavathi Court is vitiated and as such, the petitioners are entitled to get back the possession of the seized goods.

20. Shri Sirpurkar and Shri Chauhan, learned counsel for respondent Nos.1 and 5 though agree that there is a legislative purpose behind laying down elaborate procedure as regards execution of search warrant which is to create adequate safeguard against abuse of process of law, they differ with the submissions of Shri Bhangde, on the point of mandatory nature of the procedure prescribed under Sections 105 and 101 of the Cr.P.C. According to them, procedure being a

handmaiden of substantive justice, it cannot be that in every case a procedural breach of law should result in affecting the cause of substantive justice. They submit that if the petitioners contend that on account of violation of the procedure of Sections 105 and 101, the search of the godowns of the petitioners and seizure of their goods have been vitiated, they must also demonstrate the prejudice thereby caused to them, without which, their such contention cannot be accepted. They submit that it is only when not following of procedural requirement results in causing of prejudice that a person may have a reason to complain about the violation of procedure, which is not the case here.

21. Shri Sirpurkar and Shri Chauhan, learned counsel for respondent Nos.1 and 5 further submit that even otherwise, there is nothing in Sections 105 or 101, which indicates that the procedure prescribed therein must be followed in every case. On the contrary, they submit that the procedure prescribed therein appears to be directory and discretionary in nature. As regards the question of granting of an opportunity of hearing to a person whose place has been searched, they submit that such a procedure is not contemplated anywhere in Sections 105 and 101, which is evident from a plain reading of these provisions of law.

22. The rival arguments, as we have seen, basically raise a question –

> *Whether procedure regarding search and seizure prescribed in Section 105 and 101 of the Cr.P.C. is mandatory in nature* ?

If the answer to the question is in the affirmative, it would render the search made in violation of the procedure as invalid. But, if the answer is no, the search made cannot be said to be vitiated unless further requirement of law that is of prejudice having been caused to the person whose place is searched is fulfilled. To our mind, the answer to the question cannot be searched for only by looking into Sections 105 and 101 of the Cr.P.C. A holistic approach would have to be adopted if any reasonable answer to the question is to be found out. Necessity of such an approach is clearly suggested by the provisions made in Section 99 of the Cr.P.C. contained in Part - C of Chapter - VII, relating to general provisions as regards searches. It reads thus :-

> *"**99. Direction, etc., of search-warrants.**- The provisions of sections 38, 70, 72, 74, 77, 78 and 79 shall, so far as may be, apply to all search-warrants issued under section 93, section 94, section 95 or section 97."*

Above section is a pointer to the fact that not only the procedure prescribed in Sections 105 and 101 but also the procedure laid down in Sections 38, 70, 72, 74, 77, 78 and 79 would also apply to

the search-warrants generally, to an extent possible. These sections baring Section 38 basically relate to warrant of arrest. Section 38 is about assistance to be given in the execution of warrant when the warrant is directed to a person other than police officer. But, the remaining sections mentioned in Section 99 are about form of a warrant of arrest and it's duration, to whom the warrant of arrest shall ordinarily be directed, the authority of police officer directed to execute a warrant to delegate his duty to execute the warrant to any other police officer, executability of warrant of arrest at any place in India and the manner in which the warrant of arrest which is to be executed outside the local jurisdiction of the Court issuing it, be executed. All these provisions though expressly speak of warrant of arrest, by virtue of Section 99 these provisions can to the extent they could be applied to search warrants, be pressed into service for issuance and execution of search warrants. In other words, these provisions of law enlarge the choice and discretion of the Magistrate in the matter of issuance and execution of search warrants. In the present case, as we are concerned with issuance and execution of a search warrant outside the local jurisdiction of the Court issuing it, and, therefore, any reproduction of these provisions of law here would certainly provide us greater insights into the issue. From this view point, provisions as made in Sections 72, 77, 78 and 79 of the Cr.P.C. are relevant and they go as under :-

72. Warrants to whom directed.—

(1) A warrant of arrest shall ordinarily be directed to one or more police officers; but the Court issuing such a warrant may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons, and such person or persons shall execute the same.

(2) When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more of them.

77. Where warrant may be executed.—A warrant of arrest may be executed at any place in India.

78. Warrant forwarded for execution outside jurisdiction.—

(1) When a warrant is to be executed outside the local jurisdiction of the Court issuing it, such Court may, instead of directing the warrant to a police officer within its jurisdiction, forward it by post or otherwise to any Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction it is to be executed; and the Executive Magistrate or District Superintendent or Commissioner shall endorse his name thereon, and if practicable, cause it to be executed in the manner hereinbefore provided.

(2) The Court issuing a warrant under sub-section (1) shall forward, along with the warrant, the substance of the information against the person to be arrested together with such documents, if any, as may be sufficient to enable the Court acting under section 81 to decide whether bail should or should not be granted to the person.

> ***79. Warrant directed to police officer for execution outside jurisdiction.—***
>
> *(1) When a warrant directed to a police officer is to be executed beyond the local jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to an Executive Magistrate or to a police officer not below the rank of an officer in charge of a police station, within the local limits of whose jurisdiction the warrant is to be executed.*
>
> *(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same, and the local police shall, if so required, assist such officer in executing such warrant.*
>
> *(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police officer within whose local jurisdiction the warrant is to be executed will prevent such execution, the police officer to whom it is directed may execute the same without such endorsement in any place beyond the local jurisdiction of the Court which issued it.*

23. When read in the context of a search warrant, these provisions would tell us that a search warrant should ordinarily be directed to a police officer, unless the police officer is not available and it's immediate execution is necessary, and that it is capable of being executed at any place in India. It would be further clear that when a search warrant is to be executed outside the local jurisdiction of the Court issuing it, such Court may, in stead of directing the warrant to a

police officer within its jurisdiction, forward it by post or otherwise to any Executive Magistrate or the Superintendent of Police or Commissioner of Police within whose jurisdiction it is to be executed. They further show that upon receipt of the warrant, the Executive Magistrate or the Superintendent of Police or Commissioner of Police is required to cause it to be executed in the manner provided in Section 78. These provisions of law further show that when a search warrant issued by a Court is to be executed beyond the local jurisdiction of the Court issuing it, it can be executed by yet another mode. The Court can authorize a police officer within it's jurisdiction, to execute it and thereupon, such police officer would have to execute the warrant by following the procedure prescribed in Section 79. This procedure contemplates the police officer ordinarily taking the search warrant for endorsement either to an Executive Magistrate or to a police officer not below the rank of an officer incharge of the police station, within whose local limits of jurisdiction the warrant is to be executed and once such an endorsement is made, it would constitute sufficient authority for the concerned police officer to execute the search warrant. This procedure also takes into account the contingency of delay being caused in obtaining the endorsement of concerned Executive Magistrate or concerned police officer and by way of an exception, it allows the police officer, who is of the opinion that obtaining of such an endorsement is likely to cause delay and frustrate

the execution of the search warrant, to go ahead and execute the search warrant without such endorsement.

24. The position that emerges now is that, whenever a search warrant is to be executed at a place situated beyond the local limits of jurisdiction of a Court, the Court would have three options available before it and by electing one of the options, it may cause the search warrant executed at a place beyond its territorial jurisdiction. The first option is of sending the warrant in duplicate to the Presiding Officer of the other Court within whose jurisdiction the place where search warrant is to be executed is situated and the procedure as regards this option is laid down in Section 105. The second option is, as per the provisions contained in Section 78, empowering the Court to forward the search warrant by post or otherwise to Executive Magistrate or Superintendent of Police or Commissioner of Police, who shall cause the warrant to be executed, in the manner provided therein. The third option is of directing the police officer to execute the search warrant, by following the procedure prescribed in Section 79.

25. Legislature by creating such different modes of causing the search warrant executed in the territorial jurisdiction of another Court has sufficiently indicated it's consciousness about the difficulties that a Court may experience in such cases and, therefore, it has provided for these three modes of execution and left it to the discretion of the Court

to choose between them, depending on the fact situation of every case. While doing so, it has also created certain safeguards to ensure fair and proper execution of search-warrant, and so there is also an elaboration of procedure of execution. Central theme of such elaborate mechanism is of expeditious and effective execution of search warrant within the four corners of law. The safeguards embedded are in the nature of Executive Magistrate or the Superintendent of Police or the Commissioner of Police or Police Station In-charge endorsing his name on the search warrant before its execution, (Section 78 and 79) and the Presiding Officer of a Court causing the search warrant to be executed within his jurisdiction (Section 105), by subjecting it, as far as possible, to the procedure of Section 101. These sections do not require that the authority which has received the search warrant for execution, must issue a notice to a person whose place is to be searched. On the contrary, issuance of any such notice may result in failure and frustration of the object of the search warrant. It is for these reasons that we do not accept the argument of learned counsel for the petitioners that issuance of notice to the concerned person before execution of the search warrant, especially in accordance with the procedure prescribed under Section 105, is desirable, and we reject it.

26. So, it is now clear that procedure prescribed under Section 105 is not the only one which can be resorted to in such matters and that other options are also available. This would lead us to hold that

the words *"may send such summons or warrant in duplicate by post or otherwise, to the Presiding Officer of that Court"* used in Section 105(1)(i) cannot be understood as having any prescriptive or mandatory form. The word *"may"* used here, therefore, cannot be read as signifying a command which inheres in the verb *"shall"*. If any mandatory form is clothed to *"may"*, it would render the other modes available for execution of warrant redundant. The Magistrate would be left with no option but to get his warrant executed only by procedure of Section 105. The Magistrate would feel tied down to only Section 105 procedure, inspite of availability of other options. To prevent any such constriction of the power of the Magistrate from taking place the legislature intentionally employed the word *"may"* and left it to the discretion of the Magistrate to choose between the three modes of execution of warrant.

27. There is another aspect demanding our consideration. Things found in execution of search warrant invariably constitute important piece of evidence. Sometimes, any delay in their seizure may result in their being tampered with or disappearing altogether. Sometimes, wrong articles may be seized and sometimes police excesses may also take place. Legislature had to take care of these contingencies. It has, therefore, performed a balancing exercise to achieve the twin goals of criminal justice delivery system namely-

(a) ensuring proper investigation by providing for three modes of execution of search warrant and

(b) collecting quality evidence by providing for safeguards to prevent misuse of power by the officer executing the warrant.

Thus, the object of the legislature in prescribing elaborate procedure as regards execution of search warrants in Sections 78, 79 and 105 is two-fold :

(i) to have effective investigation and,

(ii) to collect credible evidence,

and with this object in view that the legislature has provided for three modes of execution of warrant and left it to the discretion of the Magistrate to choose one between them.

Learned Single Judge of Allahabad High Court, in the case of *Mahesh Pal Singh Vs. Pooran Chand Tiwari,* ***1987 SCC Online All 402***, has also found that the purpose of search warrant is to facilitate investigation. Thus, it is obvious that nothing of substance lies in the argument of learned counsel for the petitioners that the word *"may"* used in Section 105 should be read as *"shall"*, and we reject it.

28. The provisions contained in Sections 105, 78 and 79, as stated earlier, indicate three different modes by which the search warrant issued by one jurisdictional Court can be executed within the territory of another jurisdictional Court. While Sections 78 and 79, when read in the context of search warrants, do not show the way for disposal of things found in search made beyond jurisdiction, Section 101 does so. Section 105, however, specifically refers to Section 101 when it says in Sub-section 2(d)(ii) that when a search warrant has been executed and things are found in the search, same shall, so far as possible, be dealt with in accordance with the procedure prescribed by Section 101. Here, a doubt arises, given the silence of Sections 78 and 79 about the manner in which the things found in search be dealt with, whether by the procedure of Section 101 or some other procedure. The doubt could be cleared by closely examining the provisions contained in Section 101 which we have already produced in the earlier part of this judgment.

29. When we turn back to Section 101, we find that the procedure contained therein must mandatorily be followed while dealing with the seizure of the articles found in execution of the search warrant, when it is under Section 78 or 79. It must also be mandatorily followed, when it is done under Section 105, though in exceptional cases, a departure from Section 101 procedure is permissible.

30. Section 101 is an omnipotent provision, it being the only of it's kind which deals with disposal of things found in the search, whether under Section 78 or Section 79 or Section 105 and so it has universal application to all searches made by resorting to any of the three modes of the execution of warrants, barring the power of the Magistrate to depart from it in a rare case under Section 105. Language of Section 101 has an imperative character. This is evident from the use of an expression indicative of a mandate therein. The mandate is expressed in words *"such things, together with the list of same prepared under the provisions hereinafter contained, shall be immediately taken before the Court"*. Uses of the modal verb *"shall"* here signifies nothing but command of the legislature which must be followed. The command is that the things found in the search must be taken before the Court issuing the warrant but, if such Court is situated farther than the Court within whose local jurisdiction the things are found, the things are required to be taken before such nearer Court. When the things are produced before the nearest Magistrate having jurisdiction over the place searched, along with list of the articles found, such Magistrate is required to make an order authorizing the things to be taken to the Court issuing the warrant, unless he finds a good cause to the contrary.

31. Such procedure prescribed in Section 101 has a purpose behind it. When the Court issuing the warrant is situated at a distant

place, considerable time may be required for the officer to produce the things seized before the Court issuing it. Sometimes heavy expenses for transportation of such things may have to be incurred, sometimes seized articles being valuable may be at the risk of being tampered with or forcibly taken away by somebody, sometimes a need may arise for giving back the custody of the seized articles to the person on his executing a bond undertaking to produce the property before the Court as and when required, sometimes there may be also a need for providing for faster transportation of the seized articles to the Court issuing the warrant, sometimes goods being perishable, a command for issuing appropriate directions for their preservation may arise and sometimes seizure of wrong articles, police excesses, and misuse of powers may take place. Such contingencies can only be taken care of adequately by taking the things to the nearest Magistrate and therefore, there is a mandate for taking the things found in the search before the nearest Magistrate. This is the purpose which is sought to be achieved by the prescription contained in Section 101 that whenever it is not possible for an officer to take the things found in the search to the Court issuing the warrant, on account of that Court being situated at a distance farther than the Court within whose jurisdiction the search warrant is executed, the officer must produce the seized articles before such nearest Magistrate. It is also with this object in mind that a discretion has been given to the Magistrate to not authorize taking of

the things to the Court issuing the warrant whenever he finds good cause to the contrary. But, we must add here that any refusal to give such authorisation must be by way of an exception, only when there is good cause to do so, and that reasons in writing must be recorded for such refusal. Reason being that when there is a discretion, it always comes with it's own compunction, the compunction of being fair and reasonable. Reasons recorded in writing serve as a barometer to test the parameters of reasonableness, fairness and transparency in exercise of the discretion. Of course, in such a case also, disagreeing with the argument of learned counsel for the petitioners, there would be no need for the Magistrate to issue notice to the person from whose custody the articles are seized and give him an opportunity of hearing. There is nothing in Section 101 which indicates giving of such an opportunity of hearing to such person. However, the Magistrate is required to apply his mind to the contents of the search-warrant, list of seized articles and other relevant facts and decide the question of grant of permission or otherwise for the things to be taken before the Magistrate issuing the warrant.

32. In Section 105(2)(d)(ii), it is laid down that where a search warrant has been executed, things found in the search shall, **so far as possible**, be dealt with in accordance with the procedure prescribed by Section 101. According to the learned counsel for respondent Nos.1 and 5, the use of the words *"so far as possible"*

clearly indicate that whenever Section 105 mode is adopted for execution of a search warrant, it is not necessary that in every case the procedure prescribed in Section 101 as regards production of seized articles before the nearest Magistrate must be followed and that in fit cases, instead of doing so the things seized could be directly produced before the Court issuing the warrant, no matter at what distance the Court is situated from the place where the search warrant is executed. This is disagreed to by learned counsel for the petitioners.

33. We are of the view that learned counsel for respondent Nos.1 and 5 are right in their submission that ordinarily Section 101 procedure should be followed while executing the search warrant in accordance with the procedure prescribed by Section 105, but in exceptional cases, such procedure, in so far as it relates to producing the seized articles before the nearest Magistrate, can be dispensed with by the concerned Court depending on the fact situation of each case. The reason being that Section 105 procedure is a Court monitored mode of execution of the search warrant which is not so in case of the modes referred to any Sections 78 and 79. When the Court having jurisdiction over the place being subjected to search takes upon itself the job of execution of the search warrant, it may, in fit cases, permit the officer executing the search warrant to take the seized articles directly to the Court issuing the warrant instead of the nearest Court by prescribing certain conditions in order to prevent misuse of the power

by the executing officer. Such Court is presumed in law to possess the necessary power and means to ensure proper execution of the warrant and prevent abuse of process of law while the officer takes away the things found for their being produced directly before the Court issuing the warrant. Such means not having been possessed by the officer causing the warrant to be executed or executing the warrant under Sections 78 and 79, the officer executing the warrant would have to mandatorily follow the procedure prescribed by Section 101 of Cr.P.C.

34. In view of above, we are of the view that Section 101, procedure governing the disposal of things found in search beyond jurisdiction is mandatory when the modes of execution of warrant laid down in Sections 78 and 79 are resorted to and without any exception. We further find that when the mode of execution of warrant referred to in Section 105 is taken recourse to, ordinarily the procedure prescribed by Section 101 for production of seized articles must be followed and it is only in exceptional cases when warranted by fact situation of a particular case that departure therefrom, for reasons to be recorded in writing, can be permitted to be made by the Court getting the warrant executed and that too upon prescription of suitable conditions and adequate safeguards to ensure misuse of powers by the executing officer. The question that we have framed here, in so far as it relates to Section 101, thus stands answered in these terms. As regards, the other part of the question about mandatory or otherwise nature of the mode

prescribed in Section 105, we have already found that it is not compulsory for a Court to always send the warrant to the other Court for execution and that the Court may resort to any of the three modes of execution of warrant as are found in Section 78 or Section 79 or Section 105. This part of the question framed here is thus answered in these terms.

35. Of course, learned counsel for respondent Nos.1 and 5 would argue that even when the modes given under Sections 78 and 79 are adopted for execution of the search warrant, procedure of Section 101 need not necessarily be followed and violation thereof would not render the whole search and seizure operation as illegal or vitiated, unless causing of prejudice to the person from whose custody the articles are seized is shown by that person. They would rely upon the view taken in this regard by the learned Single Judge of Gujrat High Court in the case of *Gopalbhai Chandubhai Rana Vs. State of Gujarat* ***2008 SCC OnLine Guj 264***, *State represented by Inspector of Police, Central Bureau of Investigation Vs. M. Subrahmanyam* ***(2019) 6 SCC 357***, *Superintendent of Police, CBI and Ors. Vs. Tapan Kumar Singh* ***(2003) 6 SCC 175*** and *State of Punjab Vs. Balbir Singh* ***(1994) 3 SCC 299***. Shri Bhangde, learned counsel for the petitioners submits that if one takes into consideration the object sought to be achieved by legislature in prescribing the mandatory procedure under Section 101,

one would find that even a mere violation of the procedure would result in frustrating the cause of justice.

36. While it is true that it is not always the case that every procedural lapse would render seizure of articles illegal. It is also true that provisions contained in Section 101 of the Cr.P.C. are procedural. It is further true that rules of procedure are handmaiden of justice and are made to advance and not obstruct the cause of justice as observed in the case of *Sakshi Vs. Union of India* ***(2004) 5 SCC 518.*** But, in our view, the principle has to be applied in a manner that it harmonises itself with other principle of law which lays down that when a thing is directed by the legislature to be done in a particular manner, it must be done in that manner alone or not at all. This principle of law propounded in the case of *Taylor Vs. Taylor* ***(1875)***, followed in the case of *Nazir Ahmad Vs. Emperor* ***AIR 1936 PC 253 (2)*** and several other later cases, has stood firm in the time capsule in Indian jurisprudence.

37. Now, a question would be, why harmonise? Answer would lie in the object of the rule and the purpose for which it is made. Seized articles constitute important piece of evidence and, therefore, the effort must be to ensure that no doubt is left at any stage of the whole process of search, seizure and production of the articles before the trial Court for the purpose of proving the prosecution case against the

accused. In order to minimize the possibility of creating any doubt in the whole process, the legislature has, in Section 101, mandated a particular procedure to be followed. If this mandate is not followed, the piece of evidence formed by the seized articles would become vulnerable. Doubt would be expressed about the genuineness and authenticity of the whole process and it would be very difficult for the prosecution to protect the evidence from such attack. On the other hand, if all the procedural requirements as given under Section 101 are followed it would be very difficult for the accused to contend that seizure of articles cannot be believed as there was possibility of articles being tampered with or wrong articles being seized and so on and so forth.

38. We may add here that whenever a procedural provision is enacted, the legislature would necessarily have certain objects in view, and the objects of the legislature may vary from case to case. Sometimes, a certain procedure is laid down for convenience of the parties, sometimes it may be by way of guidance for the parties, sometimes it may be for bringing uniformity or certainty in practices being followed and sometimes it may be mandatory and by way of a safe-guard to prevent abuse of process of law or miscarriage of justice. When the procedure is prescribed in the nature of mandate of law and seeks to achieve the object of insulating the thing done as per the laid down procedure against abuse of process of law or miscarriage of

justice, the procedure prescribed would have to be mandatorily followed and it's mere violation would result in vitiating the whole process under the rule of *Taylor* (supra) and *Nazir Ahmed*. But, this may not be so in other cases, where the handmaiden of justice principle of *Sakshi* (supra) and prejudice rule would dominate. The procedure laid down in Section 101, with it's object explained earlier could be seen as the mandate of law prescribed to prevent miscarriage of justice, and so it has to be followed, except in a rare case discussed earlier. This would mean that the situation which has fallen for our consideration here has necessitated achieving of harmony between the afore-stated two principles of law.

39 It follows then that there is wisdom in obeying the command of law of procedure as contained in Section 101 rather than to say that it is for the officer executing the warrant to decide in his discretion, to follow or not to follow the procedure prescribed by Section 101 of the Cr.P.C. If the interpretation made by learned counsel for respondent Nos.1 and 5 about the discretionary and optional nature of procedure prescribed in Section 101 to the extent it requires seized articles to be produced before the nearest Magistrate is accepted, it may lead to subverting rather than sub-serving the cause of substantive justice. It is for this reason that we say, at the cost of repetition, that there are certain situations which call for harmonising the two principles of law, the procedure is handmaiden of substantive justice

and mandate of law to do a thing in a particular manner alone, with each other. As such, we find that whenever the search warrant is executed by taking recourse to the modes prescribed in Sections 78 and 79, the procedure prescribed by Section 101 of the Cr.P.C. must be mandatorily followed, and that it must also be followed when the warrant is executed through the route of Section 105 of the Cr.P.C., except in a rare case, in view of the provisions made in Section 105(2)(d)(ii) of the Cr.P.C., which we have already discussed.

40. Having understood the law governing the subject of the execution of search warrant that now we have to examine the correctness or the otherwise of the procedure adopted by Gangavathi Court in issuing the warrant and getting it executed at Nagpur. It is an admitted fact that the warrant which was to be executed at two places situated within the territorial jurisdiction of Nagpur Court was not forwarded to the Nagpur Court having the jurisdiction, as prescribed under Section 105 or to any authority having the jurisdiction as prescribed under Section 78 and the warrant was directed to police officer of police station Gangavathi for executing the same at Nagpur and it appears that this was done by resorting to the mode given under Section 79 of the Cr.P.C. The police officer, on his part, obtained the authorization of the officer in-charge of the jurisdictional police station and executed the search warrant at two places situated in Nagpur district. This was as per the procedure laid down under Section 79 of

the Cr.P.C. But, thereafter, it is seen that the procedure governing disposal of things found in the search as prescribed by Section 101 was not followed by the police officer who executed the warrant. We have already found that procedure contained in Section 101 of the Cr.P.C., in so far as it relates to Sections 78 and 79, is mandatory and no exception to it and no departure from it are permitted. Karnataka police do have an explanation in this regard like the resistance put up by the locals and the fear of the locals forcibly taking away the rice bags which made the officer to directly take the seized rice bags before Gangavathi Court. Such justification will be of no help to Gangavathi police when we find that there is no escape from the rigor of procedure prescribed in Section 101 in respect of two modes of execution of warrant given under Sections 78 and 79 of the Cr.P.C. As stated earlier, the mode adopted here for execution of the search warrant was as given in Section 79 and not Section 105. Therefore, any violation of procedure prescribed by Section 101, which indeed has taken place in the present case, would vitiate the whole search and seizure operation and that would mean that the seizure of the rice bags made by Karnataka police in the present case is illegal.

41. In the circumstances, we are of the view that this petition deserves to be partly allowed and accordingly it is allowed in terms of prayer clause (I).

42. It is declared that the seizure of the rice bags (6140 rice bags of Heritage brand made from godown of petitioner No.1 and 999 rice bags of Heritage brand made from the godown of petitioner No.2 situated within Nagpur district) is illegal.

43. The respondent No.1 is directed to restore these rice bags to the petitioners by bringing them back to the places from where they were seized, within two weeks.

44. Respondent Nos.1, however, is at liberty to obtain a fresh search warrant and execute it afresh in accordance with law.

Rule is made absolute in above terms.

(AVINASH G. GHAROTE, J.) (SUNIL B. SHUKRE J.)

Kirtak