Supreme Court of India
Sheonandan Paswan vs State Of Bihar & Others on 16 December, 1982
Equivalent citations: 1983 AIR 194, 1983 SCR (2) 61
Author: V Tulzapurkar
Bench: Tulzapurkar, V.D.

PETITIONER:
SHEONANDAN PASWAN

Vs.

RESPONDENT:
STATE OF BIHAR & OTHERS

DATE OF JUDGMENT16/12/1982

BENCH:
TULZAPURKAR, V.D.
BENCH:
TULZAPURKAR, V.D.
ISLAM, BAHARUL (J)
MISRA, R.B. (J)

CITATION:
1983 AIR 194 1983 SCR (2) 61
1983 SCC (1) 438 1982 SCALE (2)1241
CITATOR INFO :
APL 1987 SC 877 (38,52,62,83)
RF 1992 SC 604 (140)

ACT:

A. Nolles Prosequi-Nature and scope of power under section 321 of the Code of Criminal Procedure, 1973-In the discharge of his duties, whether a public prosecutor, who is always instructed by the Government can be said to be free and independent.

B. Special Public Prosecutor, appointment of-Appointment of Special Public Prosecutor to conduct the case in question without cancelling the appointment of an earlier appointee-Competency of the latter appointee applying for withdrawal of the Code, of Criminal Procedure, 1973, Sections 24 (8) and 321.

C. Code of Criminal Procedure, 1973-Section 321-Grounds for withdrawal from prosecution-Whether the grounds like (a) implication of the accused as a result of personal and political vendetta, (b) inexpediency of prosecution for reasons of State and Public policy, and (c) adverse effects which the continuance of prosecution will bring on public interest etc. would be relevant for withdrawing from the prosecution.

D. Nolles Prosequi-Accused charged with offences of criminal misconduct and forgery-Permission to withdraw on an application made on the ground of lack of prospect of successful prosecution in the light of the evidence on record-High Court confirming the said order-Interference by the Supreme Court under Article 136.

HEADNOTE:

After obtaining the requisite sanction from the Governor on 19th February, 1979, a chargesheet in Vigilance P.S. case no. 9 (2) 78 was filed by the State of Bihar against Respondent No 2 (Dr. Jagannath Mishra), Respondent no. 3 (Nawal Kishore Sinha), Respondent no. 4 (Jiwanand Jha) and three others (K.P. Gupta since deceased, M.A. Haidari and A.K. Singh who later became approvers) for offences under Sections 420/466/471/109/120-B I.P.C. and under Section 5 (1) (a), 5 (1) (b) and 5 (1) (d) read with Section 5 (2) of the Prevention of Corruption Act, 1947. Inter alia, the gravamen of the charge against the respondent no. 2, was that all times material he was either a Minister or the Chief Minister of Bihar and in that capacity by corrupt and or illegal means or by otherwise abusing his position as a public servant, he, in conspiracy with the other accused and with a view to protect Nawal Kishore Sinha, in particular, sought to subvert criminal prosecution and surcharge

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proceedings against Nawal Kishore Sinha and others, and either obtained for himself or conferred on them pecuniary advantage to the detriment of Patna Urban Co-operative Bank, its members, depositors and creditors and thereby committed the offence of criminal misconduct under Section 5 (1) (d) read with Section 5 (2) of the Prevention of Corruption Act, 1947 and in that process committed the other offences specified in the charge-sheet, including the offences of forgery under section 466 I.P.C. Cognizance of the case was taken on 21st November, 1979 by the learned Chief Judicial Magistrate-cum-Special Judge (Vigilance)Patna, who issued process against the accused, but before the trial commenced the State Government, at the instance of Respondent no. 2, who in the meantime had come to power and had become the Chief Minister; took a decision in February 1981 to withdraw from the prosecution for reasons of State and Public Policy. Though initially Shri Awadesh Kumar Dutt, Senior Advocate Patna High Court, had been appointed as a Special Public Prosecutor by the previous Government for conducting the case, the State Government (now headed by Respondent no. 2) without cancelling Shri Dutt's appointment as Special Public Prosecutor, on 24th February 1981 constituted a fresh panel of lawyers for conducting cases pertaining to Vigilance Department. Sri Lalan Prasad Sinha, one of the Advocates so

appointed on the fresh panel was allotted the said case and was informed of the Government's said decision and on 26th March, 1981, he was further requested to take steps for withdrawal of the case after he had considered the matter and satisfied himself about it. On 17th June, 1981, Sri Lalan Prasad Sinha made an application under Section 321 Crl. P.C. 1973 to the Special Judge seeking permission to withdraw from the prosecution of Respondent Nos. 2, 3 and 4 in the case on four grounds: namely, (a) Lack of prospect of successful prosecution in the light of the evidence, (b) Implication of the persons as a result of political and personal vendetta, (c) Inexpediency of the prosecution for the reasons of the State and Public Policy; and (d) Adverse effects that the continuance of the prosecution will bring on public interest in the light of the changed situation. The learned Special Judge by his order dated 20th June 1981 granted the permission. A Criminal Revision No. 874/81 preferred by the appellant against the said order was dismissed in limine by the High Court on 14th September, 1981. Hence the approval by Special Leave of the Court.

Allowing the Appeal, the Court

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HELD: (i) Lalan Prasad Sinha was the competent officer entitled to apply for the withdrawal from the prosecution, there being no infirmity in his appointment. [155 B-C]

(ii) He did apply his mind and came to his own conclusions before making the application for the withdrawal from the prosecution. [149 G]

Per majority (Baharul Islam and Misra JJ, Tulzapurkar J dissenting)

The executive function of the Public Prosecutor and or the supervisory function of the trial court in granting its consent to the withdrawal have been properly performed and not vitiated by reason of any illegality. [143E-158A]

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Per Tulzapurkar J (Concurring with Baharul Islam and Misra JJ.)

1:1 Sri Lalan Prasad Sinha was the competent officer entitled to apply for the withdrawal from the prosecution. [84 E. 85 F]

2:2 It is true that the appointment of the former prosecutor, in the instant case, made by the previous government to conduct the case in question had not been cancelled, though in fitness of things it should have been cancelled but that did not prevent the new government to make a fresh appointment of a Public Prosecutor and to put him in charge of the case. Appointments of Public Prosecutors generally fall under Section 24 (3) of the Code of Criminal Procedure, but when the State Government appoints public prosecutors for the purpose of any case or class of cases, the appointees became Special Public Prosecutors under Section 24 (8) of the Code. [85 B-D]

1:2 Further it cannot be disputed that the former

prosecutor not having appeared before the Special Judge at any stage of the hearing was never incharge of the case not in the actual conduct of the case; on the other hand, after the allotment of this case to him, the latter was incharge of the case and was actually conducting the case he having admittedly appeared in the case at least on four occasions before the Special Judge. [85 D-F]

State of Punjab v. Surjeet Singh and Anr., [1967] 2 S.C.R. 347; M.N.S. Nair v. P.V. Balakrishnan and Ors [1972] 2 S.C.R. 599, followed.

1:3 It is true that, in the instant case, the State Government had taken its own decision to withdraw from the prosecution in the case against the accused persons and it is also true that the said decision was communicated to the Public Prosecutor, but if the letters communicating the decision are carefully scrutinised, it will be clear that the State Government merely suggested him (which it was entitled to do) to withdraw from the prosecution but at the same time asked him to consider the matter on his own and after satisfying himself about it make the necessary application which he did, and there is no material to doubt the recital that is found in the application that he had himself considered relevant materials connected with the case and had come to his own conclusions in that behalf. [86 D-F]

2. From the Supreme Court's enunciation of the legal position governing the proper exercise of the power contained in Section 321, three or four things became clear :

(i) Though withdrawal from prosecution is an executive function of the Public Prosecutor for which statutory discretion is vested in him, the discretion is neither absolute nor unreviewable but it is subject to the court's supervisory function. In fact being an executive function it would be subject to a judicial review on certain limited grounds like any other executive action; the authority with whom the discretion is vested 'must genuinely address itself to the matter before it, must not act under the dictates of another body, must not do what it has been forbidden to do, must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or the spirit of the legislation that gives it power to act arbitrarily or capriciously." [81 E-H, 82A]
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(ii) Since the trial court's supervisory function of either granting or refusing to grant the permission is a judicial function the same is liable to correction by the High Court under its revisional powers both under the old and present Code of Criminal Procedure, and naturally the Supreme Court would have at least coextensive jurisdiction with the High Court in an appeal preferred to it by special leave or upon a certificate by the High Court. [82 B-D]

(iii) No dichotomy as such between political offences or the like on the one hand and common law crimes on the other could be said to have been made by the Supreme Court for purposes of Section 321, for, even in what are called political offences or the like, committing common law crimes, is implicit, for the withdrawal from the prosecution of which the power under Section 321 has to be resorted to. But the decisions do lay down that when common law crimes are motivated by political ambitions or considerations or they are committed during or are followed by mass agitations, communal frenzies, regional disputes, industrial conflicts, student unrest or like situations involving emotive issues giving rise to an atmosphere surcharged with violence, the broader cause of public justice, public order and peace may outweigh the public interest of administering criminal justice in a particular litigation and withdrawal from the prosecution of that litigation would become necessary, a certainty of conviction notwithstanding, and persistence in the prosecution in the name of vindicating the law may prove counter-productive. In other words, in case of such conflict between the two types of public interests, the narrower public interest should yield to the broader public interest, and, therefore, an onerous duty is cast upon the court to weigh and decide which public interest should prevail in each case while granting or refusing to grant its consent to the withdrawal from the prosecution. For, it is not invariably that whenever crime is politically motivated or is committed in or is followed by any explosive situation involving emotive issue that the prosecution must be withdrawn. In other words, in each case of such conflict the court has to weigh and decide judiciously. But it is obvious that unless the crimes in question are per se political offences like sedition or are motivated by political considerations or are committed during or are followed by mass agitations, communal frenzies, regional disputes, industrial conflicts, student unrest or the like situations involving emotive issues giving rise to an atmosphere surcharged with violence, no question of serving any broader cause of public justice, public order or peace would arise and in the absence thereof the public interest of administering criminal justice in a given case cannot be permitted to be sacrificed, particularly when a highly placed person is allegedly involved in the crime, as otherwise the common man's faith in the rule of law and democratic values would be sheltered. [82 D-H, 83 A-D]

(iv) When paucity of evidence or lack of prospect of successful prosecution is the ground for withdrawal the court has not merely the power but a duty to examine the material on record without which the validity and propriety of such ground cannot be determined. [83 D-E]

State of Bihar v. Ram Naresh Pandey, [1957] SCR 279; State of Orissa v. Chandrika Mohopatra and Ors., [1977] 1

SCR 335; Balwant Singh and Ors. v. State of Bihar, [1978] 1 SCR 604; R.K. Jain v. State, [1980] 3 SCR 982; M.N.S. Nair v. P.V. Balakrishnan and Ors, [1972] 2 S.CR 599, referred to.

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3:1 In the light of the legal principles, it would be clear, that this Vigilance P.S. case 9 (2) (78) being an ordinary criminal case involving the commission of common law crimes of bribery and forgery in ordinary normal circumstances with self-aggrandisement or favouritism as the motivating forces, grounds (b), (c) and (d) stated in the application for withdrawal were irrelevant and extraneous to the issue of withdrawal and since admittedly these were the considerations which unquestionably influenced the decision of the Public Prosecutor in seeking the withdrawal as well as the decision of the trial court to grant the permission, the impugned withdrawal of Vigilance P.S. case 9 (2) 78 from the prosecution would stand vitiated in law. [87 H, 88 A, G-H, 89 A-B]

3:2 Admittedly, the offences of bribery (criminal misconduct) and forgery which are said to have been committed by Respondent No. 2 in conspiracy with the other accused are ordinary common law crimes and were not committed during nor were they followed by any mass agitation or communal frenzy or regional dispute or industrial conflict or student unrest or the like explosive situation involving any emotive issue giving rise to any surcharged atmosphere of violence; further it cannot be disputed that these are not per se political offences nor were they committed out of any political motivation whatsoever; in fact the motivating force behind them was merely to give protection to and shield Sri Nawal Kishore Sinha, a close friend, from criminal as well as civil liability-a favouritism amounting to criminal misconduct allegedly indulged in by Respondent No. 2 by abusing his position as a Minister or Chief Minister of Bihar. If therefore, the offences did not partake of any political character nor were committed in nor followed by any explosive situation involving emotive issue giving rise to any surcharged atmosphere of violence, no question serving any broader cause of public justice, public order or peace could arise and in absence thereof the public interest of administering criminal justice in this particular case could not be permitted to be sacrificed. [88 C-F]

3:3. No results of any election, howsoever sweeping, can be construed as the people's mandate to condone or compound the common law crimes allegedly committed by those who have been returned to power; in fact such interpretation of the mandate would be contrary to all democratic canons. Success at hustings is no licence to sweep all dirt under the carpet and enjoy the fruits nonchalantly. Therefore, the plea of change in the situation brought about by the elections putting Respondent No. 2 in power as Chief

Minister and prosecution against the head of State would have had adverse effects on public interest including public order and peace is misplaced. At the worst, all that can happen is that Respondent No. 2 will have to step down and nothing more. Any fear of destabilisation of the Government is entirely misplaced. On the other hand, withdrawal from the prosecution of such offences would interfere with the normal course of administration of criminal justice and since Respondent No. 2 is placed in a high position, the same is bound to affect the common man's faith in the rule of law and administration of justice. Further if the proof of the offences said to have been committed by Respondent No. 2, in conspiracy with the other accused based on undisputed and genuine documentary evidence, no question of political and personal vendetta or unfair and overzealous investigation would arise. [89 D-H, 90 A]
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3:4 The documentary evidence, comprising the Audit Reports, the relevant notings in the concerned file and the two orders of the Respondent No. 2, the genuineness of which cannot be doubted, clearly makes out a prima facie case against Respondent No. 2 sufficient to put him on trial for the offence of criminal misconduct under Section 5 (1) (d) read with Section 5 (2) of the Prevention of Corruption Act, 1947. Similar is the incidental offence of forgery under Section 466 I.P.C. for antedating the second order. The question of "paucity of evidence", therefore, does not arise. The trial court failed, therefore, in its duty to examine this before permitting the withdrawal from prosecution. [101 C-E, H, 102 A]

3:5 Yet another legal infirmity attaching to the executive function of the Public Prosecutor as well as the supervisory judicial function of the trial court which would vitiate the final order is that while the charge-sheet is under sub-clauses (a), (b) and (d) of Section 5 (1) read with Section 5 (2) of the Prevention of Corruption Act along with other offences under the Penal Code, in the application for withdrawal and during the submission made before the Court as well as in the order of the trial Court permitting the withdrawal the reference is to Section 5 (1) (c) and not 5 (1) (d). Obviously the permission granted must be regarded as having been given in respect of an offence with which Respondent No. 2 had not been charged, completely ignoring the offence under Section 5 (1) (d) with which he had been mainly charged. This state of affairs brings out a clear and glaring non-application of mind both on the part of the Public Prosecutor and also the learned special Judge with the issue of withdrawal; in the High Court also there is no improvement in the situation. [103 B, D, E, F, H, 104 A-C]

Per Baharul Islam, J.

1:1 In view of the definition of "Public Prosecutor" in Section 2 of the Code of Criminal Procedure read with Section 24 (8) of the Code and in the light of the decision

of the Supreme Court in State of Punjab v. Surjeet Singh [1967] 2. SCR 347, there cannot be any doubt, that Sri L.P. Sinha was a Public Prosecutor validity appointed under sub-section (8) of Section 24 of the Code. [115 D-E]

State of Punjab v. Surjeet Singh, [1967] 2 SCR, 347, followed.

1:2 The appointment of Shri L.P. Sinha cannot be collaterally challenged particularly in an application under Article 136 of the Constitution. Shri A.K. Dutta, the earlier appointee had at no point of time came forward to make any grievance at any stage of the case, either at the appointment of Sri L.P. Sinha as Special Public Prosecutor or in the latter's conduct of the case; nor Sri L.P. Sinha whose appointment and right to make an application under Section 321 of the Code have been challenged is before the Supreme Court. [115 E-G]

1:3 The appointment of the latter prosecutor without the termination of the appointment of the earlier one might at best be irregular or improper, but cannot said to be legally invalid. The doctrine of de facto jurisdiction which has been recognised in India will operate in this case. [115 G-H, 116A]

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Gokaraju Rangaraju v. State of Andhra Pradesh, [1981] 3 S.C.R. 474, followed.

Newzealand and Norton v. Shelly Country p. 1886; 118 US 425 quoted with approval.

1:4 Shri L.P. Sinha was both de jure and de facto Public Prosecutor in the case. If he fulfilled the two conditions as required by Section 321, namely, (i) that he was the Public Prosecutor; and (ii) was incharge of the case, he was competent to supply for withdrawal of the case, even if he were appointed for that purpose only. [118 H, 119 A-C]

2:1 Section 321 enables the Public Prosecutor or Assistant Public Prosecutor incharge of a case to withdraw from the prosecution with the consent of the court. Before an application is made under Section 321, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any out side influence. But it cannot be said that a Public Prosecutor's action will be illegal if he receives any communication or instruction from the Government. Unlike the Judge, the Public Prosecutor is not an absolutely independent officer. He is an appointee of the Government, Central or State. appointed conducting in Court any prosecution or proceedings on behalf of the Government. A public prosecutor cannot act without instructions of the Government; a public prosecutor cannot conduct a case absolutely on his own, or contrary to the instructions of his client, namely, the Government. Section 321 does not lay any bar on the public prosecutor to receive any instruction from the Government before he files an application under that Section. If the public prosecutor

receives such instructions, he cannot be said to act under extraneous influence. On the contrary, the public prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government. [119 D-H, 120 B-C]

2:2 A mere perusal of the application made by the public prosecutor abundantly shows that he did apply his mind to the facts of the case; he perused the case Diary and the relevant materials connected with the case", before he made the application. He did not blindly quote from the Government letter which contained only one ground, namely, "inexpediency of prosecution for reasons of state and public policy". A comparison of the contents of this letter with the contents of the application under Section 321 completely negatives the contention that he did not himself apply his mind independently to the fact of the case and that he blindly acted on extraneous considerations. [112 F-H]

3:1 The object of Section 321 appears to be to reserve power to the Executive Government to withdraw any criminal case on larger grounds of public policy, such as, inexpediency of prosecutions for reasons of State; broader public interest like maintenance of law and order; maintenance of public peace and harmony, social, economic and political; changed social and political situation; avoidance of destabilisation of a State Government and the like. And such powers have been rightly reserved for the Government; for, who but the Government is in the know of such conditions and situations prevailing in a State or in the country. The Court is not in a position to know such situations.

[126 D-F]

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3:2 The withdrawal from the prosecution is an executive function of the public prosecutor and the ultimate decision to withdraw from the prosecution is his; the Government may only suggest to the Public Prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so; not merely inadequacy of evidence, but other relevant grounds such as to further the broad ends of public justice, economic and political; public order and peace are valid grounds for withdrawal. The exercise of the power to accord or withdraw consent by the court is discretionary. Of course, it has to exercise the discretion judicially. The exercise of the power of the Court is judicial to the extent that the Court in according or refusing consent has to see: (i) whether the grounds of withdrawal are valid; and (ii) whether the application is bonafide and not collusive. It may be remembered that an order passed by the Court under Section 321 is not appealable. [128 D-G]

3:3 A mere perusal of the impugned order of the Special Judge granting permission to withdraw from the prosecution of accused persons, in the case in question shows that he has applied his mind to the relevant law. What the court has

to do under section 321 is to see whether the application discloses valid grounds of withdrawal-valid as judicially laid down by the Supreme Court.

[128 G-H]

3:4 A criminal proceeding with a prima facie case may also be with drawn. Besides, the normal practice of the Supreme Court in a criminal appeal by Special Leave under Art. 136 of the Constitution directed against an order of conviction or acquittal is that it does not peruse the evidence on record and appreciate it to find whether findings of facts recorded by the courts below are correct or erroneous, far less does it peruse the police diary to see whether adequate materials were collected by the investigating agency. It accepts the findings of the Courts below unless it is shown that the findings are the results of a wrong application of the principles of law and that the impugned order has resulted in grave miscarriage of justice. [129 A-C]

R.K. Jain v. The State, [1980] 3 S.C.R. 982, followed.

3:5 An order under Section 321 of the Code does not have the same status as an order of conviction or acquittal recorded by a Trial Court or appellate court in a criminal prosecution, in as much as the former has not been made appealable. An order under Section 321 of the Code has a narrower scope. As an order under Section 321 of the Code is judicial, what the trial court is expected to do is to give reasons for according or refusing its consent to the withdrawal. The duty of the Court is to see that the grounds of withdrawal are legally valid and the application made by the public prosecutor is bonafide and not collusive. In revision of an order under Section 321 of the Code, the duty of the High Court is to see that the consideration by the trial court of the application under Section 321 was not misdirected and that the grounds of withdrawal are legally valid. In this case the trial court elaborately considered the grounds of withdrawal and found them to be valid and accordingly accorded its consent for withdrawal. In revision the High Court affirmed the findings of the trial court. In this appeal by special leave, therefore, there is no justification to disturb the findings of the courts below and peruse the statements of witnesses recorded or other materials collected by the investigating officers during the course of investigation. [129 C-H]

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3:6 A question of fact that needs investigation cannot be allowed to be raised for the first time in an appeal by special leave under Article 136 of the Constitution. In his application before the special Judge the appellant did not find fault with any of the grounds of withdrawal in the application filed by the Public Prosecutor under Section 321. There was no mention of any forgery by antedating or by pasting of any earlier order and thereby making any attempt at shielding of any culprit. He thus prevented the special

Judge and the High Court from giving any finding an alleged forgery and thereby depriving the Supreme Court also from the benefits of such findings of the courts below.

[131 C-E]

3:7 There is no prima facie case of forgery or criminal misconduct made out on the materials on record. If the Chief Minister found that his first order was unwarranted by law, it was but right that he cancelled that order. Pasting order by a piece of paper containing another order prima facie appears suspicious, but pasting is the common practice in the Chief Minister's Secretariat. Antedating simpliciter is no offence. [132 C,E,F]

3:8 If two interpretations are possible, one indicating criminal intention and the other innocent, needless to say that the interpretation beneficial to the accused must be accepted. [132 G]

3:9 Remand for trial if made will be a mere exercise in futility and it will be nothing but an abuse of the Court to remand the case to the trial court in view of the following circumstances, namely, (1) the occurrence took place as early as 1970; it is already more than twelve years; (ii) Respondent No. 2 is the Chief Minister in his office. Knowing human nature, as it is, it can hardly be expected that the witnesses, most of whom are officials, will come forward and depose against a Chief Minister; and (iii) Even after the assumption of office by Respondent No. 2 as the Chief Minister is in the court of Special Judge, the prosecution was pending on several dates but the Prosecutor, Sri A.K. Dutta, did not take any interest in the case at all. It cannot be accepted that a Public Prosecutor appointed by the Government in power, will now take interest and conduct the case so as to secure conviction of his own Chief Minister. [136 F-H, 137 A-B]

Per R.B. Misra J.

1:1 A bare perusal of Section 321 of the Criminal Procedure Code shows that it does not put any embargo or fetter on the power of the Public Prosecutor to withdraw from prosecuting a particular criminal case pending in any court. All that he requires is that he can only do so with the consent of the court where the case is pending in any court. [140 C-D]

1:2 In this country, the scheme of criminal justice places the prime responsibility of prosecuting serious offences on the executive authority. The investigation, collection of requisite evidence and the prosecution for the offences with reference to such evidence are the functions of the executive. The function of the court in this respect is a limited one and intended only to prevent the abuse. The function of the court in according its consent to withdrawal is, however, a judicial function. It, therefore, becomes necessary for the court before

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whom the application for withdrawal is filed by the public

prosecutor to apply its mind so that the appellate court may examine and be satisfied that the court has not accorded its consent as a matter of course but has applied its mind to the grounds taken in the application for withdrawal by Public Prosecutor. [140 E-G]

State of Bihar v. Ram Naresh Pand ey, [1957] SCR 297; M.N.S. Nair v. P.V. Balakrishnan & Ors., [1972] 2 SCR 599, State of Orissa v. C. Mohapatra, [1977] 1 SCR 355; Balwant Singh v. State of Bihar, [1978] 1 SCR 604; R.K. Jain v. State; [1980] 3 SCR 982, referred.

2:1 Section 321 is in very wide terms and in view of the decisions of the Supreme Court, it will not be possible to confine the grounds of withdrawal of criminal proceeding only to offences which may be termed as political offences or offences involving emotive issues. The only guiding factor which should weigh with Public Prosecutor while making the application for withdrawal and the court according its permission for withdrawal is to see whether the interest of public justice is advanced and the application for withdrawal is not moved with oblique motive unconnected with the vindication of the cause of public justice. [145 E-G]

2:2 The Indian Penal Code or the Code of Criminal Procedure does not make any such distinction between political offences and offences other than political ones. Even if it is accepted that political offences are unknown to jurisprudence and other Acts do contemplate political offences, the fact remains that Section 321 Cr. P.C. is not confined only to political offences, but it applies to all kinds of offences and the application for withdrawal can be made by the Public Prosecutor on various grounds. [145 H, 146 A-B]

2:3 To say that unless the crime allegedly committed are per se political offences or are motivated by political ambition or consideration or are committed during mass agitation, communal frenzies, regional disputes, no question of serving a broader cause of public justice, public order or peace can arise is to put limitation on the broad terms of Section 321 of the Code. [148 F-G]

3:1 The Public Prosecutor may withdraw from the prosecution not only on the ground of paucity of evidence but on the other relevant grounds as well in order to further broad aims of justice, public order and peace. Broad aim of public justice will certainly include appropriate social, economic and political purposes. [143 G-H]

3:2 An application for withdrawal from the prosecution can be made on various grounds and it is not confined to political offences. Therefore, it cannot be said that the grounds mentioned in the application for withdrawal, namely:

(i) implication of the accused persons as a result of political and personal vendetta,

(ii) inexpediency of the prosecution for the reasons of State and Public policy, and

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(iii)adverse effects that the continuance of the prosecution will bring on public interest in the light of the changed situation, are irrelevant.

are not liable grounds for withdrawal. [145 G-H]

3:3 Further, the decision of the public prosecutor to withdraw from the case on the grounds given by him in his application for withdrawal cannot be said to be actuated by improper oblique motive. He bonafide thought that in the changed circumstances it would be inexpedient to proceed with the case and would be a sheer waste of public money and time to drag on with the case if the chances for conviction are few and far between. In the circumstances, instead of serving the public cause of justice, it will be to the detriment of public interest. [149 B-D]

3:4 The letter sent by the Government to the public prosecutor did not indicate that the Government wants him not to proceed with the case, but the letter gave full discretion to the Public Prosecutor, to apply his own mind and to come to his own conclusion. Consultation with the Government or high officer is not improper. But the Public Prosecutor has to apply his own mind to the facts and circumstances of the case before coming to the conclusion to withdraw from the prosecution. From the materials on the record, it is clear that the Public Prosecutor has applied his own mind and came to his own conclusions. [155 D-F]

3:5 The statutory responsibility for deciding withdrawal squarely rests upon the public prosecutor. It is non-negotiable and cannot be bartered away. The court's duty in dealing with the application under Section 321 is not to reappraise the materials which led the public prosecutor to request withdrawal from the prosecution but to consider whether public prosecutor applied his mind as a free agent uninfluenced by irrelevant and extraneous or oblique considerations, as the court has a special duty in this regard in as much as it is the ultimate repository of legislative confidence in granting or withdrawing its consent to withdrawal from prosecution. [149 D-E]

3:6 If the view of the Public Prosecutor is one, which could in the circumstances be taken by any reasonable man, the court cannot substitute its own opinion for that of the Public Prosecutor. If the Public Prosecutor has applied his mind on the relevant materials and his opinion is not perverse and which a reasonable man could have arrived at, a roving enquiry into the evidence and materials on the record for the purpose of finding out whether his conclusions were right or wrong would be incompetent. [154 H, 155 A]

In the view taken that no prima facie case has been made out under Section 466 of the Indian Penal Code and Section 5 (1) (d) of the Prevention of Corruption Act and the fact that the High Court in revision agreed with the view of the Special Judge giving consent to the withdrawal from the prosecution on the application of the Public

Prosecutor under Section 321 I.P.C. this Court cannot make a fresh appraisal of evidence and come to a different conclusion.
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All that this Court has to see is that the Public Prosecutor was not actuated by extraneous or improper considerations while moving the application for withdrawal from the prosecution. Even if it is possible to have another view different from the one taken by the Public Prosecutor while moving the application for withdrawal from prosecution the Supreme Court should be reluctant to interfere with the order unless it comes to the conclusion that the Public Prosecutor has not applied his mind to the facts and circumstances of the case, and has simply acted at the behest of the Government or has been actuated by extraneous and improper considerations. On the facts and circumstances of the case, it is clear that the Public Prosecutor was actuated by oblique or improver motive. [157 B-F]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 241 of 1982.

Appeal by Special leave from the judgment and order dated the 14th September, 1981 of the Patna High Court in Criminal Revision No. 874 of 1981.

K.K. Venugopal, S.K. Sinha, S.K. Verma, V.N. Singh, L.K. Pandey, M.N. Krimanani and V.N. Sinha for the Appellants.

K. Parasaran, Soliciter General, K.P. Verma, P.S. Mishra and R.P. Singh for Respondent No. 1.

A.K. Sen, O.P. Malhotra and R.K. Jain for Respondent No. 2.

Rajendra Singh, R.P. Singh Ranjit Kumar and S. Goswami, for Respondent No 3.

S.N. Kacker and M.P. Jha for Respondent No. 4. Jaya Narayan and Smt. Nirmala Prasad for Intervenor. The following Judgments were delivered TULZAPURKAR, J. By this appeal, preferred on the basis of the special leave granted to him, the appellant is challenging the withdrawal from the prosecution of Respondents Nos. 2, 3 and 4 in a criminal case under s. 321 of the Criminal Procedure Code, 1973.

After obtaining the requisite sanction from the Governor on 19th February, 1979 a charge-sheet in Vigilance P.S. Case 9 (2) 78 was filed by the State of Bihar against Respondent No. 2 (Dr. Jagannath Misra), Respondent No. 3 (Nawal Kishore Sinha), Respondent No. 4 (Jiwanand Jha) and three other (K.P. Gupta, since deceased, N.A. Haidari and A.K. Singh, who later became approvers) for offences under ss. 420/466/471/109/120-B I.P.C. and under s. 5(1) (a), 5(1) (b) and 5(1) (d) read with s. 5(2)

of the Prevention of Corruption Act, 1947. Inter alia, the gravamen of the charge against the respondent No. 2 was that at all times material he was either a Minister or the Chief Minister of Bihar and in that capacity by corrupt or illegal means or by otherwise abusing his position as a public servant, he in conspiracy with the other accused and with a view to protect Nawal Kishore Sinha in particular, sought to subvert criminal prosecution and surcharge proceedings against Nawal Kishore Sinha and others, and either obtained for himself or conferred on them pecuniary advantage to the detriment of Patna Urban Cooperative Bank, its members, depositors and creditors and thereby committed the offence of criminal mis-conduct under s. 5(1) (d) read with s.5(2) of the Prevention of Corruption Act, 1947 and in that process committed the other offences specified in the charge-sheet, including the offence of forgery under s. 466 I.P.C. cognizance of the case was taken on 21st November, 1979 by the learned Chief Judicial Magistrate-cum-Special Judge (Vigilance), Patna, who issued process against the accused but before the trial commenced the State Government, at the instance of Respondent No.2, who in the mean time had come to power and had become the Chief Minister, took a decision in February 1981 to withdraw from the prosecution for reasons of State and Public Policy. Though initially Shri Awadhesh Kumar Dutt, Senior Advocate, Patna High Court, had been appointed as a Special public prosecutor by the previous Government for conducting the said case, the State Government (now headed by Respondent No. (2) without cancelling Shri Dutt's appointment as Special Public prosecutor, on 24th February, 1981 constituted a fresh panel of lawyers for conducting cases pertaining to Vigilance Department and Shri Lalan Prasad Sinha, one of the Advocates so appointed on the fresh panel was allotted the said case and was informed of the Government's said decision and on 26th March 1981 he was further requested to take steps for the withdrawal of the case after he had considered the matter and satisfied himself about it. On 17th June, 1981 Shri Lalan Prasad Sinha made an application under s. 321 Cr.P.C. 1973 to the Special Judge seeking permission to withdraw from the prosecution of Respondent Nos. 2, 3 and 4 in the case on four grounds, namely, (a) Lack of prospect of successful prosecution in the light of the evidence, (b) Implication of the persons as a result of political and personal vendetta, (c) Inexpediency of the prosecution for the reasons of the State and public policy and (d) Adverse effects that the continuance of the prosecution will bring on public interest in the light of the changed situation; and the learned Special Judge by his order dated 20th June, 1981 granted the permission. A Criminal Revision (No. 874/1981) preferred by the appellant against the said order was dismissed in limine by the High Court on 14th September, 1981. It is this withdrawal from the prosecution permitted by the learned Special Judge and its confirmation by the High Court that are being challenged in this appeal.

Counsel for the appellant raised three or four contentions in support of the appeal. In the first place he contended that the impugned withdrawal was utterly unjustified on merits and also illegal being contrary to the principles enunciated by this Court governing the exercise of the power under s. 321 Cr. P.C. According to him the decisions of this Court bearing on the nature and scope of the power under the section clearly suggest that for purposes of that section a dichotomy exists between political offences and common law offences and that the considerations of public policy, public interest, reasons of State or political and personal vendetta may become relevant in the case the former cateorgy but are irrelevant while withdrawing from the prosecution of common law offences and since in the instant case the offences with which the accused and particularly Respondent No. 2 had been charged were common law offences, namely, bribery (criminal misconduct) and forgery

and not with any political offence the grounds at (b), (c) and (d) mentioned in the application seeking permission for withdrawal were irrelevant and extraneous and non-germane considerations influenced the Public Prosecutor as also the Court the withdrawal is vitiated and is bad in law and as regards ground (a), namely, insufficiency of evidence or lack of prospect of successful prosecution the same was clearly untenable being in teeth of undisputed and genuine documentary evidence including the orders admittedly passed by respondent No. 2 in his own hand that was available to prove the charges; he also urged that in a case where the proof of the offences was primarily based on documentary evidence, the genuineness of which was not in dispute no question of political and personal vendetta or unfair and over enthusiastic investigation could arise; therefore, the impugned withdrawal deserved to be quashed. Secondly, counsel contended that Shri Lalan Prasad Sinha was not the competent officer to apply for withdrawal from the prosecution of the case under s. 321 Cr P.C. inasmuch as that Shri A.K. Dutt's appointment as Special public Prosecutor made under s. 24(8) Cr. P.C. to conduct this case had not been cancelled and as such the application for permission to withdraw as well as the permission granted thereon were unauthorised, incompetent and illegal. Thirdly, it was urged that on the facts and circumstances of the case Shri Lalan Prasad Sinha did not function independently as a free agent but was influenced and guided by the State Government's decision in the matter and as such the withdrawal at the behest of the Government was vitiated. Counsel also urged that Shri Lalan Prasad Sinha's decision (if at all it was his own) to withdraw from the prosecution as well as the Special Judge's decision to grant permission were vitiated by non-application of mind.

On the other hand, Counsel for the Respondents refuted all the contentions urged on behalf of the appellant. It was denied that the withdrawal in question was unjustified on merits or illegal or contrary to the principles governing the exercise of the power s. 321; on the Contrary counsel for the Respondents urged that the decisions of this Court had clarified the position that under the Code a withdrawal from the prosecution was an executive function of the Public Prosecutor or that the discretion to withdraw from the prosecution was that of the Public Prosecutor and none else and that he could withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace and the broad ends of public justice would include appropriate social, economic and political purposes, and what was more in granting its consent to the withdrawal the Court merely performed a supervisory function and in discharging such function the Court was not to reappreciate the grounds which led the public prosecutor to request withdrawal from the prosecution but to consider whether the Public prosecutor had applied his mind as a free agent, uninfluenced by irrelevant or extraneous consideration. It was disputed that the grounds

(b), (c) and (d) mentioned in the application seeking permission to withdraw were irrelevant or extraneous or that ground (a) was untenable. According to Counsel in the instant case Shri Lalan Prasad Sinha, being in charge as well as in the conduct of the case was competent to make the application for withdrawal and he had done so after considering all the relevant factors and circumstances bearing on the issue and satisfying himself about it and not at the behest of the Government as contended by the appellant and the learned Special Judge also performed his supervisory function in granting the requisite permission on relevant considerations. Counsel emphatically denied that either the public prosecutor's decision to withdraw from the prosecution or

the special Judge's supervisory function was vitiated by non-application of mind. Lastly it was contended that this Court should not interfere with the impugned orders of the trial Court as well as the High Court in exercise of its powers under Art. 136 of the Constitution and the appeal be dismissed.

Having regard to the aforesaid rival contentions that were urged before us by the learned Attorney General and Council on either side it is clear that principally three questions arise for our determination in this appeal, namely, (1) what is the true scope and nature of the power under s. 321 of Cr. P.C, 1973 ? (2) whether Shri Lalan Prasad Sinha was competent officer entitled to apply for withdrawal from the prosecution and if so whether he discharged his executive function independently as a free agent? And (3) whether the withdrawal from the prosecution of respondents 2, 3 and 4 in Vigilance P. S. Case No. 9 (2) 78 was unwarranted and unjustified on facts as also in law ? In other words, whether the executive function of the Public Prosecutor and or the supervisory function performed by the Court was vitiated on account of extraneous considerations or non application of mind etc deserving interference by this Court ?

On the first question s. 321 in terms gives no guidance; it merely says that "the Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried" and goes on to indicate the results that entail upon such withdrawal, namely, either a discharge of the accused if the withdrawal is made before the charge is framed or an acquittal of the accused if it is made after the charge has been framed; in other words, it gives no indication or guideline as to in what circumstances or on what grounds the public Prosecutor may apply for withdrawal from the prosecution nor the considerations on which the Court is to grant its consent and hence the necessity to go to decisions of this Court for ascertaining the true scope and nature of the power contained in it. In this behalf quite a few decisions of this Court both in regard to the earlier provision contained in s. 494 Cr. P.C. 1898 and the present provision contained in s. 321 (both being substantially in pari materia) were referred to by Counsel for the parties but it is not necessary to deal with all of them and a reference to four decisions, namely, State of Bihar v. Ram Naresh Pandey,(1) State of Orissa v. Chandrika Mohapatra and Ors.,(2) Balwant Singh and ors. v. State of Bihar(3) and R. K. Jain v. The State(4) having a bearing on the aspects under consideration will suffice. These decisions, apart from enunciating the principles which would govern the exercise of the power under the section, emphasise the functional dichotomy of the Public Prosecutor (who performs an executive function) and the Court (which performs a supervisory judicial function) thereunder.

In Ram Naresh Pandey's case (supra) the Court while dealing with s. 494 of the old Code observed thus.

> "The section is an enabling one and vests in the Public Prosecutor the discretion to apply to the Court for its consent to withdraw from the prosecution of any person. The consent, if granted, has to be followed up by his discharge or acquittal, as the case may be ..... There can be no doubt, however, that the resultant order on the granting of the consent, being an order of 'discharge' or 'acquittal', would attract the

> applicability of correction by the High Court under ss. 435, 436 and 439 or 417 of the Code of Criminal Procedure. The function of the Court, therefore, in granting its consent may well be taken to be a judicial function. It follows that in granting the consent the Court must exercise a judicial discretion ..... The initiative is that of the Public Prosecutor and what the Court has to do is only to give its consent and not to determine any matter judicially .. The judicial function, therefore, implicit in the exercise of judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes .. .... It (s. 494) cannot be taken to place on the Court the responsibility for a prima facie determination of a triable issue. For instance the discharge that results therefrom need not always conform to the standard of 'no prima facie case' under ss. 209 (1) and 253 (1) or of 'ground lessens' under ss. 209 (2) and 253 (2). This is not to say that a consent is to be lightly given on the application of the Public Prosecutor, without a careful and proper scrutiny of the grounds on which the application for consent is made." (Emphasis supplied).

In Chandrika Mohapatra's case (supra) while setting out the principles that should be kept in mind by the Court at the time of giving consent to withdrawal from the prosecution under s. 494 the Court observed thus;

> "It will therefore, be seen that it is not sufficient for the Public Prosecutor merely to say that it is not expedient to proceed with the prosecution. He has to make out some ground which would show that the prosecution is sought to be withdrawn because inter alia the prosecution may not be able to produce sufficient evidence to sustain the charge or that the prosecution does not appear to be well founded or that there are other circumstances which clearly show that the object of administration of justice would not be advanced or furthered by going on with the prosecution. The ultimate guiding consideration must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution should be allowed to be withdrawn."

It may be stated that Criminal Appeal No. 310 of 1975 was one of the appeals decided by the Court in that case. In that appeal the incident, during the course of which offences under ss. 147, 148 149, 307 and 324 I.P.C. were said to have been committed, had arisen out of rivalry between two trade unions and since the date of the incident calm and peaceful atmosphere prevailed in the industrial undertaking and in those circumstances the State felt that it would not be conducive to interest of justice to continue the prosecution against the respondents since the prosecution with the possibility of conviction of the respondents would rouse feelings of bitterness and antagonism and disturb the calm and peaceful atmosphere prevailing in the industrial undertaking and hence permission to withdraw was sought and granted. Upholding the permission the Court observed thus:

> "We cannot forget that ultimately every offence has a social or economic cause behind it and if the state feels that elimination or eradication of the social or economic cause of the crime would be better served by not proceeding with the prosecution the State should clearly be at liberty to withdraw from the prosecution."

In Balwant Singh's case (supra) the independent role of the Public Prosecutor in making an application for withdrawal from the prosecution was emphasised and the Court pointed out that the sole consideration which should guide the Public Prosecutor before he decides to withdraw from the prosecution was the larger factor of the administration of justice and not political favours nor party pressures nor the like considerations; nor should he allow himself to be dictated by his administrative superiors to withdraw from prosecution, but that the consideration which should weigh with him must be whether the broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution. The Court also indicated some instances where withdrawal from prosecution might be resorted to independently of the merits of the case where the broader cause of public justice would be served:

> "Of course, the interests of public justice being the paramount consideration they may transcend and overflow the legal justice of the particular litigation. For instance, communal feuds which may have been amicably settled should not re-erupt on account of one or two prosecutions pending. Labour disputes which, might have given rise to criminal cases, when settled, might probably be another instance where the interests of public justice in the broader connotation may perhaps warrant withdrawal from the prosecution. Other instances may also be given where public justice may be served by withdrawal even apart from the merits of the case."

In R.K. Jain's case (supra) after reviewing the entire case law on the subject this Court enunciated eight propositions as emerging from the decided cases (page 996 of the Report), out of which the following six would be material for the purposes of the instant case:

> "1. The withdrawal from the prosecution is an executive function of the Public Prosecutor.
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> 2. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.
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> 3. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.
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> 4. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but no other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes Sans Tammany Hall Enterprises.

5. The Court performs a supervisory function granting its consent to the withdrawal.

6. The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution."

By way of elaborating proposition No. 4 above, the Court has gone on to observe thus:

"We have referred to the precedents of this Court where it has been said that paucity of evidence is not the only ground on which the Public Prosecutor may withdraw from the prosecution. In the past we have often known how expedient and necessary it is in the public interest for the Public Prosecutor to withdraw from prosecutions arising out of mass agitations, communal riots, regional disputes, industrial conflicts, student unrest, etc. Whenever issues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from prosecutions in order to restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the calm which may follow the storm. To persist with prosecutions where emotive issues are involved in the name of vindicating the law may even be utterly counter productive."

Similarly, by way of elaborating proposition No. 6 above the Court has gone on to observe thus:

"We may add it shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to apprise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of s. 321 Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case."

From the aforesaid enunciation of the legal position governing the proper exercise of the power contained in s. 321, three or four things become amply clear. In the first place though it is an executive function of the Public Prosecutor for which statutory discretion is vested in him, the discretion is neither absolute nor unreviewable but it is subject to the Court's supervisory function. In fact being an executive function it would be subject to a judicial review on certain limited grounds like any other executive action, the authority with whom the discretion is vested "must genuinely address itself to the matter before it, must not act under the dictates of another body must not do what it has been forbidden to do, must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote

purposes alien to the letter or to the spirit of the legislation that gives it power to act and not must act arbitrarily or capriciously These several principles can conveniently be grouped in two main categories failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive." (vide de Smith's judicial Review of Administrative Action 4th Edition pp. 285-86) Secondly, since the trial Court's supervisory function of either granting or refusing to grant the permission is a judicial function the same is liable to correction by the High Court under its revisional powers both under the old as well as the present Code of Criminal Procedure, and naturally this Court would have at least co-extensive jurisdiction with the High Court in an appeal preferred to it by special leave or upon a certificate by the High Court.

Thirdly, no dichotomy as such between political offences or the like on the one hand and common law crimes on the other could be said to have been made by this Court for purposes of s. 321 as con-tended for by Counsel for the appellant, for, even in what are called political offences or the like, committing common law crimes is implicit for the withdrawal from the prosecution of which the power under s. 321 has to be resorted to. But the decisions of this Court do lay down that when common law crimes are motivated by political ambitions or considerations or they are committed during or are followed by mass agitations, communal frenzies, regional disputes, industrial conflicts, student unrest or like situations involving emotive issues giving rise to an atmosphere surcharged with violence the broader cause of public justice, public order and peace may out weigh the public interest of administering criminal justice in a particular litigation and withdrawal from the prosecution of that litigation would become necessary, a certainty of conviction notwithstanding persistence in the prosecution in the name of vindicating the law may prove counter-productive. In other words, in case of such conflict between the two types of public interests, the narrower public interest should yield to the broader public interest, and therefore, an onerous duty is cast upon the Court to weigh and decide which public interest should prevail in each case while granting or refusing to grant its consent to the withdrawal from the prosecution. For, it is not invariably that whenever crime is politically motivated or is committed in or is followed by any explosive situation involving emotive issue that the prosecution must be withdrawn. An instance in point would be the case of Mahatma Gandhi's assassination, which was in a sense politically motivated (due to transfer of Rs. 55 crores to Pakistan) and was followed by explosive situation involving emotive issue resulting in widespread violence, arson and incendiarism against members of a class in the country particularly in Maharashtra but no one suggested any withdrawal and the prosecution of the persons, who also included a political personality, was rightly carried to its logical end resulting in conviction of the guilty and acquittal of the political personality. In other words, in each case of such conflict the Court has to weigh and decide judiciously. But it is obvious that unless the crime in question are per se political offences like sedition or are motivated by political considerations or are committed during or are followed by mass agitations, communal frenzies, regional disputes, industrial conflicts, student unrest or the like situations involving emotive issues giving rise to an atmosphere surcharged with violence, no question of serving any broader cause of public justice public order or peace would arise and in the absence thereof the public interest of administering criminal justice in a given case cannot be permitted to be sacrificed, particularly when a highly placed person is allegedly involved in the crime, as otherwise the common man's faith in the rule of law and democratic values would be shattered.

Fourthly, the decision in R.K. Jain's case (supra) clearly shows that when paucity of evidence or lack of prospect of successful prosecution is the ground for withdrawal the Court has not merely the power but a duty to examine the material on record without which the validity and propriety of such ground cannot be determined. In that case this Court disposed of two sets of appeals, one where the withdrawal from the prosecution against George Fernandes and others was on the ground that the offences were of political character and the other pertained to withdrawal from the prosecution in four cases against Choudhry Bansi Lal on the ground that the evidence available was meagre and in one out of the four cases the complainant (Shri Manohar Lal) had been suitably and profitable compensated. The Court upheld the grant of permission for withdrawal in both the sets of appeals-in the first set on the ground that the offences alleged to have been committed by George Fernandes and others were of a political character, the motive attributed to the accused being that they wanted to change the Government led by Shrimati Gandhi and therefore with the change in the Government the broad ends of public justice justified the withdrawal, while in the other set the Court examined the entire material available on record and came to the conclusion that the ground put forward had been made out and justified the withdrawal. It may be stated that in M.N.S, Nair v. P.V. Balakrishnan and Ors (1) the Sessions Court as well as the High Court had permitted withdrawal from the prosecution of a case involving offences of forgery, cheating, etc. On the ground that the dispute was of a civil nature, that there had been enormous delay in proceeding with a trial and that securing of evidence would involve heavy expenses for the state as witnesses were in far off places. This Court allowed the appeal, set aside the permission granted for the withdrawal and directed the trial to proceed in accordance with the law after holding that none of the grounds alleged or even their cumulative effect would justify the withdrawal from the prosecution in particular after examining the material on record this Court came to the conclusion that the finding of the lower courts that the dispute was of a civil nature was incorrect. It is thus clear that when paucity of evidence or lack of prospect of successful prosecution is the ground for withdrawal this Court must of necessity examine the material in order to determine the validity or propriety of the ground. It is in the light of the aforesaid legal principles that two questions arising in this appeal will have to be decided.

The next question raised by Counsel for the appellant was whether Shri Lalan Prasad Sinha was the competent officer entitled to apply for the withdrawal from the prosecution and if so whether he discharged his function independently as a free agent ? In this behalf Counsel urged that the initial appointment of Shri A.K. Dutt as the Special Public Prosecutor made by the State Government under s. 24 (8) Cr. P.C. On 26th February, 1979 to conduct this case had not been cancelled, that Shri Lalan Prasad Sinha could merely be regarded as one of the four Public Prosecutors appointed on the fresh panel constituted under Law (Justice) Department's letter No.C/Mis-8-43/78 J dated 24th February, 1981 and that though this particular case had been allotted to him by the letter dated 25th February, 1981, he had no authority over the head of Shri A.K.Dutt to apply for withdrawal from the prosecution and as such the application made by him would be unauthorised and illegal and consequently the Court's order dated 20th June, 1981 would be vitiated. Counsel further contended that the State Government had already taken a decision to withdraw from the prosecution in this case on grounds of inexpediency of prosecution for reasons of State and public policy, that the said decision was communicated to Shri Lalan Prasad Sinha, who was directed to take steps in that behalf and that it was pursuant to such direction that he made the application and

not independently on his own as a free agent and, therefore, the executive function on the part of the Public Prosecutor (assuming he had the authority to make the application) was improperly performed. It is not possible to accept either of these contentions for the reasons we shall presently indicate.

It is true that the appointment of Shri A.K. Dutt made by the previous Government as the Special Public Prosecutor to conduct this case had not been cancelled, though in fitness of things the new Government should have done so but that did not prevent the new Government to make a fresh appointment of a Public Prosecutor and to put him in charge of the case. Appointments of Public Prosecutors generally fall under s. 24(3) but when the State Government appoints Public Prosecutors for the purposes of any case or class of cases the appointees become Special Public Prosecutors under s. 24(8) and in the instant case under the Law (Justice) Department's letter dated 24th February, 1981 a fresh panel of lawyers consisting of 4 Advocates including Shri Lalan Prasad Sinha was constituted "for conducting cases pertaining to Vigilance Department both at Headquarters at Patna as also outside Patna" and, therefore, Shri Lalan prasad Sinha will have to be regarded as having been appointed as Special Public Prosecutor under s. 24(8). But apart from this aspect of the matter, on the facts obtaining in the case, it cannot be disputed that Shri A.K. Dutt not having appeared before the Special Judge at any stage of the hearing was never defacto incharge of the case nor in the actual conduct of the case; on the other hand, after the allotment of this case to him Shri Lalan Prasad Sinha was incharge of the case and was actually conducting the case he having admittedly appeared in the case at least on 4 occasions (on 6th, April, 21st April, 27th April and 26th May, 1981) before the Special Judge, and, therefore, in our view, he was the proper person who could make the necessary application in the matter of withdrawal. In this context it will be useful to point out that s. 494 of the old Code seemed to authorise "any Public Prosecuter" to withdraw from the prosecution with the consent of the Court but this Court in State of Punjab v. Surijit Singh & Anr. (1) had held that "the reasonable interpretation to be placed upon s. 494, in our opinion, is that it is only the Public Prosecutor, who is incharge of a particular case and is actually conducting the prosecution, that can file an application under that section, seeking permission to withdraw from the prosecution." The same view was reiterated by this Court in the Case of M.N.S. Nair v. P.V. Balkrishnan (supra). The present section 321 Cr. P. C. has given legislative recognition to the aforesaid view of this Court inasmuch as it expressly provides that the Public Prosecutor "incharge of a case" may withdraw from the prosecution with the consent of the Court. We are satisfied that though he was appointed as the Special Public Prosecutor to conduct this case in February 1979 Shri A.K. Dutt was neither incharge of the case nor was actually conducting the same at the material time and since Shri Lalan Prasad Sinha was not merely incharge of the case but was actually conducting the case was the proper officer to apply for the withdrawal from the prosecution.

Similarly, there is no substance in the contention that Shri Lalan Prasad Sinha had sought the withdrawal from the prosecution at the behest of the State Government. It is true that the Government State had taken its own decision to withdraw from the prosecution in the case against the respondents Nos. 2, 3 and 4 and it is also true that the said decision was communicated to Shri Lalan Prasad Sinha but if the two letters, one dated 25th February 1981 from the Law Secretary to the District Magistrate and the other dated 26th March 1981 from the Addl. Collector, Incharge Legal Section to the Special Public Prosecutor, Incharge Vigilance cases, are carefully scrutinized it

will be clear that the State Government merely suggested to Shri Lalan Prasad Sinha (which it was entitled to do) withdraw from the prosecution but at the same time asked him to consider the matter on his own and after satisfying himself about it make the necessary application which he did on 17th June, 1981 and there is no material to doubt the recital that is found in the application that he had himself considered relevant materials connected with the case and had come to his own conclusion in that behalf. We are not impressed by the argument that the appointment of Shri Lalan Prasad Sinha was made only for applying for withdrawal and not for conducting the case. The appellants contention, therefore, has to be rejected.

The next important question that arises for consideration is whether the withdrawal from the prosecution of Respondents Nos.

2, 3 and 4 in Vigilance P.S. Case No. 9 (2) 78 was unwarranted, unjustified or illegal on facts as also in law. In other words, the real question is whether the executive function of the public prosecutor and or the supervisory function of the Trial Court in granting its consent to the withdrawal have been improperly performed or are vitiated by reason of any illegality ? This will necessitate the consideration of the four grounds on which the withdrawal was sought by the Public Prosecutor and granted by the trial Court under s. 321 Cr. P.C. As stated earlier, pursuant to the suggestion of the State Government and after considering the matter for himself Shri Lalan Prasad Sinha in his application dated 17th June, 1981 specifically set out for grounds for withdrawal from the prosecution in the namely

(a) lack of prospect of successful prosecution in the light of evidence, (b) the implication of the persons as a result of political and personal vendetta, (c) the inexpediency of the prosecution for the reasons of the State and Public policy and (d) the adverse effects that the continuation of the prosecution will bring on public interests in the light of the changed situation. Significantly enough the learned Special Judge after summarising the submissions of Shri Lalan Prasad Sinha, which were in terms of the averments made and the grounds set out in the application, passed a short reasoned order on 20th June, 1981 as follows:

> Having considered the legal position explained by the Supreme Court (in R.K. Jain's case) and submissions made by the learned Special P.P. in charge of this case and having perused the relevant records of the case I am satisfied that it is a fit case in which prayer of the learned Special P.P. to withdraw should be allowed and it is, therefore, allowed. Consequently the special P.P. Shri Lalan Prasad Sinha is permitted to withdraw from the prosecution and in view of section 321 (a) Cr. P. C. the accused persons are discharged."

In other words, the learned Special Judge accepted all the grounds on which withdrawal was sought and granted the permission to withdraw from the prosecution on those grounds. The question is whether Vigilance P.S. Case No. 9 (2) 78 was such as would attract the grounds and even if the grounds were attracted was withdrawal from the prosecution justified ?

Out of the four grounds set out above, I shall deal with grounds (b), (c) and (d) first and ground (a) later. In the light of the legal principles discussed above it cannot be disputed that grounds like the inexpediency of the prosecution for the reasons of State or public policy, implication of the accused persons out of political and or personal vendetta and adverse effects which the continuance of prosecution will have on public interests in the light of changed situation are appropriate and have a bearing on the broader cause of public justice, public order and peace, which might in a given case outweigh or transcend the narrower public interest of administering criminal justice in a particular litigation necessitating the withdrawal of the latter, but, as observe dearlier, no question of serving and broader cause of public justice, public order or peace can arise unless the crimes allegedly committed are per se political offences or are motivated by political ambitions or considerations or are committed during or are followed by mass agitations, communal frenzies, regional disputes, conflicts, student unrest or like situations which involve emotive issues giving rise to a surcharged atmosphere of violence. Admittedly, the offences of bribery (criminal mis- conduct) and forgery which are said to have been committed by Respondent No. 2 in conspiracy with the other accused are ordinary common law crimes and were not committed during nor were they followed by any mass agitation or communal frenzy or regional dispute or industrial conflict or student unrest or the like explosive situation involving any emotive issue giving rise to any surcharged atmosphere of violence; further it cannot be disputed that these are not per se political offences nor were they committed out of any political motivation whatsoever; in fact the motivating force behind them was merely to give protection to and shield Shri Nawal Kishore Sinha, a close friend, from criminal as well as civil liability-a favouritism amounting to criminal misconduct allegedly indulged in by Respondent No. 2 by abusing his position as a Minister or the Chief Minister of Bihar. If therefore the offences did not partake of any political character nor were committed in nor followed by any explosive situation involving emotive issue giving rise to any surcharged atmosphere of violence no question serving any broader cause of public justice, public order or peace could arise and in absence there of the public interest of administering criminal justice in this particular case could not be permitted to be sacrified. In other words, this being an ordinary criminal case involving the commission of common law crimes of bribery and forgery in ordinary normal circumstances with self-aggrandisement or favouritism as the motivating force, grounds (b), (c) and

(d) were irrelevant and extraneous to the issue of withdrawal and since admittedly these were the considerations which unquestionably influenced the decision of the public prosecutor in seeking the withdrawal as well as the decision of the trial Court to grant the permission, the impugned withdrawal from the prosecution would stand vitiated in law.

Counsel for the respondents urged that as a result of the elections there was a change in the situation, that Respondent No. 2's party had received the peoples' mandate and voted to power, that Respondent No. 2 had become the Chief Minister of the State and that the prosecution against the head of the State would have had adverse effects on public interest including public order and peace and, therefore, its continuation was regarded as inexpedient for reasons of State and public policy. I fail to appreciate the contention: for, what has the change in the situation brought about by the elections putting one or the other party in power got to do with the continuation of prosecution for ordinary common law crimes of bribery (criminal-mis-conduct) and forgery especially when the offences were not actuated by any political motivation whatsoever nor had they been committed in

or followed by any explosive situation involving emotive issue? No emotive issue was or is involved whatsoever. Surely, in the absence of the aforesaid, aspects no result of any election, howsoever sweeping, can be construed as the peoples' mandate to condone or compound the common law crimes allegedly committed by those who have been returned to power; in fact such interpretation of the mandate would be contrary to all democratic canons, Success at hustings is no licence to sweep all dirt under the carpet and enjoy fruits nonchalantly. Moreover, the apprehension that public interest including public order and peace would be adversely affected by the continuation of the prosecution of common law crimes (which do not partake of any political character or are not committed in or followed by any explosive situation involving emotive issue) against the head of the State is ill-founded, for, all that can happen is that Respondent No. 2 will have to step down and nothing more. Any fear of destabilisation of the Government is entirely misplaced. On the other hand, withdrawal from the prosecution of such offences would interfere with the normal course of administration of criminal justice and since Respondent No. 2 is placed in a high position the same is bound to affect the common man's faith in the rule of law and administration of justice. Besides, as I shall point out later, if the proof of the offences said to have been committed by Respondent No. 2 in conspiracy with the other accused was based on documentary evidence, the genuineness of which is not in dispute, no question of political and personal vendetta or unfair and overzealous investigation would arise. In my view, in all the facts and circumstances, grounds (b), (c) and (d) were not attracted to the instant case and were irrelevant and extraneous to the issue of withdrawal and since these grounds had influenced the executive function of the Public Prosecutor as well as the supervisory judicial function of the trial Court the performance of these functions is vitiated. The High Court has simply put its seal on the trial Court's order accepting these grounds. The impugned withdrawal as permitted by the trial Court and confirmed by the High Court in so far as it is based on these grounds would be bad in law.

I shall now proceed to deal with the ground (a) that was put forward for withdrawal from the prosecution. In substance the ground was that there were no chances of successful prosecution in view of paucity of evidence to prove the charges. As stated earlier when such is the ground it is the duty of the Court to examine the material to ascertain whether the ground was valid one or whether the available material was sufficient to make out a prima facie case against the accused to put him on trial ? And I shall approach the problem strictly from this angle.

The facts giving rise to the launching of the aforesaid prosecution against respondent Nos. 2, 3 and 4 and three others may be stated: The Patna Urban Co-operative Bank was registered in May 1970 and commenced its banking business with Nawal Kishore Sinha as its Chairman, K.P. Gupta as its Honorary Secretary, M.A. Haidari as its Manager and A.K. Singh as a Loan Clerk (who also worked as the care-taker and Personal Assistant to N.K. Sinha). A Loan Sub-Committee consisting of N.K. Sinha the Chairman, K.P. Gupta the Secretary and one Shri Purnendu Narain, an Advocate used to look after the sanctioning and granting of loans. Under its bye-laws the Chairman was the ultimate authority in regard to all the functions of the Bank and the Honorary Secretary along with the Chairman had to exercise supervisory control over all the activities of the Bank while the Manager was concerned with its day to day working. Dr. Jagan Nath Mishra, then an M.L.C. and who subsequently became a Minister and the Chief Minister in the Bihar Cabinet helped the Bank and its Chairman (N.K. Sinha being his close associate and confidant) in several ways including

mobilisation of resources for the Bank. Separate audits into the working of the Bank were conducted by the Reserve Bank of India as well as by the Co-operative Department of the Bihar Government for the years 1972-73 and 1973-74 during the course of which a large number of irregularities (such as non-maintenance of cash books in a proper manner, grant of over-draft facility without current account etc), illegal practices, acts of defalcations and malversation of funds of the Bank came to light; in particular the Audit Reports disclosed that huge amounts running into lakhs of rupees had been squandered away by (a) giving loans to non-members, (b) giving loans even without application, agreement or pronote, (c) giving loans without hypothecations, (d) giving short term loans instead of realising cash on sale proceeds even for hypothecated goods,

(e) giving loans to the same persons in different names and

(f) giving loans to fictitious persons and non-existing firms or industries etc. and the audit team of the Reserve Bank in its report came to the conclusion that the Chairman Shri Nawal Kishore Sinha and others were responsible and accountable for 'bad loans' to the tune of Rs. 12 lakhs and 'mis-appropriation and embezzlement' to the tune of Rs. 25 lakhs. On the basis of these audit reports at the instance of the Reserve Bank the management of the Bank through its Board of Directors was superseded on 10th of July, 1974 under the orders of the Registrar, Co-operative Societies, and Nawal Kishore Sinha the Chairman and other Directors on the Board were removed and an officer of the Co-operative Department, Government of Bihar, was appointed as the Special Officer to look after the affairs of the Bank.

On the strength of the aforesaid Audit Reports the Registrar, Co-operative Societies, agreeing with the Joint Registrar, put up a note dated 4.11.1974 to the Secretary, Co-operative saying that prima facie charges of defalcations, conspiracy, etc. were made out against the officials of the Bank and legal action be taken against them after taking the opinion of the Public Prosecutor; the Secretary by his note dated 7.11.1974 sought the opinion of the Law Department on 18.11.1974 the Law Department recorded its opinion in the relevant file (being File No. IX/Legal- 9/75 of the Department of Co-operation) that a case of conspiracy and criminal breach of trust against the loans and office bearers of the Bank was prima facie made out. On 16.12.1974 a draft complaint was prepared by the Assistant Public Prosecutor, Patna for being filed before the Chief Judicial Magistrate, Patna; on the same day (16.12.1974) an office noting was made by Shri Bimal on the file suggesting that the Law Department's advice on the draft complaint be obtained, which course of action was approved by the Secretary, Co-operation on 16.12.1974, by the Minister for Co-operative (Shri Umesh Prasad Verma) on 1.1.1975 and by the then Chief Minister (Shri A. Gaffoor) on 2.1.75. Accordingly, the file was sent to the Law Department which reiterated its earlier advice for launching the prosecution and on the file being received back on 18.1.1975, the Secretary Co-operation endorsed the file on 21.1.1975 to A.P.P. Shri Grish Narain Sinha for necessary action i.e. to file the prosecution (vide the several notings made in File No.IX/Legal-9/75-relied upon by the respondents). In other words by 21.1.1975 the stage was set for launching a criminal prosecution against the loanees and the members of the Board of Directors of the Bank with Nawal Kishore Sinha as the principal accused and a complaint petition in that behalf duly approved by the Law Department and signed by Shri Jagdish Narain Verma, District Co-operative Officer, Patna on 25.1.1975 was also ready with the A.P.P. for being filed in the Court. But before the A.P.P. could file

the complaint, Respondent No.2 (Jagan Nath Mishra, Agriculture and Irrigation Minister) wrote a buff-sheet note dated 24.1.1975 asking the Secretary, Co-operation to send the concerned file along with Audit Reports to him before the institution of the Criminal case. Accordingly, after obtaining the approval of the then Co-operative Minister and the then Chief Minister for sending the file to respondent No. 2, the Secretary recalled the file and other papers from the A.P.P. on 28.1.1975 and on 24.2.1975 he sent the file to the Law Minister en route the then Chief Minister. It may be stated that under the Notification dated 30th April, 1974 issued under Art. 166 (3) of the Constitution read with Rule 5 of the Rules of Executive Business of the State of Bihar, the then Chief Minister Shri Abdul Gaffoor was inter alia holding the portfolio of Law also but according to the affidavit of Shri Neelanand Singh dated 19th October, 1982 filed on behalf of Respondent No.1 before us Shri A. Gaffoor as per his note dated 29-8-1974 addressed to the Chief Secretary and circulated to various departments had, with a view to lessen his heavy burden, requested Respondent No. 2 (Jagan Nath Mishra) to look after the work of the Law Department and as such endorsing the file on 24.2.1975 'to the Law Minister en-route the Chief Minister' would mean that the file must have gone to respondent No. 2 as there was no other person holding the Law portfolio excepting the Chief Minister himself under the Notification dated 30th April, 1974. It is claimed by the appellant that Respondent No. 2 sat tight over the file for over two and half months till he became the Chief Minister whereas it is suggested on behalf of the Respondents that though the file was called for by Respondent No. 2 on 24-1-1975 it did not actually reach him till middle of May, 1975. However, ignoring the aforesaid controversy, the fact remains that the filing of the complaint got postponed from 24-1-1975 (the date of Buff- sheet order of Respondent No. 2) till middle of May, 1975 and in the meantime on 11.4.1975 Respondent No. 2 replaced Shri A. Gaffoor as the Chief Minister and in the middle of May 1975 as the Chief Minister Respondent No. 2 passed two orders which are very eloquent.

On 16-5-1975 in the File No. IX/Legal-9/75 respondent No. 2 wrote out an order in his own hand in Hindi concerning the action to be taken against Nawal Kishore Sinha and others, the English rendering of which, according to the respondents, runs thus:

> "Much time has passed. On perusal of the File it appears that there is no allegation of defalcation against the Chairman and the Members of the Board of the Bank. Stern action should be taken for realisation of loans from the loanees and if there are difficulties in realisation from the loanees surcharge proceedings should be initiated against the Board of Directors. The normal condition be restored in the Bank after calling the Annual General Meeting and holding the election.

(Sd) Jagan Nath Mishra 16-5-1975 In the margin opposite the above order the seal containing the despatch entry originally showed 16-5-1975 as the date on which the file was despatched from the Chief Minister's Secretariat to the Co-operative Department after Respondent No. 2 had made the above order. It is clear that the first part of the above order regarding the criminal involvement is in teeth of the Audit Reports of the Reserve Bank and the Co-operative Department and contrary to the opinion of the Law Department it thwarted the criminal prosecution against Shri Nawal Kishore Sinha and others, while under the latter part it still exposed them to civil liability by way of surcharge proceedings to be adopted against them in default of realisations from the loanees but as

even the loans had been advanced mostly in fictitious names and were actually utilised by the office-bearers themselves the prospect of civil liability loomed large before them. Realising this position Respondent No. 2 irregularly-there being no endorsement nor any seal showing inward receipt of the File by Chief Minister's Secretariat-got hold of the File again and passed another order in his hand on a piece of paper in Hindi under his signature but bearing an earlier date 14.5.1975 and had it pasted over the earlier order dated 16.5.1975 in the File so as to efface the same completely, and the date of despatch 16.5.75 in the despatch seal appearing in the margin was altered to 14 5.1975 by over writing; an English rendering of this second order, addressed to the Minister for Co-operation, runs thus:

> "Please issue order for restoring the normal condition in the Bank after holding Annual General Meeting.
>
> (Sd) Jagan Nath Mishra 14-5-1975"

It is undisputed that Respondent No. 2 did pass the aforesaid two orders in his own hand in Hindi, the first on 16-5-1975 and the second subsequently in point of time but ante-dated it to 14-5-1975 and had it pasted over the first order completely effacing that order. Such conduct on his part has been explained only on the basis that as the Chief Minister he had the authority and power to revise or review his earlier order and that it is the usual practice prevailing in the Patna Secretariat that whenever any order passed earlier is sought to be revised or reviewed by the same officer or Minister it is done by pasting it over by a piece of paper containing the revised orders (Para 8 of the counter affidavit of Shri Bidhu Shekhar Banerjee dated 17-3- 1982 filed on behalf of respondent No. 1). Even with this explanation the admitted position that emerges is that the aforesaid two orders were passed by respondent No. 2, that the second order was ante-dated to 14-5-1975 and that the same was pasted on the file so as to efface completely the earlier order. In other words in substance and reality the entire order passed by Respondent No. 2 in the concerned file on 16-5-1975 which contained 4 directions; (a) there being no allegation of defalcation against the Chairman, the Members of the Board no criminality was involved, (b) stern action for realisation of the loans from the loanees be taken, (c) failing which surcharge proceedings against the Board of Directors be initiated and (d) restoration of normal condition in the Bank be brought about by calling Annual General Meeting and holding the election, was wiped out and completely substituted by the second order which merely retained the last direction (item (d) above) of the first order. In effect under the second order both the criminal as well as civil liability of Nawal Kishore Sinha and others were given a go-bye, notwithstanding the Audit Reports of the Reserve Bank and the Co-operative Department and Respondent No. 2 merely directed that the normal condition in the Bank be restored and this result was brought about by the second order which was ante-dated with the obvious fraudulent intent of nullifying or rendering nugatory any action that could have been or might have been taken (even if not actually taken) pursuant to the first order after the file had left the Chief Minister's Secretariat on 16.5.1975, that being the most natural consequence flowing from the act of ante-dating the second order. It is not necessary that the fraudulent intent should materialise; it is enough if act of ante-dating is done with the fraudulent intent. This being a case of inter-departmental orders, the first order dated 16th May, 1975 passed by Respondent No. 2 became operative as soon as the concerned file left the Chief Minister's Secretariat and as such the same

could be revised or reviewed by Respondent No. 2 by officially and regularly calling back the file and by passing a fresh order subsequent in point of time modifying or cancelling the earlier order but surely not by the crude method of pasting the subsequent order over the first so as to efface the same completely and in no event by ante-dating it. It is true that mere ante-dating a document or an order would not amount to an offence of forgery but if the document or the order is antedated with oblique motive or fraudulent intent indicated above (without the same actually materialising) it will be forgery.

The aforesaid undisputed documentary evidence comprising the Audit Reports, the relevant notings in the concerned file and the two orders of Respondent No. 2 clearly makes out a prima facie case of the commission of two common Law offences of criminal mis-conduct s. 5(1) (d) of Prevention of Corruption Act) and forgery (s. 466 I.P.C.) by Respondent No. 2 without needing any further material to establish the same. The ingredients of the former can be said to be prima facie satisfied in that by passing the two orders Respondent No. 2 by corrupt or illegal means or by otherwise abusing his position as the Chief Minister subverted the criminal prosecution and surcharge proceedings against Nawal Kishore Sinha and others and had thereby at any rate obtained for them pecuniary advantage to the deteriment of the Bank, its members, depositors and creditors. This is apart from the aspect as to whether while doing so he obtained pecuniary advantage for himself or not, for which further material by way of confessional statement of the approvers would be required to be considered or appreciated but ignoring such further material the ingredients of s. 5 (1) (d) get satisfied prima facie as indicated above. As regards the latter though Respondent No. 2 had the authority and power to pass the second order in substitution of the first, by ante-dating the second order with fraudulent intent the ingredients of forgery again prima facie satisfied. In other words, the aforesaid material is clearly sufficient to put Respondent No 2 on trial for, if the said material remains unrebutted a conviction would clearly ensue.

It was strenuously contended by Counsel for respondents, particularly by counsel for Respondent No. 2 that if the aforesaid two orders passed by Respondent No. 2 are properly understood it cannot be said that the effect of either of these two orders was to thwart or to scuttle or to subvert the criminal prosecution and surcharge proceedings against Nawal Kishore Sinha and others and that the effect of the second order was certainly not to countermand the directions contained in the first order in regard to items

(b) and (c) above but in fact the effect was to facilitate recourse to surcharge proceedings against the office-bearers without the hurdle of being required to make the recovery of loans from the loanees first, which was the import of the first order dated 16-3-1978. It was further contended that instead of stifling the criminal prosecution against Nawal Kishore Sinha and other office bearers Respondent No. 2 at a subsequent stage had directed prosecution of office bearers including Nawal Kishore Sinha and actually the Co-operative Department had taken steps to adopt surcharge proceedings even against Nawal Kishore Sinha by issuing show cause notice to him and therefore, the charges of criminal misconduct and forgery against the Respondent No. 2 in conspiracy with others were clearly unsustainable and withdrawal from the prosecution sought by the public prosecutor was proper and justified. In my view, however, as I shall presently indicate, the further materials on record do not bear out or support these submissions of counsel for the respondents.

On the question as to whether the effect of either of the aforesaid two orders was to thwart; scuttle or subvert criminal prosecution and surcharge proceedings or not and what was intended by Respondent No. 2 when he passed those orders would be clear from his further conduct evidence by subsequent notings and orders passed by him till he went out of power in 1977 and in this behalf it would be desirable to delineate the course which the subsequent events took in regard to criminal prosecution as well as surcharge proceedings separately. As regards criminal prosecution, it appears that the Co-operative Department wanted to go ahead with it and in that behalf by his next noting dated 28-6- 1975 the then Minister for Co-operation sought directions from the Chief Minister as to what should be the next course of action in the matter of filing the complaint and Respondent No. 2 as the Chief Minister passed the following order on the file on 30-6-1975: "Discussion has been held. There is no need to file the prosecution." This clearly show what Respondent No. 2 intended by his aforesaid two orders in the matter of criminal prosecution and the direction clearly runs counter to the suggestion that he did not thwart, scuttle or subvert the criminal prosecution against Nawal Kishore Sinha and others. It further appears that in July, 1975 there were questions and call attention motions in the Bihar Legislative Assembly during the course of which the propriety of non-prosecution of the culprits concerned in the Bank fraud, despite Law Department's advice, was discussed, that the Speaker referred the matter to the Estimates Committee of the House, that in June, 1976 the Estimates Committee submitted its Report recommending prosecution of Nawal Kishore Sinha and others, that in July, 1976 a debate took place in the Assembly on the recommendations contained in the said Report and the Government was forced to agree to launch prosecutions against the culprits. In the wake of these events Respondent No. 2 as the Chief Minister passed an order on 4-8-1976 for launching criminal prosecutions but even there he directed that prosecutions be launched against some of the office- bearers and loanees of the Bank including Shri K. P. Gupta, the Hony, Secretary, Shri M.A. Haidary, the Manager and Shri K.P. Gupta, the Loan Clerk but not against Nawal Kishore Sinha who was excluded from being arraigned as an accused and accordingly 23 criminal cases were filed against the aforesaid office-bearers and loanees. This order is another indication that even with all the furore which the Banks affairs had created Respondent No. 2 wanted to and did protect and save Shri Nawal Kishore Sinha from criminal prosecution by excluding him from the array of accused persons. As regards the 23 criminal cases filed against the other office bearers and the loanees of the Bank there is on record in the Co-operative Department File No. 12/Legal- 31/77 a Buff-Sheet order dated 2-2-1977 passed by Respondent No. 2 to the following effect: "In order to recover the money from some of the loanees of the Patna Urban Co- operative Bank, criminal cases were instituted against them. Action should be taken immediately for the withdrawal of the cases against those loanees who have cleared the loan in full, and proper instalments for payment of loans should be fixed against those who want to repay the loan but due to financial handicaps are unable to make payment at a time, and thereafter necessary further action should be taken." It appears that pursuant to this order after verifying that loans from three parties (Plastic Fabricators, Climaz Plastic Udyog and K.K. Boolan) had been cleared the criminal cases against them were directed to be withdrawn immediately. However, the protection given to Shri Nawal Kishore Sinha against criminal prosecution continued to benefit him.

In the meanwhile in April, 1976 the Banking Licence of the Patna Urban Co-operative Bank was cancelled by the Reserve Bank of India and further at the instance of the Registrar, Co-operative Societies, the Bank was ordered to be liquidated. It appears that Shri T. Nand Kumar, I.A.S.,

Liquidator of the Bank addressed a communication to the Registrar, Co-operative Societies suggesting that besides the other office-bearers Sri Nawal Kishore Sinha, the ex- Chairman of the Bank also deserve to be prosecuted for offences of embezzlement, forfery, cheating, etc. but the matter was kept pending for report of the Superintendent of Police (Co-operative Vigilance Cell); the S.P. (Co-operative Vigilance Cell) after collecting facts and evidence got it examined by Deputy Secretary (Law) in C.I.D., obtained the opinion that a criminal case was fully made out against Shri Nawal Kishore Sinha and proposed that a fresh criminal case as per draft F.I.R. be filed and that Shri Nawal Kishore Sinha should also be made co-accused in a number of cases already under investigation, the S.P. (Co-operative Vigilance Cell) obtained the approval of D.I.G., C.I.D. on his said proposal and submitted the same to the Secretary, Co-operation, for obtaining Chief Minister's permission. In view of the Chief Minister's earlier order restricting the filing of criminal cases against some of the office-bearers and loanees only the S.P's noting categorically stated that the draft F.I.R. (against N.K. Sinha) had been vetted by D.I.G. C.I.D. as well as by I.G.. of Police. After examining the entire material carefully and obtaining clarifications on certain points Shri Vinod Kumar Secretary Co-operation put up a lengthy note dated 15-1-1977 to the Minister for Co-operation in which he specifically placed the proposal of S.P. (Co-operative Vigilance Cell) for lodging F.I.R. against Shri Nawal Kishore Sinha for his approval and also suggested that the Hon'ble Minister may also obtain the approval of the Chief Minister. The Minister for Co- operation in his turn endorsed the file on 20-1-1977 to the Chief Minister for the latter's approval. The file was received by the Chief Minister's Secretariat on 30-3-1977 and Respondent No. 2 as the Chief Minister on 9-4-1977 instead of indicating his mind either way merely marked the file to "I.G. of Police." which was meaningless as the prior noting had clearly indicated that a draft F.I.R. had been vetted by both, D.I.G., C.I.D. and I.G. of Police. Counsel for Respondent No. 2 submitted that the endorsement made by the Chief Minister meant that he had approved the action as proposed. It is impossible to accept the submission. Had the Chief Minister merely put his signature or initials without saying anything it might have been possible to suggest that he had approved the proposal, but to mark the file to "I.G. of Police" without saying 'as proposed' or something to that effect cannot mean that the Respondent No. 2 had approved the proposal. In fact, with the knowledge that the I.G. of Police had approved and vetted the draft F.I.R. against N.K. Sinha, merely marking the file to "I.G. of Police" amounted to putting off the matter Meanwhile Respondent No. 2's Government went out of power and under the President's Rule the matter was dealt with by the Governor Shri Jagan Nath Kaushal (the present Union Law Minister) who granted the approval on 16-5-1977 as a result whereof a criminal case (being F.I.R. Case No. 97 (5) 77) ultimately came to be filed at Kadam Kuan Police Station on 30-5-1977 against Nawal Kishore Sinha, for which Respondent No. 2 cannot take any credit whatsoever. On the other hand, the subsequent events show that so long at it lay within his power Respondents No. 2 made every effort to protect and save Nawal Kishore Sinha from criminal prosecution by abusing his official position-a criminal prosecution which had been proposed by independent bodies like the Reserve Bank of India and the Co-operative Department, agreed to by the Law Department, recommended by the Estimates Committee and ultimately approved by the Governor Shri Jagan Nath Kaushal.

As regards the surcharge proceedings the position is very simple. As discussed earlier, the two directions contained in the first order dated 16-5-1975 for taking stern action to realise loans from the loanees and in default to initiate surcharge proceedings against the Board of Directors were

wiped out by the subsequent ante-dated order 14-5-1977, and thereby Respondent No. 2 thwarted surcharge proceedings and attempted to give a go bye to the civil liability of Nawal Kishore Sinha and other office- bearers of the Bank. This conduct on the part of Respondent No 2 has been explained in the counter affidavit of Shri Vinod Kumar Sinha dated 8-10-1982 filed before us, and counsel for Respondent No. 2 pressed it into service during his arguments and the explanation is that a separate file titled "Surcharge Proceedings" being File No. 3 of 1975 maintained in the office of Deputy Registrar, Co-operative Societies, Patna Division shows (a) that by his letter dated 30-4-1975 the Deputy Registrar informed the joint Registrar that discussions had already been held with the Registrar and that surcharge proceedings would be initiated as soon as possible (b) that on 10-6-1975 the necessary proposal for surcharge was drafted and filed by the District Co-operative Officer before the Registrar under sec. 40 of the Bihar and Orissa Co-operative Society Act and (c) on 1-7-1975 Surcharged Case No. 3 of 1975 had been started against Nawal Kishore Sinha and others by directing issuance of show- cause-notice to them and that in view of these facts Respondent No. 2 could not be said to have counter-manded the Surcharge proceedings, it is further urged that the order dated 16-5-1975 directing surcharge proceedings was, therefore, unnecessary and irrelevant as the proper authority, namely, the Registrar had already decided to start surcharge proceedings which were started by issuance of show-cause notice to Nawal Kishore Sinha and others on 1- 7-1975 and, in fact, if the struck-out order dated 16-5-1975 had remained without being replaced by the order dated 14-5- 1975 the surcharged proceedings which were filed on 10-6- 1975 would have been delayed and the effect of recalling the first order dated 16-5-1975 (incidentally recalling of the first order by the second order is admitted) was to facilitate the surcharge proceedings (which were being processed at that time in the office of Deputy Registrar) without being required to adopt recovery proceedings from the loanees first. Counsel for Respondent No. 2 strenuously urged that instead of thwarting or stalling the surcharge proceedings the subsequent order dated 14-5-1975 removed a - hurdle. The explanation to say the least is disingenuous for two or three reasons and cannot be accepted. First, admittedly and this was fairly conceded by counsel for Respondent No. 2, that there is no material on record to show that File No. 3/75 pertaining to surcharge proceedings was sent to the Chief Minister (Respondent No. 2) or was seen by him prior to 16-5-1975,indeed, it was never sent to him at all with the result that Respondent No. 2 had no knowledge of either the notings and orders contained therein or what was being done in the office of the Deputy Registrar, Co-operative Societies, when he passed either of the two orders dated 16-5-1975 and 14-5-1975 and the explanation, therefore, that Respondent No. 2 facilitated the filing of the surcharge proceedings by the office of the Deputy Registrar, without the necessity of proceeding against the loanees first, is not candid. Secondly, the proposal for surcharge proceeding itself was submitted and filed by the District Co-operative Officer against Nawal Kishore Sinha and others on 10-6-1975 and the surcharge proceedings actually could be said to have been initiated on 1-7-1975, when show cause notice was directed to be issued and served on Nawal Kishore Sinha on 15-7-1975, while thwarting of the surcharge proceedings against Nawal Kishore Sinha and others was already complete, having been accomplished by Respondent No. 2 by his ante-dated order 14- 5-1975. Thirdly it is obvious that Respondent No. 2 cannot take credit for the action that was taken in the matter of surcharge proceedings against Nawal Kishore Sinha and others by the Office of Registrar, Co-operative Society independently of and in spite of Respondent No. 2's action of subverting the surcharge proceedings.

It will appear clear from the above discussion that the documentary evidence mentioned above, the genuineness of which cannot be doubted, clearly makes out a prima facie case against Respondent No. 2 sufficient to put him on trial for the offence of criminal misconduct under s. 5 (1) (d) read with s. 5 (2) of the Prevention of Corruption Act, 1947. Similar is the position with regard to the incidental offence of forgery under s. 466, I.P.C. said to have been committed by him, for, ante-dating of the second order by him is not disputed; and it is on record that in regard to such ante-dating no explanation was offered by him during the investigation when he was questioned about it in the presence of his lawyers and there has been no explanation of any kind in any of the counter-affidavits filed before us. But during the course of arguments his counsel offered the explanation that could only be ascribed as a bona fide mistake or slip (vide written arguments filed on 14.10.1982) but such explanation does not bear scrutiny, having regard to the admitted fact that after the ante-dated order was pasted over the first order the despatch date appearing in the margin was required to be and has been altered to 14.5.1975 by over-writing and if over-writing is required to be done there cannot any bona fide mistake or slip. The ante-dating in the circumstances would be with oblique intent to nullify any possible action that could have or might have been taken pursuant to the first order as stated earlier, that being the most natural consequence flowing from it which in must in law be presumed to have intended. It would, of course, be open to him to rebut the same at the trial but at the moment there is no material on record-by way of rebuttal. In the circumstances it is impossible to accept the paucity of evidence or lack of prospect of successful prosecution as a valid ground for withdrawal from the prosecution. On the aforesaid undisputed documentary evidence no two views are possible in the absence of any rebuttal material, which, of course, the respondent No. 2 will have the opportunity to place before the Court at the trial. What is more the so-called unfair or over-zealous investigators were miles away when the aforesaid evidence came into existence.

As far as Respondent No. 3 (Nawal Kishore Sinha) and Respondent No. 4 (Jiwanand Jha) are concerned it cannot be forgotten that they have been arraigned alongwith Respondent No. 2 on a charge of criminal conspiracy in pursuance whereof the several offences are said to have been committed by all of them. Further it is obvious that the principal beneficiary of the offence of criminal misconduct said to have been committed by Respondent No. 2 under s. 5 (1) (d) read with s. 5 (2) of Prevention of Corruption Act, 1947 has been Respondent No. 3 and so far as Respondent No. 4 is concerned it cannot be said that there is no material on record suggesting his complicity. Admittedly, he has been very close to Respondent No. 2 for several years and attending to his affairs-private and party affairs and the allegation against him in the F.I.R. is that he was concerned with the deposit of two amounts of Rs. 10,000 and Rs. 3,000 on 27.12.1973 and 1.4.1974 in the Savings Bank Account of Respondent No 2 with the Central Bank of India, Patna Dak Bungalow Branch, which sums, says the prosecution, represented some of the bribe amounts said to have been received by respondent No. 2 and the tangible documentary evidence in proof of the two deposits having been made in `Respondent No. 2's account consists of two pay-in slips of the concerned branch of Central Bank of India. Whether the two amounts came from the funds of the Patna Urban Co- operative Bank or not and whether they were really paid as bribe amounts or not would be aspects that will have to be considered at the trial. However, as pointed out earlier the offence under s. 5 (1) (d) would even otherwise be complete if pecuniary advantage (by way of scuttling the civil liability of surcharge) was conferred on Nawal Kishore Sinha and others. If Respondent No.2 has to

face the trial then in a case where conspiracy has been charged no withdrawal can be permitted against Respondent No. 3 and Respondent No. 4. In arriving at the conclusion that paucity of evidence is not a valid ground for withdrawal from the prosecution in regard to Respondents Nos. 2, 3 and 4. I have deliberately excluded from consideration the debatable evidence like confessional statements of the approvers etc. (credibility and effect whereof would be for the trial court to decide) said to have been collected by the allegedly over-zealous investigating officers after Respondent No. 2 went out of power in 1977.

There is yet another legal infirmity attaching to the executive function of the Public Prosecutor as well as the supervisory judicial function of the trial court which would vitiate the final order. As per the charge-sheet filed against them respondents Nos. 2, 3 and 4 were said to have committed offences under ss. 420/466/417/109/120-B, I.P.C. and under ss. 5 (1) (a), (b) and 5 (1) (d) read with s. 5 (2) of the Corruption of Prevention Act, 1947 and gravaman of the charge against the respondent No 2 was that in his capacity either as a Minister or the Chief Minister of Bihar by corrupt of illegal means or by otherwise abusing his position as a public servant he, in conspiracy with the other accused and with a view to protect Nawal Kishore Sinha in particular, sought to subvert criminal prosecution and surcharge proceedings against Nawal Kishore Sinha and others and either obtained for himself or conferred on them pecuniary advantage to the detriment of Patna Co-operative Bank, its Members, depositors and creditors; in other words, the principal charge against Respondent No. 2 was in respect of the offence of criminal misconduct under s. 5 (1) (d) read with s. 5 (2) of Prevention of Corruption Act, 1947 and the offence under s. 5 (1) (c) was nowhere mentioned or referred to. The difference between s. 5 (1) (d) (bribery amounting to criminal mis-conduct) and s. 5 (1) (c) (breach of trust amounting to criminal mis-conduct) is substantial, each having different ingredients but in the application for withdrawal filed by Shri Lalan Prasad Sinha on 17th June, 1981 he stated that withdrawal from the prosecution in Vigilance Case No. 9 (2) 78 was sought in respect of several offences including the offence of criminal mis-conduct under s. 5 (1) (c) read with s. 5 (2) of the Prevention of Corruption Act and through out the application there was no reference to the offence of criminal mis-conduct under s. 5 (1) (d) read with s. 5 (2) of the said Act. In other words, an offence under s. 5 (1) (c) read with s. 5 (2) with which Respondent No. 2 had never been charged was mentioned and the offence under s. 5 (1) (d) read with s. 5 (2) with which he was principally charged was completely omitted. Obviously submissions contained in the application as well as those that were made at the hearing before the Court were in relation to the offence of s. 5 (1) (c) and not s. 5 (1)

(d). Similarly the learned Special Judge while granting the requisite permission has also referred to the offence under s. 5 (1) (c) and not s. 5 (1) (d) of the Prevention of Corruption Act in his order and obviously the permission granted must be regarded as having been given in respect of an offence with which Respondent No. 2 had not been charged, completely ignoring the offence under s. 5 (1) (d) with which he had mainly been charged. This state of affairs brings out a clear and glaring non-application of mind both on the part of the Public Prosecutor as also the learned Special Judge while dealing with the issue of withdrawal; in the High Court also there is no improvement in the situation. This must lead to the quashing of the impugned withdrawal from the prosecution.

Having regard to the aforesaid discussion it is clear that the impugned withdrawal was not justified either on merits or in law and being illegal has to be quashed. I would, therefore, allow the appeal set aside the withdrawal order and direct that Vigilance P. S. Case No. 9 (2) 78 be proceeded with the disposed of in accordance with law.

BAHARUL ISLAM, J. This is an appeal by special leave by Shri Sheonandan Paswan, who intervened in an application under Section 321 of the Code of Criminal Procedure, 1973 (hereinafter `the Code') pending before the Chief Judicial Magistrate-cum-Special Judge, Patna. The material background facts may be narrated thus:

2. The appellant is a member of the Bihar Legislative Assembly and belongs to the Lok Dal Party. Respondent No. 2, Dr. Jagannath Mishra, is currently the Chief Minister of Bihar ; and Respondent No. 4, Shri Jiwanand Jha at the relevant time was a close associate of Respondent No. 2. Respondent No. 3, Shri Naval Kishore Sinha, who started the Patna Urban Cooperative Bank (hereinafter `the Bank') and became its Chairman, had been a colleague of Respondent No. 2 in the Legislative Council of Bihar. In 1972, respondent No. 2 became Minister for Cooperation and Agriculture. On June 18, 1974, the Sub Divisional Co-operative Audit Officer, Patna, submitted his audit report of the Bank in respect of the year 1972-73 alleging a number of irregularities in the affairs of the Bank. The report was submitted to the Co-operative Department whereupon the Joint Registrar, Cooperative Audit Department, recommended legal action against the Directors of the Bank. The legal assistant of the Department submitted a draft prosecution report prepared by the Public Prosecutor with a suggestion that the Registrar of the Cooperative Department should obtain the opinion of the Law Department on the draft prosecution report. The Registrar agreed to send the draft prosecution report to the law Department but expressed desire that the Minister in charge of the Cooperative Department should see the report. Accordingly the file was endorsed to the Minister in charge of the Cooperative Department. The then Chief Minister, Shri Abdul Gafoor, signed it by way of agreement with the Registrar to obtain the advice of the Law Department and approved the First Information Report (FIR). The Secretary of the Cooperative Department then requested the Public Prosecutor to amend the draft FIR which was sent to the Law Department for opinion. The Law Department returned the file to the Cooperative Department stating that it had already given its opinion and that it was not its duty to file complaint. The file was then endorsed to the Additional Public Prosecutor for necessary action. Respondent No. 2 who was the Minister in charge of Irrigation and Agriculture also wanted to see the file along with the audit report before the complaint was actually filed. The Cooperation Minister endorsed the file to the Chief Minister, Shri Gafoor, with his comments that the file might be sent to the Irrigation Minister. The Secretary, Cooperative, requested the Additional Public Prosecutor to release the file, with the endorsement, "filing of complaint may await further instructions". The Additional Public Prosecutor sent the file to the Secretary, Co-operative, through a special messenger with a request to return the file after perusal by the Chief Minister (Shri Gafoor). The Secretary, Cooperative Department, sent the file to the Minister of Cooperation with his remarks, inter alia, "para 4:-Law Deptt. have tendered their advice at page 13/N that criminal case made out against the Secretary and other Directors of the bank should be filed."

"Para 5: Chief Minister and Minister (Law) have desired to see the file before complaints are actually lodged". As a result the file was recalled from the Additional Public Prosecutor.

The above movement of the file was between January, 1975 to February 24, 1975.

3. On April 11, 1975, there was a change in the Ministry of Bihar. Chief Minister, Abdul Gafoor, was replaced by Respondent No. 2 as Chief Minister and one Dr. Jawahar Hussain became the Minister of Cooperation. On May 16, 1975, the aforesaid file was put up before the Chief Minister, who ordered for taking strict steps for realisation of the loans, failing that for starting surcharge proceedings, and to restore normal conditions in the Bank after convening annual general meeting and holding election.

Subsequently, the said order was covered by pasting a piece of paper containing a fresh order to which we shall refer later. On June 28, 1975 the Minister of Cooperation wrote to the Chief Minister that the buff-sheet of correspondence showed that the former Chief Minister (Shri Gafoor) postponed the filing of the complaint and wanted to see the file; and as the former Chief Minister had passed the said orders, it was for the new Chief Minister to indicate the next course of action in the case. Respondent No. 2 wrote on the file that discussions had been held and that there was no need to file any case. On August 4, 1976, the Chief Minister ordered for the prosecution of the office bearers and loanees of the bank including its honorary Secretary, Shri K.P. Gupta, Manager, Shri M.A. Haidari (hereinafter `Haidari') and the loan clerk.

4. There was a mid-term poll to the Lok Sabha in March, 1977. In that poll, the Congress (I) Government at the Centre was voted out of power and the Janata Government was installed with Shri Morarji Desai as the Prime Minister and Chaudhury Charan Singh as the Home Minister. In April following, the Patna Secretariat Non-gazetted Employees' Association submitted a 25 point representation against Respondent No. 2 to the Prime Minister and the Home Minister of the Union Government apprising them of the irregularities of the Bank. In June following, the Congress (I) Government of Bihar headed by Respondent No. 2 was replaced by Janata Government headed by Shri Karpoori Thakur. The said Employees' Association on July 9, 1977 submitted a copy of the representation to the new Chief Minister, Shri Karpoori Thakur, with a request for making an enquiry into the allegations by an Enquiry Commission. The representation was endorsed by the State Government to the Inspector General (Vigilance) for a preliminary probe. Eventually the preliminary inquiry was entrusted to the then Joint Secretary, Shri D.N. Sahay.

5. The Union Home Minister, Chaudhury Charan Singh, wrote a D.O. letter to the Chief Minister of Bihar, Shri Karpoori Thakur, saying that as per Code of Conduct, 1964, the Prime Minister had to look into a complaint against a Chief Minister or an ex-Chief Minister and obtain comments of the Chief Minister in the first instance and then decide the course of action. On 25.7.1977, Joint Secretary, Shri D.N. Sahay, submitted his preliminary report and recommended that the Home Ministry of the Government of India should be informed of the proposed course of action and suggested that before ordering detailed inquiry, it was essential to take concurrence of the Union Home Minister. The Chief Minister, however, on 23.8.1977, discussed the matter with the Chief Secretary `at 20.08 p.m.' and ordered full enquiry without the consent of, or intimation to, the

Union Home Ministry.

On 1.9.1977, Joint Secretary, Shri D.N. Sahay, wrote to the Special Secretary regarding the charge No. 8 that related to the Bank that as a Commission of Enquiry had already been instituted, he doubted the desirability of a vigilance inquiry. The Chief Minister, Shri Karpoori Thakur, opined that the materials collected by the Vigilance Department would be used by the Commission. On 20.9.1977, the Joint Secretary, Shri D.N. Sahay, again referred to the Conduct Rules of 1964 for Ministers and Chief Ministers and suggested that necessary notes by Chief Minister should be sent to the Union Home Minister for necessary orders for inquiry. Then on 17.10.1977, Chief Minister, Shri Karpoori Thakur, who had written a D.O. letter to the Home Minister, Chaudhury Charan Singh, regarding the allegations with regard to the Bank again suggested that although a Commission of Enquiry had been appointed, the Vigilance inquiry might continue, as the materials collected by vigilance might be used by the Commission.

In October, 1977, Shri S.B. Sahay was posted as D.I.G. (Vigilance) by the Chief Minister, Shri Karpoori Thakur. On 7.11.1977, Shri S.B. Sahay ordered for inquiry on all points without obtaining consent of the Union Home Ministry and without waiting for further orders.

In November, 1977, one Shri D.P. Ojha was posted as S.P., Vigilance, by the Chief Minister, Shri Thakur and the inquiry was endorsed to Shri Ojha.

6. It has been alleged by the respondents that in January, 1978, some Inspectors of the CID like Raghubir Singh, Sharda Prasad Singh, Ram Dahin Sharma and others were transferred to Vigilance Department and they were responsible for the investigation of the major portions of the case in question, and that all the criminal cases investigated by D.S.Ps. (CID), Bihar, relating to the Bank were transferred to Vigilance Department and placed under the charge of the Inspector, Shri Raghubir Singh. Haidari, aforesaid, who had been an accused of Kadam Kuan P.S. case and arrested and who had made a confessional statement was rearrested by the investigating officer, Shri Raghubir Singh on 22.1.1978. Haidari made a second confession implicating Respondent No. 2 for the first time. On 26.1.1978, A.K. Sinha who was also rearrested made a confession. On 28.1.1978. D.P. Ojha, aforesaid, submitted his inquiry report recommending institution of criminal cases against Respondent No. 2 and others. Similar recommendations were also made by Shri S.B. Sahay, aforesaid, and also by the I.G. Vigilance. The file was then referred to the Advocate General, Shri K.D. Chatterjee, appointed by the Karpoori Thakur Government. On 31.1.1978, the Chief Minister, Shri Thakur, approved it with the direction to hand over the file to Shri S.B. Sahay, who in turn, endorsed it to Shri D.P. Ojha for investigation and institution of the case. On 1.2.1978, Shri Ojha directed Shri R.P. Singh, Additional S.P. to institute a case. After having obtained sanction of the Governor, a criminal case was instituted on 1.2.1978 by the Vigilance Police and on 19.2.1979 a charge-sheet was submitted against the respondents and others.

7. On 26.2.1979, one Shri Awadesh Kumar Datta (hereinafter `A.K. Datta'), a Senior Advocate of the Patna High Court was appointed Special Public Prosecutor by the Karpoori Thakur Government to conduct the two vigilance cases against Respondent No. 2.

8. On 21.11.1979, the Chief Judicial Magistrate-cum- Special Judge, Patna, took cognizance of the case.

9. Shortly thereafter, there was a change of Government in Bihar and Respondent No. 2 became the Chief Minister again. On 10.6.1980, the State Government took a policy decision that criminal cases launched "out of political vendetta" in 1978-79 and cases relating to political agitation be withdrawn.

10. On 24.2.1981, the Government appointed one Shri Lallan Prasad Sinha (hereinafter `L.P. Sinha') as Special Public Prosecutor along with three others vide letter No. C./Mis-8-43 J dated 24.2.1981.

On the following day (25.2.1981), the Secretary to the Government of Bihar wrote a letter to the District Magistrate informing him about the policy decision of the Government to withdraw from prosecution of two vigilance cases including the case in hand, namely, Vigilance P.S. Case No. 9(2)78. The letter is at page 85 of Vol. I of the Paper Book and reads thus:

> "Letter No. MW 26-81, J.
>
> Government of Bihar, Law (Justice) Department From Shri Ambika Prasad Sinha, Secretary to Government, Patna.
>
> To The District Magistrate, Patna.
>
> Patna, dated 25th February, 1981.
>
> Subject: The withdrawal of Vigilance P.S. Case No. 9(2)78 and Case No. 53(8)78 in connection with Sir, I am directed to say that the State Government have decided to withdraw from prosecution the above- mentioned two criminal cases on the grounds of inexpediency of prosecution for reasons of State and public policy.
>
> You are, therefore, requested to direct the public Prosecutor to pray the Court after himself considering for the withdrawal of the above mentioned two cases for the above reasons under Section 321 of the Code of Criminal Procedure.
>
> Please acknowledge receipt of the letter and also intimate this Department about the result of the action taken.
>
> Yours faithfully, Sd/- Illegible Secretary to Government, Patna.

Memo No. MW 26/81, 1056 J.

Patna, dated 25th February, 1981.

Copy forwarded to Vigilance Department for information.

Sd/- Illegible Secretary to Government, Bihar.

Patna". (emphasis added)

11. Accordingly, on 17.6.1981, Shri L.P. Sinha filed an application under section 321 of the Code.

On 20.6.1981, the Special Judge passed the impugned order giving his consent to withdraw the case.

12. It may be noted at this stage that before the impugned order was passed, the appellant filed an application under section 302 of the Code and the learned Judge held that the appellant had no locus standi in the matter. The appellant then filed a criminal revision before the High Court and the High Court after hearing the appellant, by its order dated 14.9.1981, rejected the revision petition and affirmed the order of withdrawal passed by the Special Judge.

13. Hence this appeal by special leave against the order of the High Court in the criminal revision.

14. Shri Venugopal, learned counsel appearing for the appellant formulated three points before us:

> (1) That the permission accorded by the Special Judge to withdraw the case in question was contrary to a series of decisions of this Court and is unsustainable.
>
> (2) That Shri L.P. Sinha who had made the application under section 321 of the Criminal Procedure Code was not the Public Prosecutor in charge of the case.
>
> (3) That in the facts and circumstances of the case, Shri L.P. Sinha could not and did not function independently.

Shri Prasaran, learned Solicitor General, appearing for Respondent No. 1, the State of Bihar, on the other hand, submitted, (1) that the institution of the case was the result of political vendetta and the vendetta had vitiated the investigation of the case;

(2) that Shri L.P. Sinha was the Public Prosecutor in charge of the case and was competent to make the application under section 321 of the Code and that his appointment cannot be collaterally challenged; and (3) that the impugned order of the Special Judge was legally valid.

15. The first point for decision is whether Shri L.P. Sinha was the Public Prosecutor in charge of the case as required by Section 321 of the Code. Section 321 of the Code reads (material portion only):

> "321. Withdrawal from prosecution-The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal.-

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

Provided that..... Three of the essential requirements of section 321 are: (1) that a Public Prosecutor or Assistant Public Prosecutor is the only competent person to withdraw from the prosecution of a person; (2) that he must be in charge of the case;

(3) that the withdrawal is permissible only with the consent of the Court (before which the case is pending).

As stated above, Shri A.K. Datta was appointed Special Public Prosecutor for conducting the case in question vide order under letter No. C/Special/04/79 which reads thus (material portion only):

"Letter No. C/Special/04/79 Government of Bihar Law (Justice) Department From Shri Yogehwar Gope, Under Secretary to the Government of Bihar. To Shri R.N. Sinha, District Magistrate, Patna.

Patna, dated February, 1979.

Subject: Appointment for conducting Vigilance P.S. Case No. 9 (2) 78 and 53 (8) 78 State Versus Dr. Jagannath Mishra, ex-Chief Minister and others.

Sir, I am directed to say that the State Government have been pleased to appoint Shri Awadhesh Kumar Datta, Senior Advocate, Patna High Court, as Special Public Prosecutor for conducting vigilance P.S. Case Nos. 9 (2) 78 and 53 (8) 78 in which Dr. Jagannath Mishra, ex-Chief Minister, is the main accused.

2. The order for appointing Junior Advocates for assisting Shri Datta will be issued later.

Yours faithfully, Sd/-Yogeshwar Gope Memo No. 1313, J, Patna dated 26th February, 1979 Copy forwarded to Shri Awadhesh Kumar Datta.

Senior Advocate, Patna High Court/Cabinet (Vigilance) Deptt., Government of Bihar, Patna for information and necessary action.

Sd/-Yogeshwar Gope Under Secretary to Government of Bihar".

Later on, in pursuance of para 2 of the said letter No. C/Special 04/79 dated 26th February, 1979, by letter No. C/Misc.-8-43/78 J dated 24th February, 1981, the Government constituted a panel of

lawyers to conduct vigilance cases. This letter reads (material portion only):

"Letter No. C/Mis-8-43/78 J.

Government of Bihar, Law (Justice) Department.

From Shri Ambika Prasad Sinha, Secretary to Government, Bihar To The District Magistrate, Patna Patna, dated February 24, 1981.

Subject: Constitution of the panel of lawyers for conducting cases pertaining to Vigilance Department.

Sir, I am directed to say that for conducting case pertaining to Vigilance Department, the State Government, by cancelling the panel of lawyers constituted under Law (Justice) Department letter No. 5240 J. dated 19.8.1978, have been pleased to constitute a panel of the following four lawyers in place of the previous panel.

(1) Sri Ramjatan Singh, Salimpur Ahra, Patna-3.

(2) Sri Bindeshwari Prasad Singh, Advocate, Lalji Tola, Patna-1.

(3) Sri Kamla Kanta Prasad, Advocate Road No. 2D, Rajendranagar, Patna.

(4) Sri Lalan Prasad Sinha, Advocate, Sarda Sadan, Saidpur, Nala Road, Patna-4.

2.....

3. This order shall be effective with immediate effect.

4.....

Yours faithfully.

Sd/-Illegible Secretary to Government.

Memo No. 1043 J., Patna dated 24th February, 1981. Copy forwarded to Sri Ram Jatan Singh, Advocate, Salimpur, Ahra, Patna-3, Sri Bindeshwari Prasad Singh, Advocate, Lalji Tola, Patna-1, Sri Kamla Kanta Prasad, Advocate, Road No. 2D, Rajendra Nagar, Patna-16, Sri Lallan Prasad Sinha, Advocate, Sharda Sadan, Saidpur, Nala Road, Patna for information and necessary action.

2. Cabinet (Vigilance) Department is requested to inform the lawyers of the old panel about this order. Sd/-Illegible Secretary to Government, Bihar".

It is evident from the last quoted letter that Shri L P. Sinha was appointed a Public Prosecutor.

16. The State Government may appoint a Special Public Prosecutor under sub-section (8) of Section 24 of the Code for the purpose of any case or classes of cases. Public Prosecutor has been defined under clause (u) of Section 2 of the Code as:

> "2(u)-"Public Prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor,, In the case of State of Punjab v. Surjit Singh and another,(1) a Bench of five Judges of this Court considered the provisions of Section 492 to 495 of the old Code dealing with the appointment of Public Prosecutor. The Court observed:
>
> "Public Prosecutors are appointed by the State Government under section 492(1) or by the District Magistrate or the Sub-Divisional Magistrate, under sub-section (2) of section 492. The appointment, under sub-section (1) of section 492 can be a general appointment or for a particular case, or for any specified class of cases, in any local area. Under this provision more than one officer can be appointed as Public Prosecutors by the State Government. Under sub-section (2), the appointment of the Public Prosecutor is only for the purpose of a single case. There is no question of a general appointment of the Public Prosecutor, under sub-section (2). Therefore, it will be seen, that a Public Prosecutor or Public Prosecutors, appointed either generally, or for any case, or for any specified classes of cases, under sub- section (2), are all Public Prosecutors under the Code".
>
> There cannot be any doubt, therefore, that Shri L.P. Sinha was a Public Prosecutor validly appointed under sub-section (8) of section 24 of the Code.

But what was submitted by the appellant was that Shri L.P. Sinha could not be appointed a Public Prosecutor without the appointment of Shri A.K. Datt, having been terminated first. It was not the contention of the appellant that the appointment of Shri L.P. Sinha was otherwise invalid.

17. The answer to this contention is this, Shri A.K. Datta had at no point of time come forward to make any grievance at any stage of the case, either at the appointment of Shri L P. Sinha as Special Public Prosecutor or in the latter's conduct of the case; nor Shri L.P. Sinha whose appointment and right to make an application under section 321 of the Code have been challenged, is before us. His appointment cannot be collaterally challenged, particularly in an application under Article 136 of the Constitution.

The appointment of Shri L.P. Sinha without the termination of the appointment of Shri A.K. Datta, might at best be irregular or improper, but cannot be said to be legally invalid. The doctrine of de facto jurisdiction which has been recognised in India will operate in this case. In the case of Gokaraju Rangaraju etc. v. State of Andhra Pradesh (1) to which one of us (Baharul Islam, J.) was a party, it has been held:

> "The doctrine is now well established that 'the acts of the Officers de facto performed by them within the scope of their assumed official authority, in the interest the public or third persons and not for their own benefit, are generally as valid and binding, as if the were the acts of officers de jure".

The judgment referred, with approval, to the following observations-made in the case of New Zealand and Norton v. Shelby Country decided by the United States Supreme Court-

> "Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and function.. The official acts of such persons are recognised as valid on grounds of public policy, and for the protection of these having official business to transact".

This Court in Gokaraju's case (supra) also quoted with approval the following passage from Colley's 'Constitutional Limitation':

> "An intruder is one who attempts to perform the duties of an office without authority of law, and without the support of public acquiscence- No one is under obligation to recognise or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent confusion in the conduct of public business and in security of private right, the acts of officers de facto are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by some one claiming the office de jure, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an Officer de facto are as valid and effectual, while he is suffered to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. There is an important principle, which finds concise expression in the legal maxim that the acts of officers de facto cannot be questioned collaterally".

18. The next question is whether Shri L.P. Sinha was in charge of the case as required by section 321 of the Code. Shri L.P. Sinha was entrusted with and put in charge of, the case in question, namely, Vigilance Case No. 9(2) 78, vide Letter No. 1829 dated 25th February, 1981. The relevant portion of the letter reads:

> "Letter No. 1829 Bihar Government, Cabinet (Vigilance) Department.
>
> From Shri Shivaji Sinha, Special Secretary to Government.
>
> To Shri Lallan Prasad Sinha, Advocate, Sharda Sadan, Sendpur, Nala Road, Patna.

Patna, dated 25th February, 1981 Subject:- Panel of Advocates for----cases pertaining to Vigilance Department.

Sir, You have also been appointed as Panel Lawyer relating to the above subject vide letter No. 1943 dated 24.2.1981 of the Law Department. In many cases, charge sheets have been submitted in the Court of Chief Judicial Magistrate-cum-Special Judge. Out of these cases the following cases are allotted to you to work for the prosecution-

1. Vigilance P.S. Case No. 9(2)78

2. . . . . .

3. . . . . .

4. . . . . .

5. . . . . .

Please take necessary action for the prosecution in the cases on being acquainted with the present position from the court.

Yours faithfully,
Sd/- Shivaji Sinha
25.2.1981.
Special Secretary to Government".
(emphasis added).

Shri L.P. Sinha had been appointed a Government counsel on 24.2.1981 to conduct vigilance cases as stated above. The application for withdrawal was made by him on 17.6.1981-more than four months later. After having been appointed Public Prosecutor, and having been put in charge of the Vigilance P.S. Case No. 9(2)78, he appeared in the case on seven dates, namely, 6.4.1981, 21.4.1981, 27.4.1981, 26.5.1981, 3.6.1981, 19.6.1981 and 20.6.1981. It has been stated in the affidavit filed by the Secretary, Law Department of the State of Bihar that the order disclosed that "no one else appeared for the prosecution" except Shri L.P. Sinha. There is nothing on record to show whether in fact Shri A.K. Datta did at all accept the appointment as a Public Prosecutor.

The record does not show that he took any steps at all in the case. Shri L.P. Sinha could not have appeared on seven different dates during the course of 3 1/2 months and taken steps in it had he (A.K. Datta) been in charge of the case. The learned Special Judge also has found as a fact in his judgment that the application under section 321 of the Code was made "by Shri Lallan Prasad Sinha, Special Public Prosecutor, in charge of this case" (emphasis added). There is, therefore, absolutely no doubt that at the relevant time Shri L.P.

Sinha was in charge of the case, and not Shri A.K. Datta, as submitted by the appellant. Shri L.P. Sinha was both de jure and de facto Public Prosecutor in the case.

It was factually wrong that Shri L.P. Sinha was appointed only to withdraw the case, as submitted by appellant's counsel. Even if he were, there was nothing illegal in it (also see 1931 Cal. 607). If Shri L.P. Sinha fulfilled the two conditions as required by section 321 of the Code, namely, that (i) he was a Public Prosecutor and

(ii) was in charge of the case, he was competent to apply for withdrawal of the case, even if he were appointed for that purpose only.

19. The next question for decision is whether Shri L.P. Sinha functioned independently. The appellant's submission is that Shri L.P. Sinha acted as directed by the Government to make the application for withdrawal and himself did not apply his mind.

Section 321 of the Code enables the Public Prosecutor or Assistant Public Prosecutor in charge of a case to withdraw from the prosecution with the consent of the Court. The appellant submits, in our opinion correctly, that before an application is made under section 321 of the Code, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence; and secondly, that the Court before which the case is pending cannot give its consent to withdraw without itself applying its mind to the facts of the case. But it cannot be said that a Public Prosecutor's action will be illegal if he receives any communication or instruction from the Government.

Let us consider the point from the practical point of view. Unlike the Judge, the Public Prosecutor is not an absolutely independent officer. He is an appointee of the Government, Central or State (see ss. 24 and 25 Crl. P.C.), appointed for conducting in Court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government. A Public Prosecutor cannot act without instructions of the Government a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government. Take an extreme hypothetical case, in which Government is the prosecutor, and in which there is a prima facie case against an accused, but the Government feels on the ground of public policy, or on the ground of law and order, or on the ground of social harmony, or on the ground of inexpediency of prosecution for reasons of State, the case should not be proceeded with; the Government will be justified to express its desire to withdraw from the prosecution and instruct the Public Prosecutor to take necessary legal steps to withdraw from the prosecution. Section 321 of the Code does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. If the Public Prosecutor receives such instructions, he cannot be said to act under extraneous influence. On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government.

Now in the above hypothetical case, if the Government gives instructions to a Public Prosecutor to withdraw from the prosecution of a case, the latter has the following courses open to him:

(i) He can blindly file the petition without applying his mind to the facts of the case. This is not contemplated by Section 321 of the Code;

(ii) He may, himself, apply his mind to the facts of the case, and may agree with the instructions of the Government and file the petition stating the grounds of withdrawal. This is what is contemplated by the section and has been done in this case; or

(iii)He may tell the Government, "It is a good case for the prosecution; conviction is almost sure; and I do not agree with you that the case should be withdrawn, I am not going to file a petition for withdrawal." In that event, the Public Prosecutor will have to return the brief and perhaps to resign. For, it is the Government, not the Public Prosecutor, who is in the know of larger interest of the State.

20. Let us now see if Shri L.P. Sinha applied his mind to the facts of the case before he made the application. He made the following application before the Court:

"IN THE COURT OF THE CHIEF JUDICIAL MAGISTRATE, PATNA Withdrawal Case No.----of 1981 In Vigilance P.S. Case No. 9(2)78.

The humble petition on behalf of the Public Prosecutor for withdrawal of the Vigilance of P.S. Case No. 9(2)78 under section 321 of the Code of Criminal Procedure.

Most respectfully shewth :

1. That this is an application for withdrawal of Vigilance P.S. Case No. 9(2)78 which has been charge-sheeted under sections 466/120B/109 of the Indian Penal Code and sections 5(1)(a), 5(1)(b), 5(1)(c) read with section 5(2) of the Prevention of Corruption Act against Dr. J.N. Mishra, Shri Jivanand Jha and Shri N.K.P. Sinha.

2. That since the prosecution of the case involves the questions of momentous public policy of the Government, which may have its consequences of wide magnitude affecting the larger issue of public interest also, the desirability of the continuance of the prosecution was broadly examined both by the State Government and also by me. Keeping in view (a) lack of prospect of successful prosecution in the light of evidence, (b) the implication of the persons as a result of political and personal vendetta, (c) the inexpediency of the prosecution for the reasons of the State and public policy, (d) the adverse effects that the continuation of the prosecution will bring on public interests in the light of the changed situation, and after giving anxious considerations and full deliberations, I beg to file this application to withdraw from the prosecution of all the persons involved in the aforesaid case:

3. That I have, therefore, gone through the case diary and the relevant materials connected with the case and have come to the conclusion that in the circumstances prevailing at the time of institution of the case and the investigation thereof, it appears that the case was instituted on the ground of political vendetta and only to defame the fair image of Dr. J.N. Mishra, who was then the leader of the opposition and one of the acknowledged leaders of the Congress party in the country. The prosecution was not launched in order to advance the interest of public justice. I crave leave to place materials in support of the above submission and conclusion at the time of moving this petition.

4. That it is in public interest that the prosecution which has no reasonable chance of success and has been launched as a result of political vendetta unconnected with the advancement of the cause of public justice should not proceed further. More so, as the same is directed against the head of the Executive in whom not only the electorate have put their faith and confidence, but who has been elected leader of the majority party in the legislature, both events have taken place after the institution of the case. It is, therefore, prayed that your honour would be pleased to grant permission to withdraw from the prosecution of the persons accused in case and your honour may further be pleased to pass further orders in conformity with section 321 of the Code of the Criminal Procedure, 1973.

And for this the petitioner shall ever pray."

A mere perusal of the above application abundantly shows that Shri L.P. Sinha did apply his mind to the facts of the case ; he perused "the Case Diary and the relevant materials connected with the case" before he made the application. He did not blindly quote from the Government letter No. M/26-81 J. dated 25th February, 1981 (quoted above) which contained only one ground namely, "inexpediency of prosecution for reasons of State and public policy". A comparison of the contents of this letter with the contents of the application under section 321 of the Code completely negatives the appellant's contention that Shri L.P. Sinha did not himself apply his mind independently to the facts of the case and that he blindly acted on extraneous considerations.

As a proof of non-application of the mind of the Public Prosecutor, learned counsel pointed out that Shri L.P. Sinha mentioned in his petition inter alia Section 5(1)(c) in place of Section 5(1)(d) of the Prevention of Corruption Act. In our opinion, in the background of the case, it is too insignificant an error to be taken note of.

21. The appellant then submits that the Court erred in giving its consent for withdrawal as there was a triable case before it. The submission is misconceived. What the Court has to do under section 321 is to see whether the application discloses valid ground of withdrawal-valid as judicially laid down by this Court.

Learned counsel cited the following decisions of this Court reported in State of Bihar v. Ram Naresh Pandey(1), State of Punjab v. Surjit Singh and Ors.(2), M.N.S. Nair v. P.V. Balakrishnan & Ors.(3),

Bansi Lal v. Chandan Lal(4), State of Orissa v. Chandrika Mohapatra and Ors.(5), Balwant Singh and Ors. v. State of Bihar(6), Rajindera Kumar Jain's case(7).

We need not refer to all these decisions except to Rajindra Kumar Jain's case (supra), hereinafter referred to as "George Fernandes' Case", in as much as, this decision has considered all the earlier decisions, and summarised the observations as under :

> "Thus from the precedents of this Court; we gather, (1) Under the Scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.
>
> (2) The withdrawal from the prosecution is an executive function of the Public Prosecutor. (3) The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.
>
> (4) The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so. (5) The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and we add, political purposes Sans Tammany Hall enterprise.
>
> (6) The Public Prosecutor is an officer of the Court and responsible to the Court. (7) The Court performs a supervisory function in granting its consent to the withdrawal. (8) The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdraw from the prosecution". (emphasis added).
>
> The Court in the above decision has also observed : "Wherever issues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from prosecutions in order to restore peace to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the calm which may follow the storm. To persist with prosecutions where emotive issues are involved in the name of vindicating the law may even be utterly counterproductive. An elected Government, sensitive and responsive to the feelings and emotions of the people, will be amply justified if for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing a calm which has descended it decides not to prosecute the offenders involved or not to proceed further with prosecutions already launched. In such matters who but the

> Government, can and should decide in the first instance, whether it should be baneful or beneficial to launch or continue prosecutions. If the Government decides that it would be in the public interest to withdraw from prosecutions how is the Government to go about this task".
>
> The Court further observed :
>
> "But where such large and sensitive issues of public policy are involved, he (Public Prosecutor) must, if he is right minded, seek advice and guidance from the policymakers. His sources of information and resources are of a very limited nature unlike those of the policy-makers. If the policy-makers themselves move in the matter in the first instance, as indeed it is proper that they should where matters of momentous public policy are involved, and if they advise the Public Prosecutor to withdraw from the prosecution, it is not for the Court to say that the initiative came from the Government and therefore the Public Prosecutor cannot be said to have exercised a free mind. Nor can there be any quibbling over words". (emphasis added).

This decision is a complete answer to the contention raised by learned counsel of the appellant that a triable case cannot be withdrawn. Paucity of evidence is only one of the grounds of withdrawal.

22. Faced with this decision learned counsel submitted that the case in hand was a case involving common law offences while George Fernandes case (supra) was dealing with political offences, which offences only, according to counsel, can be permitted to be withdrawn from prosecution. We are unable to accept the submission. (Section 321 has not dichotomised into common law offences and political offences. The Court held in George Fernandes case (supra), with respect rightly, "to say that an offence is of a political character is not to absolve the offenders of the offence. But the question is, is it a valid ground for the Government to advise the Public Prosecutor to withdraw from the prosecution". (emphasis added). The reason of the absence of any dichotomy in section 321 of the Code appears to us to be the very object of the section. What is the necessity of this section. An offence is an offence. A trial will end in conviction or acquittal of the accused. If the offence is compoundable, it may be compounded. But if the offence is not compoundable, why should the trial be withdrawn ? How are offences under sections 121-A, 120-B of the Penal Code, and sections 4, 5 and 6 of the Explosive Substances Act, 1908 and sections 5(3) (b) and 12 of the Indian Explosives Act, 1884 (as in George Fernande's case) less heinous than offences under sections 420/466/471/109/120B of the Penal Code and 5(1) (a), 5(1)

(b) and 5(1) (d) of the Prevention of Corruption Act (as in this case) ? Are offences relating to security of State less serious than corruption ? In our view, the answers are in the negative. The reverse appears to be truer.

In our opinion, the object of section 321 Cr. P.C. appears to be to reserve power to the Executive Government to withdraw any criminal case on larger grounds of public policy such as inexpediency of prosecutions for reasons of State; broader public interest like maintenance of law and order; maintenance of public peace and harmony, social, economic and political; changed social and

political situation; avoidance of destabilization of a stable Government and the like. And such powers have been, in our opinion, rightly reserved for the Government; for, who but the Government is in the know of such conditions and situations prevailing in a State or in the country ? The Court is not in a position to know such situations.

23. In George Fernandes, case (supra), the allegations against Shri George Fernandes, who later on became a Minister of the Union Government during the Janata regime, where that after the proclamation of Emergency on June 25, 1975, Shri George Fernandes, Chairman of the Socialist Party of India, and Chairman Railwaymen's Federation, sought to arouse resistence against the said Emergency and to overthrow the Government and that he committed various acts in pursuance of that object. The investigating agency submitted a charge sheet against Shri Fernandes and twenty-four others for offences under section 121-A, 120-B, Penal Code, read with sections 4, 5 and 6 of the Explosive Substances Act, 1908 and sections 5(3) (b) and 12 of the Indian Explosives Act, 1884. Two of the accused persons had been tendered pardon. They had, therefore, to be examined as witnesses in the Court of the Magistrate taking cognizance of the offences notwithstanding the fact that the case was exclusively triable by the Court of Sessions. The evidence of the approver was recorded on March 22, 1977 and the case was adjourned to March 26, 1977 for further proceedings. At that stage, on March 26, 1977, Shri N.S. Mathur, Special Public Prosecutor filed an application under section 321 of the Code, for permission to withdraw from the prosecution. The application reads :

"It is submitted on behalf of the State as under :-

> 1. That on 24.9.1976, the Special Police Establishment after necessary investigation had filed a charge sheet in this Hon'ble Court against Shri George Mathew Fernandes and twenty four others for offences u/s 121A IPC, 120B IPC r/w sections 4, 5 and 6 of the Explosive Substances Act, 1908 and sections 5(3) (b) and 12 of the Indian Explosives Act, 1884 as well as the substantive offences.
>
> 2. That besides the accused who were sent up for trial, two accused, namely, Shri Bharat C. Patel and Rewati Kant Sinha were granted pardon by the Hon'ble Court and were examined as approvers u/s 306 (4) Cr. P.C.
>
> 3. That out of 25 accused sent up for trial cited in the charge sheet, two accused namely, Ladli Mohan Nigam and Atul Patel were declared proclaimed offenders by the Hon'ble Court.
>
> 4. That in public interest and changed circumstances the Central Government has desired to withdraw from the prosecutions of all the accused.
>
> 5. It is therefore prayed that this Hon'ble Court may accord consent to withdraw from (?) 26th March, 1977.
>
> Sd/-

(N.S. Mathur) Special Public Prosecutor for the State, New Delhi"

It is seen that the only ground for withdrawal was "public interest and changed circumstances" as mentioned in para 4 of the petition.

The Chief Metropolitan Magistrate granted his consent for withdrawal from the prosecution on the ground that it was 'expedient to accord consent to withdraw from the prosecution", (emphasis added). In revision, the High Court affirmed the Magistrate's order. The appeal by Special Leave was dismissed by this Court. In other words, an application stating Government's desire to withdraw from prosecution on the grounds of 'public interest' and 'changed circumstances' was held to be valid under section 321 Cr. P.C.

24. The next question for examination is whether the permission was given by the Special Judge in violation of law as laid down by this Court in this regard. We have already referred to the decisions cited by the appellant. The law laid down by this Court in the series of decisions referred to above, inter alia, is (1) that the withdrawal from the prosecution is an executive function of the Public Prosecutor and that the ultimate decision to withdraw from the prosecution is his; (2) that the Government may suggest to the public prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so ; (3) that not merely inadequacy of evidence, but other relevant grounds such as to further the broad ends of public justice, economic and political; public order and peace are valid grounds for withdrawal. The exercise of the power to accord or withdraw consent by the Court is discretionary. Of course, it has to exercise the discretion judicially. The exercise of the power of the Court is judicial to the extent that the Court, in according or refusing consent, has to see

(i) whether the grounds of withdrawal are valid; and (ii) whether the application is bona fide or is collusive. It may be remembered that the order passed by the Court under section 321 of the Code, either according or refusing to accord consent, is not appealable. A mere perusal of the impugned order of the Special Judge shows that he has applied his mind to the facts of the case and also applied his mind to the law laid down by this Court in Geroge Fernandes case that has summarised the entire law on the point, and correctly applied them to the facts of this case. It is therefore not correct to say that the decision of the Special Judge was contrary to the law laid down by this Court.

25. The only other submission of the appellant is that there is a prima facie case for trial by the Special Judge and that this Court should send it back to him for trial. We have held above that a criminal proceeding with a prima facie case may also be withdrawn. Besides, the normal practice of this Court in a criminal appeal by Special Leave under Article 136 of the Constitution directed against an order of conviction or acquittal is that this Court does not peruse the evidence on record and re-appreciate it to find whether findings of facts recorded by the Courts below are correct or erroneous, far less does it peruse the Police Diary to see whether adequate materials were collected by the investigating agency. It accepts the findings of the Courts below unless it is shown that the findings are the results of a wrong application of the principles of the law and that the impugned order has resulted in grave miscarriage of justice.

26. An order under section 321 of the Code, in our opinion, does not have the same status as an order of conviction or acquittal recorded by a trial or appellate Court in a criminal prosecution, inasmuch as the former has not been made appealable. An order under section 321 of the Code has a narrower scope. As an order under section 321 of the Code recorded by the trial Court is judicial what the trial Court is expected to do is to give reasons for according or refusing its consent to the withdrawal. As stated above, the duty of the Court is to see that the grounds of withdrawal are legally valid and the application made by the Public Prosecutor is bona fide and is not collusive. In revision of an order under section 321 of the Code, the duty of the High Court is to see that the consideration by the trial Court of the application under section 321 was not misdirected and that the grounds of withdrawal are legally valid. In this case, the trial Court elaborately considered the grounds of withdrawal and found them to be valid and accordingly accorded its consent for withdrawal. In revision the High Court affirmed the findings of the trial Court.

We find no justification in this appeal by Special Leave to disturb the findings of the Courts below and peruse the statements of witnesses recorded or other materials collected by the investigating officers during the course of investigation.

27. Although it does not arise out of the three points formulated by Mr. Venugopal at the start of his argument, nor does it arise out of the appellant's petition opposing withdrawal, learned counsel submitted that there was a prima facie case for trial by the Special Judge and the case should be remanded to him for trial. Let us examine that aspect also as it has been argued at length.

Learned counsel fairly concedes that he does not take much reliance on oral evidence but takes strong reliance on two pieces of documentary evidence, namely, alleged creation of forged documents by Dr. Mishra and the confessional statement of Haidari implicating Dr. Mishra.

Elaborate arguments were advanced by learned counsel of the parties on the piece of documentary evidence which, according to the appellant's counsel would form the basis of conviction of Respondent No. 2. That documentary evidence was that Respondent No. 2 as Chief Minister passed an order on 16-5-1975 in Hindi. English translation of this order reads as follows :

> "Much time has passed. On perusal of the file, it appears that there is no allegation of defalcation against the Chairman and the Members of the Board of the Bank. Stern action should be taken for realisation of loans from the loanees and if there are difficulties in realisation from the loanees, surcharge proceedings should be initiated against the Board of Directors. The normal condition be restored in the Bank after calling the Annual General Meeting and holding the elections."

According to the appellant, Respondent No. 2 wrote the following fresh order -

> "Please issue orders for restoring the normal condition in the Bank after holding Annual General Meeting.
>
> Sd/- Jaganath Mishra 14-5-75"

and pasted it over the earlier order.

According to the appellant, Respondent No. 2 by overwriting '4' (in (Hindi) on the original Hindi digit '6' changed the date 16-5-1975 to 14-5-1975. These facts have not been denied by Respondent No. 2 before us.

The appellant's submission was that by the above act of antedating by over-writing. Respondent No. 2 committed forgery, and by pasting over the earlier order committed an offence under section 5 (1) (d) of the Prevention of Corruption Act as by that latter act he obtained pecuniary advantage to Shri Nawal Kishore Respondent No. 3, by stopping the surcharge proceedings.

28. Before proceeding further, it is pertinent to mention that in his application before the Special Judge, the appellant did not find fault with any of the grounds of withdrawal in the application filed by the Public Prosecutor under section 321. His only contention was that an attempt was being made by the Public Prosecutor to scuttle the case and that the Court should apply its independent mind before according consent to the withdrawal and that he should be heard in the matter. He made no mention of any forgery by antedating or by pasting of any earlier order and thereby making any attempt at shielding of any culprit. He thus, prevented the Special Judge and the High Court from giving any finding on alleged forgery on the allegations of pasting and antedating and thereby depriving us also from the benefits of such findings of the Courts below. This question of fact has now been sought to be brought to the notice of this Court during the course of argument by learned counsel of the appellant in this appeal. A question of fact that needs investigation cannot be allowed to be raised for the first time in an appeal by Special Leave under Article 136 of the Constitution.

29. Be that as it may, let us examine the contention. But this will not be treated as a precedent. The pasted order containing the following:

> (i) The Chief Minister's finding that there was no allegation of defalcation against the Chairman and Members of the Board;
>
> (ii) Direction to take stern action for realisation of the loans from the loanees;
>
> (iii)Directions to initiate surcharge proceedings in case of difficulties in realisation;
>
> (iv) Direction to call the annual General Meeting of the Bank and hold election in order to restore the normal condition of the Bank.

Only the portions against (i), (ii) and (iii) above have been covered by pasting the fresh order which is but (iv) above. The appellant's submission is that by covering the first three directions, Respondent No. 2 shielded Respondent No. 3 and others from realizing the due from the culprits including Respondent No. 3 or from initiating surcharge proceedings against them. The answer to the contention is three-fold:

(i) The order of surcharge by the Chief Minister is unwarranted by law. Section 40 of the Bihar Cooperative Societies Act, 1935 gives power only to the Registrar to initiate surcharge proceedings. An appeal lies from his order to the State Government under sub-section (3) of section 40. In fact, admittedly Deputy Registrar of Cooperative Societies issued notices of surcharge against Respondent No. 3 on 31-12-1975 when Respondent No. 2 himself was the Chief Minister). If the Chief Minister found that his first order was unwarranted by Law, it was but right that he cancelled his first order

(ii) On a second thought any authority may bona fide change his mind and decide that restoration of the normal condition of the Bank by calling the annual General Meeting and election should be attended to first and realization of the loans and surcharge proceedings later. Bona fide scoring out the order retaining the last part, would constitute no offence by Respondent No. 2. Pasting an order by a piece of paper containing another order prima facie appears suspicious, but pasting is the common practice in the Chief Minister's Secretariate as revealed by the file produced before us.

(iii) Antedating simpliciter is no offence. Mr. Venugopal advanced an argument on the possible motive of antedating and submitted that the motive was to obliterate any possible action on the first order, The submission is highly speculative and cannot be accepted.

In any view, if two interpretations are possible, one indicating criminal intention and the other innocent, needless to say that the interpretation beneficial to the accused must be accepted.

30. Confessional Statement of Haidari As stated above, there was another vigilance case known as Kadam Quan P.S. Case No. 97 (5) J7 relating to the officers of the Bank. It was being investigated by the Officers of the Cooperative Department but abruptly it was transferred to the Vigilance Department on 16-1-1978. In this case Haidari, aforesaid, was one of the accused. He was also one of the accused in the case in hand, but later on, on grant of pardon, he turned an approver and became a prosecution witness. He was also being prosecuted in several other cases on the basis of orders passed by Respondent No. 2 on 4-8- 1976. In the Kadam Kuan case, Haidari made a confessional statement on 4-11-1976 but did not implicate Respondent No.

2. He was re-arrested on 22-1-1978 whereafter he made a second confessional statement on 24-1-1978, this time implicating Respondent No. 2 for the first time for the alleged offence said to have been committed in the years 1973 75. As the Kadam Kuan case also related to the affairs of the Bank and Haidari had already made a confessional statement, there was no need for him to make a second confessional statement on 24-1-1978. It may be remembered that on that date, Vigilance Case No. 9 (2) 78 had not yet been registered and Haidari was not an accused in this case and therefore it cannot be said that the confessional statement on which great reliance has been placed by the appellant was a confessional statement made by an accused. This case was registered at the Vigilance Police Station in the morning on 1-2-1978 and, therefore, to give legal validity to the confessional statement it was shown recorded in Kadam Kuan case No. 97 (5) 77. This confessional statement is said to be the second confessional statement of Haidari in the same Kadam Kuan case. Haidari's so-called confessional statement therefore is not only not a confessional statement of a co-accused but it inspires no confidence. On the top of it, it was the statement of an accomplice

turned approver, and is worthless.

31. The submission of the respondents that the criminal case against Respondent No. 1 is the result of political vendetta has also to be considered.

(i) The first circumstance pointed out by the respondents in this regard is the unusual hurry in which the file was moved. It has been stated in the affidavit filed on behalf of the State of Bihar by Shri Bidhu Shekhar Banerjee, Deputy Superintendent of Police, Cabinet Vigilance Department, that within the period of four days the inquiries were completed, advice obtained and orders passed for instituting the case as follows:

> "(i) The Kadamkuan P.S. Case No. 97 (5) 77 was transferred to Vigilance Department by an order dated 9-1-1978 passed by Shri Karpoori Thakur, the then Chief Minister. 16-1-78
>
> (ii) Confessions of Shri M.A. Haidari who was being prosecuted in other cases on the order passed by Dr. Mishra in August, 1976 and of Shri A.K. Singh, a subordinate clerk as well as appointee of Shri M.A. Haidari, were recorded after their re-arrest, in the present case on 22-1-78 and 26-1-78 respectively.
>
> 24-1-78 28-1-78
>
> (iii) Enquiries Report submitted 28-1-78
>
> (iv) Report forwarded by the D.I.G. of Police to the I.G. 29-1-78
>
> (v) The same was forwarded to the Chief Secretary 30-1-78
>
> (vi) The Chief Secretary forwarded it to the Advocate General. 30-1-78
>
> (vii) The Advocate General returned the file to the Chief Secretary 31-1-78
>
> (viii) The Chief Secretary sent the file to the Chief Minister (Shri Karpoori Thakur) 31-1-71
>
> (ix) The Chief Minister passed order for prosecution of Dr. Mishra. 31-1-78
>
> (x) The case was registered. 1-2-78"

(ii) The second circumstance pointed out is the political bitterness between Respondent No. 2 and Shri Karpoori Thakur. From the facts narrated at the beginning, it is seen that there was animosity between the appellant and Shri Karpoori Thakur, the former Chief Minister of the Janata Government on the one hand and Respondent No. 2. Dr. Mishra, the present Congress (I) Chief Minister of Bihar, on the other.

It has been stated that Respondent No. 2 is one of the prominent leaders of the Congress Party that was politically opposed to the Janata Party Government headed by Shri Karpoori Thakur at the time of the institution of the case. In 1977 when Respondent No. 2 headed the Congress Government, a warrant of arrest was issued against Shri Karpoori Thakur for his arrest and detention, for his alleged anti-Government activities and that Karpoori Thakur was absconding for long. It has been suggested that Shri Karpoori Thakur was nursing grudge against Respondent No. 2. The suggestion appears to have substance. Shri D.P. Ojha was a Superintendent of Police in Bihar. It has been stated in the counter-affidavit filed by Respondent No. 4 that he (Ojha) has been indicted by Justice Mathew in his report submitted on 9.5.1975 relating to the murder of Shri L.N. Mishra, brother of Respondent No. 5. Justice method in his report held:

> "The direct responsibility for making security arrangements under the security instructions dated 13-9-1971 issued by the Central Government devolve on the head of the Police (Shri D.P. Ojha). The Commission finds that the S.P. Samastipur failed to discharge the duty enjoined upon him by the instruction dated 13.9.1971 issued by the Central Government. The S.P. Samastipur was guilty of derelication of duty in this respect. The officer who failed to discharge their duty or were negligent of the performance of same could be directly responsible to the State Government and the State Government to be the agency for taking appropriate action against them."

It has been stated in affidavit that the Janata Government at the Centre had accepted the said findings of the Mathew Commission. But the Government of Bihar headed by Shri Karpoori Thakur, not only exonerated Shri D.P. Ojha, but transferred him to the Vigilance Department and all the cases relating to the Patna Co-operative Bank (the bank in question) were transferred to the Vigilance Department in charge of Ojha. The Respondent's allegations are that not only Chief Minister Shri Karpoori Thakur had his own political animosity against Dr. Mishra but Shri Ojha had to work under the influence of the Chief Minister. It has been suggested that he has been instrumental in directing the investigation in such a way that a case was made out against Dr. Mishra and others by collecting false evidence. The suggestion cannot be ruled out as frivolous or unreasonable. Shri Karpoori Thakur, the then Chief Minister ignored the wholesome suggestion of the then Union Home Minister, Chaudhury Charan Singh, that a former Chief Minister, could be proceeded against only after obtaining clearance of the Prime Minister according to the Code of Conduct of 1964. He also ignored the suggestion in this regard of Shri D.N. Sahay that before proceeding against an ex-Chief Minister clearance from the Prime Minister and the Home Minister was necessary. He also ignored the suggestion of Shri D.N. Sahay that no Vigilance Enquiry was necessary as there was already a Commission of Enquiry into the Bank matter, and directed the investigation. This shows active interest of Shri Karpoori Thakur in the prosecution of Respondent No. 2.

(iii) The third circumstance pointed out is that although Respondent No. 4 has been made an accused, no allegation against him has been pointed out.

32. It is common place that the prosecution is to prove the guilt of the accused beyond reasonable doubt and that the accused need not prove beyond reasonable doubt his defence, if any. If the

defence is probable and reasonable, and its considerations creates doubt in the creditability of the prosecution case, the accused will get the benefit and shall have to be acquitted. In the instant case, as we have observed, the entire investigation has been vitiated and no person can be convicted on the basis of evidence procured by such investigation.

33. The following circumstances also need to be taken into account in considering whether the case merits sending back to the Special Judge for trial as proposed by the appellant, assuming and only assuming, there is a prime facie case for trial:

(i) The occurrence took place as early as 1970; it is already more than twelve years.

(ii) Respondent No. 2 is the Chief Minister in his office. Knowing human nature, as it is, it can hardly be expected that the witnesses, most of whom are officials, will come forward and depose against a Chief Minister.

(iii) Even after the assumption of office by Respondent No. 2 the Chief Minister, in the Court of the Special Judge, the prosecution was pending on several dates but the Public Prosecutor, Shri A.K. Datta, did not take any interest in the case at all. It cannot be expected that a Public Prosecutor appointed by the Government in power, will now take interest and conduct the case so as to secure conviction of his own Chief Minister. Remand for trial, if made, will be a mere exercise in futility; and it will be nothing but an abuse of the process of the Court to remand the case to the trial Court.

34. As a result of the foregoing discussions, the appeal is dismissed.

MISRA, J. I have the privilege of perusing the differing judgments of brothers Tulzapurkar and Baharul Islam JJ. While I respectfully agree with some of the findings reached by brother Tulzapurkar, I regret my inability to concur with some of the findings. I, therefore, propose to give my own reasons for the same.

The present appeal by special leave is a sequel to an application under s.321 of the Code of Criminal Procedure (hereinafter referred to as the `Code') made by the Public Prosecutor for permission of the Court for withdrawal of Vigilance Case No. 9 (2) 78 filed by the State of Bihar against Respondent No. 2. (Dr. Jagannath Mishra, Respondent No. 3 (Nawal Kishore Sinha), Respondent No. 4 (Jiwanand Jha) and three others (K.P. Gupta, since deceased, M.A. Haidari and A.K. Singh) who later became approvers, for offences under ss. 420/466/471/109/120-B Indian Penal Code and under s.5 (1) (a), 5 (1) (b) and 5 (1) (d) of the Prevention of Corruption Act, 1947. Material facts have already been detailed in the two judgments and, therefore, it is no use repeating the same over again.

In order to appreciate the contention raised by the counsel for the parties it is essential to read the grounds taken in the application. Para 2 of the application reads:

> "That since the prosecution of the case involves the question of momentous public policy of the Government, which may have its consequences of wide magnitude

> affecting the large issue of public interest also, the desirability of the continuance of the prosecution was broadly examined both by the State Government and also by me. Keeping in view (a) lack of prospect of successful prosecution in the light of evidence, (b) the implication of the persons as a result of political and personal vendetta, (c) the inexpediency of the prosecution for the reasons of the State and public policy, (d) the adverse effects that the continuation of the prosecution will bring on public interest in the light of the changed situation, and after giving my anxious considerations and full deliberations, I beg to file this application to withdraw from the prosecution of all the persons involved in the aforesaid case."

Para 3 of the application states:

> "That I have therefore gone through the case diary and the relevant materials connected with the case and have come to the conclusion that in the circumstances prevailing at the time of institution of the case and the investigation thereof, it appears that the case was instituted on the ground of political vendetta and only to defame the fair image of Dr. J.N. Mishra, who was then the leader of the opposition and one of the acknowledged leaders of the Congress Party in the country. The prosecution was not launched in order to advance the interest of public Justice."

Para 4 reads:

> "That it is in public interest that the prosecution which has no reasonable chance of success and has been launched as a result of political vendetta unconnected with the advancement of the cause of public justice should not proceed further. More so, as the same is directed against the head of the Executive in whom not only the electorate have put their faith and confidence but whom has been elected leader of the majority party in the legislature, both events have taken place after the institution of the case."

The application was opposed on a variety of grounds by the appellant, which I shall deal with in the later part of the judgment in detail.

The application was, however, allowed by the Chief Judicial Magistrate-cum-Special Judge Vigilance and he accorded his consent by his speaking order dated 20th June, 1981.

The appellant took up the matter in revision to the High Court which also confirmed the order of the trial court. The appellant has now come to this Court by special leave. The grounds taken on behalf of the appellant are four fold:

> 1. (a) For the purposes of s. 321 of the Code there exists a dichotomy between political offences and offences under common law. While the former can be withdrawn on grounds of public policy, public interest or reasons of state even though there is certainty of obtaining a conviction, no question of public policy, public interest or reasons of State could every arise in a prosecution for a Common Law offence or a

common case of bribery or forgery.

(b) Similarly, no question of political or personal vendetta would arise in a case where the proof of the offence is based primarily on documents, the genuineness of which is not in dispute. Thus three of the grounds on which withdrawal from prosecution is based viz. public policy, public interest, reasons of State, and public or personal vendetta are irrelevant grounds, if it is, established that the offence under s. 466 of the I.P.C. and s. 5 (1) (d) of the Prevention of Corruption Act primarily based upon indisputed documentary evidence make out a prime facie case.

2. If the Court chooses to give consent to the withdrawal of a criminal case on the ground of paucity of evidence or absence of a successful prosecution, the court has to examine the material or evidence already recorded for deciding whether withdrawal is an abuse of or an interference with the normal course of justice.

3. The Public Prosecutor who applied for withdrawal of the case was not competent to withdraw as he was not incharge of the case, and in any case he acted at the behest of the Government and did not apply his own mind.

4. The documentary evidence on the record prima facie makes out a case of forgery (s. 466 IPC) and s. 5 (1) d) (criminal misconduct) of the Prevention of Corruption Act.

Before dealing with the points raised on behalf of the appellant it is appropriate at this stage to know the nature and scope of s. 321 of the Code.

A bare perusal of the section shows that it does not prescribe any ground nor does it put any embargo or fetter on the power of the Public Prosecutor to withdraw from prosecuting a particular criminal case pending in any court. All that it requires is that he can do so only with the consent of the court where the case is pending. This Court has, however, laid down certain guiding principles for the exercise of the power of withdrawal under this section by the Public Prosecutor or by the court according its consent to such withdrawal. It is in the light of those guidelines that the propriety or the legality of the withdrawal of criminal proceeding has to be judged.

In this country the scheme of criminal justice places the prime responsibility of prosecuting serious offences on the executive authority. The investigations, collection of requisite evidence and the prosecution for the offences with reference to such evidence are the functions of the executive. The function of the court in this respect is a limited one and intended only to prevent the abuse. The function of the court in according its consent to withdrawal is, however, a judicial function. It, therefore, becomes necessary for the court before whom the application for withdrawal is filed by the Public Prosecutor to apply its mind so that the appellate court may examine and be satisfied that the court has not accorded its consent as a matter of course but has applied its mind to the grounds taken in the application for withdrawal by Public Prosecutor.

The guiding principles laid down by the various decisions of this Court may now be referred to. In State of Bihar v. Ram Naresh Pande(1) this Court had the occasion to consider the scope of the corresponding s. 494 of the unamended Code, which was in pari materia with the present section 321, and observed as follows:

> "The magistrate's functions in these matters are not only supplementary, at a higher level, to those of the executive but are intended to prevent abuse. Section 494 requiring the consent of the Court for withdrawal by the Public Prosecutor is more in line with this scheme, than with the provisions of the Code relating to inquiries and trials by the Court. It cannot be taken to place on the Court the responsibility for a prima facie determination of a triable issue, for instance the discharge that results therefrom need not always conform to the standard of "no prima facie case" under ss. 209 (1) and 253 (1) or of "groundlessness" under ss. 209 (2) and 253 (2). "...the function of the Magistrate in giving consent is a judicial one open to correction. ... the application for consent may legitimately be made by the Public Prosecutor for reasons not confined to the judicial prospects of the prosecutions. ...If so, it is clear that, what the Court has to determine, for the exercise of its discretion in granting or withholding `consent' is not a triable issue on judicial evidence."

Again in M.N.S. Nair v. P.V. Balkrishnan(1) this Court after reviewing various cases from different High Courts laid down the following guidelines:

> "Though the section is in general terms and does not circumscribe the powers of the Public Prosecutor to seek permission to withdraw from the prosecution the essential consideration which is implicit in the grant of the power is that it should be in the interest of administration of justice which may be either that it will not be able to produce sufficient evidence to sustain the charge or that subsequent information before prosecuting agency would falsify the prosecution evidence or any other similar circumstances which it is difficult to predicate as they are dependent entirely on the facts and circumstances of each case. Nonetheless it is the duty of the Court also to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the Government as a matter of general policy of expediency unconnected with its duty to prosecute offenders under the law, directs the Public Prosecutor to withdraw from the prosecution and the Public Prosecutor merely does so at its behest." "It appears to us that the wide and general powers which are conferred under Sec. 494 on the Public Prosecutor to withdraw from the prosecution though they are subject to the permission of the Court have to be exercised by him in relation to the facts and circumstances of that case in furtherance of, rather than as a hindrance to the object of the law and justified on the material in the case which substantiate the grounds alleged, not necessarily from those gathered by the judicial method but on other materials which may not be strictly on legal or admissible evidence. The Court also while considering the request to grant permission under the said Section should not do so as a necessary formality-the grant

of it for the mere asking. It may do so only if it is satisfied on the materials placed before it that the grant of it subserves the administration of justice and that permission was not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duty bound to further and maintain."

(Emphasis supplied) The same principle was reiterated again in State of Orissa v. C. Mohapatra(1) in these words:

"The ultimate guiding consideration must always be the interest of administration of justice and that is the touch-stone on which the question must be determined. No hard and fast rule can be laid down nor can any categories of cases be defined in which consent should be granted or refused. It must ultimately depend on the facts and circumstances of each case in the light of what is necessary in order to promote the ends of justice, because, the objective of every judicial process must be the attainment of justice.

(Emphasis supplied) In Balwant Singh v. State of Bihar(1) this Court laid down:

"The statutory responsibility for deciding upon withdrawal squarely vests on the public prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may above him on the administrative side ..the consideration which must weigh with him is, whether the broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution."

The last in the series is the case of Rajendra Kumar Jain v. State(2). After review of the various cases of this Court, the Court laid down the following propositions:

"1. Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.

2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.

3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.

4. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.

5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add,

political purposes Sans Tammany Hall enterprise.

6. The Public Prosecutor is an officer of the Court and responsible to the Court.

7. The Court performs a supervisory function in granting its consent to the withdrawal.

8. The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution."

In view of the principles laid down in the aforesaid cases, I have to examine whether the grounds taken by the appellant are tenable.

I take up the first ground raised on behalf of the appellant that for the purpose of s. 321 Cr. P.C. there exists dichotomy between the political offences and offences at Common Law and while political offences can be withdrawn on grounds of public policy, public interest, or for reasons of the State, even though there is certainty of obtaining a conviction, no such consideration could ever arise in a prosecution for a Common Law offence or a common case of bribery or forgery.

This argument proceeds on the assumption that in the cases cited above, permission was granted only in cases relating to political offences and not with regard to offences at Common Law. I am afraid, this will not be a fair reading of the decisions mentioned above. One of the principles laid down in the aforesaid cases is that the Public Prosecutor may withdraw from the prosecution not only on the ground of paucity of evidence but on other relevant grounds as well in order to further broad aims of justice, public order and peace. Broad aims of public justice will certainly include appropriate social, economic and political purposes. In M.N.S. Nair's case (supra) this Court after enumerating certain grounds further observed:

".any other similar circumstances which it is difficult to predicate as they are dependent entirely on the facts and circumstances of each case."

Likewise in C. Mohapatra's case (supra) this Court again observed:

"No hard and fast rule can be laid down nor can any categories of cases be defined in which consent should be granted or refused."

In face of these observations it will be difficult to accept the contention that withdrawal from prosecution can be permitted only in political offences and not in Common Law offences. In the past there have been cases where crimes motivated by political ambitions or considerations or committed during mass agitations, communal frenzies, regional disputes, industrial conflicts, student unrest or

the like situations involving emotive issues giving rise to an atmosphere surcharged with violence, have been permitted to be withdrawn in the interest of public order and peace. But on that account it will not be correct to say that permission to withdraw can be granted by the Court only when offences as enumerated above are involved. Section 321 is in very wide terms and in view of the decisions cited above it will not be possible to con fine grounds only to offences which may be termed as political offences or offences involving emotive issues. To interpret the section in the way as desired by the counsel for the appellant will amount to re-writing section 321 of the Code. The only guiding factor which should weigh with the public prosecutor while moving the application for withdrawal and the court according its permission for withdrawal is to see whether the interest of public justice is advanced and the application for withdrawal is not moved with oblique motive unconnected with the vindication of cause of public justice.

If once it is accepted that the application for withdrawal from the prosecution can be made on various grounds and it is not confined to political offences, the contention raised on behalf of the appellant that grounds Nos. (b), (c), (d) mentioned in the application for withdrawal are irrelevant in the instant case will not be tenable. The Indian Penal Code or the Code of Criminal Procedure does not make any such distinction between political offences and offences other than political ones. Even if it is accepted that political offences are not unknown to jurisprudence and other Acts do contemplate political offences, the fact remains that s. 321 Cr. P.C. is not confined only to political offences or social offences, but it applies to all kinds of offences and the application for withdrawal can be made by the Public Prosecutor on various grounds. The only safeguard that should be kept in mind by the Public Prosecutor is that it should not be for an improper or oblique or ulterior consideration, and the guiding consideration should be that of vindication of public justice.

In the application for withdrawal from prosecution the public Prosecutor has given four reasons and he has applied his own mind to the facts and circumstances of the case. In para 3 of his application he has clearly stated that he has gone through the case diary and the relevant materials connected with the case and has come to the conclusion that in the circumstances prevailing at the time of institution of the case and the investigation thereof it appears that the case was instituted on the grounds of political vendetta and only to defame the fair image of Dr. J.N. Mishra who was then the leader of the opposition and one of the acknowledged leaders of the Congress Party in the country.

The Court while according the consent to the withdrawal has only to see that the Public Prosecutor has acted properly and has not been actuated by oblique or extraneous considerations. It is not the function of the Court to make a fresh appraisal of the evidence and come to its own conclusion on the question whether there is a triable issue to be investigated by the Court.

First I take up ground No. (b) in para 2 of the application for withdrawal, that is, the implication of respondent No. 2, as a result of personal and political vendetta. In the opinion of the Public Prosecutor, the prosecution was motivated by personal and political vendetta. The aforesaid criminal case was instituted during the period of Janata Party Government by an order dated 31st of January 1978 passed by Shri Karpoori Thakur, the then Chief Minister, who was the party leader of the appellant Sheonandan Paswan, who was also the State Minister of the Janata Party Government.

From the materials placed on the record it is evident that respondent No. 2 is one of the prominent leaders of the party politically opposed to the Janata Party which was the party in power led by Shri Karpoori Thakur at the relevant time of the institution of the prosecution. Respondent No. 2 had been a bitter critic of the principles and policies of Shri Karpoori Thakur. In 1977 when respondent No. 2 was heading the government a warrant of arrest was issued against Shri Karpoori Thakur for his arrest and detention. The appellant, formerly a Deputy Magistrate, was posted as Assistant Secretary in the Chief Minister's Secretariat of respondent No. 2. He was removed from the Secretariat to some other department by respondent No. 2. The appellant joined the Lok Dal and fought election on Lok Dal ticket after resigning his job. When he became a State Minister in the Ministry of Shri Karpoori Thakur, he came to occupy a big official bungalow at Bailly Road, Patna. In 1980 when the party to which respondent No. 2 belongs came to power, respondent No. 2 became the Chief Minister. The appellant ceased to be a State Minister and was asked to hand over possession of the official residence. Since the appellant refused to vacate, the State Government ultimately resorted to extreme legal step for dispossessing him. This made the appellant feel aggrieved. He vindicated his right by filing a writ petition in the High Court which was eventually decided in his favour. The fact, however, remains that there was no love lost between the appellant and respondent No. 2.

When Shri Karpoori Thakur became the Chief Minister in the Janata Party regime, the quickness with which the files moved when a decision was taken to prosecute respondent No. 2 is very significant. From the affidavit of Shri Bidhu Sekhar Banerjee, Deputy Superintendent of Police, Cabinet Vigilance Department, it is apparent that within the course of a few days the inquiries were completed, advice obtained and orders passed for instituting the case. On 9th of January 1978 all the criminal cases investigated by Dy. S.Ps. CI, Bihar, relating to Patna Urban Co-operative Bank, including P.S. Case No. 97(5)77 were transferred to Vigilance Department by order of Shri Karpoori Thakur, the then Chief Minister and placed under the Inspector, Shri Reghubir Singh. On 22nd January, 1978 M.A. Haidari and A.K. Sinha, accused of Kadam Kuan P.S. Case No. 97(5)77 were re-arrested by Shri Raghubir Singh, Inspector and the second confession of Shri M.A.Haidari was secured in which for the first time he brought allegations against Dr. Mishra. The confession of Shri A.K. Sinha was secured . on 26th of January, 1978. On 28th January 1978 Shri D.P. Ojha.

S.P. Vigilance submitted his inquiry report recommending institution of criminal cases against Dr. Mishra and others. On 29th of January 1978 Shri S.B. Sahay DIG Vigilance also recommended the institution of a criminal case. On 30th of January 1978, I.G.Vigilance also recommended the prosecution. On the same day the file was referred to Advocate General Shri K.D. Chattarjee appointed as Advocate General by Shri Karpoori Thakur. On 31st of January, 1978 the Chief Secretary sent the file to the Chief Minister of Bihar. On the same day the Chief Minister, Bihar approved it and handed over the file direct to Shri S.B. Sahay, DIG. On 1st of February, 1978 the file was endorsed by S.P. Vigilance, Shri D.P.Ojha to Addl. S.P., R.P. Singh for instituting the case. On 1st of February, 1978 a Vigilance Criminal case was instituted in Police Station at 0600 hrs. At 8.50 hrs. the Case was discussed by I.G.with DIG Shri S.B. Sahay and Shri D.P. Ojha and decision was taken to search houses of Dr. Mishra at Patna, Balua Bazar, and his relations. On the same day request to issue search warrants was made and search warrants were issued. On the same day Inspectors M/s. Sharda Nanda Singh, Raghubir Singh and Ramdehia Sharma were got transferred

from CID to Vigilance.

The speed with which the file of the criminal case moved from one place to another and orders obtained itself indicates that it was not to vindicate the cause of public justice but it was only to feed their grudge that such a keen interest was exhibited by the Chief Minister and the appellant also actuated by his personal and political vendetta sought to oppose the application for withdrawal. In these circumstances it is doubtful whether the appellant was truly representing the public interest.

To say that unless the crime allegedly committed are per se political offences or are motivated by political ambition or consideration or are committed mass agitation, communal frenzies, regional disputes, no question of serving a broader cause of public justice. public order or peace can arise is to put limitation on the broad terms of section 321 of the Code.

The Public Prosecutor was of the view that as a result of election there was a change in the situation in as much as Respondent No 2's party received the peoples mandate and voted to power and Respondent No. 2 had become the Chief Minister of the State and that the prosecution against the head of the State would have had adverse effect on public interest, including public order and peace and, therefore, he thought it inexpedient for reasons of State and public policy to proceed with the case. It is the Public Prosecutor who has been given the exclusive power to apply for withdrawal and if he in his discretion thinks that it would be inexpedient to proceed with the case the Court cannot reconsider the matter afresh and come to its own conclusion different from the one taken by the public prosecutor unless the Court comes to a conclusion that the public prosecutor has done so with an improper or oblique motive.

In my opinion the decision of the public prosecutor to withdraw from the case on the grounds given by him in his application for withdrawal cannot be said to be actuated by improper or oblique motive. He bona fide thought that in the changed circumstances of the case it would be inexpedient to proceed with the case and it would be sheer wastage of public money and time to drag on with the case if the chances for conviction are few and far between. In the circumstances instead of serving the public cause of justice it will be to the detriment of public interest.

The statutory responsibility for deciding withdrawal squarely rests upon the public prosecutor. It is non- negotiable and cannot be bartered away. The Court's duty in dealing with the application under s. 321 is not to reappreciate the grounds which led the public prosecutor to request withdrawal from the prosecution but to consider whether the public prosecutor applied his mind as a free agent uninfluenced by irrelevant and extraneous or oblique considerations as the Court has a special duty in this regard inasmuch as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from prosecution. The Court's duty is to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice.

The Public Prosecutor applied his mind and on perusal of case diary and other materials he was satisfied in the interest of public justice to withdraw from the case.

The Court also passed a speaking order while according its consent to the withdrawal. The relevant portion of its order is in the following terms:

> "Having considered the legal position explained by the Supreme Court and the submissions made by the learned Special Public Prosecutor in-charge of this case, and having perused the relevant records of the case I am satisfied that it is a fit case in which the prayer of the learned. Special Public Prosecutor to withdraw should be allowed and it is therefore allowed."

Normally the observation made by the Court that it has perused the relevant records of the case should be presumed to be correct unless a very strong case is made out for holding that it did not do so and the vaunted remark made by the Court that it has done so is incorrect. In a similar situation this Court in C. Mohapatra's case (supra) observed:

> "..according to the prosecution, the evidence collected during investigation was not sufficient to sustain the charge against the respondent and the learned Magistrate was satisfied in regard to the truth of this averment made by the Court Sub-Inspector. It is difficult for us to understand how the High Court could possibly observe in its order that the Magistrate had not perused the case diary when in terms the learned Magistrate has stated in his order that he had read the case diary and it was after reading it that he was of the opinion that the averment of the prosecution that the evidence was not sufficient was not ill-founded An attempt has been made on behalf of the appellant to show that the case diary was not with the Court and that it was lying elsewhere and, therefore, he could not have perused the case diary and his observation is not quite correct. This contention cannot be accepted at its face value in view of the observations made by the court.

Now I take up ground No. (a) of the application for withdrawal from the case. This ground relates to lack of prospect of a successful prosecution in the light of evidence. The counsel for the appellant has contended that in the instant case on the documentary evidence itself, which is not in dispute, an offence under s. 466 of the Indian Penal Code and s. 5 (1) (d) of the Prevention of Corruption Act is prima facie made out and the Public Prosecutor was not justified in moving the application for withdrawal on this ground. He referred to the antedating of an order. Dr. J.N.

Mishra, Respondent No. 2, after becoming the Chief Minister passed an order in his handwriting on 16th May, 1975 in Hindi, the English rendering whereof is given below:

> "Much time has passed. On perusal of the file it appears that there is no allegation of defalcation against the Chairman and the Members of the Board of the Bank. Stern action should be taken for realisation of the loans from the loanees and if there are difficulties in realisation from the loanees surcharge proceedings should be initiated against the Board of Directors. Normal conditions be restored in the Bank after calling the Annual General Meeting and holding elections.

Sd/- Jagan Nath Mishra 16.5.1975."

It appears that this order was replaced by another order in Hindi, the English rendering of which is:

"Please issue orders for restoring the normal condition's in the Bank after holding Annual General Meeting.

Sd/-Jagan Nath Mishra 16.5.1975."

by pasting this order over the order dated 16th May, 1975 and by antedating the latter order as 14th of May, 1975 and this clearly in the opinion of the learned counsel brings out an offence of criminal misconduct under s.5 (1) (d) of the Prevention of Corruption Act and of forgery under s. 466 IPC. A lot of argument was advanced that the pasting of an order over the order dated 16th May, 1975 by a letter order itself creates a suspicion. This was rather an unusual method adopted by Dr. J.N. Mishra to erase the previous order and to replace it by another order of the same date by antedating it as 14th may 1975 by pasting it over the earlier order. The method of replacing one order by another by pasting over the earlier one appears to be a well- recognised practice in the Secretariat of Bihar Government and Solicitor General Shri K. Parasaran showed various similar orders which had been replaced by another order by pasting over the earlier one. So, that part of the argument loses all its force on examination of various similar orders by adopting the same method. The question, however, is whether this antedating of the latter order as 14th May 1975 by pasting it over the earlier order would amount to criminal misconduct within the meaning of s. 5 (1) (d) of the Prevention of Corruption Act and forgery within the meaning of s. 466 of the Indian Penal Code. Insofar as it is material for the purpose of this case, s. 5 (1) (d) of the Prevention of Corruption Act reads:

"5. (1) A Public servant is said to commit the offence of criminal misconduct-

(a) .....

(b) .....

(c) .....

(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage."

The contention on behalf of the appellant is that by changing the order dated 16th May, 1975, respondent No. 2 obtained for Nawal Kishore Sinha, respondent No. 3, a pecuniary advantage inasmuch as by antedating the second order respondent No. 2 had absolved Nawal Kishor Sinha from the surcharge proceedings. The factum of change has not been disputed by respondent No. 2 and therefore, prima facie an offence under s. 5(1) (d) is made out and no other evidence be looked into. In the circumstances the Public Prosecutor was not justified in coming to the conclusion that there was no prospect of conviction of respondent No. 2.

I am afraid this contention cannot be accepted for obvious reasons. The earlier order dated 16th May, 1975 no doubt contemplated four things:

> (1) that there is no allegation of defalcation against the Chairman and Members of the Board of the Bank; (2) stern action should be taken for realisation of the loans from the loanees;
>
> (3) if there are difficulties in the realisation from the loanees surcharge proceedings should be initiated against the Board of Directors, and (4) normal conditions be restored in the Bank after calling the annual general meeting and holding elections.

By the second order, which is said to have been antedated, only the fourth part of the order has been maintained. There seems to be no earthly reason for antedating the latter order by putting the date as 14th of May, 1975. It was always open to the Minister to have changed his order and pass another order. The same purpose could have been served by Respondent No. 2, if he really wanted to absolve Respondent No. 3 from the liability by passing the order on the 16th of May, 1975 by replacing the earlier order by the subsequent order. Rather that purpose of Respondent No. 2, if at all, could have been served better by keeping the date of the second order as 16th May, or any subsequent date. Secondly, the second antedated order dated 14th May, 1975 could not stand in the way of initiating surcharge proceedings against Respondent No. 3 and other members of the Board of the Bank. Date 14th May, 1975, for all we know, may have been on account of some accidental slip The other reason as suggested by the Solicitor General is that surcharge proceedings could be initiated only by the Co-operative Department under s. 40 of the Bihar and Orissa Co- operative Societies Act, 1935. It reads:

> "40, Where as a result of an audit under s. 33 or an enquiry under s. 35, or an inspection under ss. 34, 36 or 37, or the winding up of a Society it appears to the Registrar that any person who has taken part in the organisation or management of the society or any past or present officer of the society has been guilty of the fact or omission mentioned in clauses (a), (b), (c) or (d) the Registrar may enquire into the conduct of such persons or officers and after giving such officer or person an opportunity of being heard, make an order for surcharge."

Therefore, in view of the aforesaid provisions of s. 40 of the Cooperative Societies Act, taking steps for a surcharge is not within the jurisdiction of the State Executive. This may have been another reason for dropping the proceedings for surcharge, if at all, against the officers of the bank. There is yet another reason. The second antedated order does not say a word about dropping the surcharge proceedings ordered by Respondent No. 2 in the earlier order and, therefore, it is difficult to say that Respondent No. 2 had actually dropped the surcharge proceedings against Respondent No. 3 and other offers of the Co-operative Bank. Indeed, surcharge proceedings had been initiated. Surcharge files regarding surcharge case No. 3 of 1975 proves that surcharge proceedings were proposed initially by the Deputy Registrar on 30th of April 1975 and were in fact taken on 1st June, 1975 and the show cause notice was issued on 1st July 1975 and surcharge order was made against Shri Nawal Kishore Sinha and others on 31st December, 1975. This shows clearly that no benefit or advantage was given to Nawal Kishore Sinha or others by the order of 14th May, 1975. From the affidavit of

Jiwanand Jha, Respondent No. 4 it appears that an amount of Rs. 33,96,024.90 was given as loans to 180 persons. Out of the total amount given by way of loans an amount of Rs. 25,64,682.23 has already been realised from 106 persons. The unrealised amount is only Rs. 8,31,337.67 for which decrees have been passed against 64 persons and as against the remaining 10 persons proceedings for realisation are going on.

About the offence of forgery under s. 466 of the Indian Penal Code also I have my grave doubts. Forgery has been defined under s. 463 as "making any false document". Making of false document is defined in s. 464. According to the counsel for the appellant the present case falls within the scope of "who dishonestly or fraudulently makes a document or part of a document ...at a time at which he knows that it was not made, signed, sealed or executed" The word "dishonestly" has been defined in s. 24 of the Indian Penal Code as "whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly." "Fraudulently" has been defined in s. 25 as "a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise." The precise contention raised on behalf of the appellant is that Respondent No. 2 changed the order which has been earlier passed with the intention of causing wrongful loss to the Bank by reason of the fact that by the order passed surcharge proceeding was countermanded.

On the materials on record I am not satisfied that a prima facie case under s. 5 (1) (d) of the Prevention of Corruption Act and of forgery under s. 466 Indian Penal Code are made out.

The facts have many faces. If the view of the Public Prosecutor is one, which could in the circumstances be taken by any reasonable man, the Court cannot substitute its own opinion for that of the Public Prosecutor. If the Public Prosecutor has applied his mind on the relevant materials and his opinion is not perverse, and which a reasonable man could have arrived at, a roving inquiry into the evidence and materials on the record for the purpose of finding out whether his conclusions were right or wrong would be incompetent. That would virtually convert this Court into an Appellate Court setting on judgment.

The contention raised by the counsel for appellant that the Public Prosecutor Shri Lallan Prasad Sinha was not competent to apply for withdrawal has not been accepted by my brothers Tulzapurkar and Baharul Islam JJ. and I respectfully agree with them.

If the Public Prosecutor thought that the continuance of the prosecution in the circumstances would only end in an exercise in futility, he was fully justified in moving the application for withdrawal. The only question is whether he has applied his mind and he was not actuated by any extraneous consideration or improper motive. It was sought to be argued on behalf of the appellant that the Public Prosecutor has acted at the behest of the Government and he did not apply his own mind. Reference was made to the letter sent by the Government to the Public Prosecutor. The letter did not indicate that the Government wants him not to proceed with the case but the letter gave full freedom to the Public Prosecutor to apply his own mind and to come to his own conclusion. In view of the various authorities of this Court, consultation with the Government or high officer is not improper. But the Public Prosecutor has to apply his own mind to the facts and circumstances of the case

before coming to the conclusion to withdraw from the prosecution. From the materials on the record I am satisfied that the Public Prosecutor has applied his own mind and came to his own conclusions.

The last but not the least in importance was the point raised on behalf of the appellant that the sanction for prosecution had already been given by the then Chief Minister, Abdul Gafoor and the complaint was going to be filed but it was postponed on account of Respondent No. 2 who by that time overtook as the Chief Minister of Bihar. The argument is that firstly he tried to delay the filing of the complaint; and secondly that he ordered for not pro secuting the officers of the bank including Respondent No. 2, Shri Jagan Nath Mishra.

It appears from the notes on dates given on behalf of the Respondent that the file went to the Chief Minister, Respondent No. 2 because of an earlier noting dated Ist of January 1975 by Shri Omesh Prasad Verma that the Chief Minister may also like to see. A further noting dated 31st of January 1975 by Shri R.K. Shrivastava in the Ministry of Co-operation was to the following effects:

> "Chief Minister and Minister of Law have desired to see the file before complaints are actually lodged. As per their directions, the file has been recalled from the Additional Public Prosecutor. In the circumstances narrated above Minister of Law and Chief Minister would like to accord their approval to the filing of the complaint."

A subsequent note of Shri R. K. Shrivastava dated 27th of January 1975 is in the following terms:

> "The Chief Minister has desired that if the said complaint has not been filed should await till he is able to see the file. Another buff sheet has been received from the Minister of Agriculture also. The file may kindly be recalled and filing of complaints may await till further clearance of the C.M."

It appears that the previous Chief Minister was replaced by that time Dr. J.N. Mishra. It is in these circumstances that the file was sent to Respondent No. 2 in his capacity as Chief Minister in pursuance of the earlier desire of the then Chief Minister, Shri Abdul Gafoor, and passed the following orders:

> "In order to recover the money from some of the loanees of the Patna Urban Co-operative Bank criminal cases were instituted against them. Action should be taken immediately for the withdrawal of the cases against those loanees who have cleared the loan in full and proper instalments for payment of loans should be fixed against those who want to repay the loan but due to financial incapacity are unable to make payment at a time and thereafter necessary further action should be taken."

In this state of affairs it cannot be said that Respondent No. 2 was out to obstruct the criminal proceedings.

The facts that the prosecution, if ordered, will start after a gap of about eight years cannot be lost sight of. In the view taken by me in the earlier part of the judgment that no prima facie case in my

opinion has been made out under s. 466 of the Indian Penal Code and s. 5 (1) (d) of the Prevention of Corruption Act and the fact that the High Court in revision agreed with the view of the Special Judge giving consent to the withdrawal from the prosecution on the application of the Public Prosecutor under s. 321 Cr. P.C. this Court cannot make a fresh appraisal of evidence and come to a different conclusion. All that this Court has to see is that the Public Prosecutor was not actuated by extraneous or improper considerations while moving the application for withdrawal from the prosecution. Even if it is possible to have another view different from the one taken by the Public Prosecutor while moving the application for withdrawal from prosecution this Court should be reluctant to interfere with the order unless it comes to the conclusion that the Public Prosecutor has not applied his mind to the facts and circumstances of the case, and has simply acted at the behest of the Government or has been actuated by extraneous and improper considerations. On the facts and circumstances of the case it is not possible for me to hold that the Public Prosecutor was actuated by oblique or improper motive.

In view of my finding that the criminal case against Respondent No. 2 and others was instituted on account of personal or political vendetta at the instance of some disgrunted political leaders, that no prima facie case of forgery or misconduct is made out on the materials on the record, that the Court's jurisdiction in dealing with the application under s. 311 of the Code is only to see whether the Public Prosecutor had applied for withdrawal in the interest of Public Justice, or he has done so actuated by improper or oblique motive, that a substantial amount of loan has already been realised, that the continuance of the criminal case in the circumstances of this case will be only an exercise in futility at the cost of public money and time, that the trial court as well as the High Court were satisfied with the grounds for withdrawal taken by the Public Prosecutor, the view taken by the trial court as well as the High Court in my opinion does not suffer from any infirmity and is a just and proper one.

For the reasons given above the appeal must fail and it is accordingly dismissed.

S.R. Appeal allowed.