15. On 6th July, 2006 the Secretary-General of the United Nations submitted a report to the General Assembly called the "In-depth Study on all forms of violence against women". In the chapter relating to violence against women within the family and harmful traditional practices, early marriage was one of the commonly identified forms of violence.1 Similarly, early marriage was considered a harmful traditional practice2 - a thought echoed a year later in the Study on Child Abuse: India 2007 (referred to later) by the Government of India.

16. An early marriage is explained as involving the marriage of a child, that is, a person below the age of 18 years. It is stated that "Minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality. When they marry and have children, their health can be adversely affected, their education impeded and economic autonomy restricted. Early marriage also increases the risk of HIV infection." Among the under-documented forms of violence against women are included traditional harmful practices, prenatal sex selection, early marriage, acid throwing and dowry or "honour" related violence etc.3

17. On the concern of appropriate legislation to deal with issues of violence against women, the right of a woman to bodily integrity and legislations that allow early marriages, the Secretary General had this to say:

The treaty bodies have expressed concerns about the scope and coverage of existing legislation, in particular in regard to: definitions of rape that require use of force and violence rather than lack of consent; definitions of domestic violence that are limited to physical violence; treatment of sexual violence against women as crimes against the honour of the family or crimes against decency rather than violations of women's right to bodily integrity; use of the defence of "honour" in cases of violence against women and the related mitigation of sentences; provisions allowing mitigation of sentences in rape cases where the perpetrator marries the victim; inadequacy of protective measures for trafficked women, as well as their treatment as criminals rather than victims; termination of criminal proceedings upon withdrawal of a case by the victim; penalization of abortion in rape cases; laws that allow early or forced marriage; inadequate penalties for acts of violence against women; and discriminatory penal laws."4

National Policy and National Plan

18. What has been the response of the Government of India to studies carried out from time to time and views expressed? The National Charter for Children, 2003 was notified on 9th February, 2004. While it failed to define a child, we assume that it was framed keeping in mind the generally accepted definition of a child as being someone below 18 years of age. Proceeding on this basis, for the present purposes, Clause 11 of the National Charter is of relevance in the context of child marriages. It recognized that child marriage is a crime and an atrocity committed against the girl child. It also provided for taking "serious measures" to speedily abolish the practice of child marriage. Clause 11 reads:

11. a. The State and community shall ensure that crimes and atrocities committed against the girl child, including child marriage, discriminatory practices, forcing girls into prostitution and trafficking are speedily eradicated.

b. The State shall in partnership with the community undertake measures, including social, educational and legal, to ensure that there is greater respect for the girl child in the family and society.

c. The State shall take serious measures to ensure that the practice of child marriage is speedily abolished."

19. As a first step in this direction, child marriages were criminalized by enacting the PCMA in 2006 but no corresponding amendment was made in Section 375 of the Indian Penal Code, as it existed in 2006, to decriminalize marital rape of a girl child.

20. The National Charter was followed by the National Policy for Children notified on 26th April, 2013. The National Policy explicitly recognized in Clause 2.1 that every person below the age of 18 years is a child. Among the Guiding Principles for the National Policy was the recognition that every child has universal, inalienable and indivisible human rights; every child has the right to life, survival, development, education, protection and participation; the best interest of a child is the primary concern in all decisions and actions affecting the child, whether taken by legislative bodies, courts of law, administrative authorities, public, private, social, religious or cultural institutions.

21. The large 'to do list' in the National Policy led to the National Plan of Action for Children, 2016: Safe Children - Happy Childhood. The National Plan appears to have been made available on 24th January, 2017. While dealing with child marriage, it is stated as follows:

In India, between NFHS-3 (2005-06) to RSOC (2013-14), there has been a considerable decline in the percentage of women, between the ages 20-24, who were married before the age of 18 (from 47.4% to 30.3%). The incidence is higher among SC (34.9%) and ST (31%) and in families with lowest wealth index (44.1%). Child marriage violates children's basic rights to health, education, development, and protection and is also used as a means of trafficking of young girls.

Child marriage leads to pregnancy during adolescence, posing life-threatening risks to both mother and child. It is indicated by the Age-specific Marital Fertility Rate (ASMFR) which is measured as a number of births per year in a given age group to the total number of married women in that age group. SRS 2013 reveals that in the age group of 15-19 years; there has been an upward trend during the period 2001-2013. ASMFR is higher in the age group 15-19 years in comparison to 25-29 years.

22. The National Plan of Action for Children recognizes that the early marriage of girls is one of the factors for neo-natal deaths; early marriage poses various risks for the survival, health and development of young girls and to children born to them and most unfortunately it is also used as a means of trafficking.

23. A reading of the National Policy and the National Plan of Action for Children reveals, quite astonishingly, that even though the Government of India realizes the dangers of early marriages, it is merely dishing out platitudes and has not taken any concrete steps to protect the girl child from marital rape, except enacting the Protection of Children from Sexual Offences Act, 2012.

Human Rights Council

24. The Report of the Working Group on the Universal Periodic Review for India (issued on 17th July, 2017 without formal editing) for the 36th Session of the Human Rights Council refers to recommendations made by several countries to remove the exception relating to marital rape from the definition of rape in Section 375 of the Indian Penal Code In other words, the issue raised by the Petitioner has attracted considerable international attention and discussion and ought to be taken very seriously by the Union of India.

25. In our opinion, it is not necessary to detail the contents of every report or study placed before us except to say that there is a strong established link between early marriage and sexual intercourse with a married girl child between 15 and 18 years of age. There is a plethora of material to clearly indicate that sexual intercourse with a girl child below the age of 18 years (even within marriage) is not at all advisable for her for a variety of reasons, including her physical and mental well-being and her social standing - all of which should ordinarily be of paramount importance to everybody, particularly the State.

26. The social cost of a child marriage (and therefore of sexual intercourse with a girl child) is itself quite enormous and in the long run might not even be worth it. This is in addition to the economic cost to the country which would be obliged to take care of infants who might be malnourished and sickly; the young mother of the infant might also require medical assistance in most cases. All these costs eventually add up and apparently only for supporting a pernicious practice.

27. We can only express the hope that the Government of India and the State Governments intensively study and analyze these and other reports and take an informed decision on the effective implementation of the PCMA and actively prohibit child marriages which 'encourages' sexual intercourse with a girl child. Welfare schemes and catchy slogans are excellent for awareness campaigns but they must be backed up by focused implementation programmes, other positive and remedial action so that the pendulum swings in favour of the girl child who can then look forward to a better future.

Provisions of the Indian Penal Code (Indian Penal Code)

28. Section 375 of the Indian Penal Code defines 'rape'. This Section was inserted in the Indian Penal Code in its present form by an amendment carried out on 3rd February, 2013 and it provides that a man is said to commit rape if, broadly speaking, he has sexual intercourse with a woman under circumstances falling under any of the seven descriptions mentioned in the section. (A woman is defined Under Section 10 of the Indian Penal Code as a female human being of any age). Among the seven descriptions is sexual intercourse against the will or without the consent of the woman; Clause 'Sixthly' of Section 375 makes it clear that if the woman is under 18 years of age, then sexual intercourse with her-with or without her consent-is rape. This is commonly referred to as 'statutory rape' in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential.

29. However, Exception 2 to Section 375 of the Indian Penal Code provides that it is not rape if a man has sexual intercourse with a girl above 15 years of age and if that girl is his wife. In other words, a husband can have sexual intercourse with his wife provided she is not below 15 years of age and this is not rape under the Indian Penal Code regardless of her willingness or her consent.

30. However, sexual intercourse with a girl under 15 years of age is rape, whether it is with or without her consent, against her will or not, whether it is by her husband or anybody else. This is clear from a reading of Section 375 of the Indian Penal Code including Exception 2.

31. Therefore, Section 375 of the Indian Penal Code provides for three circumstances relating to 'rape'. Firstly sexual intercourse with a girl below 18 years of age is rape (statutory rape). Secondly and by way of an exception, if a woman is between 15 and 18 years of age then sexual intercourse with her is not rape if the person having sexual intercourse with her is her husband. Her willingness or consent is irrelevant under this circumstance. Thirdly sexual intercourse with a woman above 18 years of age is rape if it is under any of the seven descriptions given in Section 375 of the Indian Penal Code (non-consensual sexual intercourse).

32. The result of the above three situations is that the husband of a girl child between 15 and 18 years of age has blanket liberty and freedom to have non-consensual sexual intercourse with his wife and he would not be punishable for rape under the Indian Penal Code since such non-consensual sexual intercourse is not rape for the purposes of Section 375 of the Indian Penal Code. Very strangely, and as pointed out by Sakshi before the LCI, the husband of a girl child does not have the liberty and freedom under the Indian Penal Code to commit a lesser 'sexual' act with his wife, as for example, if the husband of a girl child assaults her with the intention of outraging her modesty, he would be punishable under the provisions of Section 354 of the Indian Penal Code. In other words, the Indian Penal Code permits a man to have non-consensual sexual intercourse with his wife if she is between 15 and 18 years of age but not to molest her. This view is surprisingly endorsed by the LCI in its 172nd report adverted to above.

Protection of Human Rights Act, 1993

33. The Protection of Human Rights Act, 1993 defines "human rights" in Section 2(d) as meaning the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable

by courts in India. There can be no doubt that if a girl child is forced by her husband into sexual intercourse against her will or without her consent, it would amount to a violation of her human right to liberty or her dignity guaranteed by the Constitution or at least embodied in international conventions accepted by India such as the Convention on the Rights of the Child (the CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW).

Protection of Women from Domestic Violence Act, 2005 (DV Act)

34. Section 3 of the Protection of Women from Domestic Violence Act, 2005 (for short 'the DV Act') provides that if the husband of a girl child harms or injures or endangers the health, safety, life, limb or well being, whether mental or physical, of his wife including by causing physical abuse and sexual abuse, he would be liable to have a protection order issued against him and pay compensation to his wife. Explanation I (ii) of Section 3 defines 'sexual abuse' as including any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman.

Prohibition of Child Marriage Act, 2006 (PCMA)

35. One of the more important legislations on the subject of protective rights of children is the Prohibition of Child Marriage Act, 2006 (for short 'the PCMA'). For the purposes of the PCMA, a 'child' is a male who has not completed 21 years of age and a female who has not completed 18 years of age and a 'child marriage' means a marriage to which either contracting party is a child.

36. Section 3 of the PCMA provides that a child marriage is voidable at the option of any one of the parties to the child marriage - a child marriage is not void, but only voidable. Interestingly, and notwithstanding the fact that a child marriage is only voidable, Parliament has made a child marriage an offence and has provided punishments for contracting a child marriage. For instance, Section 9 of the PCMA provides that any male adult above 18 years of age marrying a child shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both. Therefore regardless of his age, a male is penalized under this Section if he marries a girl child. Section 10 of the PCMA provides that whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees; Section 11 of the PCMA provides punishment for promoting or permitting solemnization of a child marriage; and finally Section 13 of the PCMA

provides that the jurisdictional judicial officer may injunct the performance of a child marriage while Section 14 of the PCMA provides that any child marriage solemnized in violation of an injunction Under Section 13 shall be void.

37. It is quite clear from the above that Parliament is not in favour of child marriages per se but is somewhat ambivalent about it. However, Parliament recognizes that although a child marriage is a criminal activity, the reality of life in India is that traditional child marriages do take place and as the studies (referred to above) reveal, it is a harmful practice. Strangely, while prohibiting a child marriage and criminalizing it, a child marriage has not been declared void and what is worse, sexual intercourse within a child marriage is not rape under the Indian Penal Code even though it is a punishable offence under the Protection of Children from Sexual Offences Act, 2012.

Protection of Children from Sexual Offences Act, 2012 (POCSO)

38. The Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') is an important statute for the purposes of our discussion. The Statement of Objects and Reasons necessitating the enactment of the POCSO Act makes a reference to data collected by the National Crime Records Bureau (NCRB) which indicated an increase in sexual offences against children. The data collected by the NCRB was corroborated by the Study on Child Abuse: India 2007 conducted by the Ministry of Women and Child Development of the Government of India.

39. While the above Study focuses on child abuse, it does refer to the harmful traditional practice of child marriage and in this context adverts to child marriage as being a subtle form of violence against children. The Study notes that there is a realization that if issues of child marriage are not addressed, it would affect the overall progress of the country.

40. The above Study draws attention to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to which India is a signatory. Article 16.2 thereof provides "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."5

41. The above Study also makes a reference to gender equity to the effect that discrimination against girls results in child marriages and such an imbalance needs to be

addressed by bringing about attitudinal changes in people regarding the value of the girl child.

42. The Preamble to the POCSO Act states that it was enacted with reference to Article 15(3) of the Constitution. The Preamble recognizes that the best interest of a child should be secured, a child being defined Under Section 2(d) as any person below the age of 18 years. In fact, securing the best interest of the child is an obligation cast upon the Government of India having acceded to the Convention on the Rights of the Child (the CRC). The Preamble to the POCSO Act also recognizes that it is imperative that the law should operate "in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development of the child". Finally, the Preamble also provides that "sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed". This is directly in conflict with Exception 2 to Section 375 of the Indian Penal Code which effectively provides that the sexual exploitation or sexual abuse of a girl child is not even a crime, let alone a heinous crime - on the contrary, it is a perfectly legitimate activity if the sexual exploitation or sexual abuse of the girl child is by her husband.

43. Under Article 34 of the CRC, the Government of India is bound to "undertake all appropriate national, bilateral and multi-lateral measures to prevent the coercion of a child to engage in any unlawful sexual activity". The key words are 'unlawful sexual activity' but the Indian Penal Code declares that a girl child having sexual intercourse with her husband is not 'unlawful sexual activity' within the provisions of the Indian Penal Code, regardless of any coercion. However, for the purposes of the POCSO Act, any sexual activity engaged in by any person (husband or otherwise) with a girl child is unlawful and a punishable offence. This dichotomy is certainly not in the spirit of Article 34 of the CRC.

44. Further, in terms of our international obligations Under Article 1 and Article 34 of the CRC, the Government of India must undertake all appropriate measures to prevent the sexual exploitation or sexual abuse of any person below 18 years of age since such sexual exploitation or sexual abuse is a heinous crime. What has the Government of India done? It has persuaded Parliament to convert what is otherwise universally accepted as a heinous crime into a legitimate activity for the purposes of Section 375 of the Indian Penal Code if the exploiter or abuser is the husband of the girl child. But, contrarily the rape of a married girl child (called 'aggravated penetrative sexual assault' in the POCSO Act) is made an offence for the purposes of the POCSO Act.

45. Section 3 of the POCSO Act defines "penetrative sexual assault". Clause (n) of Section 5 provides that if a person commits penetrative sexual assault with a child, then that person actually commits aggravated penetrative sexual assault if that person is related to the child, inter alia, through marriage. Therefore, if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Section 5(n) of the POCSO Act which is punishable Under Section 6 of the POCSO Act by a term of rigorous imprisonment of not less than ten years and which may extend to imprisonment for life and fine.

46. The duality therefore is that having sexual intercourse with a girl child between 15 and 18 years of age, the husband of the girl child is said to have not committed rape as defined in Section 375 of the Indian Penal Code but is said to have committed aggravated penetrative sexual assault in terms of Section 5(n) of the POCSO Act.

47. There is no real or material difference between the definition of rape in the terms of Section 375 of the Indian Penal Code and penetrative sexual assault in the terms of Section 3 of the POCSO Act.6 The only difference is that the definition of rape is somewhat more elaborate and has two exceptions but the sum and substance of the two definitions is more or less the same and the punishment (Under Section 376(1) of the Indian Penal Code) for being found guilty of committing the offence of rape is the same as for penetrative sexual assault (Under Section 4 of the POCSO Act). Similarly, the punishment for 'aggravated' rape Under Section 376(2) of the Indian Penal Code is the same as for aggravated penetrative sexual assault Under Section 6 of the POCSO Act. Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of the Indian Penal Code - the end result is the same and only the forum of trial changes. In a violation of the provisions of the POCSO Act, a Special Court constituted Under Section 28 of the said Act would be the Trial Court but the ordinary criminal court would be the Trial Court for an offence under the Indian Penal Code.

48. At this stage it is necessary to refer to Section 42-A inserted in the POCSO Act by an amendment made on 3rd February, 2013. This Section reads:

42-A. Act not in derogation of any other law.-The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including the Indian Penal Code) to the extent of any inconsistency.

49. One of the questions that arises for our consideration is whether there is any incongruity between Exception 2 to Section 375 of the Indian Penal Code and Section 5(n) of the POCSO Act and which provision overrides the other. To decide this, it would be necessary to keep Section 42-A of the POCSO Act in mind as well as Sections 5 and 41 of the Indian Penal Code which read:

5. Certain laws not to be affected by this Act.-Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.

41. "Special law".-A "special law" is a law applicable to a particular subject.

50. These two provisions are of considerable importance in resolving the controversy and conflict presented before us.

Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act)

51. The Juvenile Justice (Care and Protection of Children) Act, 2015 (the JJ Act) is also relatable to Article 15(3) of the Constitution. Section 2(12) of the JJ Act defines a child as a person who has not completed 18 years of age. A child in need of care and protection is defined in Section 2(14) of the JJ Act, inter alia, as a child "who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage". Clearly a girl child below 18 years of age and who is sought to be married is a child in need of care and protection. She is therefore, required to be produced before a Child Welfare Committee constituted Under Section 27 of the JJ Act so that she could be cared for, protected and appropriately rehabilitated or restored to society.

Brief summary of the existing legislations

52. It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 of the Indian Penal Code which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to be cared for, protected and appropriately rehabilitated or restored to society. All these 'child-friendly statutes' are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.

Article 15(3) of the Constitution

53. Article 15(3) of the Constitution enables and empowers the State to make special provision for the benefit of women and children. The Constituent Assembly debated this provision [then Article 9(2) of the draft Constitution] on 29th November, 1948. Prof. K.T. Shah suggested an amendment to the said Article ("Nothing in this Article shall prevent the State from making any special provision for women and children") so that it would read: "Nothing in this Article shall prevent the State from making any special provision for women and children or for Scheduled Castes or backward tribes, for their advantage, safeguard or betterment." The view expressed was:

Sir, it must be distinguished from the preceding article. I read it, at any rate, that this is a provision for discrimination in favour of women and children, to which I have added the Scheduled Castes or backward tribes. This discrimination is in favour of particular classes of our society which, owing to an unfortunate legacy of the past, suffer from disabilities or handicaps. Those, I think, may require special treatment; and if they do require it, they should be permitted special facilities for some time so that real equality of citizens be established.

The rage for equality which has led to provide equal citizenship and equal rights for women has sometimes found exception in regard to special provisions that, in the long range, in the interest of the country or of the race, exclude women from certain dangerous occupations, certain types of work. That, I take it, is not intended in any way to diminish their civic equality or status as citizens. It is only intended to safeguard, protect or lead to their betterment in general; so that the long-range interests of the country may not suffer.

The amendment was negatived by Dr. Ambedkar in the following manner:

With regard to amendment No. 323 moved by Professor K.T. Shah, the object of which is to add "Scheduled Castes" and "Scheduled Tribes" along with women and children, I am afraid it may have just the opposite effect.

The object which all of us have in mind is that the Scheduled Castes and Scheduled Tribes should not be segregated from the general public.

For instance, none of us, I think, would like that a separate school should be established for the Scheduled Castes when there is a general school in the village open to the children of the entire community. If these words are added, it will probably give a handle for a State to say, 'Well, we are making special provision for the Scheduled Castes'. To my mind they can safely say so by taking shelter under the Article if it is amended in the manner the Professor wants it. I therefore think that it is not a desirable amendment.

The response given by Dr. Ambedkar suggests that he certainly favoured special provisions for women and children with a view to integrate them into society and to take them out of patriarchal control.

But a similar integration could not be achieved by making special provisions for Scheduled Castes and Scheduled Tribes - it would have the opposite effect and further segregate them from the general public.

54. What clearly emerges from this discussion is that Article 9(2) of the draft Constitution [now Article 15(3)] was intended to discriminate in favour of women and children - a form of affirmative action to their advantage.

This intention has been recognized by decisions of this Court and of some High Courts. The earliest such decision is of the Calcutta High Court in Sri Mahadeb Jiew v. Dr. B.B. Sen MANU/WB/0113/1951 : AIR 1951 Cal 563 in which it was said that: "The special provision for women in Article 15(3) cannot be construed as authorizing a discrimination against women, and the word "for" in the context means "in favour of"."

55. In Government of A.P. v. P.B. Vijayakumar MANU/SC/0317/1995 : (1995) 4 SCC 520 affirmative action for women (and children) was recognized in paragraphs 7 and 8 of the Report in the following words:

The insertion of Clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women.....

What then is meant by "any special provision for women" in Article 15(3)? This "special provision", which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation."....

56. Yusuf Abdul Aziz v. State of Bombay MANU/SC/0124/1954 : 1954 SCR 930 is a Constitution Bench decision of this Court in which the constitutional validity of Section 497 of the Indian Penal Code was challenged on the ground that it unreasonably 'exempts' a wife from being punishable for an offence of adultery and therefore should be interpreted restrictively. Rejecting the contention that Article 15(3) of the Constitution places any restriction on the legislative power of Parliament, it was said:

It was argued that Clause (3) [of Article 15 of the Constitution] should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes. We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited.

57. The view that Article 15(3) is intended to benefit women has also been accepted in Cyril Britto v. Union of India MANU/KE/0233/2003 : AIR 2003 Ker 259 wherein it was held that prohibition from arrest or detention of women in execution of a money decree Under Section 56 of the Code of Civil Procedure is a special provision calculated to ensure that a woman judgment-debtor is not put to the ignominy or arrest and detention in civil prison in execution of a money decree and that this provision is referable to Article 15(3) of the Constitution. A similar view was taken in respect of the same provision in the Code of Civil Procedure in Shrikrishna Eknath Godbole v. Union of India7.

58. It is quite clear therefore that Article 15(3) of the Constitution cannot and ought not to be interpreted restrictively but must be given its full play. Viewed from this perspective, it seems to us that legislation intended for affirmative action in respect of a girl child must not only be liberally construed and interpreted but must override any other legislation that seeks to restrict the benefit made available to a girl child. This would only emphasize the spirit of Article 15(3) of the Constitution.

Right to bodily integrity and reproductive choice

59. The right to bodily integrity and the reproductive choice of any woman has been the subject of discussion in quite a few decisions of this Court. The discussion has been wide-ranging and several facets of these concepts have been considered from time to time. The right to bodily integrity was initially recognized in the context of privacy in State of Maharashtra v. Madhukar Narayan Mardikar MANU/SC/0032/1991 : (1991) 1 SCC 57 wherein it was observed that no one has any right to violate the person of anyone else, including of an 'unchaste' woman. It was said:

The High Court observes that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law.

60. In Suchita Srivastava v. Chandigarh Administration MANU/SC/1580/2009 : (2009) 9 SCC 1 the right to make a reproductive choice was equated with personal liberty Under

Article 21 of the Constitution, privacy, dignity and bodily integrity. It includes the right to abstain from procreating. In paragraph 22 of the Report it was held:

There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood Under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

61. In issues of criminal law, investigations and recording of statements, the bodily integrity of a witness has been accepted by this Court in Selvi v. State of Karnataka MANU/SC/0325/2010 : (2010) 7 SCC 263 wherein it was held in paragraph 103 of the Report:

The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements-often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined.

62. Ritesh Sinha v. State of Uttar Pradesh MANU/SC/1072/2012 : (2013) 2 SCC 357 was a case relating to the collection of a voice sample during the course of investigation by the police. Relying of Selvi it was held that: "In a country governed by the Rule of law, police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction."

63. Finally, in Devika Biswas v. Union of India MANU/SC/0999/2016 : (2016) 10 SCC 726 it was observed that "Over time, there has been recognition of the need to respect and protect the reproductive rights and reproductive health of a person." This is all the more so in the case of a girl child who has little or no say in reproduction after an early marriage. As observed in Suchita Srivastava ".... the "best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question."

64. The discussion on the bodily integrity of a girl child and the reproductive choices available to her is important only to highlight that she cannot be treated as a commodity having no say over her body or someone who has no right to deny sexual intercourse to her husband. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance.

Rape or penetrative sexual assault

65. Whether sexual intercourse that a husband has with his wife who is between 15 and 18 years of age is described as rape (not an offence under Exception 2 to Section 375 of the Indian Penal Code) or aggravated penetrative sexual assault (an offence Under Section 5(n) of the POCSO Act and punishable Under Section 6 of the POCSO Act) the fact is that it is rape as conventionally understood, though Parliament in its wisdom has chosen to not recognize it as rape for the purposes of the Indian Penal Code. That it is a heinous crime which also violates the bodily integrity of a girl child, causes trauma and sometimes destroys her freedom of reproductive choice is a composite issue that needs serious consideration and deliberation.

66. There have been several decisions rendered by this Court highlighting the horrors of rape. In State of Karnataka v. Krishnappa MANU/SC/0210/2000 : (2000) 4 SCC 75 an 8 year girl was raped and it was held in paragraph 15 of the Report:

Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity-it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience.

67. In Bodhisattwa Gautam v. Subhra Chakraborty MANU/SC/0245/1996 : (1996) 1 SCC 490 it was observed by this Court that rape is a crime not only against a woman but against society. It was held in paragraph 10 of the Report that:

Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects.

68. About a month later, it was pithily stated in State of Punjab v. Gurmit Singh MANU/SC/0366/1996 : (1996) 2 SCC 384.

We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female.

69. There are several decisions in which similar observations have been made by this Court and it is not necessary to multiply the cases. However, reference may be made to a fairly recent decision in State of Haryana v. Janak Singh MANU/SC/0570/2013 : (2013) 9 SCC 431 wherein reference was made to Bodhisattwa Gautam and it was observed in paragraph 7 of the Report:

Rape is one of the most heinous crimes committed against a woman. It insults womanhood. It violates the dignity of a woman and erodes her honour. It dwarfs her personality and reduces her confidence level. It violates her right to life guaranteed Under Article 21 of the Constitution of India.

70. If such is the traumatic impact that rape could and does have on an adult victim, we can only guess what impact it could have on a girl child - and yet it is not a criminal

offence in the terms of Exception 2 to Section 375 of the Indian Penal Code but is an offence under the POCSO Act only. An anomalous state of affairs exists on a combined reading of the Indian Penal Code and the POCSO Act. An unmarried girl below 18 years of age could be a victim of rape under the Indian Penal Code and a victim of penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under the Indian Penal Code if the rapist is her husband since the Indian Penal Code does not recognize such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of the Indian Penal Code notwithstanding that the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. We see no rationale for such an artificial distinction.

71. While we are not concerned with the general question of marital rape of an adult woman but only with marital rape of a girl child between 15 and 18 years of age in the context of Exception 2 to Section 375 of the Indian Penal Code, it is worth noting the view expressed by the Committee on Amendments to Criminal Law chaired by Justice J.S. Verma (Retired). In paragraphs 72, 73 and 74 of the Report it was stated that the out-dated notion that a wife is no more than a subservient chattel of her husband has since been given up in the United Kingdom. Reference was also made to a decision of the European Commission of Human Rights which endorsed the conclusion that "a rapist remains a rapist regardless of his relationship with the victim." The relevant paragraphs of the Report read as follows:

72. The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew Hale declared: 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract'.

73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, 'marriage is in modern times regarded as a partnership

of equals, and no longer one in which the wife must be the subservient chattel of the husband.'

74. Our view is supported by the judgment of the European Commission of Human Rights in C.R. v. UK [C.R. v. UK Publ. ECHR, Ser. A, No. 335-C] which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act 1994.

72. In Eisenstadt v. Baird MANU/USSC/0240/1972 : 405 US 438, 31 L Ed 2d 349, 92 S Ct 1092 the US Supreme Court observed that a "marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."

73. On a combined reading of C.R. v. UK and Eisenstadt v. Baird it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated penetrative sexual assault. A rape that actually occurs cannot legislatively be simply wished away or legislatively denied as non-existent.

Harmonizing the Indian Penal Code, the POCSO Act, the JJ Act and the PCMA

74. There is an apparent conflict or incongruity between the provisions of the Indian Penal Code and the POCSO Act. The rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under the Indian Penal Code and therefore not an offence in view of Exception 2 to Section 375 thereof but it is an offence of aggravated penetrative sexual assault Under Section 5(n) of the POCSO Act and punishable Under Section 6 of that Act. This conflict or incongruity needs to be resolved in the best interest of the girl child and the provisions of various complementary statutes need to be harmonized and read purposively to present an articulate whole.

75. The most obvious and appropriate resolution of the conflict has been provided by the State of Karnataka - the State Legislature has inserted Sub-section (1A) in Section 3 of the PCMA (on obtaining the assent of the President on 20th April, 2017) declaring that henceforth every child marriage that is solemnized is void ab initio. Therefore, the

husband of a girl child would be liable for punishment for a child marriage under the PCMA, for penetrative sexual assault or aggravated penetrative sexual assault under the POCSO Act and if the husband and the girl child are living together in the same or shared household for rape under the Indian Penal Code. The relevant extract of the Karnataka amendment reads as follows:

(1A) Notwithstanding anything contained in Sub-section (1) [of Section of the PCMA] every child marriage solemnized on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio.

76. It would be wise for all the State Legislatures to adopt the route taken by Karnataka to void child marriages and thereby ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and the Indian Penal Code. Assuming all other State Legislatures do not take the Karnataka route, what is the correct position in law?

77. There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes have been enacted in the recent past though not effectively implemented. Given this situation, we are of opinion that a few facts need to be acknowledged and accepted. Firstly, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our country that a child is a person below 18 years of age. Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet-so also with the status of a child, despite any prefix. Secondly, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age. Thirdly, Exception 2 to Section 375 of the Indian Penal Code creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children.

78. What is sought to be achieved by this artificial distinction is not at all clear except perhaps to acknowledge that child marriages are taking place in the country. Such child marriages certainly cannot be in the best interest of the girl child. That the solemnization of a child marriage violates the provisions of the PCMA is well-known. Therefore, it is for the State to effectively implement and enforce the law rather than dilute it by creating artificial distinctions. Can it not be said, in a sense, that through the artificial distinction, Exception 2 to Section 375 of the Indian Penal Code encourages violation of the PCMA? Perhaps 'yes' and looked at from another point of view, perhaps 'no' for it cannot reasonably be argued that one statute (the Indian Penal Code) condones an offence under another statute (the PCMA). Therefore the basic question remains-what exactly is the artificial distinction intended to achieve?

Justification given by the Union of India

79. The only justification for this artificial distinction has been culled out by learned Counsel for the Petitioner from the counter affidavit filed by Union of India. This is given in the written submissions filed by learned Counsel for the Petitioner and the justification (not verbatim) reads as follows:

i) Economic and educational development in the country is still uneven and child marriages are still taking place. It has been, therefore, decided to retain the age of 15 years under Exception 2 of Section 375 of Indian Penal Code so as to give protection to husband and wife against criminalizing the sexual activity between them.

ii) As per National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country. Hence, criminalizing the consummation of a marriage union with a serious offence such as rape would not be appropriate and practical.

iii) Providing punishment for child marriage with consent does not appear to be appropriate in view of socio-economic conditions of the country. Thus, the age prescribed in Exception 2 of Section 375 of Indian Penal Code has been retained considering the basic facts of the still evolving social norms and issues.

iv) The Law Commission also recommended for raising the age from 15 years to 16 years and it was incorporated in the Criminal Law (Amendment) Ordinance, 2013. However,

after wide ranging consultations with various stakeholders it was further decided to retain the age at 15 years.

v) Exception 2 of Section 375 of Indian Penal Code envisages that if the marriage is solemnized at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under the Indian Penal Code.

vi) It is also necessary that the provisions of law should be in such a manner that it cannot affect a particular class of society. Retaining the age of 15 years in Exception 2 of Section 375 of Indian Penal Code has been provided considering the social realities of the nation.

80. The above justifications given by the Union of India are really explanations for inserting Exception 2 in Section 375 of the Indian Penal Code. Besides, they completely side track the issue and overlook the provisions of the PCMA, the provisions of the JJ Act as well as the provisions of the POCSO Act. Surely, the Union of India cannot be oblivious to the existence of the trauma faced by a girl child who is married between 15 and 18 years of age or to the three pro-child statutes and other human rights obligations. That these facts and statutes have been overlooked confirms that the distinction is artificial and makes Exception 2 to Section 375 of the Indian Penal Code all the more arbitrary and discriminatory.

81. During the course of oral submissions, three further but more substantive justifications were given by learned Counsel for the Union of India for making this distinction. The first justification is that by virtue of getting married, the girl child has consented to sexual intercourse with her husband either expressly or by necessary implication. The second justification is that traditionally child marriages have been performed in different parts of the country and therefore such traditions must be respected and not destroyed. The third justification is that paragraph 5.9.1 of the 167th report of the Parliamentary Standing Committee of the Rajya Sabha (presented in March 2013) records that several Members felt that marital rape has the potential of destroying the institution of marriage.

82. In law, it is difficult to accept any one of these justifications. There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Therefore unless Parliament gives any specific indication (and it has not given any such indication) that the age of consent could be deviated from for any rational reason, we cannot assume that a girl child who is otherwise incapable of

giving consent for sexual intercourse has nevertheless given such consent by implication, necessary or otherwise only by virtue of being married. It would be reading too much into the mind of the girl child and assuming a state of affairs for which there is neither any specific indication nor any warrant. It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.

83. Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable the few decades ago may not necessarily be acceptable today. This was noted by a Constitution Bench of this Court (though in a different context) in State of Madhya Pradesh v. Bhopal Sugar Industries Ltd. MANU/SC/0099/1964 : [1964] 6 SCR 846 that:

But, by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid.

84. Similarly, in Rattan Arya v. State of Tamil Nadu MANU/SC/0550/1986 : (1986) 3 SCC 385 it was observed that judicial notice could be taken of a change in circumstances. It was held:

It certainly cannot be pretended that the provision is intended to benefit the weaker Sections of the people only. We must also observe here that whatever justification there may have been in 1973 when Section 30(ii) [of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960] was amended by imposing a ceiling of Rs. 400 on rent payable by tenants of residential buildings to entitle them to seek the protection of the Act, the passage of time has made the ceiling utterly unreal. We are entitled to take judicial notice of the enormous multifold increase of rents throughout the country, particularly in urban areas. It is common knowledge today that the accommodation which one could have possibly got for Rs. 400 per month in 1973 will today cost at least five times more. In these days of universal, day to day escalation of rentals any ceiling such as that imposed by Section 30(ii) in 1973 can only be considered to be totally artificial and irrelevant today. As held by this Court in Motor General Traders v. State of A.P. MANU/SC/0293/1983 : (1984) 1 SCC 222 a provision which was perfectly valid at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that

basis. What was once a perfectly valid legislation, may in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14.

85. In Anuj Garg v. Hotel Association of India MANU/SC/8173/2007 : (2008) 3 SCC 1 this Court was concerned with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 which prohibited employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or an intoxicating drug is consumed by the public. While upholding the view of the Delhi High Court striking down the provision as unconstitutional, this Court held in paragraphs 46 and 47 of the Report:

It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.

No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a compelling State purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases.

86. Similarly, it was observed by this Court in Satyawati Sharma v. Union of India MANU/SC/1870/2008 : (2008) 5 SCC 287 in paragraph 32 of the Report that legislation which might be reasonable at the time of its enactment could become unreasonable with the passage of time. It was observed as follows:

It is trite to say that legislation which may be quite reasonable and rational at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent.

There is therefore no doubt that the impact and effect of Exception 2 to Section 375 of the Indian Penal Code has to be considered not with the blinkered vision of the days gone by but with the social realities of today. Traditions that might have been acceptable at some historical point of time are not cast in stone. If times and situations change, so must views, traditions and conventions.

87. We have adverted to the wealth of documentary material which goes to show that an early marriage and sexual intercourse at an early age could have detrimental effects on the girl child not only in terms of her physical and mental health but also in terms of her nutrition, her education, her employability and her general well-being. To make matters worse, the detrimental impact could pass on to the children of the girl child who may be malnourished and may be required to live in an impoverished state due to a variety of factors. An early marriage therefore could have an inter-generational adverse impact. In effect therefore the practice of early marriage or child marriage even if sanctified by tradition and custom may yet be an undesirable practice today with increasing awareness and knowledge of its detrimental effects and the detrimental effects of an early pregnancy. Should this traditional practice still continue? We do not think so and the sooner it is given up, it would be in the best interest of the girl child and for society as a whole.

88. We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by the Indian Penal Code. Her husband, for the purposes of Section 375 of the Indian Penal Code, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of the Indian Penal Code. This was recognized by the LCI in its 172nd report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonize the provisions of various statutes and also harmonize different provisions of the Indian Penal Code inter-se.

89. We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might become pregnant and would have to deliver a

baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born out of early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 of the Indian Penal Code that sanctifies a tradition or custom that is no longer sustainable.

90. The view that marital rape of a girl child has the potential of destroying the institution of marriage cannot be accepted. Marriage is not institutional but personal-nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable. A divorce may destroy a marriage but does it have the potential of destroying the 'institution' of marriage? A judicial separation may dent a marital relationship but does it have the potential of destroying the 'institution' of marriage or even the marriage? Can it be said that no divorce should be permitted or that judicial separation should be prohibited? The answer is quite obvious.

91. Looked at from another perspective, the PCMA actually makes child marriages voidable and makes the parties to a child marriage (other than the girl child) punishable for an offence under the said Act. For someone who supports the institution of marriage, nothing could be more destructive of the institution of marriage than the PCMA which makes a child marriage voidable and punishable on the one hand and on the other, it otherwise collaterally legitimizes the pernicious practice of child marriages. It is doubtful if the Parliamentary Standing Committee intended such a situation along with its attendant adverse and detrimental impacts and so we leave it at that.

92. Assuming some objective is sought to be achieved by the artificial distinction, the further question is: what is the rational nexus between decriminalizing sexual intercourse under the Indian Penal Code with a married girl child and an unclear and uncertain statutory objective? There is no intelligible answer to this question particularly since sexual intercourse with a married girl child is a criminal offence of aggravated penetrative sexual assault under the POCSO Act. Therefore, while the husband of a married girl child might not have committed rape for the purposes of the Indian Penal Code but he would nevertheless have committed aggravated penetrative sexual assault for the purposes of the POCSO Act. The punishment for rape (assuming it is committed) and the punishment for penetrative sexual assault is the same, namely imprisonment for a minimum period of 7 years which may extend to imprisonment for life. Similarly, for

an 'aggravated' form of rape the punishment is for a minimum period of 10 years imprisonment which may extend to imprisonment for life (under the Indian Penal Code) and the punishment for aggravated penetrative sexual assault (which is what is applicable in the case of a married girl child) is the same (under the POCSO Act). In other words, the artificial distinction merely takes the husband of the girl child out of the clutches of the Indian Penal Code while retaining him within the clutches of the POCSO Act. We are unable to understand why this is so and no valid justification or explanation is forthcoming from the Union of India.

Application of special laws

93. Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over the Indian Penal Code as provided for in Sections 5 and 41 of the Indian Penal Code. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes concerning the rights of children are special laws concerning a special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as the Indian Penal Code. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO Act are traceable to Article 15(3) of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation of Article 15(3) of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

94. A rather lengthy but useful discussion on this subject of special laws is to be found in Life Insurance Corporation of India v. D.J. Bahadur MANU/SC/0305/1980 : (1981) 1 SCC 315 in paragraphs 52 and 53 of the Report. Briefly, it was held that the subject-matter and the perspective of the statute are determinative of the question whether a statute is a general law or a special law. Therefore, for certain purposes a statute might be a special law but for other purposes, as compared to another statute, it might be a general law. In respect of a dispute between the Life Insurance Corporation and its workmen qua workmen, the Industrial Disputes Act, 1947 would be a special law vis-a-vis the Life Insurance Corporation Act, 1956; but, "when compensation on nationalisation is the question, the LIC Act is the special statute". It was held as follows:

In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes--so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the ID Act has one special mission--the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of the LIC Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to.

What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is an industrial dispute between the Corporation and its workmen qua workmen. If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious, the conclusion that flows, in the wake of the study I have made, is that vis-a-vis "industrial disputes" at the termination of the settlement as between the workmen and the Corporation, the ID Act is a special legislation and the LIC Act a general legislation. Likewise, when compensation on nationalisation is the question, the LIC Act is the special statute. An application of the generalia maxim as expounded by English textbooks and decisions leaves us in no doubt that the ID Act being special law, prevails over the LIC Act which is but general law.

The scope and amplitude of the two significant pro-child statutes may now be examined in light of the law laid down by this Court including Sections 5 and 41 of the Indian Penal Code.

(i) The JJ Act

95. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection (Section 2 (14) (xii) of the JJ Act). In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance of Article 15(3) of the Constitution. Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act.

(ii) The POCSO Act

96. Similarly, the provisions of the POCSO Act make it quite explicit that the dignity and rights of a child below 18 years of age must be recognized and respected. For this purpose, special provisions have been made in the POCSO Act as for example Section 28 thereof which provides for the establishment of a Special Court to try offences under the Act. Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit an offence Under Section 3 (penetrative sexual assault) or Under Section 5 (aggravated penetrative sexual assault) then the Special Court shall presume that such a person has committed or abetted or attempted to commit the offence unless the contrary is proved. Similarly, the procedure and powers of a Special Court have been delineated in Section 33 of the POCSO Act and this Section provides for not only a child friendly atmosphere in the Special Court but also child friendly procedures, some of which are given in subsequent Sections of the statute. Once again the legislative slant is in favour of a child thereby giving substantive meaning to Article 15(3) of the Constitution.

97. However, of much greater importance and significance is Section 42-A of the POCSO Act. This Section provides that the provisions of the POCSO Act are in addition to and not in derogation of the provisions of any other law in force which includes the Indian Penal Code. Moreover, the Section provides that in the event of any inconsistency between the provisions of the POCSO Act and any other law, the provisions of the POCSO Act shall have overriding effect. It follows from this that even though the Indian

Penal Code decriminalizes the marital rape of a girl child, the husband of the girl child would nevertheless be liable for punishment under the provisions of the POCSO Act for aggravated penetrative sexual assault.

98. Prima facie it might appear that since rape is an offence under the Indian Penal Code (subject to Exception 2 to Section 375) while penetrative sexual assault or aggravated penetrative sexual assault is an offence under the POCSO Act and both are distinct and separate statutes, therefore there is no inconsistency between the provisions of the Indian Penal Code and the provisions of the POCSO Act. However the fact is that there is no real distinction between the definition of rape under the Indian Penal Code and the definition of penetrative sexual assault under the POCSO Act. There is also no real distinction between the rape of a married girl child and aggravated penetrative sexual assault punishable Under Section 6 of the POCSO Act. Additionally, the punishment for the respective offences is the same, except that the marital rape of a girl child between 15 and 18 years of age is not rape in view of Exception 2 to Section 375 of the Indian Penal Code. In sum, marital rape of a girl child is effectively nothing but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of the Indian Penal Code. Therefore, it does appear that only a notional or linguistic distinction is sought to be made between rape and penetrative sexual assault and rape of a married girl child and aggravated penetrative sexual assault. There is no rationale for this distinction and it is nothing but a completely arbitrary and discriminatory distinction.

Harmonious and purposive interpretation

99. The entire issue of the interpretation of the JJ Act, the POCSO Act, the PCMA and Exception 2 to Section 375 of the Indian Penal Code can be looked at from yet another perspective, the perspective of purposive and harmonious construction of statutes relating to the same subject matter. Long ago, it was said by Lord Denning that when a defect appears, a judge cannot fold his hands and blame the draftsman but must also consider the social conditions and give force and life to the intention of the Legislature. It was said in Seaford Court Estates Ltd. v. Asher [1949] 2 K.B. 481 affirmed in [1950] A.C. 508 that:

A judge, believing himself to be fettered by the supposed Rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the

draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature.

100. Similarly, in Collector of Customs v. Digvijaya Singhji Spinning & Weaving Mills MANU/SC/0365/1961 : AIR 1961 SC 1549 it was said that where an alternative construction is open, that alternative should be chosen which is consistent with the smooth working of the system which the statute purports to regulate. It was said that:

It is one of the well-established Rules of construction that "if the words of a statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature". It is equally well-settled principle of construction that "Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system".

101. That a constructive attitude should be adopted in interpreting statutes was endorsed in Jugal Kishore v. State of Maharashtra MANU/SC/0213/1988 : 1989 Supp (1) SCC 589 when it was said that:

...Unless the Acts [Maharashtra Agricultural Land (Ceiling on Holdings) Act, 1961 and the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958], with the intention of implementing various socio-economic plans, are read in such complementary manner, the operation of the different Acts in the same field would create contradiction and would become impossible. It is, therefore, necessary to take a constructive attitude in interpreting provisions of these types and determine the main aim of the particular Act in question for adjudication before the court.

102. Finally, from the purposive and harmonious construction point of view as well as the social context point of view, we may only draw attention to the opinion expressed by the Constitution Bench in Abhiram Singh v. C.D. Commachen MANU/SC/0010/2017 : (2017) 2 SCC 629 by one of us (Lokur, J) to supplement our view. It is not necessary to repeat the observations made and conclusions given therein.

103. Viewed from any perspective, there seems to be no reason to arbitrarily discriminate against a girl child who is married between 15 and 18 years of age. On the contrary, there is every reason to give a harmonious and purposive construction to the pro-child statutes to preserve and protect the human rights of the married girl child.

Implementation of laws

104. The Preamble to our Constitution brings out our commitment to social justice, but unfortunately, this petition clearly brings out that social justice laws are not implemented in the spirit in which they are enacted by Parliament. Young girls are married in thousands in the country, and as Section 13 of the PCMA indicates, there is an auspicious day-Akshaya Trutiya-when mass child marriages are performed. Such young girls are subjected to sexual intercourse regardless of their health, their ability to bear children and other adverse social, economic and psychological consequences. Civil society can do just so much for preventing such child marriages but eventually it is for the Government of India and the State Governments to take proactive steps to prevent child marriages so that young girls in our country can aspire to a better and healthier life. We hope the State realizes and appreciates this.

Conclusion

105. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is-this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 of the Indian Penal Code-in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years-this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 of the Indian Penal Code-this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 of the Indian Penal Code in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the Indian Penal Code to now be meaningfully read

as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus.

106. We make it clear that we have not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before us by the Petitioner or the intervener.

107. We express our gratitude to Mr. Gaurav Agrawal, Advocate and Ms. Jayna Kothari, Advocate for the effort that they have put in and the able assistance that they have given us for the purpose of deciding this case.

Deepak Gupta, J.

108. I have gone through the extremely erudite and well written judgment of my learned brother Lokur, J.. I fully agree with both the reasoning given by him and the conclusions arrived at. However, I am expressing my own views in this separate concurring judgment wherein I have given some other reasons while reaching the same conclusion.

109. "Whether Exception 2 to Section 375 of the Indian Penal Code, in so far as it relates to girls aged 15 to 18 years, is unconstitutional and liable to be struck down" is the question for consideration in this writ petition.

110. At the outset, it may be mentioned that in the main petition the challenge is laid to the entire Exception 2. However, during the course of arguments Mr. Gaurav Agarwal, learned Counsel for the Petitioner, Independent Thought, a registered Society and Ms. Jayna Kothari, learned Counsel for the intervener, the Child Rights Group, submitted that they are limiting their challenge to Exception 2 only in so far as it deals with the girl child aged 15 to 18 years.

111. Section 375 of the Indian Penal Indian Penal Code (for short 'Indian Penal Code') defines rape and reads as follows:

375. Rape.-A man is said to commit "rape" if he---

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

First.--Against her will.

Secondly.--Without her consent.

Thirdly.--With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.--With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.--With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.--With or without her consent, when she is under eighteen years of age.

Seventhly.--When she is unable to communicate consent.

Explanation 1.--For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.--Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.--A medical procedure or intervention shall not constitute rape.

Exception 2.--Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

112. A husband who commits rape on his wife, as defined Under Section 375 of the Indian Penal Code, cannot be charged with the said offence as long as the wife is over 15 years of age. It may be made clear that this Court is not going into the issue of "marital rape" of women aged 18 years and above and the discussion is limited only to "wives" aged 15 to 18 years. A man is guilty of rape if he commits any act mentioned in Section 375 Indian Penal Code, without the consent of the women if she is above 18 years of age. If a man commits any of the acts mentioned in Section 375 Indian Penal Code, with a girl aged less than 18 years, then the act will amount to rape even if done with the consent of the victim. However, as per Exception 2 of Section 375 Indian Penal Code, if the man is married to the woman and if the "wife" is aged more than 15 years then the man cannot be held guilty of commission of the offence defined Under Section 375, whether the wife consented to the sexual act or not.

113. Section 375 of the Indian Penal Code creates three classes of victims:

(i) The first class of victims are girls aged less than 18 years. In those cases, if the acts contemplated Under Section 375 Indian Penal Code are committed with or without consent of the victim, the man committing such an act is guilty of rape.

(ii) The second class of victims are women aged 18 years or above. Such women can consent to having consensual sex. If the sexual act is done with the consent of the woman, unless the consent is obtained in circumstances falling under clauses thirdly, fourthly and fifthly of Section 375 Indian Penal Code no offence is committed. The man can be held guilty of rape, only if the sexual act is done in absence of legal and valid consent.

(iii) The third category of victims is married women. The exception exempts a man from being charged and convicted Under Section 375 Indian Penal Code for any of the acts contemplated under this Section if the victim is his "wife" aged 15 years and above.

To put it differently, Under Section 375 Indian Penal Code a man cannot even have consensual sex with a girl if she is below the age of 18 years and the girl is by law deemed unable to give her consent. However, if the girl child is married and she is aged above 15 years, then such consent is presumed and there is no offence if the husband has sex with his "wife", who is above 15 years of age. If the "wife" is below 15 then the husband would be guilty of such an offence.

114. The issue is whether a girl below 18 years who is otherwise unable to give consent can be presumed to have consented to have sex with her husband for all times to come and whether such presumption in the case of a girl child is unconscionable and violative of Articles 14, 16 and 21 of the Constitution of India.

THE LEGISLATIVE BACKGROUND

115. The Indian Penal Code was enacted in the year 1860 and the age given in Exception 2 of Section 375 has been changed from time to time. Till 1929, no minimum age of marriage was legally fixed. It was only after passing of the Child Marriage Restraint Act, 1929 (for short 'the Restraint Act') that the minimum age for marriage was fixed. The Restraint Act was repealed by the Prohibition of Child Marriage Act, 2006 (for short 'the PCMA'). A chart showing the ages of consent, from time to time, under Clause Sixthly of

Section 375 Indian Penal Code, in Exception 2 to Section 375 Indian Penal Code and the Restraint Act/PCMA is as follows:

Year	IPC	Age of Consent Under Section 375, 6th Clause I.P.C.	Age under Exception 2 to Section 375 I.P.C.	Minimum Age of Marriage under the Restraint Act/PCMA
1860	-	10 Years	10 Years	-
1891	Act 10 of 1891 (After the Amendment of IPC)	12 Years	12 Years	-
1925	(After the Amendment of IPC)	14 Years	13 Years	-
1929	(After Passing of Child Marriage Restraint Act)	14 Years	13 Years	14 Years
1940	After the Amendment of the I.P.C. and Child Marriage Act	16 Years	15 Years	15 Years
1978	-	16 Years	15 Years	18 Years
2013	-	18 Years	15 Years	18 Years

116. A perusal of the aforementioned chart clearly shows that when the Indian Penal Code was originally enacted in the year 1860, the age of consent under Clause Sixthly of Section 375 Indian Penal Code and under Exception 2 of Section 375 Indian Penal Code was 10 years. In this regard, the Indian Penal Code was amended in 1891 and the age under both the provisions was raised to 12 years. In 1925, the age of consent was raised under Clause Sixthly to 14 years but under the Exception 2 the age was retained at 13 years. In 1929, the Child Marriage Restraint Act was enacted. Section 3 of this Act provided that the minimum age of the girl child, to be eligible for marriage, was 14 years. In 1940, the Indian Penal Code was again amended and the age of consent under Clause Sixthly was raised to 16 years, but under Exception 2 to Section 375 Indian Penal Code, the age was raised to 15 years and the minimum age of marriage under the Restraint Act was also 15 years. In 1978, the Indian Penal Code was again amended and the age of consent was raised to 16 years but under Exception 2 to Section 375 Indian Penal Code, no change was made. In 1978, the minimum age for marriage of the girl child was raised to 18 years but no consequential amendment was made in the Indian Penal Code. In 2013,

after the unfortunate "Nirbhaya" incident took place, the Parliament raised the age of consent under Clause Sixthly to 18 years. The minimum age for marriage of a girl child remained at 18 years, but no change was made in Exception 2 to Section 375 Indian Penal Code and a girl child who was married before the minimum age of marriage, could be subjected to sexual intercourse (forcible or otherwise) by her husband and if she was over 15 years of age, the husband could not be charged with any offence.

117. At this stage, reference may be made to the Hindu Marriage Act. In the Hindu Marriage Act, as originally enacted in 1955, the minimum age for marriage of a bride was 15 years and of a groom 18 years. The Hindu Marriage Act was amended in 1978 and the minimum age of marriage for a bride was enhanced to 18 years and for a groom to 21 years. Identical amendment was made in the Restraint Act.

118. The Child Marriage Restraint Act, 1929 was repealed by the Prohibition of Child Marriage Act, 2006 and this Act defines a child as follows:

2. Definitions.--In this Act, unless the context otherwise requires,--

(e) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age.

119. Section 3 of the PCMA makes child marriages voidable at the option of the contracting party who is a child and reads as follows:

3. Child marriages to be voidable at the option of contracting party being a child.--(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

(2) If at the time of filing a petition, the Petitioner is a minor, the petition may be filed through his or her guardian or next friend alongwith the Child Marriage Prohibition Officer.

(3) The petition under this Section may be filed at any time but before the child filing the petition completes two years of attaining majority.

(4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:

Provided that no order under this Section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed.

120. It would be pertinent to note that under the Restraint Act the punishment Under Section 3 for a male aged 18 years to 21 years, contracting a child marriage was simple imprisonment, which could extend up to 15 days or with fine up to Rs. 1000/- or both and Under Section 4, if a male over 21 years contracted a marriage with a female child, the punishment was simple imprisonment which could extend up to 3 months. Section 5 provided punishment of simple imprisonment up to 3 months and fine with regard to those who performed, conducted or directed any child marriage. Similar provisions existed in Section 6 with regard to the punishment of parents or guardians, who acted to promote child marriage or permitted it to be solemnized or negligently failed to prevent the child marriage to be solemnized. Surprisingly, the proviso to Section 6 provided that no women could be punished with imprisonment. The punishments provided under the Restraint Act were virtually illusory and no minimum punishment was prescribed.

121. The Restraint Act was repealed and replaced by the PCMA. The provisions of the PCMA are slightly more stringent. Under Section 9 of the PCMA, if a male adult above 18 years of age contracts a child marriage, he can be sentenced to rigorous imprisonment up to 2 years or fine which may extend up to one lakh rupees or both. However, no minimum sentence is provided even under this Act. Section 10 of the PCMA provides punishment for those persons who perform, conduct, direct or abet a child marriage and the same sentence is provided. As far as the guardians and parents are concerned, the

punishment for them is provided Under Section 11 and it is the same. Again, the proviso lays down that no woman shall be punishable with imprisonment. Though this Court is not dealing with this question directly in the present petition, it is obvious that a woman would be placed in the forefront by any person who gets a child marriage conducted. Such a woman cannot be sentenced to undergo imprisonment and at the most, a fine can be levied. The punishments provided are neither sufficiently punitive nor deterrent. Therefore, the PCMA has been breached with impunity. I think the time has come when this Act needs serious reconsideration, especially in view of the harsh reality that a lot of child trafficking is taking place under the garb of marriage including child marriage. More stringent punishments should be provided and some minimum punishment should definitely be provided especially to those mature adults who promote such marriages and who perform, conduct, direct or abet any such marriage. Otherwise, this legislation will never act as a sufficient deterrent to prevent or even reduce child marriages.

122. Under Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000, a "juvenile" or "child" was defined to mean a person, who had not completed 18 years of age. The Juvenile Justice (Care and Protection of Children) Act, 2015 defines a child Under Section 2(12) to mean a person who has not completed 18 years of age.

123. Under the Protection of Women from Domestic Violence Act, 2005, a child has been defined Under Section 2(b) to mean any person below the age of 18 years.

124. Section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 entitles a women married under Muslim law to obtain a decree of dissolution of marriage if she is given in marriage by her father or other guardian before she attained the age of 15 years and she repudiates the marriage before attaining the age of 18 years provided that the marriage has not been consummated. This provision deals with girls below the age of 15 years who are got married. Such a girl is required to repudiate her marriage before she attains majority and she can only repudiate the marriage if the marriage has not been consummated. This virtually makes mockery of the PCMA. Therefore, even in a marriage which is void under PCMA, the girl will have to obtain a decree for dissolution of her marriage, that too before she attains the age of majority and only if the marriage has not been consummated. Another anomalous situation is that if the husband has forcible sex with such a girl, the marriage is consummated and the girl child is deprived of her right to get the marriage annulled.

125. Similarly Under Section 13(2)(iv) of the Hindu Marriage Act, 1955, a Hindu girl can file a petition for divorce on the ground that her marriage, whether consummated or not,

was solemnized before she attained the age of 15 years and she has repudiated her marriage after attaining the age of 15 years but before attaining the age of 18 years. This is also not in consonance with the provisions of PCMA, according to which marriage of a child bride below the age of 15 years is void and there is no question of seeking a divorce. A void marriage is no marriage. Another anomaly is that whereas a child bride, who is above 15 years under PCMA, can apply for annulment of marriage up to the age of 20 years, Under Section 13(2)(iv) of the Hindu Marriage Act, a child bride under the age of 15 years must repudiate the marriage after attaining the age of 15 years but before she attains the age of 18 years, i.e. even before she attains majority. The question that remains unanswered is who will represent or help this child, who has been forced to marry to approach the Courts.

126. It is obvious that while making amendments to various laws, some laws are forgotten and consequential amendments are not made in those laws. After the PCMA was enacted both the Hindu Marriage Act, 1955 and the Dissolution of Muslim Marriages and Divorce Act, 1939 also should have been suitably amended, but this has not been done. In my opinion, the PCMA is a secular Act applicable to all. It being a special Act dealing with children, the provisions of this Act will prevail over the provisions of both the Hindu Marriage Act and the Muslim Marriages and Divorce Act, in so far as children are concerned.

127. Section 3 of the Majority Act, 1875 provides that a person shall attain the age of majority on completing the age of 18 years and not before. It would, however, be pertinent to mention that Section 2 of the Indian Majority Act contains a non-obstante Clause excluding laws relating to marriage, divorce, dower and adoption from the provisions of that Act. Under Section 4(i) of the Guardians and Wards Act, 1890 a minor has been defined to mean a person, who has not attained majority under the Majority Act. Under Section 4(a) of the Hindu Minority and Guardianship Act, 1956 a minor has been defined to mean a person who has not completed the age of 18 years. Under the Representation of the People Act, 1951 a person is entitled to vote only after he attains the age of 18 years.

128. Under the provisions of the aforesaid Acts a person, who is a minor and not a major, is not entitled to deal with his property. The property of such a minor can be sold or transferred only if such sale or transfer is for the benefit of the minor and after the permission of the court. Section 11 of the Indian Contract Act, 1872 provides that only a person who has attained the age of majority and is of a sound mind is competent to enter into a contract. A contract entered into by a minor is treated to be a void contract.

129. Keeping in view the mounting crimes against children, regardless of the sex of the victim, Parliament enacted the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO'), which came into force on 14.11.2012. The Statement of Objects and Reasons of this Act reads as follows:

STATEMENT OF OBJECTS AND REASONS 1. Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Further, Article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the 'Study on Child Abuse: India 2007' conducted by the Ministry of Women and Child Development. Moreover, sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

4. It is, therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.

5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation.

130. POCSO is a landmark legislation for protection of child rights and to prevent the sexual abuse and exploitation of children. This Act deals with sexual offences committed against a child and a child has been defined to be a person below the age of 18 years Under Section 2(d). POCSO does not define rape, but it defines penetrative sexual assault Under Section 3 and aggravated penetrative sexual assault Under Section 5 and the punishments are provided for them Under Section 4 and 6 respectively. Section 7 of the POCSO defines sexual assault, Section 9 defines aggravated sexual assault and punishments for those offences are provided Under Section 8 and 10 respectively. Section 11 defines sexual harassment and Section 12 provides the punishment for sexual harassment. Chapter III of the POCSO deals with use of children for pornographic purposes with which we are not concerned in the instant case. This Act creates Special Courts to deal with offences against children. Section 42 of the POCSO is very important for our purpose and it provides that where an offence is punishable both under POCSO and under Indian Penal Code, then the offender found guilty would be liable for that punishment, which is more severe.

131. Section 42 and Section 42A of the POCSO read as follows:

42. Alternate punishment.-Where an act or omission constitutes an offence punishable under this Act and also Under Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or Section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

42A. Act not in derogation of any other law.-The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

132. Section 42A provides that the provisions of POCSO shall be in addition to and not in derogation of the provisions of any other Act. Therefore, the legislature, in its wisdom, thought that POCSO would supplant and would be in addition to the other criminal provisions and where there was any inconsistency, the provisions of POCSO would override any other law to the extent of inconsistency.

133. Another important provision to which reference may be made is Section 198(6) of the Code of Criminal Procedure (for short 'the Code'). The same reads as follows:

198. Prosecution for offences against marriage:

xxx xxx xxx

(6) No Court shall take cognizance of an offence Under Section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual inter-course by a man with his own wife, the wife being under eighteen years of age, if more than one year has elapsed from the date of the commission of the offence.

The age "eighteen" was substituted for "fifteen" by Act 5 of 2009 w.e.f. 31.12.2009. A perusal of the aforesaid provision also makes it clear that a complaint with regard to commission of offence Under Section 375 Indian Penal Code punishable Under Section 376 Indian Penal Code can be taken cognizance of by a court within one year of the commission of the offence even where "the wife" is below 18 years of age. It is, therefore, apparent that while amending Section 198 of the Code, the legislature was visualising that there can be marital rape with a "wife" aged less than 18 years but was prescribing a limitation of one year, for taking cognizance of such an offence. However, no consequential amendment was made to Exception 2 of Section 375 Indian Penal Code.

WHO IS A CHILD?

134. If one analyses the provisions of all the laws which have been referred to above, it is apparent that the legislature, in its wisdom, has universally enacted that a person below the age of 18 years is deemed to be a child unable to look after his or her own interests. It would be very important to note that, in 2013 the Indian Penal Code was amended, post the unfortunate "Nirbhaya" incident and the age of consent under Clause Sixthly of Section 375 Indian Penal Code was increased to 18 years. The position as on date is that under the Protection of Children from Sexual Offences Act, 2012, Juvenile Justice (Care and Protection of Children) Act, Child Marriage Restraint Act, 1929, Protection of Women from Domestic Violence Act, 2005, The Majority Act, 1875, The Guardians and Wards Act, 1890, The Indian Contract Act, 1872 and many other legislations, a person below the age of 18 years is considered to be a child unable to look after his or her own interests.

135. As far as marriage laws are concerned, as far back as 1978, the minimum age of marriage of a girl child was increased to 18 years. The Restraint Act, was replaced by the PCMA wherein also marriage of a girl child aged below 18 years is prohibited. However, Section 3 of the PCMA makes a child marriage voidable at the option of that party, who was a child at the time of marriage. The petition for annulling the child marriage must be filed within 2 years of the child attaining majority. Therefore, a girl who was married before she attained the age of 18 years, can get her marriage annulled before she attains the age of 20 years. Similarly, a male child can get the marriage annulled before attaining the age of 23 years. Even when the child is minor, a petition for annulment can be filed by the guardian or next friend of the child along with the Child Marriage Prohibition Officer. Unfortunately, both the number of prosecutions and the number of cases for annulment of marriage filed under PCMA are abysmally low.

THE ILL EFFECTS OF A CHILD MARRIAGE

136. A lot of material has been placed before us both by Mr. Gaurav Agarwal, learned Counsel appearing for the Petitioner and Ms. Jayna Kothari, learned Counsel appearing for the Intervener, to indicate that child marriage is not in the interest of the girl child. In my opinion, it is not necessary to refer to all the material cited by learned Counsel. The fact that child marriage is a reprehensible practice; that it is an abhorrent practice; that it violates the human rights of a child, cannot be seriously disputed. I am not oblivious to the harsh reality that most of the child brides are even below the age of 15 years. There is a practice in many parts of the country where children, both girls and boys, are married off, even before they attain puberty. They are innocent children, who do not even understand what marriage is. The practice which is widely prevalent is that a girl who is married pre-puberty is normally kept at her parents' home and is sent to her matrimonial home after she attains puberty in a ceremony which is commonly referred to as 'gauna'. Can the marriage of a child aged 3-4 years, by any stretch of imagination, be called a legal and valid marriage?

137. A Child marriage will invariably lead to early child birth and this will adversely affect the health of the girl child. In a report by the UNICEF8, there is an Article on ending child marriage and the ill effects of child marriage have been set out thus:

Married girls are among the world's most vulnerable people. When their education is cut short, girls lose the chance to gain the skills and knowledge to secure a good job and provide for themselves and their families. They are socially isolated. As I observed among my former schoolmates who were forced to get married, the consciousness of their isolation is in itself painful.

Subordinate to their husbands and families, married girls are more vulnerable to domestic violence, and not in a position to make decisions about safe sex and family planning-which puts them at high risk of sexually transmitted infections, including HIV, and of pregnancy and childbearing before their bodies are fully mature. Already risky pregnancies become even riskier, as married girls are less likely to get adequate medical care. During delivery, mothers who are still children are at higher risk of potentially disabling complications, like obstetric fistula, and both they and their babies are more likely to die.

138. In a study conducted on child marriages in India, based on the census of 20119, it was found that 3% girls in the age group of 10 to 14 years were got married and about 20% girls were married before attaining the age of 19 years. Unfortunately, this report deals with girls below the age of 19 years and not 18 years, but the report does indicate that more than 20% girls in this country are married before attaining the age of 18 years. Therefore, more than one out of every 5 marriages violates the provisions of the PCMA and the Hindu Marriage Act, 1955.

139. The World Health Organisation, in a Report10 dealing with the issue of child brides found that though 11% of the births worldwide are amongst adolescents, they account for 23% of the overall burden of diseases. Therefore, a child bride is more than doubly prone to health problems than a grown up woman.

140. In the Report of the Convention on the Rights of the Child11, certain recommendations have been made and the relevant portion of the Report is as follows:

Harmful Practices

51. The Committee is deeply concerned at the high prevalence of child marriages in the State party, despite the enactment of the Prohibition of Child Marriage Act (PCMA, 2006). It is further concerned at barriers impeding the full implementation of the PCMA, such as the prevalence of social norms and traditions over the legal framework, the existence of different Personal Status Laws establishing their own minimum age of marriage applicable to their respective religious community as well as the lack of awareness about the PCMA by enforcement officers. It is also concerned about the prevalence of other harmful practices against girls such as dowry and devadasi.

52. The Committee urges the State party to ensure the effective implementation of the Prohibition of Child Marriage Act (PCMA, 2006), including by clarifying that the PCMA supersede the different religious-based Personal Status Laws. It also recommends that the State party take the necessary measures to combat dowry, child marriage and devadasi including by conducting awareness-raising programmes and campaigns with a view to changing attitudes, as well as counselling and reproductive education, to prevent and combat child marriages, which are harmful to the health and well-being of girls.

141. The General Assembly of United Nations adopted a Resolution12, relevant portion of which, reads as follows:

Expressing concern about the continued prevalence of child, early and forced marriage worldwide, including the fact that there are still approximately 15 million girls married every year before they reach 18 years of age and that more than 720 million women and girls alive today were married before their eighteenth birthday.

Recognizing that child, early and forced marriage is a harmful practice that violates, abuses or impairs human rights and is linked to and perpetuates other harmful practices and human rights violations and that such violations have a disproportionately negative impact on women and girls, and underscoring the human rights obligations and commitments of States to promote and protect the human rights and fundamental freedoms of women and girls and to prevent and eliminate the practice of child, early and forced marriage."

142. In the National Family Health Survey-4, 2015-201613 some startling figures are revealed. It was found that at the time of carrying out the survey in 2014, amongst women in the age group of 20-24 years, almost 26.8% women were married before they attained the age of 18 years, i.e. more than one out of 4 marriages was of a girl child. In the urban areas the percentage is 17.5% and it rises to 31.5% in the rural areas.

143. In the National Plan of Action for Children, 201614, the Government of India itself has recognised the high rate of child marriages prevalent in the country and the fact that a child marriage violates the basic rights of health, development and protection of the child. Relevant portion of the report reads as follows:

A large number of children, especially girls are married before the legal age in India. According to NFHS 3 (2005-06), 47.4 percent of women in the age 20-24 were married

before 18, the percentage being higher for rural areas. The situation has improved in 2013-14 as the RSOC data shows that 30.3 percent women in the age 20-24 were married before their legal age. Early marriage poses various risks for the survival, health and development of young girls and to children born to them. It is also used as a means of trafficking.

144. In a Report15 based on the Census, 2011, the consequences of child marriages have been dealt with in the following terms:

5.1 Consequences

Child marriage is not only a violation of human rights, but is also recognized as an obstacle to the development of young people. The practice of child marriage cut shorts a critical stage of self-discovery and exploring one's identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets comprised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education; and participation in civic life and nullifies their basic rights as envisaged in the United Nation's Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights.

The prevalent practice of child marriage has detrimental consequences for both boys and girls, but has more grave and far-reaching adverse effects on girls. Within a patriarchal family structure, girls have relatively little power, but young and newly married women are particularly powerless, secluded and voiceless. Adolescent girls have little choice about whom and when to marry, whether or not to have sexual relations, and when to bear children. This is well elaborated in a study of girls in the age group 10-16 years. It was found that they were oppressed in several ways such as:

- They had to submit unquestioningly to the parents' decision regarding their marriage.

- They were over-burdened with household chores.

• They had limited knowledge of their body and its functioning.

• They were unaware of sexual changes, contraception, child bearing and rearing.

• They dropped out of school on attaining puberty.

• They had no time for leisure and social interaction.

• They were discriminated in matters of food intake and expressing their views within the family.

Imagine the fate of a young girl with the above profile if she is to face marital life and its challenges during adolescence. The adolescent married girl is more at risk. She is less likely to be allowed out of the house, to have access to services and usually, not be given space or freedom to exert agency. Within the marital home, which in majority of the cases is a joint family, she will probably not have much communication with her husband, and will end up socially isolated, with very little contact with her parental home.

145. This Report16 also notices upswing of female deaths during pregnancy in the age groups of 15-19 years and attributes these deaths to the death of teenage mothers. The relevant portion of the report reads as follows:

Census data have demonstrated an upswing of female deaths in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of teenage mothers. Child marriage virtually works like a double-edged sword; lower age at marriage is significantly associated with worse outcomes for the child and worse pregnancy outcomes for the mother. All these factors push girls and their families into perpetuation of intergenerational poverty and marginalization....

146. This Report17 deals with various other aspects and some apposite observations are as follows:

A young girl who is still struggling to understand her own anatomy, when forced to make conjugal relations, often shows signs of post-traumatic stress and depression owing to sexual abuse by her older partner. Neither the bodies of these young brides nor their innocent little minds are prepared, therefore, forced sexual encounters can lead to irreversible physical and psychological damage. A study conducted in 2013 showed that young girls are three times more likely to experience marital rape.

This report reveals a shocking aspect that girls below the age of 18 years are subjected to three times more marital rape as compared to the grown up women.

147. A perusal of the various reports and data placed before us clearly shows that marriage of the child not only violates the human rights of a child but also affects the health of the child.

148. Reference may be made to certain decisions cited before us. The Delhi High Court in Association for Social Justice & Research v. Union of India and Ors. MANU/DE/4335/2010 : 2010 (118) DRJ 324 (DB), was dealing with a case where a girl aged between 16 to 18 years was married off to a man stated to be over 40 years of age. The Court noted the ill effects of child marriage and gave a direction that the child will remain with her parents and her marriage will not be consummated till she attains the age of 18 years. Thereafter, a Full Bench of the Delhi High Court in Court on its own motion (Lajja Devi) and Ors. v. State and Ors.18, while dealing with the provisions of PCMA and also referring to the provisions of Sections 375 and 376 Indian Penal Code and after noticing the judgment passed in the case of Association For Social Justice & Research (supra), again reiterated that child marriage is a social evil, which endangers the life and health of the child. The ill effects of child marriage have been summarised in the following manner:

(i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.

(ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.

(iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.

(iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.

(v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality.

149. The Full Bench, with regard to Section 375 Indian Penal Code before its amendment in 2013, made the following observations:

32. It is distressing to note that the Indian Penal Code, 1860 acquiesces child marriage. The exception to Section 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape? It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years. This provision in the Indian Penal Code, 1860 is a specific illustration of legislative endorsement and sanction to child marriages.

150. A Full Bench of Madras High Court in T. Sivakumar v. Inspector of Police19, dealt with the provisions of the PCMA. It held that a marriage contracted with a female less than 18 years and more than 15 years is not a void marriage but is only a voidable marriage. However, the Court went on to hold that stricto sensu the marriage could not be called a valid marriage since the child bride had the option of getting the marriage annulled till she attains the age of 20 years. It held as follows:

The marriage contracted by a person with a female of less than 18 years is voidable and the same shall be subsisting until it is annulled by a competent Court Under Section 3 of the Prohibition of Child Marriage Act. The said marriage is not a "valid marriage" stricto sensu as per the classification but it is "not invalid". The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage stricto sensu, instead he will enjoin only limited rights.

Reference to these judgments has been made only for the purpose of highlighting the concern shown by the Courts with regard to child marriage and the manner in which the Courts have consistently held that the child marriage is an evil which should be avoided.

THE KARNATAKA EXPERIENCE

151. A writ petition20 was filed in the Karnataka High Court, raising the issue of validity of child marriages. In its order dated 10th November, 2010 the Karnataka High Court noted as follows:

The narration of facts in the present writ petition is heart rendering. The photographs appended to the writ petition have been a cause of deep distress to us. The photographs reveal, the marriage of minor girls, not yet in their teens, to fully grown men. In one of the photographs, the girl has been made to stand on a chair, so that she could garland her tall and fully grown groom. Forced marriage of the girl child, one realises, is one of the manifestations of cruelty, possibly without any equivalent comparison. It seems that the practice is common place in this part of the world. It may have remained unchecked for a variety of reasons including, poverty, lack of education, culture and ignorance. We are of the view that allowing the evil to continue without redressing it, would make us a party to the disgraceful activity.

152. After making the aforesaid observations, the Karnataka High Court constituted a four Member committee, headed by Dr. Justice Shivraj V. Patil, former Judge of this Court, to expose the extent of practice of child marriage. The Committee was also requested to suggest ways and means to root out the evil of child marriage from society and to prevent it to the maximum extent possible. The Core Committee submitted its report and made various recommendations. One of its recommendations was that marriage of a girl child below the age of 18 years should be declared void ab initio. Pursuant to the report of the Core Committee, in the State of Karnataka an amendment was made in the PCMA and Section 1(A) has been inserted after Sub-Section 2 Section 3, which reads as under:

(1A) Notwithstanding anything contained in Sub-section (1) every child marriage solemnized on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio.

153. Therefore, any marriage of a child, i.e. a female aged below 18 years and a male below 21 years is void ab initio in the State of Karnataka. This is how the law should have been throughout the country. Where the marriage is void, there cannot be a husband or a wife and I have no doubt that protection of Exception 2 to Section 375 Indian Penal Code cannot be availed of by those persons, who claim to be "husband" of "child brides" pursuant to a marriage which is illegal and void.

154. This leads to an anomalous situation. In Karnataka, if a husband has sexual intercourse with his "wife" aged below 18 years, since such marriage would be void ab initio, the wife cannot be treated to be a legal wife and, therefore, the husband cannot get the benefit of Exception 2 to Section 375 Indian Penal Code whereas in rest of the country he would be entitled to the benefit of such exception and be immune from prosecution.

THE DEFENCE OF SOCIAL REALITY

155. The main defence raised on behalf of the Union of India is that though the practice of child marriage may be reprehensible, though it may have been made illegal, the harsh reality is that 20% to 30% of female children below the age of 18 years are got married in total violation of the PCMA. According to the Union of India, keeping in view this stark reality and also keeping in view the sanctity which is attached to a union like marriage, the Parliament, in its wisdom, thought it fit to retain the age of fifteen in Exception 2 to Section 375 Indian Penal Code. It has also been urged that when Parliament enacts any law which falls within its jurisdiction, then this Court should not normally interfere with that Act. When any law is passed, the Court must presume that the Parliament has gone into all aspects of the matter. Though it was faintly urged before us by learned Counsel for the Petitioner that the Parliament did not go into certain aspects, this Court is clearly of the view that such ignorance cannot be imputed to Parliament. In our constitutional framework, where there is division of powers, each repository of power must respect the other and this Court must extend to the Parliament the respect it deserves. One cannot and should not impute ignorance to the legislature.

156. The stand of the Union of India may be summarised as follows:

(i) "Economic and educational development in the country is still uneven and child marriages are still taking place. It has been, therefore, decided to retain the age of 15 years under Exception 2 of Section 375 of Indian Penal Code so as to give protection to husband and wife against criminalizing the sexual activity between them.

(ii) As per National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country. Hence, criminalizing the consummation of a marriage union with a serious offence such as rape would not be appropriate and practical.

(iii) Providing punishment for child marriage with consent does not appear to be appropriate in view of socio-economic conditions of the country. Thus, the age prescribed in Exception 2 of Section 375 of Indian Penal Code has been retained considering the basic facts of the still evolving social norms and issues.

(iv) The Law Commission also recommended for raising the age from 15 years to 16 years and it was incorporated in the Criminal Law (Amendment) Ordinance, 2013. However, after wide ranging consultations with various stakeholders it was further decided to retain the age at 15 years.

(v) Exception 2 of Section 375 of Indian Penal Code envisages that if the marriage is solemnized at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under the Indian Penal Code.

(vi) It is also necessary that the provisions of law should be in such a manner that it cannot affect a particular class of society. Retaining the age of 15 years in Exception 2 of Section 375 of Indian Penal Code has been provided considering the social realities of the nation.

157. Certain other facts may be noted which, though not strictly necessary for deciding the legal issues, are necessary to decide the background in which amendment to Section 375 Indian Penal Code and other criminal laws were carried out. These facts clearly show that Parliament knowingly took a decision not to criminalize sexual activity between husband and wife. In the 84th Report of the Law Commission, it was recommended that the age of consent under Clause Sixthly of Section 375 Indian Penal Code, should be increased to 18 years and Exception 2 should be deleted. In the 172nd Report of the Law Commission, it was recommended that the age of consent under Clause Sixthly should be retained at 16 years, but the Law Commission specifically opined that there should be no distinction on account of marriage of the girl child and the age in Exception 2 be raised from 15 to 16 years. The Justice Verma Committee did not make any recommendation to change the age of consent under Clause Sixthly. However Parliament, while amending the Indian Penal Code in the year 2014, in the wake of the "Nirbhaya" incident, decided

to increase the age of consent to 18 years under Clause Sixthly, but did not make any change in Exception 2 of Section 375 Indian Penal Code.

158. Interestingly, though the Verma Committee did not recommend that the age of consent should be increased under Clause Sixthly from 16 to 18 years, but it did recommend that Exception 2 should be completely deleted. The Parliament took note of the Verma Committee report. It also took note of the recommendations of the Law Commission and a Standing Committee was constituted and Parliament enacted this law pursuant to the recommendations of the Standing Committee. It would also be pertinent to mention that one Member of Parliament, Mr. Saugata Roy moved a Private Member's Bill to fix the age at 18 years in Exception 2 of Section 375 Indian Penal Code, but that amendment was not carried. Interestingly, the amendment to Section 375 Indian Penal Code and other Sections relating to offences against women and the POCSO were incorporated by one Amending Act i.e., The Criminal Law (Amendment) Act, 2013. After the "Nirbhaya" case, the Juvenile Justice (Care and Protection of Children) Act, 2015 was also amended in 2016 and a child in conflict with law over the age of 16 years, if charged with a heinous offence, can be tried in a court of law if the Juvenile Justice Board feels that he was mature enough to commit a crime.

POWER OF THE COURT TO INTERFERE

159. It is a well settled principle of law that when the constitutional validity of the law enacted by the legislature is under challenge and there is no challenge to the legislative competence, the Court will always raise a presumption of the constitutionality of the legislation. The courts are reluctant to strike down laws as unconstitutional unless it is shown that the law clearly violates the constitutional provisions or the fundamental rights of the citizens. The Courts must show due deference to the legislative process.

160. There can be no dispute with the proposition that Courts must draw a presumption of constitutionality in favour of laws enacted by the legislature. In Sub-Divisional Magistrate v. Ram Kali MANU/SC/0079/1967 : (1968) 1 SCR 205, this Court observed as follows:

...The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

161. Thereafter, in Pathumma and Ors. v. State of Kerala and Ors. MANU/SC/0315/1978 : (1978) 2 SCC 1, this Court held that the Court would interfere only when the statute clearly violates the rights of the citizens provided under Part III of the Constitution or where the Act is beyond the legislative competence or such similar grounds. The relevant observations are as follows:

6. It is obvious that the Legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker Sections of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. It is for this reason that the Courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same....

162. In Government of A.P. v. P. Laxmi Devi MANU/SC/1017/2008 : (2008) 4 SCC 720, this Court held thus:

66. As observed by the Privy Council in Shell Co. of Australia v. Federal Commr. of Taxation 1931 AC 275 : 1930 All ER Rep 671 (PC)] (All ER p. 680 G-H)

...unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will....

67. Hence if two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred vide Kedar Nath Singh v. State of Bihar MANU/SC/0074/1962 : AIR 1962 SC 955. Also, if it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the court should do so vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 497....

163. In Subramanian Swamy v. Director, CBI MANU/SC/0417/2014 : (2014) 8 SCC 682, a Constitution Bench of this Court laid down the following principle:

Court's approach

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders-if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.

164. I am conscious of the self imposed limitations laid down by this Court while deciding the issue whether a law is constitutional or not. However, if the law is discriminatory, arbitrary or violative of the fundamental rights or is beyond the legislative competence of the legislature then the Court is duty bound to invalidate such a law.

165. Justice H.R. Khanna in the case of State of Punjab v. Khan Chand MANU/SC/0353/1973 : (1974) 1 SCC 549 held that when Courts strike down laws they are only doing their duty and no element of judicial arrogance should be attributed to the Courts when they do their duty under the Constitution and determine whether the law made by the legislature is in conformity with the provisions of the Constitution or not. The relevant observations are as follows:

12. It would be wrong to assume that there is an element of judicial arrogance in the act of the Courts in striking down an enactment. The Constitution has assigned to the Courts the function of determining as to whether the laws made by the Legislature are in

conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the Courts discharge an obligation which has been imposed upon them by the Constitution. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution. Hesitation or refusal on the part of the Courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the Courts to declare a provision of an enactment to be unconstitutional if it contravenes any Article of the Constitution as it is theirs to uphold its validity in case it is found to suffer from no such infirmity.

166. Therefore, the principle is that normally the Courts should raise a presumption in favour of the impugned law; however, if the law under challenge violates the fundamental rights of the citizens, the law is arbitrary, or is discriminatory, the Courts can either hold the law to be totally unconstitutional and strike down the law or the Court may read down the law in such a manner that the law when read down does not violate the Constitution. While the Courts must show restraint while dealing with such issues, the Court cannot shut its eyes to the violations of the fundamental rights of the citizens. Therefore, if the legislature enacts a law which is violative of the fundamental rights of the citizens, is arbitrary and discriminatory, then the Court would be failing in its duty if it does not either strike down the law or read down the law in such a manner that it falls within the four corners of the Constitution.

167. It is not the job of the Court to decide whether a law is good or bad. Policy matters fall within the realm of legislature and not of the Courts. The Court, however, is empowered and has the jurisdiction to decide whether a law is unconstitutional or not.

168. "The law is an ass" said Mr. Bumble21. That may be so. The law, however, cannot be arbitrary or discriminatory. Merely because a law is asinine, it cannot be set aside. However, if the law is arbitrary, discriminatory and violates the fundamental rights guaranteed to the citizens of the country, then the law can either be struck down or can be read down to make it in consonance with the Constitution of India.

WHETHER EXCEPTION 2 TO SECTION 375 Indian Penal Code IS ARBITRARY?

169. Before dealing with this issue, it would be necessary to point out that earlier there was divergence of opinion as to whether a law could be struck down only on the ground that it was arbitrary. In Indira Nehru Gandhi v. Raj Narain MANU/SC/0304/1975 : 1975 (Supp.) SCC 1 the Court struck down clauses 4 and 5 of Article 329A of the Constitution on the ground of arbitrariness. Reliance was placed on the celebrated judgment of this Court passed in the case of Keshavananda Bharati v. State of Kerala MANU/SC/0445/1973 : (1973) 4 SCC 225. In Para 681 of Raj Narain (supra), Chandrachud J., held as follows:

681. It follows that Clauses (4) and (5) of Article 329A are arbitrary and are calculated to damage or destroy the Rule of law. Imperfections of language hinder a precise definition of the Rule of law as of the definition of 'law' itself. And the Constitutional Law of 1975 has undergone many changes since A.V. Dicey, the great expounder of the Rule of law, delivered his lectures as Vinerian Professor of English Law at Oxford, which were published in 1885 under the title, "Introduction to the Study of the Law of the Constitution". But so much, I suppose, can be said with reasonable certainty that the Rule of law means that the exercise of powers of government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to Rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the courts....

170. The aforesaid case was one of the first cases in which a law was set aside on the ground of being arbitrary. In E.P. Royappa v. State of Tamil Nadu MANU/SC/0380/1973 : (1974) 4 SCC 3 the doctrine of arbitrariness was further expanded. Bhagwati, J., eruditely explained the principle in the following terms.

85. ...From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the Rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike

at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.

171. The doctrine developed in Royappa's case (supra) was further advanced in the case of Maneka Gandhi v. Union of India MANU/SC/0133/1978 : (1978) 1 SCC 248. In this case, the test of reasonableness was introduced and it was held that a law which is not "right, just and fair" is arbitrary. The following observations are apposite:

7. ...The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

172. This principle was followed in the cases of A.L. Kalra v. Project and Equipment Corpn. MANU/SC/0259/1984 : (1984) 3 SCC 316, Babita Prasad v. State of Bihar MANU/SC/0723/1993 : 1993 Supp (3) SCC 268, Ajay Hasia v. Khalid Mujib Sehravardi MANU/SC/0498/1980 : (1981) 1 SCC 722 and Dr. K.R. Lakshmanan v. State of Tamil Nadu MANU/SC/0309/1996 : (1996) 2 SCC 226. In the case of Ajay Hasia (supra), a Constitution Bench of this Court held as follows:

16. ...Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' Under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.

173. In State of A.P. v. McDowell & Co. MANU/SC/0427/1996 : (1996) 3 SCC 709, a three-Judge Bench of this Court struck a discordant note and rejected the plea of the Amending

Act being arbitrary. The Court held that an enactment could be struck down if it is being challenged as violative of Article 14 only if it is found that it is violative of equality clause, equal protection Clause or violative of fundamental rights. The Court went on to hold that an enactment cannot be stuck down only on the ground that the Court thinks that it is unjustified. This judgment need not detain us for long because in Shayara Bano v. Union of India and Ors.22 popularly known as the "Triple Talaq case", this Court held that this judgment did not take note of binding judgments of this Court passed by a Constitution Bench, in the case of Ajay Hasia (supra) and a three-Judge Bench in the case of Dr. K.R. Lakshmanan (supra). After discussing the entire law on the subject, Nariman, J., in his judgment held as follows:

It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary".

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55. ...The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation Under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14.

Therefore, there can be no dispute that a law can be struck down if the Court find it is arbitrary and falls foul of Article 14 and other fundamental rights.

174. In this case, we are concerned mainly with Article 14 and 21 of the Constitution of India. The legislative history given above clearly indicates that a child has universally been defined as a person below 18 years of age in all the enactments. This has been done for the reason that it is perceived that a person below the age of 18 years is not fully developed and does not know the consequences of his/her actions. Not only is a person

below the age of 18 years treated to be a child, but is also not even entitled to deal with his property, enter into a contract or even vote.

175. The fact that child marriage is an abhorrent practice and is violative of human rights of the child is not seriously disputed by the Union of India. The only justification given is that since a large number of child marriages are taking place, it would not be proper to criminalize the consummation of such child marriages. It is urged that, keeping in view age old traditions and evolving social norms, the practice of child marriage cannot be wished away and, therefore, legislature in its wisdom has thought it fit not to criminalize the consummation of such child marriages.

176. I am not impressed with the arguments raised by the Union of India. Merely because something is going on for a long time is no ground to legitimise and legalise an activity which is per se illegal and a criminal offence. No doubt, it is totally within the realm of Parliament to decide what should be the age of consent under Clause Sixthly of Section 375 Indian Penal Code. It is also within the domain of the Parliament to decide what should be the minimum age of marriage. The Parliament has decided in both the enactments that a girl below 18 years is not capable of giving consent to have sex and legally she cannot marry. Parliament has also, in no uncertain terms, prohibited child marriage and come to the conclusion that child marriage is an activity which must come to an end. If that be so, can the practice of child marriage which is admittedly "an evil", and is also a criminal offence be set up as an exception in a case of a girl child, who is subjected to sexual intercourse by her so called husband. Shockingly, even if this sexual intercourse is forcible and without the consent of the girl child, then also the husband is not liable for any offence. This law is definitely not right, just and fair and is, therefore, arbitrary.

177. There can be no dispute that every citizen of this country has the right to get good healthcare. Every citizen can expect that the State shall make best endeavours for ensuring that the health of the citizen is not adversely affected. By now it is well settled by a catena of judgments of this Court that the "right to life" envisaged in Article 21 of the Constitution of India is not merely a right to live an animal existence. This Court has repeatedly held that right to life means a right to live with human dignity. Life should be meaningful and worth living. Life has many shades. Good health is the raison d'etre of a good life. Without good health there cannot be a good life. In the case of a minor girl child good health would mean her right to develop as a healthy woman. This not only requires good physical health but also good mental health. The girl child must be encouraged to bloom into a healthy woman. The girl child must not be deprived of her right of choice. The girl child must not be deprived of her right to study further. When the girl child is deprived of her right to study further, she is actually deprived of her right to develop

into a mature woman, who can earn independently and live as a self sufficient independent woman. In the modern age, when we talk of gender equality, the girl child must be given equal opportunity to develop like a male child. In fact, in my view, because of the patriarchal nature of our society, some extra benefit must be showered upon the girl child to ensure that she is not deprived of her right to life, which would include her right to grow and develop physically, mentally and economically as an independent self sufficient female adult.

178. It is true that at times the State, because of paucity of funds, or other reasons beyond its control, cannot live up to the expectations of the people. At the same time, it is not expected that the State should frame a law, which adversely affects the health of a citizen, that too a minor girl child. The State, Under Article 15 of the Constitution, is in fact, empowered to make laws favouring women. Reservation for women is envisaged Under Article 15 of the Constitution. In Vishakha v. State of Rajasthan MANU/SC/0786/1997 : (1997) 6 SCC 241, this Court held that sexual harassment of working women amounts to violation of the rights guaranteed by Articles 14, 15 and 23 of the Constitution.

179. When a girl is compelled to marry before she attains the age of 18 years, her health is put in serious jeopardy. As is evident from various reports referred to above, girls who were married before the age of 19 years are likely to suffer medical and psychological problems. A 15 or 16 year old girl, when forcibly subjected to sexual intercourse by her "husband", undergoes a trauma, which her body and mind is not ready to face. The girl child is also twice as more likely to die in child birth than a grown up woman. The least, that one would expect in such a situation, is that the State would not take the defence of tradition and sanctity of marriage in respect of girl child, which would be totally violative of Article 14, 15 and 21 of the Constitution. Therefore, this Court is of the view that Exception 2 to Section 375 Indian Penal Code is arbitrary since it is violative of the principles enshrined in Article 14, 15 and 21 of the Constitution of India.

180. Approaching this aspect from another angle. As is evident from various reports filed in this case, child marriages are not restricted to girls aged above 15 years. Even as per the National Plan of Action for Children, 2016 prepared by the Ministry of Women and Child Development, Government of India, 30.3% marriages i.e. almost 1 in every 3 marriage takes place in violation of the PCMA. Many of these relate to child brides aged less than 15 years. A girl may be married when she is 3-4 years or may be 10-11 years old. She may be sent to her matrimonial home on attaining the age of puberty, which may be well before she attains the age of 15 years. In such an eventuality, what is the reason for fixing the magic figure of 15 years. This figure had relevance when under the criminal law and the marriage laws the age was similar. In the year 1940, the age of consent was 16 years, the age of marriage was 15 years and the age under the exception was also 15

years; in 1975, the age of consent was 16 years, the age of marriage was 18 years, but the age under the exception remained 15 years. That may have been there because there was no change in the age of consent under Clause Sixthly. Now when the age of consent is changed to 18 years, the minimum age of marriage is also 18 years and, therefore, fixing a lower age under Exception 2 is totally irrational. It strikes against the concept of equality. It violates the right of fair treatment of the girl child, who is unable to look after herself. The magic figure of 15 years is not based on any scientific evaluation, but is based on the mere fact that it has been existing for a long time. The age of 15 years in Exception 2 was fixed in the year 1940 when the minimum age for marriage was also 15 and the age of consent under Clause Sixthly was 16. In the present context when the age for marriage has been fixed at 18 years and when the age of consent is also fixed at 18 years, keeping the age under Exception 2 at 15 years, cannot be said to be right, just and fair. In fact, it is arbitrary and oppressive to the girl child.

181. Law cannot be hidebound and static. It has to evolve and change with the needs of the society. Recognising these factors, the Parliament increased the minimum age for marriage. The Parliament also increased the minimum age of consent but the inaction in raising the age in Exception 2 is by itself an arbitrary non-exercise of power. When the age was being raised in all other laws, the age under Exception 2 should also have been raised to bring it in line with the evolving laws especially the laws to protect women and the girl child aged below 18 years. Therefore, I have no hesitation in holding that the Exception 2, in so far as it relates to the girl child below eighteen years, is unreasonable, unjust, unfair and violative of the rights of the girl child. To that extent the same is arbitrary and liable to be set aside.

WHETHER EXCEPTION 2 TO SECTION 375 Indian Penal Code IS DISCRIMINATORY?

182. There can be no dispute that a law can be set aside if it is discriminatory. Some elements of discrimination have already been dealt with while dealing with the issue of arbitrariness. However, there are certain other aspects which make Exception 2 to Section 375 Indian Penal Code in so far as it deals with the girl child totally discriminatory. The law discriminates between a girl child aged less than 18 years, who may be educated and has sexual intercourse with her consent and a girl child who may be married even before the age of 15 years, but her marriage has been consummated after 15 years even against her consent. This is invidious discrimination which is writ large. The discrimination is between a consenting girl child, who is almost an adult and non-consenting child bride. To give an example, if a girl aged 15 years is married off by her parents without her consent and the marriage is consummated against her consent, then also this girl child cannot file a criminal case against her husband. The State is talking of the reality of the child marriages. What about the reality of the rights of the girl child? Can this helpless,

underprivileged girl be deprived of her rights to say 'yes' or 'no' to marriage? Can she be deprived of her right to say 'yes' or 'no' to having sex with her husband, even if she has consented for the marriage? In my view, there is only one answer to this and the answer must be a resounding "NO". While interpreting such a law the interpretation which must be preferred is the one which protects the human rights of the child, which protects the fundamental rights of the child, the one which ensures the good health of the child and not the one which tries to say that though the practice is "evil" but since it is going on for a long time, such "criminal" acts should be decriminalised.

183. The State is entitled and empowered to fix the age of consent. The State can make reasonable classification but while making any classification it must show that the classification has been made with the object of achieving a certain end. The classification must have a reasonable nexus with the object sought to be achieved. In this case the justification given by the State is only that it does not want to punish those who consummate their marriage. The stand of the State is that keeping in view the sanctity attached to the institution of marriage, it has decided to make a provision in the nature of Exception 2 to Section 375 Indian Penal Code. This begs the question as to why in this exception the age has been fixed as 15 years and not 18 years. As pointed out earlier, a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years. This age has no nexus with the object sought to be achieved viz., maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not void ab initio (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons including her husband, and those persons who were involved in getting her married are guilty of having committed a criminal act. In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, also Exception 2 in so far as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.

184. One more ground for holding that Exception 2 to Section 375 Indian Penal Code is discriminatory is that this is the only provision in various penal laws which gives immunity to the husband. The husband is not immune from prosecution as far as other

offences are concerned. Therefore, if the husband beats a girl child and has forcible sexual intercourse with her, he may be charged for offences Under Sections 323, 324, 325 Indian Penal Code etc. but he cannot be charged with rape. This leads to an anomalous and astounding situation where the husband can be charged with lesser offences, but not with the more serious offence of rape. As far as sexual crimes against women are concerned, these are covered by Sections 354, 354A, 354B, 354C, 354D of the Indian Penal Code. These relate to assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with intent to disrobe; voyeurism; and stalking respectively. There is no exception Clause giving immunity to the husband for such offences. The Domestic Violence Act will also apply in such cases and the husband does not get immunity. There are many other offences where the husband is either specifically liable or may be one of the accused. The husband is not given the immunity in any other penal provision except in Exception 2 to Section 375 Indian Penal Code. It does not stand to reason that only for the offence of rape the husband should be granted such an immunity especially where the "victim wife" is aged below 18 years i.e. below the legal age of marriage and is also not legally capable of giving consent to have sexual intercourse. Exception 2 to Section 375 Indian Penal Code is, therefore, discriminatory and violative of Article 14 of the Constitution of India, on this count also.

185. The discrimination is absolutely patent and, therefore, in my view, Exception 2, in so far as it relates to the girl child between 15 to 18 years is not only arbitrary but also discriminatory, against the girl child.

LAW IN CONFLICT WITH POCSO

186. Another aspect of the matter is that the POSCO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by which Section 375, Section 376 and other Sections of Indian Penal Code relating to crimes against women were amended. The definition of rape was enlarged and the punishment Under Section 375 Indian Penal Code was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under Indian Penal Code, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the

child. As the objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated. She is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove.

187. Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law. However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of Indian Penal Code. Section 3 of the POCSO is identical to the opening portion of Section 375 of Indian Penal Code whereas Section 5 of POCSO is similar to Section 376(2) of the Indian Penal Code. Exception 2 to Section 375 of Indian Penal Code, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and Indian Penal Code. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas Indian Penal Code is the general criminal law. Therefore, POCSO will prevail over Indian Penal Code and Exception 2 in so far as it relates to children, is inconsistent with POCSO.

IS THE COURT CREATING A NEW OFFENCE?

188. One of the doubts raised was if this Court strikes down, partially or fully, Exception 2 to Section 375 Indian Penal Code, is the Court creating a new offence. There can be no cavil of doubt that the Courts cannot create an offence. However, there can be no manner of doubt that by partly striking down Section 375 Indian Penal Code, no new offence is being created. The offence already exists in the main part of Section 375 Indian Penal Code as well as in Section 3 and 5 of POCSO. What has been done is only to read down Exception 2 to Section 375 Indian Penal Code to bring it in consonance with the Constitution and POCSO.

189. In this behalf, reference may be made to some English decisions. In England, there was never any such statutory exception granting immunity to the husband from the offence of marital rape. However, Sir Mathew Hale, who was Chief Justice of England for five years prior to his death in 1676, was credited with having laid down the following principle:

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.

190. The aforesaid principle, commonly known as Hale's principle, was recorded in the History of the Pleas of the Crown (1736), Vol. 1, Ch. 58, P. 629 and was followed in England for many years. Under Hale's principle a husband could not be held guilty of raping his wife. This principle was based on the proposition that the wife gives up her body to her husband at the time of marriage. Women, at that time, were considered to be chattel. It was also presumed that on marriage, a woman had given her irrevocable consent to have sexual intercourse with her husband.

191. The aforesaid principle was followed in England for more than two centuries. For the first time in Reg v. Clarence (1888) 22 Q.B.D. 23, some doubts were raised by Justice Wills with regard to this proposition. In Rex v. Clarke (1949) 2 All E.R. 448, Hale's principle was given the burial it deserved and it was held that the husband's immunity as expounded by Hale, no longer exists. Dealing with the creation of new offence, the House of Lords held as follows:

The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.

192. In my view, as far as this case is concerned, this Court is not creating any new offence but only removing what was unconstitutional and offensive.

THE PRIVACY DEBATE

193. Ms. Jayna Kothari, learned Counsel for the Intervener, had raised the issue of privacy and made reference to the judgment of this Court in the case of Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. MANU/SC/1044/2017 : (2017) 10 SCALE 1 to urge that the right of privacy of the girl child is also violated by Exception 2 to Section 375 Indian Penal Code. I have purposely not gone into this aspect of the matter because anything said or urged in this behalf would affect any case being argued on "marital rape" even in relation to "women over 18 years of age". In this case, the issue raised is only with regard to the girl child and, therefore, I do not think it proper to deal with this issue which may have wider ramifications especially when the case of girl child can be decided without dealing with the issue of privacy.

RELIEF

194. Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 Indian Penal Code should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

195. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 Indian Penal Code in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 Indian Penal Code is read down as follows:

Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape.

It is, however, made clear that this judgment will have prospective effect.

196. It is also clarified that Section 198(6) of the Code will apply to cases of rape of "wives" below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code.

197. At the cost of repetition, it is reiterated that nothing said in this judgment shall be taken to be an observation one way or the other with regard to the issue of "marital rape".

198. Extremely valuable assistance was rendered to this Court by Mr. Gaurav Agarwal, learned Counsel appearing for the Petitioner and Ms. Jayna Kothari, learned Counsel appearing for the intervener and I place on record my appreciation and gratitude for the same.

1 Paragraph 111

2 Paragraph 118

3 Paragraph 222

4 Paragraph 277

5India became a signatory to the CEDAW Convention on 30th July, 1980 (ratified on 9th July, 1993) but with a reservation to the extent of making registration of marriage compulsory stating that it is not practical in a vast country like India with its variety of customs, religions and level of literacy. Nevertheless, the Supreme Court in the case of Seema (Smt.) v. Ashwani Kumar MANU/SC/0996/2006 : (2006) 2 SCC 578 directed the States and Central Government to notify Rules making registration of marriages compulsory. However, the same has not been implemented in full.

6 3. Penetrative sexual assault.-A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.....

375. Rape.-A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

7 PIL No. 166/2016 decided on 21st October, 2016

8 Report of UNICEF "ON THE STATE OF THE WORLD'S CHILDREN 2016". A fair chance for girls-End Child Marriage by Angelique Kidjo

9 A Statistical analysis of CHILD MARRIAGE IN INDIA, Based on Census 2011 published by Young Lives and National Commission for Protection of Child Rights (NCPCR)

10 World Health Organisation Report on "Early Marriages, Adolescent and Young Pregnancies", Sixty-Fifth World Health Assembly dated 16th March, 2012

11 Report of the United Nations Committee on the Rights of the Child (CRC) on the Convention of the Rights of the Child, dated 13th June, 2014, dealing with India

12 Resolution adopted by the United Nations General Assembly on 19th December, 2016 on "Child, early and forced marriage", Seventy-first session, Agenda Item 64(a)

13 India Fact Sheet-Issued by Government of India, Ministry of Health and Family Welfare

14 Drawn up by the Ministry of Women and Child Development, Government of India, (Published on 14th January, 2017)

15 A Statistical Analysis of Child Marriage in India, Based on Census, 2011 (Published by Young Lives and National Commission for Protection of Child Rights(NCPCR) June 2017, New Delhi

16 A Statistical Analysis of Child Marriage in India, Based on Census, 2011 (Published by Young Lives and National Commission for Protection of Child Rights(NCPCR), June 2017, New Delhi

17 A Statistical Analysis of Child Marriage in India, Based on Census, 2011 (Published by Young Lives and National Commission for Protection of Child Rights(NCPCR) June 2017, New Delhi

18 W.P.(Crl.) No. 338 of 2008

19 H.C.P. No. 907 of 2011, vide its judgment dated 3rd November, 2011

20 Writ Petition No. 11154/2006 (GM-RES-PIL), Muthamma Devaya and Anr. v. Union of India and Ors.

21 Oliver Twist: Author Charles Dickens

22 WP (C) No. 118/2016 and connected matters (2017) Vol. 8 SCALE 178

MANU/SC/0786/1997

Back to Section 354A of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Writ Petition (Criminal) Nos. 666-70 of 1992

Decided On: 13.08.1997

Vishaka and Ors. Vs. State of Rajasthan and Ors.

Hon'ble Judges/Coram:
J.S. Verma, C.J.I., S.V. Manohar and B.N. Kirpal, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Fali Sam Nariman, Meenakshi Arora and Niti Dixit, Advs
For Respondents/Defendant: T.R. Andhyarujina, Solicitor General, Mukul Mudgal, Suvira Lal, C.V. Subba Rao, K.S. Bhati and M.K. Singh, Advs.

ORDER
J.S. Verma, C.J.I.

1. This writ petition has been filed for the enforcement of the fundamental rights of working women under Articles 14 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. With the increasing awareness and emphasis on gender justice, there is increase in the effort to guard against such violations; and the resentment towards incidents of sexual harassment is also increasing. The present petition has been brought as a class action by certain social activists and NGOs with the aim of focusing attention towards this societal aberration, and assisting in finding suitable methods for realisation of the true concept of 'gender equality'; and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.

2. The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. That incident is the subject-matter of a separate criminal action and no further mention of it, by us, is necessary. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.

3. Each such incident results in violation of" the fundamental rights of 'Gender Equality' and the 'Right to Life and Liberty'. It is a clear violation of the rights under Articles 14 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

4. The notice of the petition was given to the State of Rajasthan and the Union of India. The learned Solicitor General appeared for the Union of India and rendered valuable assistance in the true spirit of a Law Officer to help us find a proper solution to this social problem of considerable magnitude. In addition to Ms. Meenakshi Arora and Ms. Naina Kapur who assisted the Court with full commitment. Shri Fali S. Nariman appeared as Amicus Curiae and rendered great assistance. We place on record our great appreciation for every counsel who appeared in the case and rendered the needed assistance to the Court which has enabled us to deal with this unusual matter in the manner considered appropriate for a cause of this nature.

5. Apart from Article 32 of the Constitution of India, we may refer to some other provisions which envisage judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to Articles 14 19(1)(g) and 21, which have relevance are:

Article 15:

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.-

(1) The State shall not discriminate against any citizen on only of religion, race, caste, sex, place of birth or any of them.

(2) xxx xxx xxx

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) xxx xxx xxx Article 42:

42. Provision for just and humane conditions of work and maternity relief - The State shall make provision for securing just and humane conditions of work and for maternity relief.

Article 51A:

51 A. Fundamental duties.- It shall be the duty of every citizen of India;-

(a) to abide by the Constitution and respect its ideals and institutions....

xxx xxx xxx

(c) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

xxx xxx xxx

6. Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

Article 51:

51. Promotion of international peace and security.- The State shall endeavour to-

xxx xxx xxx

(c) foster respect for international law and treaty obligations in the dealings of organised people with one another; and

xxx xxx xxx

Article 253:

253. Legislation for giving effect to international agreements.- Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for

the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.
Seventh Schedule:

List I - Union List:

xxx xxx xxx

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

xxx xxx xxx

7. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil.

8. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest.

9. The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and norms declared by this Court to govern the behavior of the employers and all others at the work places to curb this social evil.

10. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

Objectives of the Judiciary:

10. The objectives and functions of the judiciary include the following:

(a) to ensure that all persons are able to live securely under the Rule of Law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.

12. Some provisions in the 'Convention on the Elimination of All Forms of Discrimination against Women', of significance in the present context are:

Article 11:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

xxx xxx xxx

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction

xxx xxx xxx

Article 24:

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present Convention.
13. The general recommendations of CEDAW in this context in respect of Article 11 are:

Violence and equality in employment:

22. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place.

23. Sexual harassment includes such unwelcome sexually determined behavior as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation, should be provided.

24. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the work place.

The Government of India has ratified the above resolution on June 25, 1993 with some reservations which are not material in the present context. At the Fourth World Conference on Women in Beijing, the Government of India has also made an official commitment, inter alia, to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women's to act as a public defender of women's human rights; to institutionalise a national level mechanism to monitor the implementation of the Platform for Action. We have, therefore, no hesitation in placing reliance on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

14. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme.

The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them
and there is a void in the domestic law. The High Court of Australia in Minister for Immigration and Ethnic Affairs v. Tech 128 ALR 353, has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.
15. In Nilabati Behera v. State of Orissa MANU/SC/0307/1993: 1993CriLJ2899, a provision in the ICCPR was referred to support the view taken that 'an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right', as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

16. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

The guidelines and norms pre-scribed herein are as under:

Having regard to the definition of 'human rights' in Section 2(d) of the Protection of Human Rights Act, 1993.

Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time.

It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. Duty of the Employer or other responsible persons in work places and other institutions:

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. Definition:

For this purpose, sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as:

a) physical contact and advances;

b) a demand or request for sexual favours;

c) sexually coloured remarks;

d) showing pornography;

e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps:

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.
6. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.
7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counselor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government department concerned of the complaints and action taken by them.

The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative:

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness:

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. Third Party Harassment:

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.

MANU/SC/0081/1964

Back to Section 361 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 46 of 1963

Decided On: 09.09.1964

S. Varadarajan Vs. State of Madras

Hon'ble Judges/Coram:
J.R. Mudholkar, K. Subba Rao and M. Hidayatullah, JJ.

JUDGMENT
J.R. Mudholkar, J.

1. This is an appeal by special leave from the judgment of the High Court of Madras affirming the conviction of the appellant under s. 363 of the Indian Penal Code and sentence of rigorous imprisonment for one year awarded by the Fifth Presidency Magistrate, Egmore, Madras.

2. Savitri, P.W. 4, is the third daughter of S. Natarajan, P.W. 1, who is an Assistant Secretary to the Government of Madras in the Department of Industries and Co-operation. At the relevant time, he was living on 6th Street, Lake Area, Nungumbakkam, along with his wife and two daughters, Rama, P.W. 2 and Savitri, P.W. 4. The former is older than the latter and was studying the Madras Medical College while the latter was a student of the second year B.Sc. class in Ethiraj College.

3. A few months before September 30, 1960 Savitri became friendly with the appellant Varadarajan who was residing in a house next door to that of S. Natarajan. The appellant and Savitri used to carry on conversation with each other from their respective houses. On September 30, 1960 Rama found them talking to each other in this manner at about 9.00 A.M. and also been her talking like this on some previous occasions. That day she asked Savitri why she was talking with the appellant. Savitri replied saying that the she wanted to marry the appellant. Savitri's intention was communicated by Rama to their father when he returned home at about 11.00 A.M. on that day. Thereupon Natarajan questioned her. Upon being questioned Savitri started weeping but did not utter word. The same day Natarajan took Savitri to Kodambakkam and left her at the house of a relative of his K. Natarajan, P.W. 6, the idea being that she should be kept as far away from the appellant as possible for some time.

4. On the next day, i.e., on October 1, 1960 Savitri left the house of K. Natarajan at about 10.00 A.M. and telephoned to the appellant asking him to meet her on a certain road in

that area and then went to that road herself. By the time she got there the appellant had arrived there in his car. She got into it and both of them then went to the house of one P. T. Sami at Mylapore with a view to take that person along with them to the Registrar's office to witness their marriage. After picking up Sami they went to the shop Govindarajulu Naidu in Netaji Subhas Chandra Bose Road and appellant purchased two gundus and Tirumangalyam which were selected by Savitri and then proceeded to the Registrar's office. Thereafter the agreement to marry entered into between the appellant and Savitri, which was apparently written there, was got registered. Thereafter the appellant asked her to wear the articles of jewellery purchased at Naidu's shop and she accordingly did so. The agreement which these two persons had entered into was attested by Sami as well as by one P. K. Mar, who was a co-accused before the Presidency Magistrate but was acquitted by him. After the document was registered the appellant and Savitri went to Ajanta Hotel and stayed there for a day. The appellant purchased a couple of sarees and blouses for Savitri the next day and then they went by train to Sattur. After a stay of a couple of days there, they proceeded to Sirukulam on October 4, and stayed there for 10 or 12 days. Thereafter they went to Coimbatore and then on to Tanjore where by they were found by the police who were investigating into a complaint of kidnapping made by S. Natarajan and were then brought to Madras on November 3rd.

5. It may be mentioned that as Savitri did not return to his house after she went out on the morning of October 1st, K. Natarajan went to the house of S. Natarajan in the evening and enquired whether she had returned home. On finding that case she had not, both these persons went to the railway station and various other places in search of Savitri. The search having proved fruitless S. Natarajan went to the Nungumbakkam Police Station and lodged a complaint stain there that Savitri was a minor on that day and could not be found. Thereupon the police took up investigation and ultimately apprehended, as already stated, the appellant and Savitri at Tanjore.

6. It is not disputed that Savitri was born on November 13, 1942 and that she was a minor on October 1st. The other facts which have already been stated are also not disputed. A two-fold contention was, however, raised and that was that in the first place Savitri had abandoned the guardianship of her father and in the second place that appellant in doing what he did, did not in fact take away Savitri out of the keeping of her lawful guardian.

7. The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that "taking" of Savitri out of the keeping of her father has not been established. The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of s. 361 of the Indian Penal code:

"Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

8. It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what, we have to find out is whether the part plays by the appellant amounts to "taking", out of the keeping of the lawful guardian, of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishment or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her own side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge if attaining majority and was capable of knowing what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing form a rural area. The learned Judge of the High Court has referred to the decision In re: Abdul Sathar 54 M.L.J. 456 in which it was held that where the evidence disclosed that, but for something which the accused consented to do and ultimately did, a minor girl would not have left

her husband's house, or would not have been able to leave her husband's house, there was sufficient taking in law for the purpose of s. 363 and expressing agreement with this statement of the law observed: "In this case the minor, P.W. 4, would not have left the house but for the promise of the appellant that he would marry her." Quite apart from the question whether this amounts to blandishment we may point out that this is not based upon any evidence direct or otherwise. In Abdul Sathar's case 54 M.L.J. 456 Srinivasa Aiyangar J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed:

"If a girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or brought about by something that the accused did."

9. In the light of this observation the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a court of fact could find against the accused. This decision, therefore, is of little assistance in this case because, as already stated, every essential step was taken by Savitri herself: it was she who telephoned to the appellant and fixed the rendezvous; she walked up to that place herself and found the appellant waiting in the car; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently, her one and only intention was to become the appellant's wife and thus be in a position to be always with him.

10. The learned Judge also referred to a decision in R. V. Kumarasami 2 M.H C.R. 331 which was a case under s. 498 of the Indian Penal Code. It was held there that if whilst the wife was living with her husband, a man knowingly went away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, it would be a taking from the husband within the meaning of the section.

11. It must, however, be borne in mind that there is a distinction between "taking: and allowing a minor to accompany a person. The two expression are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

12. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

13. The case before us is not of a kind considered by Srinivasa Aiyangar J., in that the facts established do not show that Savitri would not have left K. Natarajan's house in which her father had left her without the active help of the appellant.

14. In the next decision, that is, that in Kumarasami's case 2 M.H.C.R 331 upon which the High Court has relied, it was observed that the fact that a married woman whom the accused was alleged to have taken or enticed away for certain purposes was a temptress, would make no difference and the accused who yielded to her solicitations would be guilty on an offence under s. 498(b) of the Penal Code. This decision was approved of in In re: Sundara Dass Tevan 4 M. H.C.R. 20, a case to which also the High Court has referred. The basis of both these decisions appears to be that depriving the husband of his proper control over his wife, for the purpose of illicit intercourse is the gist of the offence of taking away a wife under the same section and that detention occasioning such deprivation may be brought about simply by the influence of allurement and blandishment. It must be borne in mind that while Sections 497 498, I.P.C. are meant essentially for the protection of the rights of the husband, s. 361 and other cognate sections of the Indian Penal Code are intended more for the protection of the minors and persons of unsound mind themselves than of the rights of the guardians of such persons. In this connection we may refer to the decision in State v. Harbansing Kisansing MANU/MH/0098/1954: AIR1954Bom339. In that case Gajendragadkar J., (as he then was) has, after pointing out what we have said above, observed:

"It may be that the mischief intended to be punished party consists in the violation or the infringement of the guardians' right to keep their wards under their care and custody; but the more important object of these provisions undoubtedly is to afford security and protection to the wards themselves".
15. While, therefore, it may perhaps be argued on the basis of the two Madras decisions that the word "taking" occurring in ss. 497 and 498 of the Indian Penal Code should be given a wide interpretation so as to effectuate the object underlying these provisions there

is not reason for giving to that word a wide meaning in the context of the provisions of s. 361 and cognate sections.

16. The last case relied upon by the High Court is Ramaswami Udayar v. Raju Udayar (1952) M.W.N. which is also a case under s. 498, I.P.C. In that case the High Court has followed the two earlier decisions of that Court to which we have made reference but in the course of the judgment the learned judge has observed that it is not open to a minor in law to abandon her guardian, and that, therefore, when the minor leaves the guardian of her own accord and when she comes into the custody of the accused person, it is not necessary that the latter should be shown to have committed an overt act before he could be convicted under s. 498. The learned Judge has further observed:

"A woman's free will, or her being a free agent, or walking out of her house of her own accord are absolutely irrelevant and immaterial for the offence under s. 498."
17. Whatever may be the position with respect to an offence under that section and even assuming that a minor cannot in law abandon the guardianship of her lawful guardian, for the reason which we have already stated, the accused person in whose company she is later found cannot be held guilty of having taken her out of the keeping of her guardian unless something more is established.

18. The view which we have taken accords with that expressed in two decisions reported in Cox's Criminal Cases. The first of them is Reg. v. Christian Olifier (X Cox's Criminal Cases, 402). In that case Baron Bramwell stated the law of the case to the jury thus:

"I am of opinion that if a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parent's custody, yet his not doing so is no infringement of this Act of Parliament (24 & 25 Vict. c. 100, s. 55) for the Act does not say he shall restore her, but only that he shall not take her away."
19. The jury returned a verdict of guilty in this case because the girl's evidence showed that the initial formation of her intention to leave her father's house was influenced by the solicitation of the accused and by his promise to marry her.

20. The other case is Rex v. James Jarvis (XX Cox's Criminal Cases, 249). There Jelf J., has stated the law thus to the jury:

"Although there must be a taking, yet it is quite clear that an actual physical taking away of the girl is not necessary to render the prisoner liable to conviction; it is sufficient if he persuaded her to leave her home or go away with him by persuasion or blandishments. The question for you is whether the active part in the going away together was the act of the prisoner or of the girl; unless it was that of the prisoner, he is entitled to your verdict. And, even if you do not believe that he did what he was morally bound to do-namely,

tell her to return home-that fact is not by itself sufficient to warrant a conviction: for if she was determined to leave her home, and showed prisoner that that was her determination, and insisted on leaving with him- or even if she was so forward as to write and suggest to the prisoner that he should go away with her, and he yielded to her suggestion, taking no active part in the matter, you must acquit him. If, however, prisoner's conduct was such as to persuade the girl, by blandishments or otherwise, to leave her home either then or some future time, he ought to be found guilty of the offence of abduction."

21. In this case there was no evidence of any solicitation by the accused at any time and the jury returned a verdict of 'not guilty. Further, there was no suggestion that the girl was incapable of thinking for herself and making up her own mind.

22. The relevant provisions of the Penal Code are similar to the provisions of the Act of Parliament referred to in that case.

23. Relying upon both these decisions and two other decisions, the law in England is stated thus in Halsbury's Laws of England, 3rd edition, Vol. 10. at p. 758:

"The defendant may be convicted, although he took no part in the actual removal of the girl, if he previously solicited her to leave her father, and afterwards received and harboured her when she did so. If a girl leaves her father of her own accord, the defendant taking no active part in the matter and not persuading or advising her to leave, he cannot be convicted of this offence, even though he failed to advise her not to come, or to return, and afterwards harboured her."

24. On behalf of the appellant reliance was placed before us upon the decision in Rajappan v. State of Kerala I.L.R. [1960] Ker 481 and Chathu v. Govindan Kutty I.L.R. [1957] Ker 591. In both the cases the learned Judges have held that the expression "taking out of the keeping of the lawful guardian" must signify some act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the guardian; or, in other words an act but for which the person would not have gone out of the keeping of the guardian as he or she did. In taking this view the learned Judge followed, amongst other decisions, the two English decisions to which we Have adverted. More or less to the same effect is the decision in Nura v. Rex MANU/UP/0002/1949: AIR1949All710. We do not agree with everything that has been said in these decisions and would make it clear that the mere circumstance that the act of the accused was not the immediate cause of the girl leaving her father's protection would not absolve him if he had at an earlier stage solicited her or induced her in any manner to take this step.

25. As against this Mr. Ranganadham Chetty appearing for the State has relied upon the decisions in Bisweswar Misra v. The King I.L.R. [1949] Cutt. 194 and In re: Khalandar Saheb I.L.R. [1955] Andh 290. The first decision is distinguishable on the ground that it was found that the accused had induced the girl to leave the house of her lawful guardian. Further the learned Judges have made it clear that mere passive consent on the part of a

person in giving shelter to the minor does not amount to taking or enticing of the minor but the active bringing about of the stay of the minor in the house of a person by playing upon the weak and hesitating mind of the minor would amount to "taking" within the meaning of s. 361. In the next case, the act of the accused, upon the facts of the case was held by the Court to fall under s. 366, I.P.C. and the decision in Nura v. Rex MANU/UP/0002/1949: AIR1949All710 on which reliance has been placed on behalf of the appellant is distinguished. Referring to that case it was observed by the Court:

"Reliance is placed upon the decision of Mustaq Ahmed J. in Nura v. Rex wherein the learned Judge observed that where a minor girl voluntarily leaves the roof of her guardian and when out of his house, comes across another who treats her with kindness, he cannot be held guilty under section 361, Indian Penal Code. This decision cannot help the accused for, on the facts of that case, it was found that the girl went out of the protection of her parents of her own accord and thereafter went with the accused..... In the present case it is not possible to hold that she is not under the guardianship of her father. In either contingency, namely, whether she went out to answer calls of nature, or whether she went to the house of the accused pursuant to a previous arrangement, she continued to be under the guardianship of her father. On the evidence, it is not possible to hold that she abandoned the guardianship of her father and, thereafter, the accused took her with him."

26. After pointing out that there is an essential distinction between the words "taking" and "enticing" it was no doubt observed that the mental attitude of the minor is not of relevance in the case of taking and that the word "take" means to cause to go, to escort or to get into possession. But these observations have to be understood in the context of the facts found in that case. For, it had been found that the minor girl whom the accused was charged with having kidnapped had been persuaded by the accused when she had gone our of her house for answering the call of nature, to go along with him and was taken by him to another village and kept in his uncle's house until she was restored back to her father by the uncle later. Thus, here there was an element of persuasion by the accused person which brought about the willingness of the girl and this makes all the difference. In our opinion, therefore, neither of these decisions is of assistance to the State.

27. We are satisfied, upon the material on record, that no offence under s. 363 has been established against the appellant and that he is, therefore, entitled to acquittal. Accordingly we allow the appeal and set aside the conviction and sentence passed upon him.

28. Appeal allowed.

MANU/SC/0191/1973

Back to Section 363 of Indian Penal Code, 1860

Back to Section 366 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 18 of 1970

Decided On: 02.05.1973

Thakorlal D. Vadgama Vs. The State of Gujarat

Hon'ble Judges/Coram:
I.D. Dua and K.K. Mathew, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: R.H. Dhebar and S.K. Dholakia, Advs
For Respondents/Defendant: R.L. Kohli and S.P. Nayar, Advs.

JUDGMENT
I.D. Dua, J.

1. This appeal by special leave is directed against the judgment and order of the Gujarat High Court allowing in part the appellant's appeal from his conviction by the Court of the Sessions Judge, Jamnagar under Sections 366 and 376, I.P.C. The High Court acquitted him of the offence under Section 375, I.P.C. but maintained his conviction and sentence under Section 366, I.P.C.

2. According to the prosecution case, the offence under Section 366, I.P.C., took place on January 16, 1967 and the offence of rape with which he was charged was committed on the night between the 16th and 17th January, 1967. As observed by the High Court, the background which led to the culmination resulting in the commission of the offences leading to the appellant's trial has been traced by Mohin, the victim of the offences, in the prosecution version, to the latter part of the year 1965. The appellant, an industrialist, had a factory at Bunder Road for manufacturing oil engines and adjoining the factory was his residential bungalow. During the bombardment of Jamnagar by Pakistan in 1965, Mohini's parents came to reside temporarily at Dhrol near Jamnagar. The appellant came to be introduced to that family and on December 18, 1965, which was Mohini's birth-day, the appellant presented her with a parker pen. It may be pointed out that Mohini was at that time a school going girl below 15 years of age. She kept the pen for about 2 to 3 days, but at the instance of her mother, returned it to the appellant. Thereafter, the appellant went to Baroda in his car and he took with him, Mohini, her father Liladhar Jivraj, his manager Tribhovandas, Malti, daughter of Tribhovandas, who was about 12 years old, and Harish, a younger brother of Malati. At Baroda, the appellant negotiated some transaction with regard to the purchase of some land for the purpose of installing a

factory there. It appears that there was some kind of impression created in the mind of Mohini's father that he would be employed by the appellant as a manager of the factory to be installed at Baroda. The party spent a night at Baroda and next morning started on their return journey to Jamnagar. During Christmas of 1965 the appellant had a trip to Bombay and during this trip also he took with him the same party, viz. Mohini, her father, Tribhovandas and Tribhovandas' daughter and son. In Bombay they stayed in Metropolitan Hotel for 2 nights. According to the prosecution story it was during these two nights that Mohini, Malati and the appellant slept in one room, whereas Mohini's father, Malati's father and Harish slept in another room. On these two nights the appellant is stated to have had sexual inter-course with Mohini. During this trip to Bombay the appellant is also said to have purchased two skirts and waste bands for Mohini and Malati. After their return to Jamnagar, according to the prosecution story, the appellant had sexual inter-course with Mohini once in the month of March, 1965 when she had gone to the appellant's residential bungalow at about 7.00 P.M. Indeed, Mohini used to visit the appellant's place off and on. During the summer vacation in 1966 the appellant had a trip to Mahabaleshwar in his car. On this occasion, along with Mohini he took her two parents as well as also his own daughter Rekha. On their way to Mahabaleshwar, they stopped at Bombay for two days. After staying at Mahabaleshwar for two days, on their return journey they again halted at Bombay for a night, and then proceeded to Mount Abu. At Mount Abu they stayed for one day and all of them slept in one room. At about 3.00 a.m. when Mohini's mother got up for going to bathroom and switched on the light, she noticed that the appellant was sleeping by Mohini's side with his hand on her head. Mohini's mother restrained herself and did not speak about what she had seen because the appellant had requested her not to do so. Next morning, the party went to Ambaji from where they returned to Jamnagar. At Jamnagar Mohini's mother informed her husband about what she had seen during the night at Mount Abu. Mohini's father got annoyed and rebuked Mohini. Her mother also warned her against repetition of such conduct. Mohini apologised. The appellant, on coming to know of the feelings of Mohini's parents, told her father that Mohini was just like his own daughter Rekha to him and that he would even go to Dattatraya temple and swear by God to that effect. The appellant is stated to have actually taken Mohini's father, Mohini and Rekha to Dattatraya temple in Jamnagar and placing his hands on the heads of Mohini and Rekha swore that they were his daughters. Even after this incident in Dattatraya temple, the appellant once met Mohini when she was returning from her school and took her to his own bungalow in his car. There, he had sexual intercourse with her. It seems that Mohini's parents came to know about this incident and they rebuked her. Mohini's parents also started taking precaution of not sending her alone to the school. From July, 1966 onwards either the maid-servant or Mohini's mother herself would accompany her to the school. The appellant is stated to have made an effort to contact Mohini during this period. He called her at his house on Saturday, September 24, 1966. Mohini's mother having come to know of this behavior on the part of the appellant, wrote to him a letter dated September 26, 1966 requesting him to desist from his activities of trying to contact Mohini. Apparently, after this letter there was no contact between Mohini and the

appellant in Jamnagar. In October, 1966, however, Mohini had gone to Ahmedabad in school camp and there the appellant contacted her and took her out for a joy ride in company with two of her girl friends. Thereafter, in the months of November and December, 1966 nothing particular seems to have happened. According to the appellant, however, during those two months, Mohini had written letters to him complaining of ill-treatment by her parents and expressing her desire to leave her parent's house. We would refer to those letters a little later. Early in January, 1967, the appellant is alleged to have told Mohini to come to his Bungalow. On January 16, 1967, Mohini started for her school with a school book and two exercise books, in the company of her mother Narmada who had to go to Court for some work. Upto the Court premises, they both went together where Smt. Narmada stayed on and Mohini proceeded to her school. Instead of going to her school, she apparently went to the appellant's factory according to a previous arrangement. There the appellant met her and took her inside his motor garage. From there she was taken to the attached room and made to write two or three letters on his dictation. She did so while sitting on two tyres. These letters were stated to have been addressed to her father, to the District Superintendent of Police of Jamnagar, and to the appellant himself. These letters contained complaints of ill-treatment of Mohini by her father and mother and information about the fact that she was leaving for Bombay after taking Rs. 250/- from the appellant. According to the postal stamps, these letters appeared to have been cleared from the post office at 2.30 p.m. on January 16, 1967. Thereafter, according to the prosecution version, Mohini was made by the appellant to sit in the dicky of his car which was taken to some place, Mohini remaining in the dicky for some hours. She was then taken to the office of his factory at mid-night and there he had sexual inter-course with her against her will. After the sexual inter-course, there was some sound of motor car entering the compound whereupon the appellant took her inside the celler in the office and asked her to sit there. After about an hour the appellant came and took her from the celler to his garage where she was again made to remain in the dicky. It appears that the following morning the appellant told Mohini that he was called to the police station. He went there in his car with Mohini in the dicky and then he and the police man came back to his Bungalow. The police man went inside the bungalow and the appellant parked the car in his garage. He took Mohini out of the dicky and told her to go to the inner room of the garage. This inner room had four doors. One of them opened on the main road and another in the garage. Feeling thirsty, Mohini went out in the garden and saw a Mali working there whom she asked for water. It appears that at about 6.30 p.m. the appellant came to the inner room and promised to bring some food, water and clothes for Mohini, telling her to wait for him in that room. After some time, he returned with food, water and clothes. Mohini changed her clothes washed her face and started taking her meal. While doing so, she felt that some motor car had come into the compound. The appellant told her that police had come and, therefore, she must leave through the back door and go to the road-side directing her to go towards Gandhinagar and wait there for him. Leaving her food unfinished, Mohini went out and waited near Gandhinagar at a distance of about one furlong from the appellant's garage. It was here that she was traced by the Police Sub-Inspector Chaudhary who came there with the

appellant in the latter's car at about 9.00 p.m. From the dicky of the appellant's motor car, one bedding and some clothes belonging to Mohini, viz., skirt, blouse, nicker and petticoat were found. These clothes were wet. Her school books and two exercise books were also found there. In the inner room of the garage was found unfinished food and utensils which bore the name of the appellant. Mohini was sent for medical examination by the Lady Medical Officer, but the Medical Officer did not find any symptoms of forcible sexual inter-course.

3. Turning now to the scene at the house of Mohini's parents, after her mother Smt. Narmada finished with the court work, she returned to her house. They had a visitor Dinkerrai from Rajkot. While they were all at home some school girls informed Mohini's mother that Mohini had not gone to the school that day. Smt. Narmada at once suspected the appellant and therefore went to his house along with Dinkerrai. On enquiry from the appellant, he expressed his ignorance about Mohini's whereabouts. He, however, admitted that she had come to him for money but had gone away after taking Rs. 250/- from him. This according to him had happened between 4 and 5.30 p.m. on that day viz. January 16, 1967. Mohini's father then lodged complaint with the police at about 7.20 p.m. on that very day. The Police Sub-Inspector visited the appellant's bungalow in the night between 16th and 17th of January and searched the bungalow but did not find Mohini there. Thereafter, the Sub-Inspector again went to the appellant's bungalow on the morning of the 17th January and attached some letters and other papers produced by the appellant. He also went to the appellant's office and inspected the books of account for the purpose of verifying whether there was any entry about the payment of Rs. 250/- to Mohini. Meanwhile, Mohini's father Liladhar received a letter bearing post mark dated 16-1-1967 which was produced by him before the Police Sub-Inspector. On the night of 17th January, Police Sub-Inspector Chaudhary went to the appellant's bungalow and it was this time that Mohini heard the sound of a motor car and left the garage at the instance of the appellant leaving unfinished the food she was eating. In the inner room, next to the garage, were found Mohini's clothes, a lady's purse, one comb, 2 plastic buckets full of water, one lantern and some other articles. From the dicky of the appellant's car on search were also found skirt, one blouse, a petticoat and one book and two exercise books as already noticed. All these articles belonged to Mohini. This in brief is the prosecution story.

4. The appellant admitted that he had developed intimate relations with the family of Mohini, but denied haying presented to her a parker pen in December, 1965. He also admitted his trips to Baroda and Bombay in December, 1965 when he took with him Mohini, her father Malati, her mother and Malati's brother. He admitted having stayed in Metropolitan Hotel at Bombay but denied that he, Mohini and Malati had slept in one room and that he had sexual inter-course with Mohini during their stay in this hotel. He also denied having sexual inter-course with Mohini in the month of March, 1966. He further denied having purchased skirts and waste bands for Mohini and Malati in Bombay in December, 1965. The trip to Mahabaleshwar during summer vacation and also

the trip to Mount Abu were admitted by the appellant but he denied having been found sleeping with Mohini by Mohini's mother at Mount Abu. He admitted the incident of Dattatraya temple in Jamnagar but this he explained was due to the fact that Mohini's parents had heard some false rumours about his relations with Mohini, and that he wanted to remove their suspicion. He further admitted that in the evening of 16th January, Narmada and Dinkerrai had approached him to inquire about Mohini's whereabouts but according to him Mohini had merely taken Rs. 250/from him without telling him as to where she was going. He denied having told Dinkerrai that Mohini had gone to Bombay. According to his version, Mohini approached him on January 16, 1967 and requested him to keep her at his house for about 15 days because she was tired of harassment at the hands of her parents. She added that she would make her own arrangements after 15 days. The appellant expressed his inability to keep her in his house and suggested that he would take her to her parents' house and persuade them not to harass her. She, however, was firm and adamant in not going back to her parents' house at any cost. According to the appellant, the reason for falsely involving him in this case was that Mohini's father wanted the appellant to appoint him as a manager at Baroda where the appellant was planning to start a new factory. The appellant having declined to do so because he had many senior persons working in his office, Mohini's father felt displeased and concocted the false story to involve him.

5. The trial court in an exhaustive judgment after considering the case from all relevant aspects came to the conclusion that Mohini was born on September 18, 1951 and that the medical evidence led in the case also showed that she was above 14 and below 17 years of age during the relevant period. She was according held to be a minor on the day of the incident. If, therefore, the appellant had sexual intercourse with her even with her consent, he would be guilty of rape. Mohini was believed by the trial court when she stated that the appellant had sexual inter-course with her at the earliest possible opportunity as this was corroborated by the medical evidence. The trial court found no reason for her to stake her whole life by making false statement about her chastity, nor for her parents to encourage or induce her to come out with a false story, there being no enmity between the appellant and the family of Mohini with respect to any matter, which would induce them to charge him falsely. The appellant's explanation that as a result of his refusal to appoint Mohini's father as a Manager of his factory at Baroda, she had, in collusion with the parents, concocted this story was considered by the trial court to be too far-fetched to be worthy of belief. In fact, according to the trial court it was the appellant who had made a suggestion about appointing Mohini's father as his manager at Baroda and this explained why Mohini's father was taken by the appellant to Baroda when he paid a visit to that place for purchasing land. The court found no other cogent reason for taking Mohini's father to Baroda. The trial court in express terms disbelieved the appellant's explanation. That court also came to the conclusion, on consideration of the evidence and bearing in mind the common course of human conduct, that it was the appellant who had induced Mohini to leave her parents' house on the day in question and to have sexual inter-course with her. The trial court also considered that part of

Mohini's statement that when she went to the appellant's place, he told her to return to her school, suggesting that he would take her to her parents and persuade them not to harass her and, it expressed its undoubted opinion that the appellant had used those words to make a show of being her well-wisher, so that, if some proceedings were started against him, he could put forth the defence that he had kept Mohini at his house only at her own request and not with the object of keeping her out of her parents' custody for having sexual inter-course with her. The trial court got support for this view from the letters got written by the appellant in Mohini's handwriting. This is what that court said in this connection:

There is therefore, no doubt in my mind that the accused had prepared all this material so that in case criminal proceedings were taken against him by Mohini's parents, he may be able to lead plausible defence of his innocence. Nothing prevented the accused from returning Mohini to her parents. In any case, even if it were held that it was not the duty of the accused to return Mohini to her parents, it can equally he said that it was not legal on the part of the accused to secretly confine Mohini at his place and have sexual intercourse with her.

The trial court then quoted the following passage from the case of Christian Olivier, reported in 10 Cox. 420:-

Although she may not leave at the appointed time and although he may not wish that she should have left at that particular time, yet if, finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment he is also guilty, if his persuasion operated on her mind so as to induce her to leave.

On the basis of this observation, the trial court held that in the present case, the inducement given by the appellant operated on Mohini's mind to stay in his house and do as he told her to do. The trial court on a consideration of the circumstances of the case and of the subsequent conduct of the appellant came to the definite conclusion that Mohini had gone to the appellant's place at his instance and subsequently taking advantage of that position she was persuaded by the appellant to stay there. The appellant was accordingly held guilty under Sections 366 and 376, I.P.C. Under Section 366, I.P.C., he Was sentenced to rigorous imprisonment for 18 months and under Section 376, I.P.C. to rigorous imprisonment for two years and also to fine of Rs. 500/- and in default, to further rigorous imprisonment for six months. The substantive sentences of imprisonment were to run concurrently.

6. On appeal by the appellant, the High Court also considered the matter at great length and in a very exhaustive judgment, the appellant's conviction under Section 376 was set aside and he was acquitted of that offence. This acquittal was ordered because the charge being only for sexual inter-course on the night of January 16, 1967, the evidence of Mohini in support of that offence was not accepted as safe and free from all reasonable doubt, in the absence of independent corroboration. In adopting this approach the High Court seems to us to have been somewhat over indulgent and unduly favourable to the

appellant with respect to the offence under Section 376, I.P.C. But there being no appeal against acquittal, we need say nothing more about it. The appellant's conviction for the offence punishable under Section 366, I.P.C. and the sentence for that offence were, however, upheld. The High Court felt that the story of Mohini with regard to the appellant's call about 3 or 4 days before the incident in question was so natural and so highly probable that it felt no hesitation in accepting it. The circumstances preceding the incident were considered by the High Court to be sufficiently telling to lend assurance that it was quite safe to act upon her testimony. Her account was considered to be quite truthful and, therefore, acceptable. Mohini's version that the appellant had told her about 3 or 4 days before the incident of January 16, 1967 that he would keep her permanently at his place provided sufficient temptation to the school-going girl like Mohini to go to the appellant leaving her parental home. This was all the more so because in the past year or so, the appellant had treated Mohini very fondly by taking her out on trips to different places in his own car and had also lavishly given her gifts of articles like costly pens and silver band. The High Court also took into consideration the attitude adopted by Mohini's mother in this connection. She had very discretely warned the appellant in a dignified and respectful language to leave Mohini alone and also expressed her disappointment and unhappiness at the manner in which the appellant used to behave towards Mohini. The High Court considered a part of Mohini's version, as to how she was kept in the dicky of the appellant's car on the 16th and 17th January, 1967, to be improbable and to have been exaggerated by her, but this was considered to be due to the fact that, like a school-girl that she was, she introduced an element of sensation in her story. Her complaint about inter-course on this occasion was not accepted for want of independent corroboration. The medical evidence also suggested that there was no presence of spermatozoa when vaginal swab was examined. It was on this reasoning that the offence under Section 376, I.P.C as charged was held not to have been proved beyond doubt. The presence of Mohini in the appellant's house and also in his garage on the 16th and 17th January was held by the High Court to be fully established on the record. The version given by Mohini was held to be fully corroborated by the surrounding circumstances of the case and by the recoveries of various articles belonging to her. The High Court also came to the positive conclusion that there was no unreasonable delay on the part of the investigating authorities to record Mohini's statement. The suggestion on behalf of the appellant that various articles belonging to Mohini and the utensils found in the inner room of the appellant's premises were planted, was rejected outright. The High Court in a very well reasoned judgment with respect to the offence under Section 366, I.P.C. came to the conclusion that the appellant had taken Mohini out of the keeping of her parents (her lawful guardian) with an intention that she may be seduced to illicit inter-course. This is what the High Court observed:-

Having come in contact with the family of Mohini in about November 1965 the appellant cultivated relationship with them to such an extent that he took Mohini, and her parents out on trips in his car spending lavishly by staying in hotels in Ahmedabad, Bombay, Mahabaleshwar and Mount Abu. He also presented Mohini with a parker pen on 18th

December, 1965. Within a few days thereafter he purchased by way of gift to Mohini skirt, silver waist-band which as per unchallenged testimony of Mohini was worth about Rs. 12/-. He was actually found by the side of Mohini in Mohini's bed by Mohini's mother at Mount Abu. His connection with Mohini was suspected and in spite of that as the letters of Mohini show he was in correspondence with her without the knowledge of her parents. Mohini was a school girl of immature understanding having entered her 16th year less than a month before the incident. Out of emotion she wrote letters to the appellant exaggerating incidents of rebuking by her mother and beating. She however was quite normal from 1st January, 1967. The appellant having come to know about the frame of her mind disclosed from the letters of November and December, 1966, took chance to take away this girl from her parents. With that view he told Mohini about 4 days before 16th January, 1967 to come to his house and added that he will keep her with him permanently. This possibly caught the imagination of the girl and the result was that on 16th January she left her father's house with bare clothes on her body and with school books and went straight to the appellant. The appellant in order to see that her view to his factory during day time may not arouse suspicion of other invented the story of giving Rs. 250/- to Mohini and also got written 3 letters by Mohini addressed to himself, the District Superintendent of Police Jamnagar and Mohini's father. He kept her in the garage of his bungalow for 2 days, tried to secret her from police and her parents and had already made attempt on 16th to put police and parents of Mohini on wrong track. There is no scope for an inference other than the inference that Mohini was kidnapped from lawful guardianship, with an intention to seduce her to illicit inter-course. The intention contemplated by Section 366 of the Indian Penal Code is amply borne out by these circumstances. Therefore, the conviction of the appellant under that section is correct and has to be maintained.
As already observed, the appellant was acquitted of the offence under Section 376, I.P.C., but his conviction and sentence under Section 366, I.P.C. was upheld.

7. In this Court, Shri Dhebar addressed very elaborate arguments and took us through considerable part of the evidence led in the case with the object of showing that the conclusions of the two courts below accepting the evidence led by the prosecution with respect to the charge under Section 366, I.P.C. is wholly untrustworthy and no judicial mind could ever have accepted it. After going through the evidence to which our attention was drawn, we are unable to agree with the appellant's learned Counsel. Both the courts below devoted very anxious care to the evidence led in the case and the circumstances and the probabilities inherent in such a situation. They gave to the appellant all possible benefit of the circumstances which could have any reasonable hearing in his favour, but felt constrained to conclude that the appellant was proved beyond reasonable doubt guilty of the offence under Section 366, I.P.C.

8. The appellant's main argument was that it was Mohini who feeling unhappy and perhaps harassed in her parent's house, left it on her own accord and came to the appellant's house for help which he gave out of compassion and sympathy for the

helpless girl in distress. Mohini's parents were, according to the counsel, unreasonably harsh on her on account of some erroneous or imaginary suspicion which they happened to entertain about the appellant's attitude towards their daughter or about the relationship between the two, and that it was primarily her parent's insulting and stern behavior towards her which induced her to leave her parental home. It was contended on this reasoning that the charge under Section 366, I.P.C. was in the circumstances unsustainable.

9. The legal position with respect to an offence under Section 366, I.P.C. is not in doubt. In State of Haryana v. Raja Ram MANU/SC/0262/1972: 1973CriLJ651., this Court considered the meaning and scope of Section 361, I.P.C. It was said there:-

The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor... out of the keeping of the lawful guardian of such minor" in Section 361, are significant. The use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control: further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section.
In the case cited reference has been made to some English decisions in which it has been stated that forwardness on the part of the girl would not avail the person taking her away from being guilty of the offence in question and that if by moral force a willingness is created in the girl to go away with the former, the offence would be committed unless her going away is entirely voluntary. Inducement by previous promise or persuasion was held in some English decision to be sufficient to bring the case within the mischief of the statute. Broadly, the same seems to us to be the position under our law. The expression used in Section 361, I.P.C. is "whoever takes or entices any minor". The word "takes" does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, "to cause to go", "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle} depending for their success on the mental state of the person at the time when the inducement is intended to operate.

This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices", as used in Section 361, I.P.C. are, in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361, I.P.C. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him. The question truly falls for determination on the facts and circumstances of each case. In the case before us, we cannot ignore the circumstances ill which the appellant and Mohini came close to each other and the manner in which he is stated to have given her presents and tried to be intimate with her. The letters written by her to the appellant mainly in November, 1966 (Exhibit p. 20) and in December, 1966 (Exhibit p. 16) and also the letter written by Mohini's mother to the appellant in September, 1966 (Exhibit p. 27) furnish very important and essential background in which the culminating incident of January 16th and 17th, 1967 has to be examined. These letters were taken into consideration by the High Court and in our opinion rightly. The suspicion entertained by Mohini's mother is also, in our opinion, relevant in considering the truth of the story as narrated by the prosecutrix. In fact, this letter indicates how the mother of the girl belonging to a comparatively poorer family felt when confronted with a rich man's dishonourable behavior towards her young, impressionable, immature daughter; a man who also suggested to render financial help to her husband in time of need. These circumstances, among others, show that the main substratum of the story as revealed by Mohini in her evidence, is probable and trustworthy and it admits of no reasonable doubt as to its truthfulness. We have, therefore, no hesitation in holding that the conclusions of the two courts below with respect to the offence under Section 366, I.P.C. are unexceptionable. There is absolutely no ground for interference under Article 136 of the Constitution.

10. On the view that we have taken about the conclusions of the two courts below on the evidence, it is unnecessary to refer to all the decisions cited by Shri Dhebar. They have all proceeded on their own facts. We have enunciated the legal position and it is unnecessary to discuss the decisions cited. We may however briefly advert to the decision in 5. Varadarajan v. State of Madras MANU/SC/0081/1964: 1965CriLJ33., on which Shri Dhebar placed principal reliance, Shri Dhebar relied on the following passage at page 245 of the report:-

It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what, we have to find out is whether the part played by the appellant amounts to "taking", out of the keeping of the lawful guardian of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan, she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant.
From this passage, Shri Dhebar tried to infer that the case before us is similar to that case and, therefore, Mohini herself went to the appellant and the appellant had absolutely no involvement in Mohini's leaving her parents' home. Now the relevant test laid down in the case cited is to be found at page 248:-

It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what, she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.
11. It would however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part, in our opinion, falls short of an inducement to the

minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to 'taking'".

It is obvious that the facts and the charge with which we are concerned in the present case are not identical with those in Varadarajan's case (supra). The evidence of the constant behavior of the appellant towards Mohini for several months preceding the incident on the 16th and 17th January 1967 completely brings the case within the passage at Section 248 of the decision cited. We have before us ample material showing earlier allurements and even of the appellant's participation in the formation of Mohini's intention and resolve to leave her father's house. The appellant's conviction must, therefore, be upheld.

12. In so far as the question of sentence is concerned, we are wholly unable to find any cogent ground for interference. The conduct and behavior of the appellant in going to the temple and representing that Mohini was like his daughter merely serves to add to the depravity of the appellant's conduct, when once we believe the evidence of Mohini with respect to the offence under Section 366, I.P.C Though the appellant has been acquitted of the offence of rape, for which he was also charged, we cannot shut our eyes to his previous improper intimacy with Mohini on various occasions as deposed by her. They were not taken into account as substantive evidence of rape on earlier occasions for reasons best known to the prosecution and the charge under Section 376, I.P.C. was not framed with respect to the earlier occurrences. But the previous conduct of the appellant does clearly constitute aggravating factors. The sentence is in our view, already very lenient.

13. This appeal must, therefore, fail and is dismissed.

MANU/SC/0825/2003

Back to Section 376D of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 1265 of 2002

Decided On: 16.10.2003

Bhupinder Sharma Vs. State of Himachal Pradesh

Hon'ble Judges/Coram:
Doraiswamy Raju and Dr. Arijit Pasayat, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Rachna Gupta, Adv
For Respondents/Defendant: J.S. Attri and Pramod Kumar Yadav, Advs.

JUDGMENT
Arijit Pasayat, J.

1. Enhancement of sentence from four years RI as awarded by the trial Court, to 10 years as done by the Himachal Pradesh High Court for an offence of rape punishable under Section 376 of the Indian Penal Code 1860, (in short 'the IPC') is the subject matter of challenge in this appeal.
2. We do not propose to mention name of the victim. Section 228-A of the Indian Penal Code, 1860 (in short the "IPC") makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is the restriction does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of preventing social victimization or ostracisms of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of High Court or lower Court, the name of the victim should not be indicated. We have chosen to describe her as ' victim' in the judgment.
3. While issuing notice by order dated 8.1.2002 it was clearly indicated by this Court that examination of the case would be restricted to the question of sentence only. Appellant was found guilty of offence punishable under Section 376 read with Section 34 IPC and Section 342 read with Section 34 thereof. The enhancement of sentence was done in respect of offence punishable under Section 376 IPC.
4. Prosecution version as unfolded during trial is that the victim aged about 16 years had gone to Solan in 1998 to purchase medicines for her ailing grandfather. She had gone to Solan for the first times and reached the bus stand at about 2.00 p.m. After having alighted

from the bus, she enquired from a lady as to where a particular medicine shop was located. The lady stated ignorance. At this juncture, two persons came there and asked her to accompany them in a three-wheeler as they were both going to the concerned shop. The victim was taken by two boys namely, accused Ashish Kanwar and Suresh to an isolated place in a jungle. The three-wheeler was sent back with a direction to come in the evening. After gagging her mouth, she was taken to a house which was below the road. There were four more boys. Three out of those were Identified by the victim during trial. The fourth one namely Shanker was not tried as adequate evidence was not available against him. The victim was sexually abused firstly by accused-Ashish followed by accused-Sunil, Suresh and Ruby. The appellant Bhupinder and Shanker (not tried) were in the process of taking off their clothes with a view to perpetuate sexual abuse when the victim managed to escape with only a shirt and ran away bare footed. When she reached near the road, she saw Chaman Lal, ASI who was accompanied by police officers. Meanwhile, two other persons also came there. They were Charanjit (PW-2) and Balvinder (PW-3). When the victim described the ghastly incident to them, she was taken to the room where she had been raped; but, it was found that all six of them had fled away. Police took into possession certain articles. Statement of the victim was recorded and investigation was undertaken. She was sent for medical examination where she was examined by Dr. Radha Chopra (PW-8). All the convicts were arrested during investigation. Forensic Laboratory tests were conducted and charge sheet was placed under Section 376 read with Section 34 IP C and Section 342 read with Section 34 IPC. The accused persons pleaded not guilty. After conclusion of trial all of them were found guilty and convicted to undergo different sentences. The present appellant Bhupinder was sentenced to undergo RI for four years for the offence relatable to Section 376 read with Section 34 IPC and two years for the offence punishable under Section 342 read with Section IPC. All the other accused persons were convicted to RI for 7 years for the offence punishable under Section 376 and 342 IPC.

5. In case of present appellant, a departure was made so far as sentence is concerned because trial Court was of the view that he had not actually committed rape and the victim had escaped before he could do so. The High Court issued suo motu notice of enhancement of sentence in respect of appeals filed by the present appellant Bhupinder and accused Ashish.

6. Before the High Court the evidence of victim was stated to be tainted and it was also submitted that the consent was writ large and, therefore, offence under Section 376 was not made out. It was urged that there was no corroboration to the evidence of the victim and, therefore, the prosecution version should not have been accepted.

7. The High Court found that the evidence was cogent and confirmed the conviction. It took note of Explanation I to Sub-section (2) of Section 376 IPC as the case was one of gang rape. It was observed that not only said Explanation I but also provisions of Section 114-A of the Indian Evidence Act, 1872 (in short the 'Evidence Act') applied. Accordingly it was held that involvement of accused appellant Bhupinder cannot be ruled out though he may not have actually raped the victim. In view of the specific provision relating to sentence and in the absence of any adequate and special reason having been indicated by

the trial Judge, the minimum sentence was to be imposed. With these findings the sentence was enhanced as aforesaid.

8. We have heard learned counsel for the respondent-State. He pointed out that the minimum sentences are prescribed for the offence of rape under Sub-sections (1) and (2). Sub-section 2(1)(g) of Section 376 refers to gang rape, Explanation (1) by a deeming provision makes every one in a group of persons acting in furtherance of their common intention guilty of offence of rape and each is deemed to have committed gang rape, even though one or more of them may not have actually committed rape. Unfortunately, there was no appearance on behalf of the accused-appellant and ultimately after the hearing was over and the judgment was reserved and after considerable time thereof appearance was made by learned counsel for the accused appellant. In view of the continued absence without any justifiable reason, and since the matter was closed after hearing learned counsel for the respondent at length, the learned counsel for the accused-appellant though made a request to grant an opportunity of being heard, was only granted permission to file written notes of argument keeping in view, that the quantum of sentence alone was to be subject matter of consideration.

9. The stand as appears from the memorandum of appeal and the written submissions made is that at the most the appellant can be held guilty of an attempt to commit the offence and not commission of the offence itself. The evidence is also claimed to be unreliable in the absence of corroboration and the telltale symptoms of consent. Regarding quantum of sentence personal and family difficulties are urged, as extenuating circumstances.

10. The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Sections 375, 376, 376-A, 376-B, 376-C, and 376-D. 'Rape' is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, i.e.. 376-A, 376-B, 376-C, and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is "the ravishment of a woman, without her consents by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co, Litt. 123-b); or as expressed more fully,' rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will' (Hale PC 628). The essential words in an indictment for rape are rapist and carnalities cognovit; but carnalities cognovit, nor any other circumlocution without the word rapist, are not sufficient in a legal sense to express rape; 1 Hon. 6, 1a, 9 Edw. 4, 26 a (Hale PC 628). In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's "Criminal Law" 9th Ed. p. 262), In 'Encyclopedia of Crime and Justice' (Volume 4, page 1356) it is stated ".....even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove

sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

11. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery. A similar view was expressed by this Court in Rafiq v. State of U.P. MANU/SC/0196/1980: 1980CriLJ1344 with some anguish. The same was echoed again in Bharwada Bhogiabhai and Hirjibhai v. State of Gujarat MANU/SC/0090/1983: 1983CriLJ1096. It was observed in the said case that in the Indian Setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in Rameshwar v. The State of Rajasthan MANU/SC/0036/1951: 1952CriLJ547 were. "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...".

12. To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her chain of rape will not be believed unless it is corroborated in material particulars as in" the case of an accomplice to a crime. (See State of Maharashtra v. Chandra Prakash Kewalchand Jain MANU/SC/0122/1990: 1990CriLJ889). Why should be the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance.

13. It is unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. Decency and morality in public and social life cart be protected only if Courts deal strictly with those who violate the social norms. Two alternative custodial punishments are provided; one is imprisonment for life or with imprisonment of either description for a term which may extend to ten years. The

latter is the minimum, subject of course to the proviso which authorizes lesser sentence for adequate and special reasons.

14. In cases of gang rape the proof of completed act of rape by each accused on the victim is not required. The statutory intention in introducing Explanation (1) in relation to Section 376(2)(9) appears to have been done with a view to effectively deal with the growing menace of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty of gang rap and convict them under Section 371 IPC - (See Promod Mahto and Ors. v. The State of Bihar MANU/SC/0416/1989: 1989CriLJ1479)

15. Both in cases of Sub-sections (1) and (2) the Court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for 'adequate and special reasons'. If the Court: does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum.

16. In order to exercise the discretion of reducing the sentence the statutory requirement is that the Court has to record 'adequate and special reasons' in the judgment and not fanciful reasons which would permit the Court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but special. What is adequate and special would depend upon several factors and no strait-jacket formula, can be imposed. In the case at hand, only reason which seems to have weighed with the trial Court is that the present accused appellant had not actually committed the rape. That cannot be a ground to warrant lesser sentence; more so in view of Explanation (1) to Sub-section (2) of Section 376. By operation of a deeming provision a member of a group of persons who have acted in furtherance of their common intention per se attract the minimum sentence. Section 34 has been applied by both the trial Court, and the High Court, to conclude that rape was committed in furtherance of common intention. Not only was the accused-appellant present, but also he was waiting for his turn, as evident from the fact that he was in the process of undressing. The evidence in this regard is cogent, credible and trustworthy- Since no other just or special reason was given by the trial Court nor could any such be shown as to what were the reasons to warrant a lesser sentence, the High Court was justified in awarding the mini mum prescribed sentence. That being the position, this appeal is dismissed.

MANU/SC/0030/1957

Back to Section 378 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 51 of 1955

Decided On: 11.02.1957

K.N. Mehra Vs. The State of Rajasthan

Hon'ble Judges/Coram:
B. Jagannadhadas, Parakulangara Govinda Menon and Syed Jaffer Imam, JJ.

JUDGMENT
B. Jagannadhadas, J.

1. The appellant, K. N. Mehra, and one M. Z. Phillips were both convicted under s. 379 of the Indian Penal Code and sentenced to simple imprisonment by the trial Magistrate for eighteen months and a fine of Rs. 750 with imprisonment in default of payment of fine for a further term of four months. The conviction and sentence against them have been confirmed on appeal by the Sessions Judge and on revision by the High Court. The appeal before us is by special leave obtained on behalf of the appellant Mehra alone.

2. Both Mehra and Phillips were cadets on training in the Indian Air Force Academy, Jodhpur. The prosecution is with reference to an incident which is rather extraordinary being for alleged theft of an aircraft, which, according to the evidence of the Commanding Officer, P.W. 1, has never so far occurred. The alleged theft was on May 14, 1952. Phillips was discharged from the Academy just the previous day, i.e., May 13, 1952, on grounds of misconduct. Mehra was a cadet receiving training as a Navigator. The duty of a Navigator is only to guide a pilot with the help of instruments and maps. It is not clear from the evidence whether Phillips also had been receiving training as a Navigator. It is in evidence, however, that he knew flying. On May 14, 1952, Phillips was due to leave Jodhpur by train in view of his discharge. Mehra was due for flight in a Dakota as part of his training along with one Om Prakash, a flying cadet. It is in evidence that he had information about it. The authorised time to take off for the flight was between 6 a.m. to 6.30 a.m. The cadets under training have generally either local fights which mean flying area of about 20 miles from the aerodrome or they may have cross-country exercises and have flight in the country through the route for which they are specifically authorised. On that morning admittedly Mehra and Phillips took off, not a Dakaota, but a Harvard H.T. 822. This was done before the prescribed time, i.e., at about 5 a.m. without authorisation and without observing any of the formalities, which are prerequisites for an aircraft-flight. It is also admitted that some time in the forenoon the same day they landed at a place in Pakistan about 100 miles away from the Indo-Pakistan border. It is in

the evidence of one J. C. Kapoor who was the Military Adviser to the Indian High Commissioner in Pakistan at Karachi, that Mehra and Phillips contacted him in person on the morning of May 16, 1962, at about 7 a.m. and informed him that they had lost their way and force-landed in a field, and that they left the plane there. They requested for his help to go back to Delhi. Thereupon Kapoor arranged for both of them being sent back to Delhi in an Indian National Airways plane and also arranged for the Harvard aircraft being sent away to Jodhpur. While they were thus on their return to Delhi on May 17, 1952, the plane was stopped at Jodhpur and they were both arrested.

3. The case for the prosecution, as appears from the questioning of the trial Magistrate under s. 342 of the code of Criminal Procedure, was that Mehera along with his co-accused Phillips stole away the aircraft Harvard H. T. 822 and few with it to Pakistan with a Harvard intention. The defence, as appears from the answers thereto, was as follows. Mehra went to the aerodrome on the morning of May 14, at the usual time and took off the aircraft along with Phillips and they flew for some time. After a short while the weather became bad and visibility became poor and hence they turned the aircraft back towards Jodhpur-side by guess. They continued what they thought to be the return journey for some time; but finding the petrol nearing exhaustion they force-landed in a field which, on enquiry, they came to know was in Pakistan territory. This defence has not been accepted and the Courts below have held the prosecution case to have been proved.

4. Learned counsel for the appellant, Shri Sethi, attempted to minimise the gravity of the incident by characterising it as a thoughtless prank on the part of a young student aged about 22 years who was receiving training as a flying cadet and that there can be no question of any offence under the Penal Code having been committed, whatever may have been the breach of rules and regulations involved thereby. None of the three courts below who have death with this case were prepared to accept any such suggestion. Indeed in view of the fact that the appellant himself has not put forward any such defence it is impossible to accede to it. The next contention of the learned for the appellant - and that appears also to be the defence of the appellant - is that as a cadet under training he was entitled to take an aircraft on flight, no doubt subject to certain rules and regulations and that what at best happened was nothing more than unauthorised flight by a trainee as part of his training which was due and in which he lost his way. He had to get force-landed in an unknown place and this turned out to be Pakistan territory. The prosecution case, however, is that the flight to Pakistan was intentional and that such flight in the circumstances constituted theft of the aircraft. The main question of fact to be determined, therefore, is whether this was intentional flight into Pakistan territory. It has been strenuously pressed upon us that the trial court was not prepared to accept the story that the flight was an intentional one to Pakistan and hence there was no justification for the appellate court and the High Court to find the contrary. It is also pointed out that Kapoor, the Military Adviser to the Indian High Commissioner in Pakistan, gave evidence that when the appellant and Phillips met him at Karchi on the morning of May 16, 1952, they

told him that they wanted to fly to Delhi with a view to contact the higher authorities there. It was also pointed out that neither the appellant nor Phillips took with them in the flight any of their belongings. Now it is clear from the judgments of the courts below that both High Court on revision, as well as the Sessions Judge on appeal, came to a clear finding on his matter against the appellant. It is true that the trial court said that the suggestion that the appellant and Phillips wanted to go to Delhi was not beyond the realm of possibility. But it gave effect to this possibility only for determining the sentence. The trial Court also seems to have been of the view that the flight was intended for Pakistan as appears from the following passage in its judgment.

"Although the facts on the record point almost conclusively that they were heading towards Pakistan, it is impossible to dismiss the other theory beyond the realm of possibility that they were going to Delhi to contact the higher authorities there."
5. In contemplating this possibility the trial Court seems to have lost sight of the fact that the Delhi theory was not the defence of the appellant in his answers to the questioning under s. 342 of the Code of Criminal Procedure. It was obviously an excuse given to Kapoor in order to impress him that their flight was innocent and to persuade him to sent them back to Delhi instead of to Jodhpur. The significance of this plea, however, is that the suggestion that the flight was by way of a prank or as part of the flying lessons though unauthorised in the particular instance, is clearly untenable.

6. In view however of the somewhat halting finding of the trial Court on this matter, we have been taken through the evidence. It would be enough to mention broadly the facts from which, in our opinion, the conclusion arrived at by the Courts below that the flight was intends for Pakistan is not without sufficient reason and justification. As already stated, the aircraft in which the appellant was scheduled to fly on the morning of May 14, was a Dakota but he took off in a Harvard plane. It is in evidence that this was done between 5 a.m. and 5-30 a.m. i.e., before the prescribed time. The plane had just then been brought out from the hangar in order to be utilised for some other flight in the regular course. Appellant started the engine himself by misrepresenting to P.W. 12, the mechanic on duty at the hangar, that he had the permission of the Section Officer in charge. He was scheduled to have the flight along with another person, a flight-cadet by name Om Prakash. But he did not fly with Om Prakash, but managed to take with him a discharge cadet, Phillips, whom knew flying. Before any aircraft can be taken off, the flight has to be authorised by the Flight Commander. A flight authorisation book and form No. 700 have to be signed by the person who is to take off the aircraft for the flight. Admittedly these have not been done in this case and no authorisation was given. The explanation of the appellant is that this is not uncommon. These, however, are not merely empty formalities but are required for the safety of the aircraft as well as of the persons flying in it. It is impossible to accept the suggestion of the appellant that it is usual to allow trainees to take off the aircraft without complying with these essential preliminaries. No such suggestion has been made in cross-examination to any of the officers, and witnesses, who have been examined for the prosecution. It is in evidence that as soon as the taking off of

the aircraft was discovered, it inevitably attracted the attention of officers and other persons in the aerodrome and that radio signals were immediately sent out to the occupants in the aircraft to bring the same back to once to the aerodrome. But these signals were not heeded. The explanation of the appellant is that the full apparatus of the radio-telephone was not with them in the aircraft and that he did not receive the message. The appellant goes so far as to say that there were also no maps or compass or watch in the aircraft. It is proved, however, on the evidence of the responsible officers connected with the aerodrome and by production of Ex. P-6, that this particular aircraft, before it was brought out from the hangar, had been tested and was airworthy. It is difficult to believe that the flight would have been undertaken without all the equipment being in order. Even according to the evidence of Kapoor, the Military Adviser to the Indian High Commissioner in Pakistan, the appellant and Phillips had told him that the plane was airworthy. The suggestion of the appellant, therefore, in this behalf cannot obviously be accepted. It has been pointed out to us that there is some support in the evidence for the suggestion of force-landing on account of the weather being bad and the visibility being poor. This may be so, but would not explain why the aircraft got force-landed after going beyond the Indo-Pakistan border. There is evidence to show that the appellant Mehra was feeling some kind of dissatisfaction with his course and was contemplating a change. Seeking employment in Pakistan was, according to the evidence, one of the ideas in his mind, though in a very indefinite sort of way. Having regard to all these circumstances and the fact that must be assumed against the appellant that an airworthy aircraft was taken off for flight and that a person like Phillips who knew flying sufficiently well and who was discharged the previous day, was deliberately taken into the aircraft, we are satisfied that the finding of the Courts below, viz., that the flight to Pakistan was intentional and not accidental, was justified. It is, therefore, not possible to treat the facts of this case as being a mere prank or as an unauthorised cross-country flight in the course of which the border was accidentally crossed and force-landing became inevitable.

7. It has been strenuously urged that if the flight was intended to be Pakistan the appellant and Phillips would not have contacted Kapoor and requested him to send them back to Delhi. But this does not necessarily negative their intention at the time of taking off. It may be that after reaching Pakistan the impracticability of their venture dawned upon them and they gave it up. It may be noticed that they were in fact in Pakistan territory for three days and we have nothing but their own word as to how they spent the time on the 14th and 15th. However this may be, if the circumstances are such from which a Court of fact is in a position to infer the purpose and intention and the story of having lost the way cannot be accepted having regard to the aircraft being airworthy, with the necessary equipment, the finding that it was a deliberate flight to Pakistan cannot be said to be unreasonable. It may be true that they did not take with them any of their belongings but this was probably part of the plan in order to take off by surprise and does not exclude the idea of an exploratory flight to Pakistan. We must, therefore, accept the findings of the Courts below. In that view, the only point for consideration is whether the facts held to be proved constitute theft under s. 378 of the Indian Penal Code.

8. Theft is defined in s. 378 of the Indian Penal Code as follows:

"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit left."

9. Commission of theft, therefore, consists in (1) moving a movable property of a person out of his possession without his consent, (2) the moving being in order to the taking of the property with a dishonest intention. Thus (1) the absence of the person's consent at the time of moving, and (2) the presence of dishonest intention in so taking and at the time, are the essential ingredients of the offence of theft. In the Courts below a contention was raised, which has also been pressed here, that in the circumstances of this case there was implied consent to the moving of the aircraft inasmuch as the appellant was a cadet who, in the normal course, would be allowed to fly in an aircraft for purposes of training. It is quite clear, however, that the taking out of the aircraft in the present case had no relation to any such training. It was in an aircraft different from that which was intended for the appellant's training course for the day. It was taken out without the authority of the Flight Commander and, before the appointed time, in the company of a person like Phillips who, having been discharged, could not be allowed to fly in the aircraft. The flight was persisted in, in spite of signals to return back when the unauthorised nature of the flight was discovered. It is impossible to imply consent in such a situation.

10. The main contention of the learned counsel for the appellant, however, is that there is no proof in this case of any dishonest intention, much less of such an intention at the time when the flight was started. It is rightly pointed out that since the definition of theft requires that the moving of the property is to be in order to such taking. "such" meaning "intending to take dishonestly", the very moving out must be with the dishonest intention. It is accordingly necessary to consider what "dishonest" intention consists of under the Indian Penal Code. Section 24 of the Code says that "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". Section 23 of the Code says as follows:

"'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled.

'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property."

11. Taking these two definitions together, a person can be said to have dishonest intention, if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of the property to which a person so losing is legally entitled. It is further clear from the definition that the gain or loss contemplated need not be a total acquisition or total deprivation but it is enough if it is a temporary retention of property by the person wrongfully gaining or a temporary "keeping out" of property from the person legally entitled. This is clearly brought out in illustration (1) to s. 378 of the Indian Penal Code and is uniformly recognised by various decisions of the High Courts which point out that in this respect "theft" under the Indian Penal Code differs from "larceny" in English law which contemplated permanent gain or loss. (See Queen-Empress v. Sri Churn Chungo I.L.R. [1895] Cal. 1017, and Queen-Empress v. Nagappa I.L.R. [1890] Bom. 344. In the present case there can be no reasonable doubt that the taking out of the Harvard aircraft by the appellant for the unauthorised flight has in fact given the appellant the temporary use of the aircraft for his own purpose and has temporarily deprived the owner of the aircraft, viz., the Government, of its legitimate use for its purposes, i.e., the use of this Harvard aircraft for the Indian Air Force Squadron that day. Such use being unauthorised and against all the regulations of aircraft-flying was clearly a gain or loss by unlawful means. Further, the unlawful aspect is emphasised by the fact that it was for flight to a place in Pakistan. Learned counsel for the appellant has urged that the courts below have treated absence of consent as making out dishonestly and have not clearly appreciated that the two are distinct and essential constituents of the offence of theft. The true position, however, is that all the circumstances of the unauthorised flight justify the conclusion both as to the absence of consent and as to the unlawfulness of the means by which there has been a temporary gain or loss by the use of the aircraft. We are, therefore, satisfied that there has been both wrongful gain to the appellant and wrongful loss to the Government.

12. The only further questions that remain for consideration, therefore, are whether the causing of such wrongful gain or loss, was intentional and if so whether such intention was entertained at the time when the aircraft was taken. If, as already found, the purpose for which the flight was undertaken was to go to Pakistan, and if in order to achieve that purpose, breach of various regulations relating to the initial taking out of such aircraft for flight was committed at the very outset, there is no difficulty in coming to the conclusion, as the courts below have done, that the dishonest intention, if any, was at the very outset. This is not a case where a person in the position of the appellant started on an authorised flight and exploited it for a dishonesty purpose in the course thereof. In such a case, inference of initial dishonest intention may be difficult. The question, however, is whether the wrongful gain and the wrongful loss were intentional. It is urged that the well-known distinction which Penal Code makes, in various places, between intention to cause a particular result and the knowledge of likelihood of causing as particular result has not been appreciated. It is also suggested that the decided cases have pointed out that

the maxim that every person must be taken to taken to intend the natural consequence of his acts, is a legal fiction which is not recognised for penal consequences in the Indian Penal Code. (See Vullappa v. Bheema Row A.I.R. 1918 Mad. 136. Now whatever may be said about these distinctions in an appropriate case, there is no scope for any doubt in this case, that though the ultimate purpose of the flight was to go to Pakistan, the use of the aircraft for that purpose and the unauthorised and hence unlawful gain of that use to the appellant and the consequent loss to the Government of its legitimate use, can only be considered intentional. This is not by virtue of any presumption but as a legitimate inference from the facts and circumstances of the case. We are, therefore, satisfied that the facts proved constitute theft. The conviction of the appellant under s. 379 of the Indian Penal Code is, in our opinion, right and there is no reason to interfere with the same.

13. Learned counsel for the appellant has very strenuously urged that the circumstances of the case do not warrant the imposition of a substantial sentence of (simple) imprisonment for eighteen months. He also urges that the appellant, who is now on bail, has undergone his sentence for nearly an year and presses upon us that the interests of the justice in the case, do not require that, after the lapse of over four years from the date of the commission of the offence, a young man in the appellant's situation should be sent back to all to serve out the rest of the sentence. We have ascertained from the Advocate appearing for the Government that the appellant has already served a sentence of 11 months and 27 days. Learned counsel for the appellant has also informed us that the appellant was in judicial custody for about eleven months as an under-trial prisoner. In view of all the circumstances of the case, we agree that the interests of justice do not call for being sent back to jail.

14. While therefore, maintaining the conviction of the appellant, K. N. Mehra, we reduce the sentence of imprisonment against him to the period already undergone. The sentence of fine and the sentence of imprisonment in default thereof shall stand. With this medication, in sentence, the appeal is dismissed.

15. Appeal dismissed, and sentence modified.

MANU/BH/0133/1940

Back to Section 383 of Indian Penal Code, 1860

IN THE HIGH COURT OF PATNA

Decided On: 18.09.1940

Jadunandan Singh and Ors. Vs. Emperor

ORDER
Dhavle, J.

1. Narain Dusadh and Sheonandan Singh, the gorait and gomasta respectively of a landlord, were returning after the inspection of some fields when the two petitioners and others came out of an ahar and assaulted them.

2. The petitioner Alakh gave a bhala blow to Narain on the right leg, and then other people assaulted him with lathis. The petitioner Jadunandan and others then assaulted Sheonandan. Jadunandan after this forcibly took the thumb impressions of Narain on one piece of blank paper, and of Sheonandan on three blank papers. On these findings the two petitioners and two others were convicted by the trying Magistrate, Jadunandan being sentenced under Section 384, Penal Code, to six months rigorous imprisonment and Alak to four months rigorous imprisonment under Section 324. Jadunandan was also found guilty under Section 323, but the Magistrate did not consider it necessary to pass any separate sentence on him under that section.

3. Two other men were also convicted by the Magistrate under Section 323 and fined. An appeal which was heard by the Additional Sessions Judge of Gay a failed. When the matter came to this Court, Varma J., rejected the revisional application of the last two men, Baghu Kahar and Chander Singh, but admitted the application of Jadunandan Singh and also, so far as the question of sentence was concerned, that of Alakh.

4. It has been contended on behalf of Jadunandan Singh that no offence under Section 384 has been brought home to him. This contention is rested on the definition of 'extortion' in Section 383 which reads:

Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'extortion'.
5. It is clear that this definition makes it necessary for the prosecution to prove that the victims Narain and Sheonandan were put in fear of injury to themselves or to others, and further, were thereby dishonestly induced to deliver papers containing their thumb impressions. The prosecution story in the present case goes no further than that thumb

impressions were "forcibly taken" from them. The details of the forcible taking were apparently not put in evidence. The trial Court speaks of the wrists of the victims being caught and of their thumb impressions being then 'taken.' Cases frequently occur which turn on the difference between the giving and the taking of thumb impressions.

6. In Ramyad Singh v. Emperor Criminal Revn. No. 125 of 1931 heard by Sir Courtney-Terrell C.J., and myself on 15th April 1931, the victim was tied up on refusing to give his thumb impression on a piece of paper. He then consented to put his thumb impression on that piece of paper, and it was by that fear that he was found to have been induced to put his thumb impression on the paper. The conviction under Section 384 was therefore upheld.

7. This was contrasted with the case which had come before me sitting singly in 1930, Kapildeo Singh v. Emperor Criminal Revn. No. 420 of 1930, decided on 15th August 1930, where the finding of fact was that, helped by two others, the petitioner took by force the thumb impressions of the victim--the man was thrown on the ground, his mouth and eyes tied with a gamcha, his left hand pulled out and the thumb put into a kajrauta and then impressions of that thumb taken on certain papers.

8. I had held that in the circumstances there was no inducing the victim to deliver the pieces of paper with his thumb impressions. As to this, the late Chief Justice observed:

If the facts had been that the complainant's thumb had been forcibly seized by one of the petitioners and had been applied to the piece of paper notwithstanding his struggles and protests, then I would agree that there is good ground for saying that the offence committed, whatever it may be, was not the offence of extortion because the complainant would not have been induced by the fear of injury but would have simply been the subject of actual physical compulsion, and I venture to agree with the reasoning of my learned brother Dhavle in Kapildeo Singh v. Emperor Criminal Revn. No. 420 of 1930.
9. The Assistant Government Advocate has drawn attention to Batisa Singh v. Emperor MANU/BH/0023/1932: A.I.R. 1932 Pat. 335 where the petitioners were convicted under Section 347. It is said in one part of the report that the victim was laid down on the floor and gagged and only allowed to go after his thumb impressions were taken on several pieces of paper. Macpherson J. upheld the conviction, after pointing out however that it had been found as a fact that the petitioners intentionally put the victim in fear of injury to himself and thereby dishonestly induced him to place his thumb impression upon certain pieces of paper. There is no such finding in the present case. The lower Courts only speak of the forcible taking of the victim's thumb impressions and as this does not necessarily involve inducing the victim to deliver papers with his thumb impressions, (papers which could no doubt be converted into valuable securities), I must hold that the offence of extortion is not established.

10. The learned advocate suggested that in that event this may be a case of robbery, tot it has not been asserted or found that the papers were taken from the victim's possession. It seems to me that on the findings the offence is no more than the use of criminal force or an assault punishable under Section 352, Penal Code.

11. Jadunandan Singh was also convicted under Section 323, but no separate sentence was passed upon him under that section. I do not propose to interfere with that part of the order of the lower Court, and as regards his conviction under Section 384, Penal Code, which must be replaced by a conviction under Section 352, Penal Code, I sentence him to rigorous imprisonment for three months and a fine of Rs. 100 with two months rigorous imprisonment in default. As regards the petitioner Alakh it has been urged that he is a student.

12. From the record it appears that his age is 22, and though the record does not show that he is a student, an attempt has been made before me quite recently by means of an affidavit and a certificate to show that he is a student. I am not sure that this is any mitigation of the offence of causing hurt with a bhala, but having regard to the nature of the injury that he caused, it seems to me that the ends of justice will be served if the sentence passed upon him under Section 824, Penal Code, is reduced to rigorous imprisonment for three months. Ordered accordingly.

Back to Section 384 of Indian Penal Code, 1860

MANU/SC/0002/1988

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 468 of 1986

Decided On: 29.04.1988

A.R. Antulay Vs. R.S. Nayak and Ors.

Hon'ble Judges/Coram:
B.C. Ray, G.L. Oza, M.N. Venkatachaliah, Ranganath Misra, S. Natarajan, S. Ranganathan and Sabyasachi Mukherjee, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: P.P. Rao, R.D. Ovalekar, M.N. Dwevedi, Salman Khurshid and N.V. Pradhan, Advs
For Respondents/Defendant: Ram Jethmalani, Rani Jethmalani, Ashok Sharma, A.M. Khanwilkar and Ajit S. Bhasme, Advs.

JUDGMENT

1. The main question involved in this appeal, is whether the directions given by this Court on 16th February, 1984. as reported in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984: 1984CriLJ613 were legally proper. The next question is, whether the action and the trial proceedings pursuant to those directions, are legal and valid. Lastly, the third consequential question is, can those directions be recalled or set aside or annulled in those proceedings in the manner sought for by the appellant. In order to answer these questions certain facts have to be borne in mind.

2. The appellant became the Chief Minister of Maharashtra on or about 9th of June, 1980. On 1st of September, 1981, respondent No. 1 who is a member of the Bharatiya Janta Party applied to the Governor of the State under Section 197 of the Criminal Procedure Code, 1973 (hereinafter referred to as the Code) and Section 6 of the Prevention of Corruption Act, 1947 (hereinafter referred to as the Act) for sanction to prosecute the appellant. On nth of September, 1981, respondent No. 1 filed a complaint before the Additional Metropolitan Magistrate, Bombay against the appellant and other known and unknown persons for alleged offence under Sections 161 and 165 of the Indian Penal Code and Section 5 of the Act as also under Sections 384 and 420 read with Sections 109 and 120B of the Indian Penal Code. The learned Magistrate refused to take cognizance of the offences under the Act without the sanction for prosecution. Thereafter a criminal revision application being C.R.A. No. 1742 of 1981 was filed in the High Court of Bombay, by respondent No. 1.

3. The appellant thereafter on 12th of January, 1982 resigned from the position of Chief Minister in deference to the judgment of the Bombay High Court in a writ petition filed against him. In CRA No. 1742 of 1981 filed by respondent No. 1 the Division Bench of the High Court held that sanction was necessary for the, prosecution of the appellant and the High Court rejected the request of respondent No. 1 to transfer the case from the Court of the Additional Chief Metropolitan Magistrate to itself.

4. On 28th of July, 1982, the Governor of Maharashtra granted sanction under Section 197 of the Code and Section 6 of the Act in respect of five items relating to three subjects only and refused sanction in respect of all other items.

5. Respondent No. 1 on 9th of August, 1982 filed a fresh complaint against the appellant before the learned Special Judge bringing in many more allegations including those for which sanction was refused by the Governor. It was registered as a Special Case No. 24 of 1982. It was submitted by respondent No. 1 that there was no necessity of any sanction since the appellant had ceased to be a public servant after his resignation as Chief Minister.

6. The Special Judge, Shri P.S. Bhutta issued process to the appellant without relying on the sanction order dated 28th of July, 1982. On 20th of October, 1982, Shri P.S. Bhutta overruled the appellant's objection to his jurisdiction to take cognizance of the complaint and to issue process in the absence of a notification under Section 7(2) of the Criminal Law Amendment Act, 1952 (hereinafter referred to as 1952 Act) specifying which of the three Special Judges of the area should try such cases.

7. The State Government on 15th of January, 1983 notified the appointment of Shri R.B. Sule as the Special Judge to try the offences specified under Section 6(1) of the 1952 Act. On or about 25th of July 1983, it appears that Shri R.B. Sule, Special Judge discharged the appellant holding that a member of the Legislative Assembly is a public servant and there was no valid sanction for prosecuting the appellant.

8. On 16th of February, 1984, in an appeal filed by respondent No. 1 directly under Article 136, a Constitution Bench of this Court held that a member of the Legislative Assembly is not a public servant and set aside the order of Special Judge Sule. Instead of remanding the case to the Special Judge for disposal in accordance with law, this Court suo motu withdrew the Special Cases No. 24/82 and 3/83 (arising out of a complaint filed by one P.B. Samant) pending in the Court of Special Judge, Greater Bombay, Shri R.B. Sule and transferred the same to the Bombay High Court with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court for holding the trial from day to day. These directions were given, according to the appellant, without any pleadings, without any arguments, without any such prayer from either side and without giving any opportunity to the appellant to make his submissions before issuing the same.

It was submitted that the appellant's right to be tried by a competent court according to the procedure established by law enacted by Parliament and his rights of appeal and revision to the High Court under Section 9 of the 1952 Act had been taken away.

9. The directions of this Court mentioned hereinbefore are contained in the decision of this Court in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984: 1984CriLJ613. There the Court was mainly concerned with whether sanction to prosecute was necessary. It was held that no such sanction was necessary in the facts and circumstances of the case. this Court further gave the following directions:

The accused was the Chief Minister of a premier State-the State of Maharashtra. By a prosecution launched as early 'as on September 11, 1981, his character and integrity came under a cloud. Nearly two and a half years have rolled by and the case has not moved an inch further. An expeditious trial is primarily in the interest of the accused and a mandate of Article 21. Expeditious disposal of a criminal case is in the interest of both the prosecution and the accused. Therefore, Special Case No. 24 of 1982 and Special Case No. 3/83 pending in the Court of Special Judge, Greater Bombay Shri R.B. Sule are withdrawn and transferred to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. On being so assigned, the learned Judge may proceed to expeditiously dispose of the cases preferably by holding the trial from day to day.

10. The appellant as mentioned hereinbefore had appeared before the Special Judge and objected to the jurisdiction of the learned Judge on the ground that the case had not been properly allocated to him by the State Government. The Special Judge Bhutta after hearing the parties had decided the case was validly filed before him and he had properly taken cognizance. He based his order on the construction of the notification of allocation which was in force at that time. Against the order of the learned Special Judge rejecting the appellant's contention, the appellant filed a revision application in the High Court of Bombay. During the pendency of the said revision application, the Government of Maharashtra issued a notification appointing Special Judge R.B. Sule, as the Judge of the special case. It is the contention of the respondents before us that the appellant thereafter did not raise any further objection in the High Court against cognizance being taken by Shri Bhutta. It is important to take note of this contention because one of the points urged by Shri Rao on behalf of the appellant was that not only we should set aside the trial before the High Court as being without jurisdiction but we should direct that no further trial should take place before the Special Judge because the appellant has suffered a lot of which we shall mention later but also because cognizance of the offences had not been taken properly. In order to meet the submission that cognizance of the offences had not been taken properly, it was urged by Shri Jethmalani that after the Government Notification appointing Judge Sule as the Special Judge, the objection that cognizance of the offences could not be taken by Shri Bhutta was not agitated any further. The other objections that the appellant raised against the order passed by Judge Bhutta were

dismissed by the High Court of Bombay. Against the order of the Bombay High Court the appellant filed a petition under Article 136 of the constitution. The appeal after grant of leave was dismissed by a judgment delivered on 16th February, 1984 by this Court in A.R. Antulay v. Ramdas Sriniwas Nayak and Anr. MANU/SC/0082/1984: 1984CriLJ647. There at page 954 of the report, this Court categorically observed that a private complaint filed by the complainant was clearly maintainable and that the cognizance was properly taken. This was the point at issue in that appeal. This was decided against the appellant. On this aspect therefore, the other point is open to the appellant. We are of the opinion that this observation of this Court cannot by any stretch of imagination be considered to be without jurisdiction. Therefore, this decision of this Court precludes any scope for argument about the validity of the cognizance taken by Special Judge Bhutta. Furthermore, the case had proceeded further before the Special Judge, Shri Sule and the learned Judge passed an order of discharge on 25th July, 1983. This order was set aside by the Constitution Bench of this Court on 16th February, 1984, in the connected judgment (vide MANU/SC/0102/1984: 1984CriLJ613. The order of taking cognizance had therefore become final and cannot be reagitated. Moreover Section 460(e) of the Code expressly provides that if any Magistrate not empowered by law to take cognizance of an offence on a complaint under Section 190 of the Code erroneously in good faith does so his proceedings shall not be set aside merely on the ground that he was not so empowered.

11. Pursuant to the directions of this Court dated 16th February, 1984, on 1st of March, 1984, the Chief Justice of the Bombay High Court assigned the cases to S.N. Khatri, J. The appellant, it is contended before us, appeared before Khatri, J. and had raised an objection that the case could be tried by a Special Judge only appointed by the Government under the 1952 Act. Khatri, J. on 13th of March, 1984, refused to entertain the appellant's objection to jurisdiction holding that he was bound by the order of this Court. There was another order passed on 16th of March, 1984 whereby Khatri, J. dealt with the other contentions raised as to his jurisdiction and rejected the objections of the appellant.

12. Being aggrieved the appellant came up before this Court by filing special leave petitions as well as writ petition. this Court on 17th April, 1984, in Abdul Rehman Antulay v. Union of India and Ors. etc. [1984] 3 S.C.R. 482 held that the learned Judge was perfectly justified and indeed it was the duty of the learned Judge to follow the decision of this Court which was binding on him. this Court in dismissing the writ petition observed, inter alia, as follows:

In my view, the writ petition challenging the validity of the order and judgment passed by this Court as nullity or otherwise incorrect cannot be entertained. I wish to make it clear that the dismissal of this writ petition will not prejudice the right of the petitioner, to approach the Court with an appropriate review petition or to file any other application which he may be entitled in law to file.

13. D.N. Mehta, J. to whom the cases were transferred from Khatri, J. framed charges under 21 heads and declined to frame charges under 22 other heads proposed by respondent No. 1. this Court allowed the appeal by special leave preferred by respondent No. 1 except in regard to three draft charges under Section 384, I.P.C. (extortion) and directed the Court below to frame charges with regard to all other offences alleged. this Court requested the Chief Justice of the Bombay High Court to nominate another Judge in place of D.N. Mehta, J. to take up the trial and proceed expeditiously to dispose of the case finally. See in this connection R.S. Nayak v. A.R. Antulay and Anr. MANU/SC/0198/1986: 1986CriLJ1922.

14. P.S. Shah, J. to whom the cases were referred to from D.N. Mehta, J. on 24th of July, 1986 proceeded to frame as many as 79 charges against the appellant and decided not to proceed against the other named co-conspirators. This is the order impugned before us. Being aggrieved by the aforesaid order the appellant filed the present Special leave Petition (Crl.) No. 2519 of 1986 questioning the jurisdiction to try the case in violation of the appellant's fundamental rights conferred by Articles 14 and 21 and the provisions of the Act of 1952. The appellant also filed Special leave Petition (Crl.) No. 2518 of 1986 against the judgment and order dated 21st of August, 1986 of P.S. Shah, J. holding that none of the 79 charges framed against the accused required sanction under Section 197(1) of the Code. The appellant also filed a Writ Petition No. 542 of 1986 challenging a portion of Section 197(1) of Code as ultra vires Articles 14 and 21 of the Constitution.

15. this Court granted leave in Special Leave Petition (Crl.) No. 2519 of 1986 after hearing respondent No. 1 and stayed further proceedings in the High Court. this Court issued notice in Special Leave Petition (Crl.) No. 2518 and Writ Petition (Crl.) No. 542 of 1986 and directed these to be tagged on with the appeal arising out of Special Leave Petition (Crl.) No. 2519 of 1986.

16. On 11th of October, 1986 the appellant filed a Criminal Miscellaneous Petition for permission to urge certain additional grounds in support of the plea that the origination of the proceedings before the Court of Shri P.S. Bhutta, Special Judge and the process issued to the appellant were illegal and void an initio.

17. this Court on 29th October, 1986 dismissed the application for revocation of special leave petition filed by respondent No. 1 and referred the appeal to a Bench of 7 Judges of this Court and indicated the points in the note appended to the order for consideration of this Bench.

18. So far as SLP (Crl.) No. 2518/86 against the judgment and order dated 21st August, 1986 of P.S. Shah, J. of the Bombay High Court about the absence of sanction under Section 197 of the Code is concerned, we have by an order dated 3rd February, 1988 delinked that special leave petition inasmuch as the same involved consideration of an independent question and directed that the special leave petition should be heard by any

appropriate Bench after disposal of this appeal, Similarly, Writ Petition (Crl.) No. 542 of 1986 challenging a portion of Section 197(1) of the Criminal Procedure Code as ultra vires Articles 14 and 21 of the Constitution had also to be delinked by our order dated 3rd February, 1988 to be heard along with special leave petition no 2518 of 1986. This judgment therefore, does not cover these two matters.

19. In this appeal two questions arise, namely, (1) whether the directions given by this Court on 16th of February, 1984 in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984: 1984CriLJ613 withdrawing the Special Case No. 24/82 and Special Case No. 3/83 arising out of the complaint filed by one shri P.B. Samant pending in the Court of Special Judge, Greater Bombay, Shri R.B. Sule, and transferring the same to the High Court of Bombay with a request to the Chief Justice to assign these two cases to a sitting Judge of the High Court, in breach of Section 7(1) of the Act of 1952 which mandates that offences as in this case shall be tried by a Special Judge only thereby denying at least one right of appeal to the appellant was violative of Articles 14 and 21 of the Constitution and whether such directions were at all valid or legal and (2) if such directions were not at all valid or legal in view of the order dated 17th of April, 1984 referred to hereinbefore, is this appeal sustainable or the grounds therein justiciable in these proceedings. In other words, are the said directions in a proceedings inter-parties binding even if bad in law or violative of Articles 14 and 21 of the Constitution and as such are immune from correction by this Court even though they cause prejudice and do injury? These are the basic questions which this Court must answer in this appeal.

20. The contention that has been canvassed before us was that save as provided in Sub-section (1) of Section 9 of the Code the provisions thereof (corresponding to Section 9(1) of the Criminal Procedure Code, 1898) shall so far as they are not inconsistent with the Act apply to the proceedings before the Special Judge and for purposes of the said provisions the Court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting the prosecution before a Special Judge shall be deemed to be a public prosecutor. It was submitted 'before us that it was a private complaint and the prosecutor was not the public prosecutor. This was another infirmity which this trial suffered, it was pointed out. In the background of the main issues involved in this appeal we do not propose to deal with this subsidiary point which is of not any significance.

21. The only question with which we are concerned in this appeal is, whether the case which is triable under the 1952 Act only by a Special Judge appointed under Section 6 of the said Act could be transferred to the High Court for trial by itself or by this Court to the High Court for trial by it. Section 406 of the Code deals with transfer of criminal cases and provides power to this Court to transfer cases and appeals whenever it is made to appear to this Court that an order under this section is expedient for the ends of justice. The law provides that this Court may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court

subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court. Equally Section 407 deals with the power of High Court to transfer cases and appeals. Under Section 6 of the 1952 Act, the State Government is authorised to appoint as many Special Judges as may be necessary for such area or areas for specified offences including offences under the Act. Section 7 of the 1952 Act deals with cases triable by Special Judges. The question, therefore, is whether this Court under Section 406 of the Code could have transferred a case which was triable only by a Special Judge to be tried by the High Court or even if an application had been made to this Court under Section 406 of the Code to transfer the case triable by a Special Judge to another Special Judge could that be transferred to a High Court, for trial by it. It was contended by Shri Rao that the jurisdiction to entertain and try cases is conferred either by the Constitution or by the laws made by Parliament. He referred us to the powers of this Court under Articles 32, 131, 137, 138, 140, 142 and 145(1) of the Constitution. He also referred to Entry 77 of List I of the Constitution which deals with the Constitution of the courts. He further submitted that the appellant has a right to be tried in accordance with law and no procedure which will deny the equal protection of law can be invented and any order passed by this Court which will deny equal protection of laws would be an order which is void by virtue of Article 13(2) of the Constitution. He referred us to the previous order of this Court directing the transfer of cases to the High Court and submitted that it was a nullity because of the consequences of the wrong directions of this Court, The enormity of the consequences warranted this Court's order being treated as a nullity. The directions denied the appellant the remedy by way of appeal as of right. Such erroneous or mistaken directions should be corrected at the earliest opportunity, Shri Rao submitted.

22. Shri Rao also submitted that the directions given by the Court were without jurisdiction and as such void. There was no jurisdiction, according to Shri Rao, or power to transfer a case from the Court of the Special Judge to any High Court. Section 406 of the Code only permitted transfer of cases from one High Court to another High Court or from a Criminal Court subordinate to one High Court to a Criminal Court subordinate to another High Court. It is apparent that the impugned directions could not have been given under Section 406 of the Code as the Court has no such power to order the transfer from the Court of the Special Judge to the High Court of Bombay.

23. Section 7(1) of the 1952 Act creates a condition which is sine qua non for the trial of offences under Section 6(1) of the said Act. The condition is that notwithstanding anything contained in the CrPC or any other law, the said offences shall be triable by Special Judges only. (Emphasis supplied). Indeed conferment of the exclusive jurisdiction of the Special Judge is recognised by the judgment delivered by this Court in A.R. Antulay v. Ramdas Sriniwas Nayak and Anr. MANU/SC/0082/1984: 1984CriLJ647 where this Court had adverted to Section 7(1) of the 1952 Act and at page 931 observed that Section 7 of the 1952 Act conferred exclusive jurisdiction on the Special Judge appointed under Section 6 to try cases set out in Section 6(1)(a) and 6(1)(b) of the said Act.

The Court emphasised that the Special Judge had exclusive jurisdiction to try offences enumerated in Section 6(1)(a) and (b). In spite of this while giving directions in the other matter, that is, R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984: 1984CriLJ613, this Court directed transfer to the High Court of Bombay the cases pending before the Special Judge. It is true that Section 7(1) and Section 6 of the 1952 Act were referred to while dealing with the other matters but while dealing with the matter of directions and giving the impugned directions, it does not appear that the Court kept in mind the exclusiveness of the jurisdiction of the Special Court to try the offences enumerated in Section 6.

24. Shri Rao made a point that the directions of the Court were given per incuriam, that is to say without awareness of or advertence to the exclusive nature of the jurisdiction of the Special Court and without reference to the possibility of the violation of the fundamental rights in a case of this nature as observed by a seven Judges Bench decision in The State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952: 1952CriLJ510.

25. Shri Ram Jethmalani on behalf of the respondents submitted that the judgment of the Constitution Bench of this Court was delivered on 16th of February, 1984 and counsel for both sides were present and it was neither objected to nor stated by the appellant that he wanted to be heard in regard to the transfer of the trial forum. He submitted that the order of discharge was not only challenged by a special leave petition before this Court but also that a revision application before the High Court being Criminal Revision Application No. 354/83 was filed but the Criminal Revision Application by an order of this Court was withdrawn and heard along with the special leave petition. That application contained a prayer to the effect that the order of discharge be set aside and the case be transferred to the High Court for trial. Therefore, it was submitted that the order of transfer was manifestly just. There was no review against this order. It was submitted that the order of transfer to a superior court cannot in law or in fact ever cause any harm or prejudice to any accused. It is an order made for the benefit of the accused and in the interests of justice. Reliance was placed on Romesh Chandra Arora v. The State MANU/SC/0034/1959: 1960CriLJ177. It was further submitted by Shri Jethmalani that a decision which has become final cannot be challenged. Therefore, the present proceedings are an abuse of the process of the Court, according to him. It was further submitted that all the attributes of a trial court were present in a Court of Appeal, an appeal being a continuation of trial before competent Court of Appeal and, therefore, all the qualifications of the trial court were there. The High Court is authorised to hear an appeal from the judgment of the Special Judge under the Act of 1952. It was submitted that a Special Judge except in so far as a specific provision to the contrary is made is governed by all the provisions of the Code and he is a Court subordinate to the High Court. See A.R. Antulay v. R.S. Nayak and Anr. MANU/SC/0082/1984: 1984CriLJ647.

26. It was submitted that power under Section 526 of the old Code corresponding to Section 407 of the new Code can be exercised qua a Special Judge. This power, according to Shri Jethmalani, is exercise-able by the High Court in respect of any case under Section

407(1)(iv) irrespective of the Court in which it is pending. This part of the section is not repealed wholly or pro tanto, according to the learned Counsel, by anything in the 1952 Act. The Constitution Bench, it was submitted, consciously exercised this power. It decided that the High Court had the power to transfer a case to itself even from a Special Judge. That decision is binding at least in this case and cannot be reopened, it was urged. In this case what was actually decided cannot be undone, we were told repeatedly. It will produce an intolerable state of affairs. this Court sought to recognise the distinction between finality of judicial orders qua the parties and the reviewability for application to other cases. Between the parties even a wrong decision can operate as res judicata. The doctrine of res judicata is applicable even to criminal trials, it was urged. Reliance was placed on Bhagat Ram v. State of Rajasthan MANU/SC/0090/1972: 1972CriLJ909. A judgment of a High Court is binding in all subsequent proceedings in the same case; more so, a judgment which was unsuccessfully challenged before this Court.

27. It is obvious that if a case could be transferred under Section 406 of the Code from a Special Judge it could only be transferred to another Special Judge or a court of superior jurisdiction but subordinate to the High Court. No such court exists. Therefore, under this section the power of transfer can only be from one Special Judge to another Special Judge. Under Section 407 however, corresponding to Section 526 of the old Code, it was submitted the High Court has power to transfer any case to itself for being tried by it, it was submitted (sic).

28. It appears to us that in Gurcharan Das Chadha v. State of Rajasthan [1966] 2 S.C.R. 678 an identical question arose. The petitioner in that case was a member of an All India Service serving in the State of Rajasthan. The State Government ordered his trial before the Special Judge of Bharatpur for offences under Section 120B/161 of the Indian Penal Code and under Sections 5(1)(a) and (d) and 5(2) of the Act. He moved this Court under Section 527 of the old Code praying for transfer of his case to another State on various grounds. Section 7(1) of the Act required the offences involved in that case to be tried by a Special Judge only, and Section 7(2) of the Act required the offences to be tried by a Special Judge for the area within which these were committed which condition could never be satisfied if there was a transfer. this Court held that the condition in Sub-section (1) of Section 7 of the Act that the case must be tried by a Special Judge, is a sine qua non for the trial of offences under Section 6. This condition can be satisfied by transferring the case from one Special Judge to another Special Judge. Sub-section (2) of Section 7 merely distributes, it was noted, work between Special Judges appointed in a State with reference to territory. This provision is at par with the section of the Code which confers territorial jurisdiction on Sessions Judges and magistrates. An order of transfer by the very nature of things must sometimes result in taking the case out of the territory. The third sub-section of Section 8 of the Act preserves the application of any provision of the Code if it is not inconsistent with the Act save as provided by the first two sub-sections of that Section. It was held by this Court that Section 527 of the old Code, hence, remains applicable if it is not inconsistent with Section 7(2) of the Act. It was held that there was

no inconsistency between Section 527 of the Code and Section 7(2) of the Act as the territorial jurisdiction created by the latter operates in a different sphere and under different circumstances. Inconsistency can only be found if two provisions of law apply in identical circumstances, and create contradictions. Such a situation does not arise when either this Court or the High Court exercises the power of transfer. Therefore, this Court in exercise of its jurisdiction and power under Section 527 of the Code can transfer a case from a Special Judge subordinate to one High Court to another Special Judge subordinate to another High Court. It has to be emphasised that that decision was confined to the power under Section 527 of the previous Code and to transfer from one Special Judge to another Special Judge though of another State. It was urged by Shri Jethmalani that Chadha's case (supra) being one of transfer from one Special Judge to another the judgment is not an authority for the proposition that it cannot be transferred to a court other than that of a Special Judge or to the High Court. But whatever be the position, this is no longer open at this juncture.

29. The jurisdiction, it was submitted, created by Section 7 of the Act of 1952 is of exclusiveness qua the Courts subordinate to the High Court. It is not exclusive qua a Court of superior jurisdiction including a Court which can hear an appeal against its decision. The non-obstante clause does not prevail over other provisions of the Code such as those which recognise the powers of the superior Courts to exercise jurisdiction on transfer. It was submitted that the power of transfer vested in the High Court is exercisable qua Special Judges and is recognised not merely by Chadha's case but in earlier cases also, Shri Jethmalani submitted.

30. It was next submitted that apart from the power under Sections 406 and 407 of the Code the power of transfer is also exercisable by the High Court under Article 228 of the Constitution. There is no doubt that under this Article the case can be withdrawn from the Court of a Special Judge. It is open to the High Court to finally dispose it of. A chartered High Court can make orders of transfer under Clause 29 of the Letters Patent. Article 134(1)(b) of the Constitution expressly recognises the existence of such power in every High Court.

31. It was further submitted that any case transferred for trial to the High Court in which it exercises jurisdiction only by reason of the order of transfer is a case tried not in ordinary original criminal jurisdiction but in extraordinary original criminal jurisdiction. Some High Courts had both ordinary criminal jurisdiction as well as extraordinary criminal original jurisdiction. The former was possessed by the High Courts of Bombay, Madras and Calcutta. The first two High Courts abolished it in the 40's and the Calcutta High Court continued it for quite some time and after the 50's in a truncated form until it was finally done away with by the Code. After the Code the only original criminal jurisdiction possessed by all the High Courts is extraordinary. It can arise by transfer under the Code or the Constitution or under Clause 29 of the Letters Patent. It was submitted that it was not right that extraordinary original criminal jurisdiction is

contained only in Clause 24 of the Letters Patent of the Bombay High Court. This is contrary to Section 374 of the Code itself. That refers to all High Courts and not merely all or any one of the three Chartered High Courts. In P.P. Front, New Delhi v. K.K. Birla and Ors. MANU/DE/0037/1983: 23(1983)DLT499, the Delhi High Court recognised its extraordinary original criminal jurisdiction as the only one that it possessed. The nature of this jurisdiction is clearly explained in Madura, Tirupparankundram etc. v. Alikhan Sahib and Ors. MANU/WB/0033/1931: 35 C W N 1088 and Sunil Chandra Roy and Anr. v. The State, MANU/WB/0110/1954: AIR1954Cal305. Reference may also be made to the Law Commissioner's 41st Report, paragraphs 3.1 to 3.6 at page 29 and paragraph 31.10 at page 259.

32. The 1952 Act was passed to provide for speedier trial but the procedure evolved should not be so directed, it was submitted, that it would violate Article 14 as was held in Anwar Ali Sarkar's case (supra).

33. Section 7 of the 1952 Act provides that notwithstanding anything contained in the CrPC, or in any other law the offences specified in Sub-section (1) of Section 6 shall be triable by Special Judges only. So the law provides for a trial by Special Judge only and this is notwithstanding anything contained in Sections 406 and 407 of the CrPC, 1973. Could it, therefore, be accepted that this Court exercised a power not given to it by Parliament or the Constitution and acted under a power not exercisable by it? The question that has to be asked and answered is if a case is tried by a Special Judge or a court subordinate to the High Court against whose order an appeal or a revision would lie to the High Court, is transferred by this Court to the High Court and such right of appeal or revision is taken away would not an accused be in a worse position than others? this Court in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984: 1984CriLJ613 did not refer either to Section 406 or Section 407 of the Code. It is only made clear that if the application had been made to the High Court under Section 407 of the Code, the High Court might have transferred the case to itself.

34. The second question that arises here is if such a wrong direction has been given by this Court can such a direction inter-parties be challenged subsequently. This is really a value perspective judgment.

35. In Kiran Singh and Ors. v. Chaman Paswan and Ors. MANU/SC/0116/1954: [1955]1SCR117 Venkatarama Ayyar, J. observed that the fundamental principle is well established that a decree passed by a Court without jurisdiction is a nullity, and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon-even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

36. This question has been well put, if we may say so, in the decision of this Court in M.L. Sethi v. R.P. Kapur MANU/SC/0245/1972: [1973]1SCR697 where Mathew, J. observed that the jurisdiction was a verbal coat of many colours and referred to the decision in Anisminic Ltd. v.Foreign Compensation Commission [1969] 2 A.C. 147 where the majority of the House of Lords dealt with the assimilation of the concepts of 'lack' and 'excess' of jurisdiction or, in other words, the extent to which we have moved away from the traditional concept of jurisdiction. The effect of the dicta was to reduce the difference between jurisdictional error and error of law within jurisdiction almost to a vanishing point. What is a wrong decision on a question of limitation, he posed referring to an article of Professor H.W.R. Wade, "Constitutional and Administrative Aspects of the Anismanic case" and concluded; "it is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or decree embodying the decision a nullity liable to collateral attack.... And there is no yardstick to determine the magnitude of the error other than the opinion of the Court."

(Emphasis supplied)

37. While applying the ratio to the facts of the present controversy, it has to be borne in mind that Section 7(1) of the 1952 Act creates a condition which is sine qua non for the trial of offenders under Section 6(1) of-that Act. In this connection, the offences specified under Section 6(1) of the 1952 Act are those punishable under Sections 161, 162, 163, 164 and 165A of the Indian Penal Code and Section 5 of the 1947 Act. Therefore, the order of this Court transferring the cases to the High Court on 16th February, 1984, was not authorised by law. this Court, by its directions could not confer jurisdiction on the High Court of Bombay to try any case which it did not possess such jurisdiction under the scheme of the 1952 Act. It is true that in the first judgment in A.R. Antulay v. Ramdas Sriniwas Nayak and Anr. MANU/SC/0082/1984: 1984CriLJ647 when this Court was analysing the scheme of the 1952 Act, it referred to Sections 6 and 7 at page 931 of the Reports. The arguments, however, were not advanced and it does not appear that this aspect with its ramifications was present in the mind of the Court while giving the impugned directions.

38. Shri Jethmalani sought to urge before us that the order made by the Court was not without jurisdiction or irregular. We are unable to agree. It appears to us that the order was quite clearly per incuriam. this Court was not called upon and did not decide the express limitation on the power conferred by Section 407 of the Code which includes offences by public servants mentioned in the 1952 Act to be overridden in the manner sought to be followed as the consequential direction of this Court. this Court, to be plain, did not have jurisdiction to transfer the case to itself. That will be evident from an analysis of the different provisions of the Code as well as the 1952 Act. The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by law and no Court, whether

superior or inferior or both combined can enlarge the jurisdiction of a Court or divest a person of his rights of revision and appeal.

See in this connection the observations in M.L. Sethi v. R.P. Kapur (supra) in which Justice Mathew considered Anisminic [1969] 2 AC 147 and also see Halsbury's Laws of England, 4th Edn. Vol. 10 page 327 at para 720 onwards and also Amnon Rubinstein 'Jurisdiction and Illegality' 1965 Edn. 16. Reference may also be made to Raja Soap Factory v. S.P. Shantaraj MANU/SC/0231/1965: [1965]2SCR800.
39. The question of validity, however, is important in that the want of jurisdiction can be established solely by a superior Court and that, in practice, no decision can be impeached collaterally by any inferior Court. But the superior Court can always correct its own error brought to its notice either by way of petition or ex debito justitiae. See Rubinstein's Jurisdiction and Illegality' (supra).

40. In the aforesaid view of the matter and the principle reiterated, it is manifest that the appellant has not been ordered to be tried by a procedure mandated by law, but by a procedure which was violative of Article 21 of the Constitution. That is violative of Articles 14 and 19 of the Constitution also, as is evident from the observations of the 7 Judges Bench judgment in Anwar Ali Sarkar's case (supra) where this Court found that even for a criminal who was alleged to have committed an offence, a special trial would be per se illegal because it will deprive the accused of his substantial and valuable privileges of defences which, others similarly charged, were able to claim. As Justice Vivian Bose observed in the said decision at page 366 of the report, it matters not whether it was done in good faith, whether it was done for the convenience of Government, whether the process could be scientifically classified and labelled, or whether it was an experiment for speedier trial made for the good of society at large. Justice Bose emphasised that it matters not how lofty and laudable the motives were. The question which must be examined is, can fair minded, reasonable, unbiased and resolute men regard that with equanimity and call it reasonable, just and fair, regard it as equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which are obtained in India today. Judged by that view the singling out of the appellant in this case for a speedier trial by the High Court for an offence of which the High Court had no jurisdiction to try under the Act of 1952 was, in our opinion, unwarranted, unprecedented and the directions given by this Court for the said purpose, were not warranted. If that is the position, when that fact is brought to our notice we must remedy the situation. In rectifying the error, no procedural inhibitions should debar this Court because no person should suffer by reason of any mistake of the Court. The Court, as is manifest, gave its directions on 16th February, 1984. Here no rule of res judicata would apply to prevent this Court from entertaining the grievance and giving appropriate directions. In this connection, reference may be made to the decision of the Gujarat High Court in Soni Vrajlal Jethalal v. Soni Jadavji Govindji and Ors. MANU/GJ/0033/1972: AIR1972Guj148. Where D.A. Desai, J. speaking for the Gujarat High Court observed that no act of the court or irregularity can come in the way

of justice being done and one of the highest and the first duty of all Courts is to take care that the act of the Court does no injury to the suitors.

41. It appears that when this Court gave the aforesaid directions on 16th February, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in Anwar Ali Sarkar's case (supra). See Halsbury's Laws of England, 4th End, Vol. 26, page 297, para 578 and page 300, the relevant notes 8, 11 and 15; Dias on Jurisprudence, 5th Edn., pages 128 and 130; Young v. Bristol Aeroplane Co. Ltd. [1944] 2 AER 293. Also see the observations of Lord Goddard in Moore v. Hewitt [1947] 2 A.E.R. 270-A and Penny v. Nicholas [1950] 2 A.E.R. 89. "per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See Morelle v. Wakeling [1955] 1 All E.R. 708. Also see State of Orissa v. The Titaghur Paper Mills Co. Ltd. MANU/SC/0325/1985: [1985]3SCR26. We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong.

42. The principle that the size of the Bench-whether it is comprised of two or three or more Judges-does not matter, was enunciated in Young v. Bristol Aeroplane Co. Ltd. (supra) and followed by Justice Chinnappa Reddy in Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra MANU/SC/0090/1984: 1984CriLJ1909 where it has been held that a Division Bench of three Judges should not overrule a Division Bench of two Judges, has not been followed by our Courts. According to well-settled law and various decisions of this Court, it is also well-settled that a Full Bench or a Constitution Bench decision as in Anwar Ali Sarkar's case (supra) was binding on the Constitution Bench because it was a Bench of 7 Judges.

43. The principle in England that the size of the Bench does not matter, is clearly brought out in the decision of Evershed M.R. in the case of Morelle v. Wakeling (supra). The law laid down by this Court is somewhat different. There is a hierarchy within the Court itself here, where larger Benches overrule smaller Benches. See the observations of this Court in Mattulal v. Radhe Lal MANU/SC/0010/1974: [1975]1SCR127, Union of India and Anr. v. K.S. Subramanian MANU/SC/0468/1976: (1977)ILLJ5SC at page 92 and State of U.P. v. Ram Chandra Trivedi MANU/SC/0465/1976: (1977)ILLJ200SC. This is the practice followed by this Court and now it is a crystallised rule of law. See in this connection, as mentioned hereinbefore, the observations of the State of Orissa v. Titagarh Paper Mills (supra) and also Union of India and Ors. v. Godfrey Philips India Ltd. [1985] Su. 3 SCR 123.

44. In support of the contention that a direction to delete wholly the impugned direction of this Court be given, reliance was placed on Satyadhvan Ghoshal v. Deorajini Devi

MANU/SC/0295/1960: [1960]3SCR590. The ratio of the decision as it appears from pages 601 to 603 is that the judgment which does not terminate the proceedings, can be challenged in an appeal from final proceedings. It may be otherwise if subsequent proceedings were independent ones.

45. The appellant should not suffer on account of the direction of this Court based upon an error leading to conferment of jurisdiction.

46. In our opinion, we are not debarred from re-opening this question and giving proper directions and correcting the error in the present appeal, when the said directions on 16th February, 1984, were violative of the limits of jurisdiction and the directions have resulted in deprivation of the fundamental rights of the appellant, guaranteed by Articles 14 and 21 of the Constitution. The appellant has been treated differently from other offenders, accused of a similar offence in view of the provisions of the Act of 1952 and the High Court was not a Court competent to try the offence. It was directed to try the appellant under the directions of this Court, which was in derogation of Article 21 of the Constitution. The directions have been issued without observing the principle of audi alteram partem. It is true that Shri Jethmalani has shown us the prayers made before the High Court which are at page 121 of the paper-book. He argued that since the transfers have been made under Section 407, the procedure would be that given in Section 407(8) of the Code. These directions, Shri Jethmalani sought to urge before us, have been given in the presence of the parties and the clarificatory order of April 5, 1985 which was made in the presence of the appellant and his Counsel as well as the Counsel of the State Government of Maharashtra, expressly recorded that no such submission was made in connection with the prayer for grant of clarification. We are of the opinion that Shri Jethmalani is not right when he said that the decision was not made per incuriam as submitted by the appellant. It is a settled rule that if a decision has been given per incuriam the Court can ignore it. It is also true that the decision of this Court in the case of The Bengal Immunity Co. Ltd. v. The State of Bihar and Ors. MANU/SC/0083/1955: [1955]2SCR603 was not regarding an order which had become conclusive inter-parties. The Court was examining in that case only the doctrine of precedents and determining the extent to which it could take a different view from one previously taken in a different case between different parties.

47. According to Shri Jethmalani, the doctrine of per incuriam has no application in the same proceedings. We are unable to accept this contention. We are of the opinion that this Court is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution if the Court is satisfied that its directions have resulted in the deprivation of the fundamental

rights of a citizen or any legal right of the petitioner. See the observations in Prem Chand Garg v. Excise Commissioner, U.P. Allahabad [1963] Su.1 S.C.R. 885.

48. In support of the contention that an order of this Court be it administrative or judicial which is violative of fundamental right can always be corrected by this Court when attention of the Court is drawn to this infirmity, it is instructive to refer to the decision of this Court in Prem Chand Garg v. Excise Commissioner, U.P., Allahabad (supra). This is a decision by a Bench of five learned Judges. Gajendragadkar, J. spoke for four learned Judges including himself and Shah, J. expressed a dissenting opinion. The question was whether Rule 12 of Order XXXV of the Supreme Court Rules empowered the Supreme Court in writ petitions under Article 32 to require the petitioner to furnish security for the costs of the respondent. Article 145 of the Constitution provides for the rules to be made subject to any law made by Parliament and Rule 12 was framed thereunder. The petitioner contended that the rule was invalid as it placed obstructions on the fundamental right guaranteed under Article 32 to move the Supreme Court for the enforcement of fundamental rights. This rule as well as the judicial order dismissing the petition under Article 32 of the Constitution for non-compliance with Rule 12 of Order XXXV of the Supreme Court Rules were held invalid. In order to appreciate the significance of this point and the actual ratio of that decision so far as it is relevant for our present purpose it is necessary to refer to a few facts of that decision. The petitioner and 8 others who were partners of M/s. Industrial Chemical Corporation, Ghaziabad, had filed under Article 32 of the Constitution a petition impeaching the validity of the order passed by the Excise Commissioner refusing permission to the Distillery to supply power alcohol to the said petitioners. The petition was admitted on 12th December, 1961 and a rule was ordered to be issued to the respondents, the Excise Commissioner of U.P., Allahabad, and the State of U.P. At the time when the rule was issued, this Court directed under the impugned rule that the petitioners should deposit a security of Rs. 2,500 in cash within six weeks. According to the practice of this Court prevailing since 1959, this order was treated as a condition precedent for issuing rule nisi to the impleaded respondents. The petitioners found it difficult to raise the amount and so on January 24, 1962, they moved this Court for modification of the said order as to security. This application was dismissed, but the petitioners were given further time to deposit the said amount by March 26, 1962. This order was passed on March 15, 1962. The petitioners then tried to collect the requisite fund, but failed in their efforts and that led to the said petition filed on March 24, 1962 by the said petitioners. The petitioners contended that the impugned rule, in so far as it related to the giving of security, was ultra vires, because it contravened the fundamental right guaranteed to the petitioners under Article 32 of the Constitution. There were two orders, namely, one for security of costs and another for the dismissal of the previous application under Article 32 of the Constitution.

49. this Court by majority held that Rule 12 of Order XXXV of the Supreme Court Rules was invalid in so far as it related to the furnishing of security. The right to move the Supreme Court, it was emphasised, under Article 32 was an absolute right and the

content of this right could not be circumscribed or impaired on any ground and an order for furnishing security for the respondent's costs retarded the assertion or vindication of the fundamental right under Article 32 and contravened the said right. The fact that the rule was discretionary did not alter the position. Though Article 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the Court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. No question of inconsistency between Article 142(1) and Article 32 arose. Gajendragadkar, J. speaking for the majority of the Judges of this Court said that Article 142(1) did not confer any power on this Court to contravene the provisions of Article 32 of the Constitution. Nor did Article 145 confer power upon this Court to make rules, empowering it to contravene the provisions of the fundamental right. At page 899 of the Reports, Gajendragadkar, J. reiterated that the powers of this Court are no doubt very wide and they are intended and "will always be exercised in the interests of justice." But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. It was emphasised that an order which this Court could make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws (Emphasis supplied). The Court therefore, held that it was not possible to hold that Article 142(1) conferred upon this Court powers which could contravene the provisions of Article 32. It follows, therefore, that the directions given by this Court on 16th February, 1984, on the ground of expeditious trial by transferring Special Case No. 24 of 1982 and Special Case No. 3 of 1983 pending in the Court of Special Judge, Greater Bombay, Shri S.B. Sule, to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court was contrary to the relevant statutory provision, namely, Section 7(2) of the Criminal law Amendment Act, 1952 and as such violative of Article 21 of the Constitution. Furthermore, it violates Article 14 of the Constitution as being made applicable to a very special case among the special cases, without any guideline as to which cases required speedier justice. It that was so as in Prem Chand Garg's case, that was a mistake of so great a magnitude that it deprives a man by being treated differently of his fundamental right for defending himself in a criminal trial in accordance with law. If that was so then when the attention of the Court is drawn the Court has always the power and the obligation to correct it ex debito justitiae and treat the second application by its inherent power as a power of review to correct the original mistake. No suitor should suffer for the wrong of the Court. this Court in Prem Chand Garg's case struck down not only the administrative order enjoined by Rule 12 for deposit of security in a petition under Article 32 of the Constitution but also struck down the judicial order passed by the Court for non-deposit of such security in the subsequent stage of the same proceeding when attention of the Court to the infirmity of the rule was drawn. It may be mentioned that Shah, J. was of the opinion that Rule 12 was not violative. For the present controversy it is not necessary to deal with this aspect of the matter.

50. The power of the Court to correct an error subsequently has been reiterated by a decision of a bench of nine Judges of this Court in Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr. MANU/SC/0044/1966: [1966]3SCR744. The facts were different and not quite relevant for our present purposes but in order to appreciate the contentions urged, it will be appropriate to refer to certain portions of the same. There was a suit for defamation against the editor of a weekly newspaper, which was filed in the original side of the High Court. One of the witnesses prayed that the Court may order that publicity should not be given to his evidence in the press as his business would be affected. After hearing arguments, the trial Judge passed an oral order prohibiting the publication of the evidence of the witness. A reporter of the weekly along with other journalists moved this Court under Article 32 of the Constitution challenging the validity of the order. It was contended that: (1) the High Court did not have inherent power to pass the order; (2) the impugned order violated the fundamental rights of the petitioners under Article 19(1)(a); and (3) the order was amenable to the writ jurisdiction of this Court under Article 32 of the Constitution.

51. It was held by Gajendragadkar, C.J. for himself and five other learned Judges that the order was within the inherent power of the High Court. Sarkar, J. was of the view that the High Court had power to prevent publication of proceedings and it was a facet of the power to hold a trial in camera and stems from it. Shah, J. was, however, of the view that the CPC contained no express provision authorising the Court to hold its proceedings in camera, but if excessive publicity itself operates as an instrument of injustice, the Court has inherent jurisdiction to pass an order excluding the public when the nature of the case necessitates such a course to be adopted. Hidayatullah, J. was, however, of the view that a Court which was holding a public trial from which the public was not excluded, could not suppress the publication of the deposition of a witness, heard not in camera but in open Court, on the request of the witness that his business would suffer. Sarker, J. further reiterated that if a judicial tribunal makes an order which it has jurisdiction to make by applying a law which is valid in all respects, that order cannot offend a fundamental right. An order which is within the jurisdiction of the tribunal which made it, if the tribunal had jurisdiction to decide the matters that were litigated before it and if the law which it applied in making the order was a valid law, could not be interfered with. It was reiterated that the tribunal having this jurisdiction does not act without jurisdiction if it makes an error in the application of the law.

52. Hidayatullah, J. observed at page 790 of the report that in Prem Chand Garg's case the rule required the furnishing of security in petition under Article 32 and it was held to abridge the fundamental rights. But it was said that the rule was struck down and not the judicial decision which was only revised. That may be so. But a judicial decision based on such a rule is not any better and offends the fundamental rights just the same and not less so because it happens to be a judicial order. If there be no appropriate remedy to get such an order removed because the Court has no superior, it does not mean that the order is made good. When judged under the Constitution it is still a void order although it may

bind parties unless set aside. Hidayatullah, J. reiterated that procedural safeguards are as important as other safeguards. Hidayatullah, J. reiterated that the order committed a breach of the fundamental right of freedom of speech and expression. We are, therefore, of the opinion that the appropriate order would be to recall the directions contained in the order dated 16th February, 1984.

53. In considering the question whether in a subsequent proceeding we can go to the validity or otherwise of a previous decision on a question of law inter-parties, it may be instructive to refer to the decision of this Court in Smt. Ujjam Bai v. State of Uttar Pradesh MANU/SC/0101/1961: [1963]1SCR778. There, the petitioner was a partner in a firm which carried on the business of manufacture and sale of hand-made bidis. On December 14, 1957, the State Government issued a notification under Section 4(1)(b) of the U.P. Sales Tax Act, 1948. By a subsequent notification dated 25th November, 1958, hand-made and machine-made bidis were unconditionally exempted from payment of sales tax. The Sales Tax Officer had sent a notice to the firm for the assessment of tax on sale of bidis during the assessment period 1st of April, 1958 to June 30, 1958. The firm claimed that the notification dated 14th December, 1957 had exempted bidis from payment of sales tax and that, therefore, it was not liable to pay sales tax on the sale of bidis. This position was not accepted by the Sales Tax Officer who passed certain orders. The firm appealed under Section 9 of the Act to the Judge (Appeals) Sales Tax, but that was dismissed. The firm moved the High Court under Article 226 of the Constitution. The High Court took the view that the firm had another remedy under the Act and the Sales Tax Officer had not committed any apparent error in interpreting the notification of December 14, 1957. The appeal against the order of the High Court on a certificate under Article 133(1)(a) of the Constitution was dismissed by this Court for non-prosecution and the firm filed an application for a restoration of the appeal and condonation of delay. During the pendency of that appeal another petition was filed under Article 32 of the Constitution for the enforcement of the fundamental right under Articles 19(1)(g) and 31 of the Constitution. Before the Constitution Bench which heard the matter a preliminary objection was raised against the maintainability of the petition and the correctness of the decision of this Court in Kailash Nath v. State of U.P., MANU/SC/0136/1957: AIR1957SC790 relied upon by the petitioner was challenged. The learned Judges referred the case to a larger Bench. It was held by this Court by a majority of five learned Judges that the answer to the questions must be in the negative. The case of Kailash Nath was not correctly decided and the decision was not sustainable on the authorities on which it was based. Das, J. speaking for himself observed that the right to move this Court by appropriate proceedings for the enforcement of fundamental rights conferred by Part III of the Constitution was itself a guaranteed fundamental right and this Court was not trammelled by procedural technicalities in making an order or issuing a writ for the enforcement of such rights. The question, however, was whether, a quasi-judicial authority which made an order in the undoubted exercise of its jurisdiction in pursuance of a provision of law which was intra vires, an error of law or fact committed by that authority could not be impeached otherwise than on appeal, unless the erroneous

determination related to a matter on which the jurisdiction of that body depended. It was held that a tribunal might lack jurisdiction if it was improperly constituted. In such a case, the characteristic attribute of a judicial act or decision was that it binds, whether right or wrong, and no question of the enforcement of a fundamental right could arise on an application under Article 32. Subba Rao, J. was, however, unable to agree.

54. Shri Jethmalani urged that the directions given on 16th February, 1984, were not per incuriam. We are unable to accept this submission. It was manifest to the Bench that exclusive jurisdiction created under Section 7(1) of the 1952 Act read with Section 6 of the said Act, when brought to the notice of this Court, precluded the exercise of the power under Section 407 of the Code. There was no argument, no submission and no decision on this aspect at all. There was no prayer in the appeal which was pending before this Court for such directions. Furthermore, in giving such directions, this Court did not advert to or consider the effect of Anwar Ali Sarkar's case (supra) which was a binding precedent. A mistake on the part of the Court shall not cause prejudice to any one. He further added that the primary duty of every Court is to adjudicate the cases arising between the parties. According to him, it is certainly open to a larger Bench to take a view different from that taken by the earlier Bench, if it was manifestly erroneous and he urged that the trial of a corrupt Chief Minister before a High Court, instead of a Judge designated by the State Government was not so injurious to public interest that it should be overruled or set aside. He invited us to consider two questions: (1) does the impugned order promote justice? and (2) is it technically valid? After considering these two questions, we are clearly of the opinion that the answer to both these questions is in the negative. No prejudice need be proved for enforcing the fundamental rights. Violation of a fundamental right itself renders the impugned action void. So also the violation of the principles of natural justice renders the act a nullity. Four valuable rights, it appears to us, of the appellant have been taken away by the impugned directions.

(i) The right to be tried by a Special Judge in accordance with the procedure established by law and enacted by Parliament.

(ii) The right of revision to the High Court under Section 9 of the Criminal Law Amendment Act.

(iii) The right of first appeal to the High Court under the same section.

(iv) The right to move the Supreme Court under Article 136 thereafter by way of a second appeal, if necessary.

55. In this connection Shri Rao rightly submitted that it is no necessary to consider whether Section 374 of the Criminal Procedure Code confers the right of appeal to this Court from the judgment of a learned Judge of the High Court to whom the case had been assigned inasmuch as the transfer itself was illegal. One has to consider that Section 407

of the Criminal Procedure Code was subject to the overriding mandate of Section 7(1) of the 1952 Act, and hence, it does not permit the High Court to withdraw a case for trial to itself from the; Court of Special Judge. It was submitted by Shri Rao that even in cases where a case is withdrawn by the High Court to itself from a criminal court other than the Court of Special Judge, the High Court exercised transferred jurisdiction which is different from original jurisdiction arising out of initiation of the proceedings in the High Court. In any event Section 374 of Criminal Procedure Code limits the right to appeals arising out of Clause 24 of the Letters Patent.

56. In aid of the submission that procedure for trial evolved in derogation of the right guaranteed under Article 21 of the Constitution would be bad, reliance was placed on Attorney General of India v. Lachma Devi and Ors. [1985] 2 Scale 144. In aid of the submission on the question of validity our attention was drawn to 'Jurisdiction and Illegality' by Amnon Rubinstein (1965 Edn.). The Parliament did not grant to the Court the jurisdiction to transfer a case to the High Court of Bombay. However, as the superior Court is deemed to have a general jurisdiction, the law presumes that the Court acted within jurisdiction. In the instant case that presumption cannot be taken,firstly because the question of jurisdiction was not agitated before the Court, secondly these directions were given per incuriam as mentioned hereinbefore and thirdly the superior Court alone can set aside an error in its directions when attention is drawn to that error. This view is warranted only because of peculiar facts and circumstances of the present case. Here the trial of a citizen in a Special Court under special jurisdiction is involved, hence, the liberty of the subject is involved. In this connection, it is instructive to refer to page 126 of Rubinstein's aforesaid book. It has to be borne in mind that as in Kuchenmeister v. Home Office [1958] 1 Q.B. 496 here form becomes substance. No doubt, that being so it must be by decisions and authorities, it appears to us patently clear that the directions given by this Court on 16th February, 1984 were clearly unwarranted by constitutional provisions and in derogation of the law enacted by the Parliament. See the observations of Attorney General v. Herman James Sillem [1864] 10 H.L.C. 703, where it was reiterated that the creation of a right to an appeal is an act which requires legislative authority, neither an inferior Court nor the superior Court or both combined can create such a right, it being one of limitation and extension of jurisdiction. See also the observations of Isaacs v. Roberston [1984] 3 A.E.R. 140 where it was reiterated by Privy Council that if an order is regular it can be set aside by an appellate Court; if the order is irregular it can be set aside by the Court that made it on the application being made to that Court either under the rules of that Court dealing expressly with setting aside orders for irregularity or ex debito justitiae if the circumstances warranted, namely, violation of the rules of natural justice or fundamental rights. In Ledgard v. Bull, 13 I.A. 134, it was held that under the old Civil Procedure Code under Section 25 the superior Court could not make an order of transfer of a case unless the Court from which the transfer was sought to be made, had jurisdiction to try. In the facts of the instant case, the criminal revision application which was pending before the High Court even if it was deemed to be transferred to this Court under Article 139A of the Constitution it would not have vested this Court with power larger than what

is contained in Section 407 of Criminal Procedure Code. Under Section 407 of the Criminal Procedure Code read with the Criminal law Amendment Act, the High Court could not transfer to itself proceedings under Sections 6 and 7 of the said Act. this Court by transferring the proceedings to itself, could not have acquired larger jurisdiction. The fact that the objection was not raised before this Court giving directions on 16th February, 1984 cannot amount to any waiver. In Meenakshi Naidoo v. Subramaniya Sastri, 14 I.A. 160 it was held that if there was inherent incompetence in a High Court to deal with all questions before it then consent could not confer on the High Court any jurisdiction which it never possessed.

57. We are clearly of the opinion that the right of the appellant under Article 14 regarding equality before the law and equal protection of law in this case has been violated. The appellant has also a right not to be singled out for special treatment by a Special Court created for him alone. This right is implicit in the right to equality. See Anwar Ali Sarkar's case (supra).

58. Here the appellant has a further right under Article 21 of the Constitution a right to trial by a Special Judge under Section 7(1) of the 1952 Act which is the procedure established by law made by the Parliament, and a further right to move the High Court by way of revision or first appeal under Section 9 of the said Act. He has also a right not to suffer any order passed behind his back by a Court in violation of the basic principles of natural justice. Directions having been given in this case as we have seen without hearing the appellant though it appears from the circumstances that the order was passed in the presence of the counsel for the appellant, these were bad.

59. In Nawabkhan Abbaskhan v. The State of Gujarat MANU/SC/0068/1974: 1974CriLJ1054, it was held that an order passed without hearing a party which affects his fundamental rights, is void and as soon as the order is declared void by a Court, the decision operates from its nativity. It is proper for this Court to act ex debito justitiae, to act in favour of the fundamental rights of the appellant.

60. In so far as Mirajkar's case (supra) which is a decision of a Bench of 9 Judges and to the extent it affirms Prem Chand Garg's case (supra), the Court has power to review either under Section 137 or suo motu the directions given by this Court. See in this connection P.S.R. Sadhananatham v. Arunachalam MANU/SC/0083/1980: [1980]2SCR873 and Suk Das v. Union of Territory of Arunachal Pradesh MANU/SC/0140/1986: 1986CriLJ1084. See also the observations in Asrumati Debi v. Kumar Rupendra Deb Raikot and Ors. MANU/SC/0088/1953: [1953]4SCR1159, Satyadhyan Ghosal and Ors. v. Smt. Deorajin Debi and Anr. MANU/SC/0295/1960: [1960]3SCR590, Sukhrani (dead) by L.Ls. and Ors. v. Hari Shanker and Ors. MANU/SC/0538/1979: [1979]3SCR671 and Bejoy Gopal Mukherji v. Pratul Chandra Ghose MANU/SC/0077/1953: [1953]4SCR930.

61. We are further of the view that in the earlier judgment the points for setting aside the decision, did not include the question of withdrawal of the case from the Court of Special Judge to Supreme Court and transfer it to the High Court. Unless a plea in question is taken it cannot operate as res judicata. See Shivshankar Prasad Shah and Ors. v. Baikunth Nath Singh and Ors. MANU/SC/0022/1969: [1969]3SCR908, Bikan Mahuri and Ors. v. Mst. Bibi Walian and Ors. MANU/BH/0174/1939: AIR1939Pat633. See also S.L. kapoor v. Jagmohan and Ors. MANU/SC/0036/1980: [1981]1SCR746 on the question of violation of the principles of natural justice. Also see Maneka Gandhi v. Union of India MANU/SC/0133/1978: [1978]2SCR621 at pages 674-681. Though what is mentioned hereinbefore in the Bengal Immunity Co. Ltd. v. The State of Bihar and Ors. (supra), the Court was not concerned with the earlier decision between the same parties. At page 623 it was reiterated that the Court was not bound to follow a decision of its own if it was satisfied that the decision was given per incuriam or the attention of the Court was not drawn. It is also well-settled that an elementary rule of justice is that no party should suffer by mistake of the Court. See Sastri Yagnapurushadji and Ors. v. Muldas Bhudardas Vaishya and Anr. MANU/SC/0040/1966: [1966]3SCR242, Jang Singh v. Brijlal MANU/SC/0006/1963: [1964]2SCR145, Bhajahari Mondal v: The State of West Bengal MANU/SC/0052/1958: 1959CriLJ98 and Asgarali N. Singaporawalla v. The State of Bombay MANU/SC/0100/1957: 1957CriLJ605.

62. Shri Rao further submitted that we should not only ignore the directions or set aside the directions contained in the order dated 16th February, 1984, but also direct that the appellant should not suffer any further trial. It was urged that the appellant has been deprived of his fundamental right guaranteed under Articles 14 and 21 as a result of the directions given by this Court. Our attention was drawn to the observations of this Court in Suk Das's case (supra) for this purpose. He further addressed us to the fact that six and half years have elapsed since the first complaint was lodged against the appellant and during this long period the appellant has suffered a great deal. We are further invited to go into the allegations and to held that there was nothing which could induce us to prolong the agony of the appellant. We are, however, not inclined to go into this question.

63. The right of appeal under Section 374 is limited to Clause 24 of Letters Patent. It was further submitted that the expression 'Extraordinary original criminal jurisdiction' under Section 374 has to be understood having regard to the language used in the Code and other relevant statutory provisions and not with reference to decisions wherein Courts described jurisdiction acquired by transfer as extraordinary original jurisdiction. In that view the decisions referred to by Shri Jethmalani being Kavasji Pestonji Dalai v. Rustomji Sorabji jamadar and Anr, MANU/MH/0034/1948: AIR 1949 Bom. 42, Sunil Chandra Roy and Anr. v. The State, MANU/WB/0110/1954: AIR1954Cal305, Sasadhar Acharjya and Anr. v. Sir Charles Tegart and Ors. [1935] CWN 1088, Peoples' Insurance Co. Ltd. v. Sardul Singh Caveeshgar and Ors. AIR 1961 Punj. 87 and P.P. Front, New Delhi v. K.K. Birla MANU/DE/0037/1983: 23(1983)DLT499 are not relevant.

64. It appears to us that there is good deal of force in the argument that Section 411A of the old Code which corresponds to Section 374 of the new Code contained the expression 'original jurisdiction'. The new Code abolished the original jurisdiction of High Courts but retained the extraordinary original criminal jurisdiction conferred by Clause 24 of the Letters Patent which some of the High Courts had.

65. The right of appeal is, therefore, confined only to cases decided by the High Court in its Letter Patent jurisdiction which in terms is 'extraordinary original criminal jurisdiction'.

66. By the time the new CrPC 1973 was framed, Article 21 had not been interpreted so as to include one right of appeal both on facts and law.

67. Shri Ram Jethmalani made elaborate submissions before us regarding the purpose of the Criminal Law Amendment Act and the Constitution of the Special Court. In our opinion, these submissions have no relevance and do not authorise this Court to confer a special jurisdiction on a High Court not warranted by the statute. The observations of this Court in Re The Special Courts Bill, MANU/SC/0039/1978: [1979]2SCR476 are not relevant for this purpose. Similarly, the observations on right of appeal in V.C. Shukla v. Delhi Administration [1980] 3 SCR 500, Shri Jethmalani brought to our notice certain facts to say that the powers given in the Criminal Law Amendment Act were sought to be misused by the State Government under the influence of the appellant. In our opinion, these submissions are not relevant for the present purpose. Mr. Jethmalani submitted that the argument that in so far as Section 407 purports to authorise such a transfer it stands repealed by Section 7(1) of the Criminal Law Amendment Act is wrong. He said it can be done in its extraordinary criminal jurisdiction. We are unable to accept this submission. We are also unable to accept the submission that the order of transfer was made with full knowledge of Section 7(1) of the Criminal Law Amendment Act and the so-called exclusive jurisdiction was taken away from Special Judges and the directions were not given per incuriam. That is not right. He drew our attention to the principles of interpretation of statutes and drew our attention to the purpose of Section 7(1) of the Act. He submitted that when the Amending Act changes the law, the change must be confined to the mischief present and intended to be dealt with. He drew us to the Tek Chand Committee Report and submitted that he did not wish that an occasional case withdrawn and tried in a High Court was because of delay in disposal of corruption cases. He further submitted that interference with existing jurisdiction and powers of superior Courts can only be by express and clear language. It cannot be brought about by aside wind.

68. Thirdly, the Act of 1952 and the Code have to be read and construed together, he urged. The Court is never anxious to discover a repugnancy and in ft. apro tanto repeal. Resort to the non obstante clause is permissible only when it is impossible to harmonise the two provisions.

69. Shri Jethmalani highlighted before us that it was for the first time a Chief Minister had been found guilty of receiving quid pro quo for orders of allotment of cement to various builders by a Single Judge of the High Court confirmed by a Division Bench of the High Court. He also urged before us that it was for the first time such a Chief Minister did not have the courage to prosecute his special leave petition before this Court against the findings of three Judges of the High Court. Shri Jethmalani also urged that it was for the first time this Court found that a case instituted in 1982 made no progress till 1984. Shri Jethmalani also sought to contend that Section 7(1) of the 1952 Act states "shall be triable by Special Judges only", but does not say that under no circumstances the case will be transferred to be tried by the High Court even in its Extraordinary Original Criminal Jurisdiction. He submitted that Section 407(1)(iv) is very much in the statute and and it is not repealed in respect of the cases pending before the Special Judge. There is no question of repealing Section 407(1)(iv). Section 407 deals with the power of the High Court to transfer cases and appeals. Section 7 is entirely different and one has to understand the scheme of the Act of 1952, he urged. It was an Act which provided for a more speedy trial of certain offences. For this it gave power to appoint Special Judges and stipulated for appointment of Special Judges under the Act. Section 7 states that notwithstanding anything contained in the Code, the offences mentioned in Sub-section (1) of Section 6 shall be triable by Special Judges only. By express terms therefore, it takes away the right to transfer cases contained in the Code to any other Court which is not a Special Court. Shri Jethmalani sought to urge that the Constitution Bench had considered this position. That is not so. He submitted that the directions of this Court on 16th February, 1984 were not given per incuriam or void for any reason. He referred us to Dias on jurisprudence, 5th Edition, page 128 and relied on the decision of Milianges v. George Frank (Textiles) Ltd. [1975] 3 All E.R. 801. He submitted that the per incuriam rule does not apply where the previous authority is alluded to. It is true that previous statute is referred to in the other judgment delivered on the same date in connection with different contentions. Section 7(1) was not referred to in respect of the directions given on 16th February, 1984 in the case of R.S. Nayak v. A.R. Antulay (supra). Therefore, as mentioned hereinbefore the observations indubitably were per incuriam. In this case in view of the specific language used in Section 7, it is not necessary to consider the other submissions of Shri Jethmalani, whether the procedure for trial by Special Judges under the Code has stood repealed or not. The concept of repeal may have no application in this case. It is clear that words should normally be given their ordinary meaning bearing in mind the context. It is only where the literal meaning is not clear that one resorts to the golden rule of interpretation or the mischief rule of interpretation. This is well illustrated from the observations of Tindal, C.J. in Sussex Peerage Claim [1844] 11 C & F 85. He observed:

The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from

the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Pyer, Stewell v. Lord Zouch [1569] 1 Plowd 353 is a key to open the minds of the makers of the Act, and the mischiefs which they intend to redress.

70. This passage states the commonly accepted view concerning the relationship between the literal and mischief rules of interpretation of statutes. Here there is no question as to what was the previous law and what was intended to be placed or replaced as observed by Lord Wilberforce in 274 House of Lords Debate, Col. 1294 on 16th November, 1966, see Cross; Statutory Interpretation, second edition, page 36. He observed that the interpretation of legislation is just a part of the process of being a good lawyer; a multi-faceted thing, calling for many varied talents; not a subject which can be confined in rules. When the words are clear nothing remains to be seen. If words are as such ambiguous or doubtful other aids come in. In this context, the submission of controversy was whether the Code repealed the Act of 1952 or whether it was repugnant or not is futile exercise to undertake. Shri Jethmalani distinguished the decision in Chadha's case, which has already been discussed. It is not necessary to discuss the controversy whether the Chartered High Courts contained the Extraordinary Original Criminal Jurisdiction by the Letters Patent.

71. Article 134(1)(b) does not recognise in every High Court power to withdraw for trial cases from any Court subordinate to its authority. At least this Article cannot be construed to mean where power to withdraw is restricted, it can be widened by virtue of Article 134(1)(b) of the Constitution. Section 374 of the Code undoubtedly gives a right of appeal. Where by a specific clause of a specific statute the power is given for trial by the Special Judge only and transfer can be from one such Judge to another Special Judge, there is no warrant to suggest that the High Court has power to transfer such a case from a Judge under Section 6 of the Act of 1952 to itself. It is not a case of exclusion of the superior Courts. So the submissions made on this aspect by Shri Jethmalani are not relevant.

72. Dealing with the submission that the order of the Constitution Bench was void or non-est and it violated the principles of natural justice, it was submitted by Shri Jethmalani that it was factually incorrect. Inspite of the submissions the appellant did not make any submission as to directions for transfer as asked for by Shri Tarkunde. It was submitted that the case should be transferred to the High Court. The Court merely observed there that they had given ample direction. No question of submission arose after the judgment was delivered. In any case, if this was bad the fact that no objection had been raised would not make it good. No question of technical rules or res judicata apply, Shri Jethmalani submitted that it would amount to an abuse of the process of the Court. He referred us to Re Tarling [1979] 1 All E.R. 981; Ali v. Secretary of State for the Home Department [1984] 1 All E.R. 1009 and Seervai's Constitutional Law, Vol. 1, pages 260 to 265. We are

of the opinion that these submissions are not relevant. There is no abuse of the process of the Court. Shri Jethmalani submitted that there was no prejudice to the accused. There was prejudice to the accused in being singled out as a special class of accused for a special dispensation without room for any appeal as of right and without power of the revision to the High Court. There is prejudice in that. Reliance placed on the decision of this Court in Ramesh Chandra Arora v. The State MANU/SC/0034/1959: 1960CriLJ177 was not proper in the facts of this case.

73. If a discrimination is brought about by judicial perception and not by executive whim, if it is unauthorised by law, it will be in derogation of the right of the appellant as the special procedure in Anwar Ali Sarkar's case (supra) curtailed the rights and privileges of the accused. Similarly, in this case by judicial direction the rights and privileges of the accused have been curtailed without any justification in law. Reliance was placed on the observations of the seven Judges Bench in Re: Special Courts Bill, 1978 (supra). Shri Jethmalani relied on the said observations therein and emphasised that purity in public life is a desired goal at all times and in all situations and ordinary Criminal Courts due to congestion of work cannot reasonably be expected to bring the prosecutions to speedy termination. He further submitted that it is imperative that persons holding high public or political office must be speedily tried in the interests of justice. Longer these trials last, justice will tarry, assuming the charges to be justified, greater will be the impediments in fostering democracy, which is not a plant of easy growth. All this is true but the trial even of person holding public office though to be made speedily must be done in accordance with the procedure established by law. The provisions of Section 6 read with Section 7 of the Act of 1952 in the facts and circumstances of this case is the procedure established by law; any deviation even by a judicial direction will be negation of the rule of law.

74. Our attention was drawn to Article 145(e) and it was submitted that review can be made only where power is expressly conferred and the review is subject to the rules made under Article 145(e) by the Supreme Court. The principle of finality on which the Article proceeds applies to both judgments and orders made by the Supreme Court. But directions given per incuriam and in violation of certain constitutional limitations and in derogation of the principles of natural justice can always be remedied by the court ex debite justitiae. Shri Jethmalani's submission was that ex debite justitiae, these directions could not be recalled. We are unable to agree with this submission.

75. The Privy Council in Isaacs v. Robertson [1984] 3 A.E.R. 140 held that orders made by a Court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. If an order is regular it can only be set aside by an appellate Court; if it is irregular it can be set aside by the Court that made it on application being made to that Court either under rules of Court dealing expressly with setting aside orders for irregularity or ex debite justitiae if the circumstances warranted, namely, where there was a breach of the rules of natural justice etc. Shri Jethmalani urged before us that Lord Diplock had in express terms rejected the argument that any orders of a superior Court

of unlimited jurisdiction can over be void in the sense that they can be ignored with impunity. We are not concerned with that. Lord Diplock delivered the judgment. Another Judge who sat in the Privy Council with him was Lord Keith of Kinkel. Both these Law Lords were parties to the House of Lords judgment in Re Racal Communications Ltd. case [1980] 2 A.E.R. 634 and their Lordships did not extend this principle any further. Shri Jethmalani submitted that there was no question of reviewing an order passed on the construction of law. Lord Scarman refused to extend the Anisminic principle to superior Courts by the felicitous statement that this amounted to comparison of incomparables. We are not concerned with this controversy. We are not comparing incomparables. We are correcting an irregularity committed by Court not on construction or misconstruction of a statute but on non-perception of certain provisions and certain authorities which would amount to derogation of the constitutional rights of the citizen.

76. The directions given by the order of 16th February, 1984 at page 557 were certainly without hearing though in the presence of the parties. Again consequential upon directions these were challenged ultimately in this Court and finally this Court reserved the right to challenge these by an appropriate application.

77. The directions were in deprival of Constitutional rights and contrary to the express provisions of the Act of 1952. The directions were given in violation of the principles of natural justice. The directions were without precedent in the background of the Act of 1952. The directions definitely deprived the appellant of certain rights of appeal and revision and his rights under the Constitution.

78. We do not labour ourselves on the question of discretion to disobey a judicial order on the ground of invalid judicial order. See discretion to Disobey by Mertimer R. Kadish and Sanford H. Kadish pages 111 and 112. These directions were void because the power was not there for this Court to transfer a proceeding under the Act of 1952 from one Special Judge to the High Court. This is not a case of collateral attack on judicial proceeding; it is a case where the Court having no Court superior to it rectifies its own order. We recognise that the distinction between an error which entails absence of jurisdiction and an error made within the jurisdiction is very fine. So fine indeed that it is rapidly being eroded as observed by Lord Wilberforce in Anisminic Ltd. v. Foreign Compensation Commissioner [1969] 1 All E.R. 208. Having regard to the enormity of the consequences of the error to the appellant and by reason of the fact that the directions were given suo motu, we do not find there is anything in the observations of Ittavira Mathai v. Varkey Varkey and Anr. MANU/SC/0260/1963: [1964]1SCR495 which detract the power of the Court to review its judgment ex debite justitiae in case injustice has been caused. No court, however, high has jurisdiction to give an order unwarranted by the Constitution and, therefore, the principles of Bhatia Co-operative Housing Society Ltd. v. D.C. Patel MANU/SC/0064/1952: [1953]4SCR185 would not apply.

79. In giving the directions this Court infringed the Constitutional safeguards granted to a citizen or to an accused and injustice results therefrom. It is just and proper for the Court to rectify and recall that injustice, in the peculiar facts and circumstances of this case.

80. This case has caused us considerable anxiety. The appellant-accused has held an important position in this country, being the Chief Minister of a premier State of the country. He has been charged with serious criminal offences. His trial in accordance with law and the procedure established by law would have to be in accordance with the 1952 Act. That could not possibly be done because of the directions of this Court dated 16th February, 1984, as indicated above. It has not yet been found whether the appellant is guilty or innocent. It is unfortunate, unfortunate for the people of the State, unfortunate for the country as a whole, unfortunate for the future working of democracy in this country which, though is not a plant of an easy growth yet is with deep root in the Indian polity that delay has occurred due to procedural wrangles. The appellant may be guilty of grave offences alleged against him or he may be completely or if not completely to a large extent, innocent. Values in public life and perspective of these values in public life, have undergone serious changes and erosion during the last few decades. What was unheard of before is common place today. A new value orientation is being undergone in our life and in our culture. We are at the threshold of the cross-roads of values. It is, for the sovereign people of the country to settle those conflicts yet the Courts have vital roles to play in such matters. With the avowed object of speedier trial the case of the appellant had been transferred to the High Court but on grounds of expediency of trial he cannot be subjected to a procedure unwarranted by law, and contrary to the constitutional provisions. The appellant may or may not be an ideal politician. It is a fact, however, that the allegations have been brought against him by a person belonging to a political party opposed to his but that is not the decisive factor. If the appellant Shri Abdul Rehman Antulay has infringed law, he must be dealt with in accordance with the law. We proclaim and pronounce that no man is above the law; but at the same time reiterate and declare that no man can be denied his rights under the Constitution and the laws. He has a right to be dealt with in accordance with the law and not in derogation of it. this Court, in its anxiety to facilitate the parties to have a speedy trial gave directions on 16th February, 1984 as mentioned hereinbefore without conscious awareness of the exclusive jurisdiction of the Special Courts under the 1952 Act and that being the only procedure established by law, there can be no deviation from the terms of Article 21 of the Constitution of India. That is the only procedure under which it should have been guided. By reason of giving the directions on 16th February, 1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution by denying him the equal protection of law by being singled out for a special procedure not provided for by law. When these factors are brought to the notice of this Court, even if there are any technicalities this Court should not feel shackled and decline to rectify that injustice or otherwise the injustice noticed will remain forever a blot on justice. It has been said long time ago that "Actus Curiae Neminem Gravabit"- an act of

the Court shall prejudice no man. This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law.

81. Lord Cairns in Alexander Rodger v. The Comptoir D'escompte De Paris, (Law Reports Vol. III 1869-71 page 465 at page 475) observed thus:

Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors. and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.

82. This passage was quoted in the Gujarat High Court by D.A. Desai, J. speaking for the Gujarat High Court in Vrajlal v. Jadavji (supra) as mentioned before. It appears that in giving directions on 16th February, 1984, this Court acted per incuriam inasmuch it did not bear in mind consciously the consequences and the provisions of Sections 6 and 7 of the 1952 Act and the binding nature of the larger Bench decision in Anwar Ali Sarkar's case (supra) which was not adverted to by this Court. The basic fundamentals of the administration of justice are simple. No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the hand-maids of justice and not the mistress of the justice. Ex debite justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied. This is a peculiar fact of this case which requires emphasis.

83. Shri Rao, learned Counsel for the appellant has vehemently canvassed before us that the appellant has suffered a great wrong for over six and a half years. He has undergone trials and proceedings because of the mistakes of the Court. Shri Rao submitted that the appellant should be made not to suffer more. Counsel urged that political battles must be fought in the political arena. Yet a charge of infraction of law cannot remain uninvestigated against an erstwhile Chief Minister of a premier State of the country.

84. Shri Rao has canvassed before us on the authority of Hussainara Khatoon v. Home Secretary, State of Bihar, Patna MANU/SC/0119/1979: 1979CriLJ1036 ; Kadra Pahadiyal (1) v. State of Bihar MANU/SC/0140/1980: AIR1981SC939 ; Kadra Pahadiya (II) v. State of Bihar, A.I.R. 1982 S.C. 1167 and Sheela Barse v. Union of India MANU/SC/0115/1986: [1986]3SCR562. He has, however, very strongly relied upon the observations of this Court in Suk Das v. Union Territory of Arunachal Pradesh (supra). In that case the appellant a government servant was tried and convicted to suffer imprisonment for two years for offences under Section 506 read with Section 34, I.P.C. He was not represented at the trial

by any lawyer by reason of his inability to afford legal representation. On appeal the High Court held that the trial was not vitiated since no application for legal aid was made by him. On appeal this Court quashed the conviction and considered the question whether the appellant would have to be tried in accordance with law after providing legal assistance to him. this Court felt that in the interests of justice the appellant should be reinstated in service without back wages and accordingly directed that no trial should take place. Shri Rao submitted that we should in the facts of this case in the interests of justice direct that the appellant should not be tried again. Shri Rao submitted to let the appellant go only on this long delay and personal inconveniences suffered by the appellant, no more injury be caused to him. We have considered the submission. Yet we must remind ourselves that purity of public life is one of the cardinal principal which must be upheld as a matter of public policy. Allegations of legal infractions and criminal infractions must be investigated in accordance with law and procedure established under the Constitution. Even if he has been wronged, if he is allowed to be left in doubt that would cause more serious damage to the appellant. Public confidence in public administration should not be eroded any further. One wrong cannot be remedied by another wrong.

85. In the aforesaid view of the matter and having regard to the facts and circumstances of the case, we are of the opinion that the legal wrong that has been caused to the appellant should be remedied. Let that wrong be therefore remedied. Let right be done and in doing so let no more further injury be caused to public purpose.

86. In the aforesaid view of the matter the appeal is allowed; all proceedings in this matter subsequent to the directions of this Court on 16th February, 1984 as indicated before are set aside and quashed. The trial shall proceed in accordance with law, that is to say under the Act of 1952 as mentioned hereinbefore.

Authored By: Ranganath Misra, G.L. Oza, B.C. Ray, M.N. Venkatachaliah, S. Ranganathan

Ranganath Misra, J.

87. I have had the advantage of perusing the judgment proposed by my learned Brother Mukharji, J. While I agree with the conclusion proposed by my esteemed Brother, keeping the importance of the matter, particularly the consequences the decision may generate as also the fact that I was a party to the two-Judge Bench decision of this Court reported in MANU/SC/0198/1986: 1986CriLJ1922 in view, I propose to express my opinion separately.

88. Abdul Rehman Antulay, the appellant, was the Chief Minister of the State of Maharashtra from 1980 till January 20, 1982, when he resigned his office but continued to be a member of the Maharashtra Legislative Assembly. Ramdas Shrinivas Nayak,

Respondent No. 1 herein, lodged a complaint in the Court of Chief Metropolitan Magistrate, 28th Esplanade, Bombay, on September 11, 1981, against Antulay alleging commission of several offences under the Indian Penal Code as also Section 5(2) of the Prevention of Corruption Act, 1947 ('1947 Act' for short). The learned Magistrate was of the view that prosecution under Sections 161 and 165 of the Penal Code and Section 5 of the 1947 Act required sanction as a condition precedent and in its absence the complaint was not maintainable. The Governor of Bombay later accorded sanction and the Respondent No. 1 filed a fresh complaint, this time in the Court of the Special Judge of Bombay, alleging the commission of those offences which had formed the subject-matter of the complaint before the Magistrate. On receiving summons from the Court of the particular Special Judge, Antulay took the stand that the said Special Judge had no jurisdiction to entertain the complaint in view of the provisions of Section 7 of the Criminal Law Amendment Act, 1952 (hereinafter referred to as the 1952 Act) to take cognizance and such cognizance could not be taken on a private complaint. These objections were overruled by the Special Judge by order dated October 20, 1982, and the case was set down for recording evidence of the prosecution. The Criminal Revision Petition of the accused against the order of the Special Judge was rejected by the Bombay High Court and it held that a private complaint was maintainable and in view of the notification specifying a particular Special Judge for the offences in question there was no basis for the objections. this Court granted special leave to the accused against the decision of the High Court that a private complaint was maintainable. Criminal Appeal No. 347 of 1983 thus came to be instituted. In the meantime, objection raised before the Special Judge that without sanction the accused who still continued to be a member of Legislative Assembly, could not be prosecuted came to be accepted by the Special Judge. The complainant filed a criminal revision application before the High Court questioning that order. this Court granted special leave against the decision that sanction was necessary, whereupon Criminal Appeal No. 356 of 1983 was registered and the pending criminal revision application before the High Court was transferred to this Court. Both the criminal appeals and the transferred criminal revision were heard together by a five-Judge Bench of this Court but the two appeals were disposed of by two separate judgments delivered on February 16, 1984. The judgment in Criminal Appeal No. 347 of 1983 is reported in MANU/SC/0082/1984: 1984CriLJ647. In the present appeal we are not very much concerned with that judgment. The judgment of Criminal Appeal No. 356 of 1983 is reported in MANU/SC/0102/1984: 1984CriLJ613. As already noticed the main theme of the criminal appeal was as to whether a member of the Legislative Assembly was a public servant for whose prosecution for the offences involved in the complaint sanction was necessary as a condition precedent. this Court at page 557 of the Reports came to hold:

To sum up, the learned Special Judge was clearly in error in holding that M.L.A. is a public servant within the meaning of the expression in Section 12(a) and further erred in holding that a sanction of the Legislative Assembly of Maharashtra or majority of the members was a condition precedent to taking cognizance of offences committed by the

accused. For the reasons herein stated both the conclusions are wholly unsustainable and must be quashed and set aside.

Consequently this Court directed:

This appeal accordingly succeeds and is allowed. The order and decision of the learned Special Judge Shri R.B. Sule dated July 25, 1983 discharging the accused in Special Case No. 24 of 1982 and Special Case No. 3/1983 is hereby set aside and the trial shall proceed further from the stage where the accused was discharged.

this Court gave a further direction to the following effect:

The accused was the Chief Minister of a premier State-the State of Maharashtra. By a prosecution launched as early as on September 11, 1981, his character and integrity came under a cloud. Nearly 2½ years have rolled by and the case has not moved an inch further. An expeditious trial is primarily in the interest of the accused and a mandate of Article 21. Expeditious disposal of a criminal case is in the interest of both, the prosecution and the accused. Therefore, Special Case No. 24 of 1982 and Special Case No. 3/83 pending in the Court of Special Judge, Greater Bombay Shri R.B. Sule are withdrawn and transferred to the High Court of Bombay with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. On being so assigned, the learned Judge may proceed to expeditiously dispose of the cases preferably by holding the trial from day to day.

89. Pursuant to this direction, the two cases came to be posted for trial before Khatri J. of the Bombay High Court and trial opened on April 9, 1984. The appellant challenged Khatri J.'s jurisdiction on 12th March, 1984 when the matter was first placed before him but by two separate orders dated 13th March, 1984 and 16th March, 1984, the learned Judge rejected the objection by saying that he was bound by this Court's direction of the 16th February, 1984. Antulay then moved this Court by filing an application under Article 32 of the Constitution. A two-Judge Bench consisting of Desai and A.N. Sen. JJ. by order dated 17th April, 1984 dismissed the applications by saying:

A.N. Sen, J.:

There is no merit in this writ petition. The writ petition is accordingly dismissed.

In my view, the writ petition challenging the validity of the order and judgment passed by this Court as nullity or otherwise incorrect cannot be entertained. I wish to make it clear that the dismissal of this writ petition will not prejudice the right of the petitioner to approach the Court with an appropriate review petition or to file any other application which he may be entitled in law to file.

D.A. Desai, J.:

I broadly agree with the conclusion recorded by my brother. The learned Judge in deciding the SLP (Crl.) Nos. 1949-50 of 1984 has followed the decision of this Court. The learned Judge was perfectly justified and indeed it was the duty of the learned Judge to follow the decision of this Court which is binding on him. Special leave petitions are dismissed. 1984 (3) SCR 482.

16 witnesses were examined by Khatri J. by July 27, 1984. Khatri J. was relieved of trying the case on his request, whereupon the learned Chief Justice nominated Mehta J. to continue the trial. 41 more witnesses were examined before him and at the stage when 57 witnesses in all had been examined for the prosecution, the Trial Judge invited the parties to consider the framing of charges. 43 draft charges were placed for his consideration on behalf of the prosecution and the learned Trial Judge framed 21 charges and recorded an order of discharge in respect of the remaining 22. At the instance of the complainant, Respondent No. 1, the matter came before this Court in appeal on special leave and a two-Judge Bench of which I happened to be one, by judgment dated April 17, 1986, in Criminal Appeal No. 658 of 1985 (1962) 2 SCC 716 set aside the order of discharge in regard to the several offences excepting extortion and directed the learned Trial Judge to frame charges for the same. this Court requested the learned Chief Justice of the Bombay High Court to nominate another Judge to take up the matter from the stage at which Mehta J. had made the order of discharge. Shah J. came to be nominated by the learned Chief Justice to continue the trial. By order dated July 24, 1986, Shah J. rejected the application of the accused for proceeding against the alleged co-conspirators by holding that there had been a long delay, most of the prosecution witnesses had already been examined and that if the co-conspirators were then brought on record, a de novo trial would be necessitated. The appellant challenged the order of Shah J. by filing a special leave petition before this Court wherein he further alleged that the High Court had no jurisdiction to try the case. A two-Judge Bench, of which Mukherji J., my learned brother, was a member, granted special leave, whereupon this Criminal Appeal (No. 468 of 1986) came to be registered. The Respondent No. 1 asked for revocation of special leave in Criminal Miscellaneous Petition No. 4248 of 1986. While rejecting the said revocation application, by order dated October 29, 1986, the two-Judge Bench formulated several questions that arose for consideration and referred the matter for hearing by a Bench of seven Judges of the Court. That is how this seven-Judge Bench has come to be constituted to hear the appeal.

90. It is the settled position in law that jurisdiction of courts comes solely from the law of the land and cannot be exercised otherwise. So far as the position in this country is concerned conferment of jurisdiction is possible either by the provisions of the Constitution or by specific laws enacted by the Legislature. For instance, Article 129 confers all the powers of a court of record on the Supreme Court including the power to punish for contempt of itself. Articles 131, 132, 133, 134, 135, 137, 138 and 139 confer

different jurisdictions on the Supreme Court while Articles 225, 226, 227, 228 and 230 deal with conferment of jurisdiction on the High Courts. Instances of conferment of jurisdiction by specific law are very common. The laws of procedure both criminal and civil confer jurisdiction on different courts. Special jurisdiction is conferred by special statute. It is thus clear that jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the Legislature. Jurisdiction is thus the authority or power of the court to deal with a matter and make an order carrying binding force in the facts. In support of judicial opinion for this view reference may be made to the permanent edition of 'Words and Phrases Vol. 23A' at page 164. It would be appropriate to refer to two small passages occurring at pages 174 and 175 of the Volume at page 174, referring to the decision in Carlile v. National Oil and Development Co. it has been stated:

Jurisdiction is the authority to hear and determine, and in order that it may exist the following are essential: (1) A court created by law, organized and sitting; (2) authority given it by law to hear and determine causes of the kind in question; (3) power given it by law to render a judgment such as it assumes to render; (4) authority over the parties to the case if the judgment is to bind them personally as a judgment in personam, which is acquired over the plaintiff by his appearance and submission of the matter to the court, and is acquired over the defendant by his voluntary appearance, or by service of process on him; (5) authority over the thing adjudicated upon its being located within the court's territory, and by actually seizing it if liable to be carried away; (6) authority to decide the question involved, which is acquired by the question being submitted to it by the parties for decision.

91. Article 139A of the Constitution authorises this Court to transfer cases from a High Court to itself or from one High Court to another and is, therefore, not relevant for our purpose. Section 406 of the Code empowers this Court to transfer cases and appeals by providing:

(1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case of appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

(2)The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.

(3)....

The offences alleged to have been committed by the accused here are either punishable under the Penal Code or under Act 2 of 1947, both of which could have been tried in an appropriate court under the Criminal Procedure Code; but Parliament by the Criminal Law Amendment Act 46 of 1952 (1952 Act for short) amended both the Penal Code as also the Criminal Procedure Code with a view to providing for a more speedy trial of certain offences. The relevant sections of the 1952 Act are Sections 6, 7, 8, 9 and 10. For convenience, they are extracted below:

6. Power to appoint special Judges (1) The State Government may, by notification in the official Gazette, appoint as many special Judges as may be necessary for such area or areas as may be specified in the notification to try the following offences, namely,

(a) an offence punishable under Section 161, Section 162, Section 163, Section 164, Section 165 or Section 165A of the Indian Penal Code (45 of 1860) or Section 5 of the Prevention of Corruption Act, 1947 (2 of 1947);

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in Clause (a).

(2) A person shall not be qualified for appointment as a special Judge under this Act unless he is, or has been, a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the CrPC, 1898 (5 of 1898).

7. Cases triable by Special Judges (1) Notwithstanding anything contained in the CrPC, 1898 (5 of 1898), or in any other law the offences specified in Sub-section (1) of Section 6 shall be triable by Special Judges only;

(2) Every offence specified in Sub-section (1) of Section 6 shall be tried by the Special Judge for the area within which it was committed, or where there are more Special Judges than one for such area, by such one of them as may be specified in this behalf by the State Government.

(3) When trying any case, a Special Judge may also try any offence other than an offence specified in Section 6 with which the accused may, under the CrPC, 1898 (5 of 1898), be charged at the same trial

8. Procedure and powers of Special Judges (1) A Special Judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the CrPC, 1898 (5 of 1898), for the trial of warrant cases by Magistrates.

(2) A special Judge, may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon

to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof; and any pardon so tendered shall, for the purposes of Sections 339 and 339-A of the CrPC, 1898 (5 of 1898), be deemed to have been tendered under Section 338 of that Code.

(3) Save as provided in Sub-section (1) or Sub-section (2), the provisions of the CrPC, 1898 (5 of 1898), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a Special Judge; and for the purposes of the said provisions, the Court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a Special Judge shall be deemed to be a public prosecutor.

(3-A) In particular, and without prejudice to the generality of the provisions contained in Sub-section (3), the provisions of Sections 350 and 549 of the CrPC, 1898 (5 of 1898), shall, so far as may be, apply to the proceedings before a Special Judge, and for the purposes of the said provisions a special Judge shall be deemed to be a Magistrate.

(4) A special Judge may pass upon any person convicted by him any sentence authorized by law for punishment of the offence of which such person is convicted.

9. Appeal and revision-The High Court may exercise, so far as they may be applicable, all the powers conferred by Chapters XXXI and XXXII of the CrPC, 1898 (5 of 1898) on a High Court as if the Court of the special Judge were a Court of Session trying cases without a jury within the local limits of the jurisdiction of the High Court.

10. Transfer of certain pending cases-All cases triable by a special Judge under Section 7 which, immediately before the commencement of this Act, were pending before any Magistrate shall, on such commencement, be forwarded for trial to the special Judge having jurisdiction over such cases.

On the ratio of the seven-Judge Bench decision of this Court in the State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952: 1952CriLJ510 the vires of this Act are not open to challenge. The majority of the learned Judges in Anwar Ali Sarkar's case expressed the view that it was open to the Legislature to set up a special forum for expedient trial of particular class of cases. Section 7(1) has clearly provided that offences specified in Sub-section (1) of Section 6 shall be triable by the Special Judge only and has taken away the power of the courts established under the CrPC to try those offences. Section 10 of the Act required all pending cases on the date of commencement of the Act to stand transferred to the respective Special Judge. Unless there be challenge to the provision creating exclusive jurisdiction of the Special Judge, the procedural law in the Amending Act is binding on courts as also the parties and no court is entitled to make orders contrary to the law which are binding. As long as Section 7 of the Amending Act

of 1952 hold the field it was not open to any court including the apex Court to act contrary to Section 7(1) of the Amending Act.

92. The power to transfer a case conferred by the Constitution or by Section 406 of the CrPC does not specifically relate to the special Court. Section 406 of the Code could perhaps be applied on the principle that the Special Judge was a subordinate court for transferring a case from one special Judge to another special Judge. That would be so because such a transfer would not contravene the mandate of Section 7(1) of the Amending Act of 1952. While that may be so, the provisions for transfer, already referred to, do not authorize transfer of a case pending in the court of a special Judge first to the Supreme Court and then to the High Court for trial. A four Judge Bench in Raja Soap Factory v. S.P. Santharaj MANU/SC/0231/1965: [1965]2SCR800 was considering the jurisdiction of the High Court to deal with a matter Shah J., as he then was, spoke for the court thus:

But if the learned Judge, as reported in the summary of the judgment, was of the opinion that the High Court is competent to assume to itself jurisdiction which it does not otherwise possess, merely because an 'extra-ordinary situation' has arisen, with respect to the learned Judge, we are unable to approve of that view. By 'jurisdiction' is meant the extent of the power which is conferred upon the court by its Constitution to try a proceeding; its exercise cannot be enlarged because what the learned Judge calls an extraordinary situation 'requires' the Court to exercise it.

93. Brother Mukharji in his elaborate judgment has come to the conclusion that the question of transferring the case from the court of the special Judge to the High Court was not in issue before the five-Judge Bench. Mr. Jethmalani in course of the argument has almost accepted the position that this was not asked for on behalf of the complainant at the hearing of the matter before the Constitution Bench. From a reading of the judgment of the Constitution Bench it appears that the transfer was a suo motu direction of the court. Since this particular aspect of the matter had not been argued and counsel did not have an opportunity of pointing out the legal bar against transfer, the learned Judges of this Court obviously did not take note of the special provisions in Section 7(1) of the 1952 Act. I am inclined to agree with Mr. Rao for Antulay that if this position had been appropriately placed, the direction for transfer from the court or exclusive jurisdiction to the High Court would not have been made by the Constitution Bench. It is appropriate to presume that this Court never' intends to act contrary to law.

94. There is no doubt that after the Division Bench of Desai and Sen, JJ. dismissed the writ petition and the special leave petitions on 17th April, 1984, by indicating that the petitioner could file an appropriate review petition or any other application which he may be entitled in law to file, no further action was taken until charges were framed on the basis of evidence of 57 witnesses and a mass of documents. After a gap of more than three years, want of jurisdiction of the High Court was sought to be reagitated before the

two-Judge Bench in the present proceedings. During this intervening period of three years or so a lot of evidence was collected by examining the prosecution witnesses and exhibiting documents. A learned Judge of the High Court devoted his full time to the case. Mr. Jethmalani pointed out to us in course of his argument that the evidence that has already been collected is actually almost three-fourths of what the prosecution had to put in. Court's time has been consumed, evidence has been collected and parties have been put to huge expenses. To entertain the claim of the appellant that the transfer of the case from the Special Judge to the High Court was without authority of law at this point of time would necessarily wipe out the evidence and set the clock back by about four years. It may be that some of the witnesses may no longer be available when the de novo trial takes place. Apart from these features, according to Mr. Jethmalani to say at this stage that the direction given by a five-Judge Bench is not binding and, therefore, not operative will shake the confidence of the litigant public in the judicial process and in the interest of the system it should not be done. Long arguments were advanced on either side in support of their respective stands-the appellant pleading that the direction for transfer of the proceedings from the Special Judge to the High Court was a nullity and Mr. Jethmalani contending that the apex Court had exercised its powers for expediting the trial and the action was not contrary to law. Brother Mukharji has dealt with these submissions at length and I do not find any necessity to dwell upon this aspect in full measure. In the ultimate analysis I am satisfied that this Court did not possess the power to transfer the proceedings from the Special Judge to the High Court. Antulay has raised objection at this stage before the matter has been concluded. In case after a full dressed trial, he is convicted, there can be no doubt that the wise men in law will raise on his behalf, inter alia, the same contention as has been advanced now by way of challenge to the conviction. If the accused is really guilty of the offences as alleged by the prosecution there can be no two opinions that he should be suitably punished and the social mechanism of punishing the guilty must come heavily upon him. No known loopholes should be permitted to creep in and subsist so as to give a handle to the accused to get out of the net by pleading legal infirmity when on facts the offences are made out. The importance of this consideration should not be overlooked in assessing the situation as to whether the direction of this Court as contained in the five-Judge Bench decision should be permitted to be questioned at this stage or not.

95. Mr. Rao for Antulay argued at length and Brother Mukharji has noticed all those contentions that by the change of the forum of the trial the accused has been prejudiced. Undoubtedly, by this process he misses a forum of appeal because if the trial was handled by a Special Judge, the first appeal would lie to the High Court and a further appeal by special leave could come before this Court. If the matter is tried by the High Court there would be only one forum of appeal being this Court, whether as of right or by way of special leave. The appellant has also contended that the direction violates Article 14 of the Constitution because he alone has been singled out and picked up for being treated differently from similarly placed accused persons. Some of these aspects cannot be overlooked with ease. I must, however, indicate here that the argument based upon the

extended meaning given to the contents of Article 21 of the Constitution, though attractive have not appealed to me.

96. One of the well-known principles of law is that decision made by a competent court should be taken as final subject to further proceedings contemplated by the law of procedure. In the absence of any further proceeding, the direction of the Constitution Bench of 16th of February, 1984 became final and it is the obligation of everyone to implement the direction of the apex Court. Such an order of this Court should by all canons of judicial discipline be binding on this Court as well and cannot be interfered with after attaining finality. Brother Mukharji has referred to several authorities in support of his conclusion that an order made without jurisdiction is not a valid one and can be ignored, overlooked or brushed aside depending upon the situation. I do not propose to delve into that aspect in my separate judgment.

97. It is a well-settled position in law that an act of the court should not injure any of the suitors. The Privy Council in the well-known decision of Alexander Rodger v. The Comptori D' Escompte De Paris [1871] 3 P.C. 465 observed:

One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors and when the expression act of the court is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter upto the highest court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the court in the course of the whole of the proceedings does an injury to the suitors in courts.

Brother Mukharji has also referred to several other authorities which support this view.

98. Once it is found that the order of transfer by this Court dated 16th of February, 1984, was not within jurisdiction by the direction of the transfer of the proceedings made by this Court, the appellant should not suffer.

99. What remains to be decided is the procedure by which the direction of the 16th of February, 1984, could be recalled or altered. There can be no doubt that certiorari shall not lie to quash a judicial order of this Court. That is so on account of the fact that the Benches of this Court are not subordinate to larger Benches thereof and certiorari is, therefore, not admissible for quashing of the orders made on the judicial side of the court. Mr. Rao had relied upon the ratio in the case of Prem Chand Garg v. Excise Commissioner, U.P., Allahabad MANU/SC/0082/1962: [1963] 1 SCR 885. Brother Mukharji has dealt with this case at considerable length. this Court was then dealing with an Article 32 petition which had been filed to challenge the vires of Rule 12 of Order 35 of this Court's Rules. Gajendragadkar, J., as the learned Judge then was, spoke for himself and three of his learned brethren including the learned Chief Justice. The facts of the case

as appearing from the judgment show that there was a judicial order directing furnishing of security of Rs. 2,500 towards the respondent's costs and the majority judgment directed:

In the result, the petition is allowed and the order passed against the petitioners on December 12, 1961, calling upon them to furnish security of Rs. 2,500 is set aside.

Shah, J. who wrote a separate judgment upheld the vires of the rule and directed dismissal of the petition. The fact that a judicial order was being made the subject matter of a petition under Article 32 of the Constitution was not noticed and whether such a proceeding was tenable was not considered. A nine-Judge Bench of this Court in Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr. MANU/SC/0044/1966: [1966]3SCR744 referred to the judgment in Prem Chand Garg's case (supra). Gajendragadkar, CJ., who delivered the leading and majority judgment stated at page 765 of the Reports:

In support of his argument that a judicial decision can be corrected by this Court in exercise of its writ jurisdiction under Article 32(2), Mr. Setalvad has relied upon another decision of this Court in Prem Chand Garg v. Excise Commissioner, U.P. Allahabad (supra). In that case, the petitioner had been required to furnish security for the costs of the respondent under Rule 12 of order 35 of the Supreme Court Rules. By his petition filed under Article 32, he contended that the rule was invalid as it placed' obstructions on the fundamental right guaranteed under Article 32 to move the Supreme Court for the enforcement of fundamental rights. This plea was upheld by the majority decision with the result that the order requiring him to furnish security was vacated. In appreciating the effect of this decision, it is necessary to bear in mind the nature of the contentions raised before the Court in that case. The rule itself, in terms, conferred discretion on the court, while dealing with applications made under Article 32, to impose such terms as to costs as to the giving of security as it thinks fit. The learned Solicitor General who supported the validity of the rule, urged that though the order requiring security to be deposited may be said to retard or obstruct the fundamental right of the citizen guaranteed by Article 32(1), the rule itself could not be effectively challenged as invalid, because it was merely discretionary; it did not impose an obligation on the court to demand any security; and he supplemented his argument by contending that under Article 142 of the Constitution, the powers of this Court were wide enough to impose any term or condition subject to which proceedings before this Court could be permitted to be conducted. He suggested that the powers of this Court under Article 142 were not subject to any of the provisions contained in Part III including Article 32(1). On the other hand, Mr. Pathak who challenged the validity of the rule, urged that though the rule was in form and in substance discretionary, he disputed the validity of the power which the rule conferred on this Court to demand security.... It would thus be seen that the main controversy in the case of Prem Chand Garg centered round the question as to whether Article 145 conferred powers on this Court to make rules, though they may be

inconsistent with the constitutional provisions prescribed by Part III. Once it was held that the powers under Article 142 had to be read subject not only to the fundamental rights, but to other binding statutory provisions, it became clear that the rule which authorised the making of the impugned order was invalid. It was in that context that the validity of the order had to be incidentally examined. The petition was made not to challenge the order as such, but to challenge the validity of the rule under which the order was made. Once a rule was struck down as being invalid, the order passed under the said rule had to be vacated. It is difficult to see how this decision can be pressed into service by Mr. Setalvad in support of the argument that a judicial order passed by this Court was held to be subject to the writ jurisdiction of this Court itself....

In view of this decision in Mirajkar's case (supra) it must be taken as concluded that judicial proceedings in this Court are not subject to the writ jurisdiction thereof.

100. On behalf of the appellant, at one stage, it was contended that the appeal may be taken as a review. Apart from the fact that the petition of review had to be filed within 30 days-and here there has been inordinate delay-the petition for review had to be placed before the same Bench and now that two of the learned Judges of that Constitution Bench are still available, it must have gone only before a Bench of five with those two learned Judges. Again under the Rules of the Court a review petition was not to be heard in Court and was liable to be disposed of by circulation. In these circumstances, the petition of appeal could not be taken as a review petition. The question, therefore, to be considered now is what is the modality to be followed for vacating the impugned direction.

101. This being the apex Court, no litigant has any opportunity of approaching any higher forum to question its decisions. Lord Buck-master in 1917 A.C. 170 stated:

All rules of court are nothing but provisions intended to secure proper administration of justice. It is, therefore, essential that they should be made to serve and be subordinate to that purpose.

this Court in Gujarat v. Ram Prakash MANU/SC/0157/1969: [1970]2SCR875 reiterated the position by saying:

Procedure is the handmaid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it, like all rules of procedure, this rule demands a construction which would promote this cause.

Once judicial satisfaction is reached that the direction was not open to be made and it is accepted as a mistake of the court, it is not only appropriate but also the duty of the Court to rectify the mistake by exercising inherent powers. Judicial opinion heavily leans in favour of this view that a mistake of the Court can be corrected by the Court itself without any fetters. This is on the principle as indicated in Alexander Rodger's case (supra). I am

of the view that in the present situation, the Court's inherent powers can be exercised to remedy the mistake. Mahajan, J. speaking for a four-Judge Bench in Kishan Deo v. Radha Kissen MANU/SC/0006/1952: [1953]4SCR136 stated:

The Judge had jurisdiction to correct his own error without entering into a discussion of the grounds taken by the decree-holder or the objections raised by the judgment-debtOrs.

102. The Privy Council in Debi v. Habib, ILR 35 All. 331, pointed out that an abuse of the process of the Court may be committed by the court or by a party. Where a court employed a procedure in doing something which it never intended to do and there is an abuse of the process of the court it can be corrected. Lord Shaw spoke for the Law lords thus:

Quite apart from Section 151, any court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made.

It was pointed out by the Privy Council in Murtaza v. Yasin, AIR 1916 PC 85 that:

Where substantial injustice would otherwise result, the court has, in their Lordships' opinion, an inherent power to set aside its own judgments of condemnation so as to let in bona fide claims by parties....

Indian authorities are in abundance to support the view that injustice done should be corrected by applying the principle actus curiae neminem gravabit an act of the court shall prejudice no one.

103. To err is human, is the off-quoted saying. Courts including the apex one are no exception. To own up the mistake when judicial satisfaction is reached does not militate against its status or authority. Perhaps it would enhance both.

104. It is time to sound a note of caution this Court under its Rules of Business ordinarily sits in divisions and not as a whole one. Each Bench, whether small or large, exercises the powers vested in the Court and decisions rendered by the Benches irrespective of their size are considered as decisions of the Court. The practice has developed that a larger Bench is entitled to overrule the decision of a smaller Bench notwithstanding the fact that each of the decisions is that of the Court. That principle, however, would not apply in the present situation and since we are sitting as a Bench of Seven we are not entitled to reverse the decision of the Constitution Bench. Overruling when made by a larger Bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without affecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger Bench. In fact, if it is a case of exercise of inherent powers to rectify a mistake it was open

even to a five-Judge Bench to do that and it did not require a Bench larger than the Constitution Bench for that purpose.

105. Mr. Jethmalani had told us during arguments that if there was interference in this case there was possibility of litigants thinking that the Court had made a direction by going out of its way because an influential person like Antulay was involved. We are sorry that such a suggestion was made before us by a senior counsel. If a mistake is detected and the apex Court is not able to correct it with a view to doing justice for fear of being misunderstood, the cause of justice is bound to suffer and for the apex Court the apprehension would not be a valid consideration. Today it is Abdul Rehman Antulay with a political background and perhaps some status and wealth but tomorrow it can be any ill-placed citizen. this Court while administering justice does not take into consideration as to who is before it. Every litigant is entitled to the same consideration and if an order is warranted in the interest of justice, the contention of Mr. Jethmalani cannot stand in the way as a bar to the making of that order.

106. There is still another aspect which should be taken note of. Finality of the orders is the rule. By our directing recall of an order the well-settled propositions of law would not be set at naught. Such a situation may not recur in the ordinary course of judicial functioning and if there be one certainly the Bench before which it comes would appropriately deal with it. No strait jacket formula can be laid down for judicial functioning particularly for the apex Court. The apprehension that the present decision may be used as a precedent to challenge judicial orders of this Court is perhaps misplaced because those who are familiar with the judicial functioning are aware of the limits and they would not seek support from this case as a precedent. We are sure that if precedent value is sought to be derived out of this decision, the Court which is asked to use this as an instrument would be alive to the peculiar facts and circumstances of the case in which this order is being made.

107. I agree with the ultimate conclusion proposed by my learned brother Mukharji.

G.L. Oza, J.

108. I had the opportunity to go through opinion prepared by learned brother Justice Mukharji and I agree with his opinion. I have gone through these additional reasons prepared by learned brother Justice R.N. Misra. It appears that the learned brother had tried to emphasise that even if an error is apparent in a judgment or an order passed by this Court it will not be open to a writ of certiorari and I have no hesitation in agreeing with this view expressed. At the same time I have no hesitation in observing that there should be no hesitation in correcting an error in exercise of inherent jurisdiction if it comes to our notice.

109. It is clear from the opinions of learned brothers Justice Mukharji and Justice Misra that the jurisdiction to try a case could only be conferred by law enacted by the legislature and this Court could not confer jurisdiction if it does not exist in law and it is this error which is sought to be corrected. Although it is unfortunate that it is being' corrected after long lapse of time. I agree with the opinion prepared by Justice Mukharji and also the additional opinion prepared by Justice Misra.

B.C. Ray, J.

110. I have the privilege of going through the judgment prepared by learned brother Mukharji, J and I agreed with the same. Recently, I have received a separate judgment from brother R.N. Misra, J and I have decipherred the same.

111. In both the judgments it has been clearly observed that judicial order of this Court is not amenable to a writ of certiorari for correcting any error in the judgment. It has also been observed that the jurisdiction or power to try and decide a cause is conferred on the courts by the Law of the Lands enacted by the Legislature or by the provisions of the Constitution. It has also been highlighted that the court cannot confer a jurisdiction on itself which is not provided in the law. It has also been observed that the act of the court does not injure any of the suitors. It is for this reason that the error in question is sought to be corrected after a lapse of more than three years. I agree with the opinion expressed by Justice Mukharji in the judgment as well as the additional opinion given by Justice Misra in his separate judgment.

M.N. Venkatachaliah, J.

112. Appellant, a former Chief Minister of Maharashtra, is on trial for certain offences under Sections 161, 165, Indian Penal Code and under the Prevention of Corruption Act, 1947. The questions raised in this appeal are extra-ordinary in many respects touching, as they do, certain matters fundamental to the finality of judicial proceedings. It also raises a question-of far-reaching consequences-whether, independently of the review jurisdiction under Article 137 of the Constitution, a different bench of this Court, could undo the finality of earlier pronouncements of different benches which have, otherwise, reached finality.

If the appeal is accepted, it will have effect of blowing-off, by a side-wind as it were, a number of earlier decisions of different benches of this Court, binding inter-parties, rendered at various stages of the said criminal prosecution including three judgments of 5 judge benches of this Court. What imparts an added and grim poignance to the case is that the appeal, if allowed, would set to naught all the proceedings taken over the years before three successive Judges of the High Court of Bombay and in which already 57 witnesses have been examined for the prosecution-all these done pursuant to the direction dated 16.12.1984 issued by a five judge Bench of this Court. This by itself should

be no deterrent for this Court to afford relief if there has been a gross miscarriage of justice and if appropriate proceedings recognised by law are taken. Lord Atkin said "Finality is a good thing, but justice is a better". [See 60 Indian Appeals 354 PC]. Considerations of finality are subject to the paramount considerations of justice; but the remedial action must be appropriate and known to law. The question is whether there is any such gross miscarriage of justice in this case, if so whether relief can be granted in the manner now sought.

The words of caution of the judicial committee in Venkata Narasimha Appa Row v. The Court of Wards and Ors. [1886] 1 ILR 660 are worth recalling:

There is a salutary maxim which ought to be observed by all courts of last resort-interest reipublicae ut sit finis litium. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

(emphasis supplied).

113. I have had the opportunity, and the benefit, of reading in draft the learned and instructive opinions of my learned Brothers Sabyasachi Mukharji J., and Ranganath Misra J. They have, though for slightly differing reasons, proposed to accept the appeal. This will have the effect of setting-aside five successive earlier orders of different benches of the Court made at different stages of the criminal prosecution, including the three judgments of Benches of five Judges of this Court in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984: 1984CriLJ613 and A.R. Antulay R.S. Nayak MANU/SC/0082/1984: 1984CriLJ647 and R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984: 1984CriLJ613.

I have bestowed a respectful and anxious consideration to the weighty opinion of my brothers with utmost respect, I regret to have to deny myself the honour of agreeing with them in the view they take both of the problem and the solution that has commended itself to them. Apart from other things, how can the effect and finality of this Court's Order dated 17.4.1984 in Writ Petition No. 708 of 1984 be unsettled in these proceedings? Admittedly, this order was made after hearing and does not share the alleged vitiating factors attributed to the order dated 16.2.1984. That order concludes everything necessarily inconsistent with it. In all humility, I venture to say that the proposed remedy and the procedure for its grant are fraught with far greater dangers than the supposed injustice they seek to relieve: and would throw open an unprecedented procedural flood-gate which might, quite ironically, enable a repetitive challenge to the present decision itself on the very grounds on which the relief is held permissible in the appeal. To seek to be wiser than the law, it is said, is the very thing by good laws forbidden. Well trodden path is the best path.

Ranganath Misra J. if I may say so with respect, has rightly recognised these imperatives:

It is time to sound a note of caution this Court under its rules of business ordinarily sits in divisions and not as a whole one. Each Bench, whether small or large, exercises the powers vested in the Court and decisions rendered by the Benches irrespective of their size are considered as decisions of the Court. The practice has developed that a larger bench is entitled to over-rule the decision of a small bench notwithstanding the fact that each of the decisions is that of the Court. That principle, however, would not apply in the present situation and since we are sitting as a Bench of Seven we are not entitled to reverse the decision of the Constitution Bench.

Learned brother, however, hopes this case to be more an exception than the Rule:

Finality of the orders is the rule. By our directing recall of an order the well-settled propositions of law would not be set at naught. Such a situation may not recur in the ordinary course of judicial functioning and if there be one, certainly the bench before which it comes would appropriately deal with it.

114. A brief advertence to certain antecedent events which constitute the back-drop for the proper perception of the core-issue arising in this appeal may not be out of place:

Appellant was the Chief Minister of Maharashtra between 9.6.1980 and 12.1.1982 on which latter date he resigned as a result of certain adverse findings made against him in a Court proceeding. On 9.8.1982, Ramdas Srinivas Nayak, respondent No. 1, with the sanction of the Governor of Maharashtra, accorded on 28.7.1982, filed in the Court of Special-Judge, Bombay, a criminal Case No. 24 of 1982 alleging against the appellant certain offences under Section 161 and 165 of Indian Penal Code and Section 6 of the Prevention of Corruption Act, 1947, of which the Special-Judge took cognisance.

Appellant questioned the jurisdiction of Special Judge to take cognisance of those offences on a private complaint. On 20.10.1982, the Special Judge over-ruled the objection. On 7.3.1983, the High Court dismissed appellant's revision petition in which the order of the Special Judge was assailed. The criminal case thereafter stood transferred to another Special Judge, Shri R.B. Sule. Appellant did not accept the order of the High Court dated 7.3.1983 against which he came up in appeal to this Court, by Special-leave, in Criminal appeal No. 347 of 1983. During the pendency of this appeal, however, another important event occurred. The Special Judge, Shri R.B. Sule, by his order dated 25.7.1983, discharged the appellant, holding that the prosecution was not maintainable without the sanction of the Maharashtra Legislative Assembly, of which the appellant continued to be a member, notwithstanding his ceasing to be Chief Minister. Respondent No. 1 challenged this order of discharge in a Criminal Revision Petition No. 354 of 1982 before the High Court of Bombay. Respondent No. 1 also sought, and was granted, special-leave to appeal against

Judge Sule's order directly to this Court in Criminal appeal No. 356 of 1983. this Court also withdrew to itself the said criminal revision application No. 354 of 1982 pending before the High Court. All the three matters-the two appeals (Crl. A. 347 of 1983 and 356 of 1983) and Criminal Revision Petition so withdrawn to this Court-were heard by a five Judge bench and disposed of by two separate Judgments dated 16.2.1984.

By Judgment in Crl. appeal No. 356 of 1983 R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984: 1984CriLJ613 this Court, while setting aside the view of the Special Judge that sanction of the Legislative Assembly was necessary, further directed the trial of the case by a Judge of the Bombay High Court. this Court observed that despite lapse of several years after commencement of the prosecution the case had "not moved an inch further", that "expeditious trial is primarily necessary in the interest of the accused and mandate of Article 21", and that "therefore Special case No. 24 of 1982 and Special Case No. 3 of 1983 pending in the Court of Special Judge, Greater Bombay, Shri R.B. Sule" be withdrawn and transferred to the High Court of Bombay, with a request to the learned Chief Justice to assign these two cases to a sitting Judge of the High Court. The Judge so designated was also directed to dispose of the case expeditiously, preferably "by holding the trial from day-to-day.

Appellant, in these proceedings, does not assail the correctness of the view taken by the 5 Judge Bench on the question of the sanction. Appellant has confined his challenge to what he calls the constitutional infirmity-and the consequent nullity-of the directions given as to the transfer of the case to a Judge of the High Court.

In effectuation of the directions dated 16.2.1984 of this Court the trial went on before three successive learned Judges of the High Court. It is not necessary here to advert to the reasons for the change of Judges. It is, however, relevant to mention that when the matter was before Khatri J. who was the first learned Judge to be designated by the Chief Justice on the High Court, the appellant challenged his jurisdiction, on grounds which amounted to a challenge to the validity of directions of this Court for the transfer of the case. Khatri J. quite obviously, felt bound to repel the challenge to his jurisdiction. Learned Judge said appellant's remedy, if any was to seek a review of the directions dated 16.2.1984 at the hands of this Court.

Learned Judge also pointed out in his order dated 14.3.1984 what, according to him, was the true legal position permitting the transfer of the case from the Special-Judge to be tried by the High Court in exercise of its extra-ordinary original criminal jurisdiction. In his order dated 16.3.1984, Khatri J. observed:

...Normally it is the exclusive jurisdiction of a Special Judge alone to try corruption charges. This position flows from Section 7 of the 1952 Act. However, this does not mean that under no circumstances whatever, can trial of such offences be not tried by a Court

of superior jurisdiction than the Special Judge. I have no hesitation in contemplating at three situations in which a Court of Superior jurisdiction could try such offence....

115. The third situation can be contemplated under the CrPC itself where a Court of superior jurisdiction may have to try the special cases. Admittedly, there are no special provisions in the 1952 Act or 1947 Act relating to the transfer of special cases from one Court to the other. So by virtue of the combined operation of Section 8(3) of the 1952 Act and Section 4(2) of the CrPC, the High Court will have jurisdiction under Section 407 of the Code in relation to the special cases also. An examination of the provisions of Section 407 leaves no doubt that where the requisite conditions are fulfilled, the High Court will be within its legitimate powers to direct that a special case be transferred to and tried before itself.

Appellant did not seek any review of the directions at the hands of the Bench which had issued them, but moved in this Court a Writ Petition No. 708 of 1984 under Article 32 of the Constitution assailing the view taken by Khatri J. as to jurisdiction which in substance meant a challenge to the original order dated 16.2.1984 made by this Court. A division Bench consisting of D.A. Desai and A.N. Sen, JJ. dismissed the writ petition on 17.4.1984. Sen, J. speaking for the bench said:

In my view, the writ petition challenging the validity of the order and judgment passed by this Court as nullity or otherwise is incorrect, cannot be entertained. I wish to make it clear that the dismissal of this writ petition will not prejudice the right of the petitioner to approach the Court with an appropriate review petition or to file any other application which he may be entitled in law to file.

(emphasis supplied)

[A.R. Antulay v. Union [1984] 3 SCR 482

This order has become final. Even then no review was sought.

It is also relevant to refer here to another pronouncement of a five Judge bench of this Court dated 5.4.1984 in R.S. Nayak v. A.R. Antulay MANU/SC/0102/1984: 1984CriLJ613 in Criminal misc. petition No. 1740 of 1984 disposing of a prayer for issue of certain directions as to the procedure to be followed before the designated Judge of the High Court. The bench referred to the provisions of law, which according to it, enabled the transfer of the trial of the criminal case to the High Court. The view taken by my two learned Brothers, it is needless to emphasise, has the effect of setting at naught this pronouncement of the five Judge Bench as well. The five Judge bench considered the legal foundations of the power to transfer and said:

...To be precise, the learned Judge has to try the case according to the procedure prescribed for cases instituted otherwise than on police report by Magistrate. This position is clearly an unambiguous in view of the fact that this Court while allowing the appeal was hearing amongst others Transferred case No. 347 of 1983 being the Criminal Revision Application No. 354 of 1983 on the file of the High Court of the Judicature at Bombay against the order of the learned Special Judge, Shri R.B. Sule discharging the accused. if the criminal revision application was not withdrawn to this Court, the High Court while hearing criminal revision application could have under Section 407(8), CrPC, 1973, would have to follow the same procedure which the Court of Special Judge would have followed if the case would not have been so transferred....

(emphasis supplied)

According to the Bench, the High Court's power under Section 407, Criminal Procedure Code for withdrawing to itself the case from a Special Judge, who was, for this purpose, a Sessions Judge, was preserved notwithstanding the exclusivity of the jurisdiction of the Special Judge and that the Supreme Court was entitled to and did exercise that power as the Criminal Review application pending in the High Court had been withdrawn to the Supreme Court. The main basis of appellant's case is that all this is per-incurriam, without jurisdiction and a nullity.

In the meanwhile Mehta J. was nominated by the Chief Justice of the High Court in place of Khatri. J. In addition to the 17 witnesses already examined by Khatri J. 41 more witnesses were examined for the prosecution before Mehta J. of the 43 charges which the prosecution required to be framed in the case, Mehta J. declined to frame charges in respect of 22 and discharged the appellant of those alleged offences. Again respondent No. 1 came up to this Court which by its order dated 17.4.1986 in Criminal Appeal No. 658 of 1985 [reported in (1985) 2 SCC 716] set aside the order of discharge in regard to 22 offences and directed that charges be drawn in respect of them. this Court also suggested that another Judge be nominated to take up the case. It is, thus, that Shah J came to conduct the further trial.

116. I may now turn to the occasion for the present appeal. In the further proceedings before Shah J. the appellant contended that some of the alleged co-conspirators. Some of whom had already been examined as prosecution witnesses, and some others proposed to be so examined should also be included in the array of accused persons. This prayer, Shah J had no hesitation to reject. It is against this order dated 24.7.1986 that the present appeal has come up. With this appeal as an opening, appellant has raised directions of the five Judges Bench, on 16.2.1984; of the serious violations of his constitutional-rights; of a hostile discrimination of having to face a trial before a Judge of the High Court instead of the Special-Judge, etc. A Division Bench consisting of E.S. Venkataramiah and Sabyasachi Mukharji JJ. in view of the seriousness of the grievances aired in the appeal, referred it to be heard by a bench of seven Judges.

117. The actual decision of Shah J in the appeal declining to proceed against the alleged co-conspirators is in a short compass. But the appeal itself, has assumed a dimension far beyond the scope of the order it seeks to be an appeal against. The appeal has become significant not for its pale determined by the order under appeal; but more for the collateral questions for which it has served as a spring board in this Court.

118. Before going into these challenges, it is necessary to say something on the merits of the order under appeal itself. An accused person cannot assert any right to a joint trial with his co-accused. Normally it is the right of the prosecution to decide whom it prosecutes. It can decline to array a person as a co-accused and, instead, examine him as a witness for the prosecution. What weight is to be attached to that evidence, as it may smack of the testimony of a guilty partner, in crime, is a different matter. Prosecution can enter Nolle proseque against any accused-person. It can seek to withdraw a charge against an accused person. These propositions are too well settled to require any further elaboration. Suffice it to say that the matter is concluded by the pronouncement of this Court in Choraria v. Maharashtra MANU/SC/0065/1967: 1968CriLJ1124 where Hidayathullah J referred to the argument that the accomplice, a certain Ethyl Wong in that case, had also to be arrayed as an accused and repelled it, observing:

... Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (proviso).

...The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was prosecuted by Section 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence....

On this point, really, appellant cannot be heard to complain. Of the so called co-conspirators some have been examined already as prosecution witnesses; some others proposed to be so examined; and two others, it would appear, had died in {he interregnum. The appeal on the point has no substance and would require to be dismissed. We must now turn to the larger issue raised in the appeal.

119. While Shri P.P. Rao, learned Senior Counsel for the appellant, handling an otherwise delicate and sensitive issue, deployed all the legal tools that a first rate legal-smithy could design, Shri Ram Jethmalani, learned Senior Counsel, however, pointed out the impermissibility both as a matter of law and propriety of a different bench embarking upon the present exercise which, in effect, meant the exertion of an appellate and superior jurisdiction over the earlier five Judge Bench and the precedential problems and anomalies such a course would create for the future.

120. The contentions raised and urged by Shri P.P. Rao admit of being summarised and formulated thus:

(a) That Supreme Court has, and can, exercise only such jurisdiction as is invested in it by the Constitution and the laws; that even the power under Article 142(1) is not unfettered, but is confined within the ambit of the jurisdiction otherwise available to it; that the Supreme Court, like any other court, cannot make any order that violates the law; that Section 7(1) of the Criminal Law (Amendment) Act, 1952, (1952 Act) envisages and sets-up a special and exclusive forum for trial of certain offences; that the direction for trial of those offences by a Judge of the High Court is wholly without jurisdiction and void; and that 'Nullity' of the order could be set up and raised whenever and wherever the order is sought to be enforced or effectuated;

(b) That in directing a Judge of the High Court to try the case the Supreme Court virtually sought to create a new jurisdiction and a new forum not existent in and recognised by law and has, accordingly, usurped Legislative powers, violating the basic tenets of the doctrine of separation of powers;

(c) That by being singled out for trial by the High Court, appellant is exposed to a hostile discrimination, violative of his fundamental rights under Articles 14 and 21 and if the principles in State of West Bengal v. Anwar Ali Sarkar MANU/SC/0033/1952: 1952CriLJ510. The law applicable to Anwar Ali Sarkar should equally apply to Abdul Rahman Antulay.

(d) That the directions for transfer were issued without affording an opportunity to the appellant of being hear and therefore void as violative of Rules of Natural Justice.

(e) That the transfer of the case to the High Court deprived appellant of an appeal, as of right, to the High Court. At least one appeal, as of right is the minimal constitutional safeguard.

(f) That any order including a judicial order, even if it be of the highest Court, which violates the fundamental rights of a person is a nullity and can be assailed by a petition under Article 32 of the Constitution on the principles laid down in Prem Chand Garg v. Excise Commissioner, UP. MANU/SC/0082/1962: [1963] 1 SCR 885.

(g) That, at all events, the order dated 16.2.1984 in so far as the impugned direction is concerned, is per incuriam passed ignoring the express statutory provisions of Section 7(1) of Criminal Law (Amendment) Act, 1952, and the earlier decision of this Court in Gurucharan Das Chadhaw. State of Rajasthan [1966] 2 SCR 678.

(h) That the direction for transfer of the case is a clear and manifest case of mistake committed by the Court and that when a person is prejudiced by a mistake of Court it is the duty of the Court to correct its own mistake: Actus Curiae Neminem Gravabit.

121. Courts are as much human institutions as any other and share all human susceptibilities to error. Justice Jackson said:

...Whenever decisions of one Court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court a substantial proportion of our reversals of state Courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

(See Brown v. Allen [1944] US 443.

In Broom v. Cassel [1972] AC 1027 Lord Diplock said:

...It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary. When I sat in Court of Appeal I sometimes thought the House of Lords was wrong in over ruling me. Even since that time there have been occasions, of which the instant appeal itself is one, when, alone or in company, I have dissented from a decision of the majority of this House. But the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted.

Judge Learned Hand, referred to as one of the most profound legal minds in the jurisprudence of the English speaking world, commended the Cromwellian intellectual humility and desired that these words of Cromwell be written over the portals of every church, over court house and at every cross road in the nation: "I beseech ye...think that ye may be mistaken.

As a learned author said, while infallibility is an unrealisable ideal, "correctness", is often a matter of opinion. An erroneous decision must be as binding as a correct one. It would be an unattainable ideal to require the binding effect of a judgment to defend on its being correct in the absolute, for the test of correctness would be resort to another Court the infallibility of which is, again subject to a similar further investigation. No self-respecting Judge would wish to act if he did so at the risk of being called a usurper whenever he failed to anticipate and predict what another Judge thought of his conclusions. Even infallibility would not protect him he would need the gift of prophecy-ability to anticipate the fallibilities of others as well. A proper perception of means and ends of the judicial process, that in the interest of finality it is inevitable to make some compromise between its ambitions of ideal justice in absolute terms and its limitations.

122. Re: Contentions (a) and (b): In the course of arguments we were treated to a wide ranging, and no less interesting, submissions on the concept of "jurisdiction" and "nullity" in relation to judicial orders. Appellant contends that the earlier bench had no jurisdiction to issue the impugned directions which were without any visible legal support, that they are 'void' as violative of the constitutional-rights of the appellant, and, also as violating the Rules of natural justice. Notwithstanding these appeal to high-sounding and emotive appellate; I have serious reservations about both the permissibility-in these proceedings-of an examination of the merits of these challenges. Shri Rao's appeal to the principle of "nullity" and reliance on a collateral challenge in aid thereof suffers from a basic fallacy as to the very concept of the jurisdiction of superior courts. In relation to the powers of superior courts, the familiar distinction between jurisdictional issues and adjudicatory issues-appropriate to Tribunals of limited jurisdiction,-has no place. Before a superior court there is no distinction in the quality of the decision-making-process respecting jurisdictional questions on the one hand and adjudicatory issues or issues pertaining to the merits, on the other.

123. The expression "jurisdiction" or the power to determine is, it is said, a verbal cast of many colours. In the case of a Tribunal, an error of law might become not merely an error in jurisdiction but might partake of the character of an error of jurisdiction. But, otherwise, jurisdiction is a 'legal shelter'-a power to bind despite a possible error in the decision. The existence of jurisdiction does not depend on the correctness of its exercise. The authority to decide embodies a privilege to bind despite error, a privilege which is inherent in and indispensable to every judicial function. The characteristic attribute of a judicial act is that it binds whether it be right or it be wrong. In Malkarjun v. Narahari [1900] 27 I.A. 216 the executing Court had quite wrongly, held that a particular person represented the estate of the deceased Judgment-debtor and put the property for sale in execution. The judicial committee said:

In doing so, the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right and if that course is not taken the decision, however wrong, cannot be disturbed.

In the course of the arguments there were references to the Anisminic case. In my view, reliance on the Anisminic principle is wholly misplaced in this case. That case related to the powers of Tribunals of limited jurisdiction. It would be a mistake of first magnitude to import these inhibitions as to jurisdiction into the concept of the jurisdiction of superior courts. A finding of a superior court even on a question of its own jurisdiction, however grossly erroneous it may, otherwise be, is not a nullity; nor one which could at all be said to have been reached without jurisdiction, susceptible to be ignored or to admit of any collateral-attack. Otherwise, the adjudications of superior courts would be held-up to ridicule and the remedies generally arising from and considered concomitants of such

classification of judicial-errors would be so seriously abused and expanded as to make a mockery of those foundational principles essential to the stability of administration of justice.

The superior court has jurisdiction to determine its own jurisdiction and an error in that determination does not make it an error of jurisdiction. Holdsworth (History of English Law vol. 6 page 239) refers to the theoretical possibility of a judgment of a superior court being a nullity if it had acted coram-non-judice. But who will decide that question if the infirmity stems from an act of the Highest Court in the land? It was observed:

...It follows that a superior court has jurisdiction to determine its own jurisdiction; and that therefore an erroneous conclusion as to the ambit of its jurisdiction is merely an abuse of its jurisdiction, and not an act outside its jurisdiction....

...In the second place, it is grounded upon the fact that, while the judges of the superior courts are answerable only to God and the king, the judges of the inferior courts are answerable to the superior courts for any excess of jurisdiction....

Theoritically the judge of a superior court might be liable if he acted coram non judice; but there is no legal tribunal to enforce that liability. Thus both lines of reasoning led to the same conclusion-the total immunity of the judges of the superior courts.

Rubinstein in his "Jurisdiction and Illegality" says:

...In practice, every act made by a superior court is always deemed valid (though, possibly, voidable) wherever it is relied upon. This exclusion from the rules of validity is indispensable. Superior courts knew the final arbiters of the validity of acts done by other bodies; their own decisions must be immune from collateral attack unless confusion is to reign. The superior courts decisions lay down the rules of validity but are not governed by these rules.

(See P. 12)

A clear reference to inappositeness and limitations of the Anisminic Rule in relation to Superior Court so to be found in the opinion of Lord Diplock in Re Racal Communications Ltd. [1980 2 All E.R. 634], thus:

There is in my view, however, also an obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction to decide a defined question finally and conclusively or unappealably, and a similar jurisdiction conferred on the High Court or a judge of the High Court acting in his judicial capacity. The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High

Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required to construe the words of the statute by which the question submitted to his decision was defined. There is simply no room for error going to his jurisdiction, or as is conceded by counsel for the respondent, is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their judicial capacity as such can be corrected only by means of appeal to an appellate court and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all.

[See page 639 & 640].

In the same case, Lord Salmon, said:

The Court of Appeal, however, relied strongly on the decision of your Lordship's House in Anisminic Ltd. v. Foreign Compensation Commission [1969] 1 All ER 209. That decision however was not, in my respectful view in any way relevant to the present appeal. It has no application to any decision or order made at first instance in the High Court of Justice. It is confined to decisions made by commissioners, tribunals or inferior courts which can now be reviewed by the High Court of Justice, just as the decision of inferior courts used to be reviewed by the old Court of King's Bench under the prerogative writs. If and when any such review is made by the High Court, it can be appealed to the Court of Appeal and hence, by leave, to your Lordship's House. [See page 641].

Again in Issac v. Robertson [1984] 3 All E.R. 140 the Privy Council reiterated the fallacy of speaking in the language of Nullity, void, etc, in relation to Judgments of superior courts. It was pointed out that it could only be called 'irregular'. Lord Diplock observed:

Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refers to the possibility of these being such a distinction between orders to which the description 'void' and void able' respectively have been applied can be found in the opinion given by the judicial committee of the Privy Council in Marsh v. Marsh, [1945] AC 271 and Maxfoy United Africa Co. Ltd. [1961] All EWR 1169 AC 152, but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall in a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceeding to have them set aside. The cases that are referred to in these dicta do not support the

proposition that there is any category of orders of a court of unlimited jurisdiction of this kind....

The contrasting legal concepts of voidness and void ability form part of the English Law of contract. They art inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies. [See page 143]

Superior courts apart, even the ordinary civil courts of the land have jurisdiction to decide questions of their own jurisdiction. this Court, in the context of the question whether the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, was not attracted to the premises in question and whether, consequently, the exclusion under Section 28 of that Act, of the jurisdiction of all courts other than the Court of Small Causes in Greater Bombay did not operate, observed:

...The crucial point, therefore, in order to determine the question of the jurisdiction of the City Civil Court to entertain the suit, is to ascertain whether, in view of Section 4 of the Act, the Act applies to the premises at all. If it does, the City Civil Court has no jurisdiction but if it does not then it has such jurisdiction, The question at once arises as to who is to decide this point in controversy. It is well settled that a Civil Court has inherent power to decide the question of its own jurisdiction, although, as a result of its enquiry, it may turn out that it has no jurisdiction over the suit. Accordingly, we think, in agreement with High Court that this preliminary objection is not well founded in principle or on authority and should be rejected. MANU/SC/0064/1952: [1953]4SCR185. Bhatia Co-operative Housing Society Ltd. v. D.C. Patel]

It would, in my opinion, be wholly erroneous to characterise the directions issued by the five Judge bench as a nullity, amenable to be ignored or so declared in a collateral attack.

124. A judgment, inter-parties, is final and concludes the parties. In Re Hastings (No. 3) [1959] 1 All ER 698, the question arose whether despite the refusal of a writ of Habeas Corpus by a Divisional Court of the Queen's bench, the petitioner had, yet, a right to apply for the writ in the Chancery Division. Harman J. called the supposed right an illusion:

Counsel for the applicant, for whose argument I for one am much indebted, said that the clou of his case as this, that there still was this right to go from Judge to Judge, and that if that were not so the whole structure would come to the ground....

I think that the Judgment of the Queen's bench Divisional Court did make it clear that this supposed right was an illusion. If that be right, the rest follows. No body doubts that

there was a right to go from court to court, as my Lord has already explained. There are no different courts now to go to. The courts that used to sit in bane have been swept away and their places taken by Divisional Courts, which are entirely the creatures of statute and rule. Applications for a writ of habeas corpus are assigned by the rule to Divisional Courts of the Queen's Bench Division, and that is the only place to which a applicant may go.... [See page 701]

In Daryao v. State of U.P. MANU/SC/0012/1961: [1962]1SCR574 it was held:

It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res-judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32. [See page 583].

In Trilok Chand v. H.B. Munshi MANU/SC/0127/1968: [1969]2SCR824 Bachawat J. recognised the same limitations even in matter pertaining to the conferment of fundamental rights.

...The right to move this Court for enforcement of fundamental rights is guaranteed by Article 32. The writ under Article 32 issues as a matter of course if a breach of a fundamental right is established. But this does not mean that in giving relief under Article 32 the Court must ignore and trample under foot all laws of procedure, evidence, limitation, res-judicata and the like....

...the object of the statutes of limitation was to give effect to the maxim 'interest reipublicae ut sit finis litium' (Cop Litt 303)-the interest of the State requires that there should be a limit to litigation. The rule of res-judicata is founded upon the same rule of public policy.... [See page 842 and 843]

It is to be recalled that an earlier petition, W.P. No. 708 of 1984 under Article 32 moved before this Court had been dismissed, reserving leave to the appellant to seek review.

The words of Venkataramiah J in Sheonandan Paswan v. State of Bihar MANU/SC/0206/1986: 1987CriLJ793 are apt and are attracted to the present case:

The reversal of the earlier judgment of this Court by this process strikes at the finality of judgments of this Court and would amount to the abuse of the power of review vested in this Court, particularly in a criminal case. It may be noted that no other court in the country has been given the power of review in criminal cases. I am of the view that the majority judgment of Baharul Islam and R.B. Misra, JJ. should remain undisturbed. This case cannot be converted into an appeal against the earlier decision of this Court.

(Emphasis supplied)

125. The exclusiveness of jurisdiction of the special judge under Section 7(1) of 1952 Act, in turn, depends on the construction to be placed on the relevant statutory-provision. If on such a construction, however erroneous it may be, the court holds that the operation of Section 407, Cr.P.C. is not excluded, that interpretation will denude the plenitude of the exclusivity claimed for the forum. To say that the court usurped legislative powers and created a new jurisdiction and a new forum ignores the basic concept of functioning of courts. The power to interpret laws is the domain and function of courts. Even in regard to the country's fundamental-law as a Chief Justice of the Supreme Court of the United States said: "but the Constitution is what the judges say it is". In Thomas v. Collins,(1945) US 516 it was said:

at page 943-4
The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always is, delicate....

I am afraid appellant does himself no service by resting his case on these high conceptual fundamentals.

126. The pronouncements of every Division-Bench of this Court are pronouncements of the Court itself. A larger bench, merely on the strength of its numbers, cannot un-do the finality of the decisions of other division benches. If the decision suffers from an error the only way to correct it, is to go in Review under Article 137 read with Order 40 Rule I framed under Article 145 before "as far as is practicable" the same judges. This is not a matter merely of some dispensable procedural 'form' but the requirement of substance. The reported decisions on the review power under the Civil Procedure Code when it had a similar provision for the same judges hearing the matter demonstrate the high purpose sought to be served thereby.

127. In regard to the concept of Collateral Attack on Judicial Proceedings it is instructive to recall some observations of Van Fleet on the limitations-and their desirability-on such actions.

One who does not understand the theory of a science, who has no clear conception of its principles, cannot apply it with certainty to the problems; it is adapted to solve. In order to understand the principles which govern in determining the validity of RIGHTS AND TITLES depending upon the proceedings of judicial tribunals, generally called the doctrine of COLLATERAL ATTACK ON JUDGMENTS, it is necessary to have a clear conception of the THEORY OF JUDICIAL PROCEEDINGS....

...And as no one would think of holding a judgment of the court of last resort void if its jurisdiction were debatable or even colorable, the same rule must be applied to the judgments of all judicial tribunals. This is the true theory of judicial action when viewed collaterally. If any jurisdictional question is debatable or colorable, the tribunal must decide it; and an erroneous conclusion can ony be corrected by some proceeding provided by law for so doing, commonly called a Direct Attack. It is only where it can be shown lawfully, that some matter or thing essential to jurisdiction is wanting, that the proceeding is void, collaterally.

It is the duty of the courts to set their faces against all collateral assaults on judicial proceedings for two reasons, namely: First. Not one case in a hundred has any merits in it....

...Second. The second reason why the courts should reduce the chances for a successful collateral attack to the lowest minimum is, that they bring the courts themselves into disrepute. Many people look upon the courts as placed where jugglery and smartness are substituted for justice....

...Such things tend to weaken law and order and to cause men to settle their rights by violence. For these reasons, when the judgment rendered did not exceed the possible power of the court, and the notice was sufficient to put the defendant upon inquiry, a court should hesitate long before holding the proceedings void collaterally....

(emphasis supplied)

128. But in certain cases, motions to set aside Judgments are permitted where, for instance a judgment was rendered in ignorance of the fact that a necessary party had not been served at all, and was wrongly shown as served or in ignorance of the fact that a necessary-party had died and the estate was not represented. Again, a judgment obtained by fraud could be subject to an action for setting it aside. Where such a judgment obtained by fraud tended to prejudice a non-party, as in the case of judgments in-rem such as for divorce, or justification or probate etc. even a person, not eo-nomine a party to the proceedings, could seek a setting-aside of the judgment.

Where a party has had no notice and a decree is made against him, he can approach the court for setting-aside the decision. In such a case the party is said to become entitled to relief ex-debito justitiae, on proof of the fact that there was no service. This is a class of cases where there is no trial at all and the judgment is for default. D.N. Gordan, in his "Actions to set aside judgments." 1961 77 L Q R 356 says:

The more familiar applications to set aside judgments are those made on motion and otherwise summarily. But these are judgments obtained by default, which do not represent a judicial determination. In general, Judgments rendered after a trial are

conclusive between the parties unless and until reversed on appeal. Certainly in general judgments of superior Courts cannot be overturned or questioned between the parties in collateral actions. Yet there is a type of collateral action known as an action of review, by which even a superior court's judgment can be questioned, even between the parties, and set aside....

Cases of such frank failure of natural justice are obvious cases where Relief is granted as of right. Where a person is not actually served but is held erroneously, to have been served, he can agitate that grievance only in that forum or in any further proceeding therefrom. In Issac's case [1984] 3 All ER 140 privy council referred to:

...a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex-debito justitiae in exercise of the inherent jurisdiction of the court without needing to have recourse to the Rules that deal expressly with proceedings to set-aside orders for irregularity and give to the judge a discretion as to the order he will make.

In the present case by the order dated 5.4.1984 a five judge bench set-out, what according to it, was, the legal basis and source of jurisdiction to order transfer. On 17.4.1984 appellant's writ petition challenging that transfer as a nullity was dismissed. These orders are not which appellant is entitled to have set-aside ex-debito justitiae by another bench. Reliance on the observations in Issac's case is wholly misplaced.

The decision of the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh 2 NI Act 181 illustrates the point. Referring to the law on the matter, Lord Brougham said:

It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be re-heard, and that an Order once made, that is, a report submitted to His Majesty and adopted, by being made an Order in Council, is final, and cannot be altered. The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country. Whatever, therefore, has been really determined in these Courts must stand, there being no power of re-hearing for purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in. The Courts of Equity may correct the Decrees made while they are in minutes; when they are complete they can only vary them by re-hearing; and when they are signed and enrolled they can no longer be reheard, but they must be altered, if at all, by Appeal. The Courts of Law, after the term in which the judgments are given can only alter them so as to correct misprisions, a power given by the Statutes of Amendment. The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however,

gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects, in order to enable the Decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. But with the exception of one case in 1669, of doubtful authority, here, and another in Parliament of still less weight in 1642 (which was an Appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a rehearing upon the whole cause, and an entire alteration of the judgment once pronounced....

129. The second class of cases where a judgment is assailed for fraud, is illustrated by the Duchess of Kingston's case (1776 2 Sm. L.C. 644 13th Ed.). In that case, the Duchess was prosecuted for bigamy on the allegation that she entered into marriage while her marriage to another person, a certain Hervey, was still subsisting. In her defence, the Duchess relied upon a decree of jactitation from an ecclesiastical court which purported to show that she had never been married to Hervey. The prosecution sought to get over this on the allegation the decree was obtained in a sham and collusive proceeding. The House of Lords held the facts established before Court rendered the decree nugatory and was incapable of supplying that particular defence. De Grey CJ said that the collusive decree was not be impeached from within; yet like all other acts of the highest authority, it is impeachable from without, although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud which affected the judgment was described by the learned Chief Justice as an "extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice."

130. The argument of nullity is too tall and has no place in this case. The earlier direction proceeded on a construction of Section 7(1) of the Act and Section 407 Cr.P.C. We do not sit here in appeal over what the five Judge bench said and proclaim how wrong they were. We are, simply, not entitled to embark, at a later stage, upon an investigation of the correctness of the very same decision. The same bench can, of course, reconsider the matter under Article 137.

However, even to the extent the argument goes that the High Court under Section 407 Cr.P.C. could not withdraw to itself a trial from Special-Judge under the 1952 Act, the view of the earlier bench is a possible view. The submissions of Shri Ram Jethmalani that the exclusivity of the jurisdiction claimed for the special forum under the 1952 Act is in relation to Courts which would, otherwise, be Courts of competing or co-ordinate jurisdictions and that such exclusivity does not effect the superior jurisdiction of the High Court to withdraw, in appropriate situations, the case to itself in exercise of its extraordinary original criminal jurisdiction; that canons of Statutory-construction, appropriate to the situation, require that the exclusion of jurisdiction implied in the 1952 amending Act should not be pushed beyond the purpose sought to be served by the amending law; and that the law while creating the special jurisdiction did not seek to exclude the extra-ordinary jurisdiction of the High Court are not without force; The

argument, relying upon Kavasji Pestonji Dalal v. Rustomji Sorabji Jamadar and Anr, AIR 1949 Bombay 42 that while the ordinary competing jurisdictions of other Courts were excluded, the extraordinary jurisdiction of the High Court was neither intended to be, nor, in fact, affected, is a matter which would also bear serious examination. In Sir Francis Bennion's Statutory Interpretation, there are passages at page 433 which referring to presumption against implied repeal, suggest that in view of the difficulties in determining whether an implication of repeal was intended in a particular situation it would be a reasonable presumption that where the legislature desired a repeal, it would have made it plain by express words. In Sutherland Statutory construction the following passages occur:

Prior statutes relating to the same subject matter are to be compared with the new provisions; and if possible by reasonable construction, both are to be so construed that effect is given to every provision of each. Statutes in pari materia although in apparent conflict, are so far as reasonably possible constructed to be in harmony with each other.

(Emphasis supplied)

When the legislature enacts a provision, it has before it a 11 the other provisions relating to the same subject matter which it enacts at that time, whether in the same statute or in a separate Act. It is evident that it has in mind the provisions of a prior Act to which it refers, whether it phrases the later Act as amendment or an independent Act. Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is rec ogzant of them both, without expressly recognizing the inconsistency.

(emphasis supplied)

Reliance by Shri Ram Jethmalani on these principles to support his submission that the power under Section 407 was unaffected and that the decision in State of Rajasthan v. Gurucharan Das Chadda (supra), can not also be taken to have concluded the matter, is not un-arguable. I would, therefore, hold contentions (a) and (b) against appellant.

131. Re: contention (c):

The fundamental right under Article 14, by all reckoning, has a very high place in constitutional scale of values. Before a person is deprived of his personal liberty, not only that the Procedure established by law must strictly be complied with and not departed from to the disadvantage or detriment of the person but also that the procedure for such deprivation of personal liberty must be reasonable, fair and just. Article 21 imposes limitations upon the procedure and requires it to conform to such standards of reasonableness, fairness and justness as the Court acting as sentinel of fundamental rights would in the context, consider necessary and requisite. The court will be the arbiter of the question whether the procedure is reasonable, fair and just.

If the operation of Section 407, Cr.P.C. is not impliedly excluded and therefore, enables the withdrawal of a case by the High Court to itself for trial as, indeed, has been held by the earlier bench, the argument based on Article 14 would really amount to a challenge to the very vires of Section 407. All accused persons cannot claim to be tried by the same Judge. The discriminations-inherent in the choice of one of the concurrent jurisdictions-are not brought about by an inanimate statutory-rule or by executive fiat. The withdrawal of a case under Section 407 is made by a conscious judicial act and is the result of judicial discernment. If the law permits the withdrawal of the trial to the High Court from a Special Judge, such a law enabling withdrawal would not, prima facie, be bad as violation of Article 14. The five Judge bench in the earlier case has held that such a transfer is permissible under law. The appeal to the principle in Anwar Ali Sarkar's case (supra), in such a context would be somewhat out of place.

If the law did not permit such a transfer then the trial before a forum which is not according to law violates the rights of the accused person. In the earlier decision the transfer has been held to be permissible. That decision has assumed finality.

If appellant says that he is singled out for a hostile treatment on the ground alone that he is exposed to a trial before a Judge of the High Court then the submission has a touch of irony. Indeed that a trial by a Judge of the High Court makes for added re-assurance of justice, has been recognised in a number of judicial pronouncement. The argument that a Judge of the High Court may not necessarily possess the statutory-qualifications requisite for being appointed as a Special Judge appears to be specious. A judge of the High Court hears appeals arising from the decisions of the Special Judge, and exercises a jurisdiction which includes powers co-extensive with that of the trial court. There is, thus, no substance in contention (c).

132. Re: Contention (d):

This grievance is not substantiated on facts; nor, having regard to the subsequent course of events permissible to be raised at this stage. These directions, it is not disputed, were issued on 16.2.1984 in the open Court in the presence of appellant's learned Counsel at the time of pronouncement of the judgment. Learned Counsel had the right and the opportunity of making an appropriate submission to the court as to the permissibility or otherwise of the transfer. Even if the submissions of Shri Ram Jethmalani that in a revision application Section 403 of the Criminal Procedure Code does not envisage a right of being heard and that transfer of a case to be tried by the Judge of the High Court cannot, in the estimate of any right thinking person, be said to be detrimental to the accused person is not accepted, however, applicant, by his own conduct, has disentitled himself to make grievance of it in these proceedings. It cannot be said that after the directions were pronounced and before the order was signed there was no opportunity for the appellant's learned Counsel to make any submissions in regard to the alleged illegality or

impropriety of the directions. Appellant did not utilise the opportunity. That apart, even after being told by two judicial orders that appellant, if aggrieved, may seek a review, he did not do so. Even the grounds urged in the many subsequent proceedings appellant took to get rid of the effect of the direction do not appear to include the grievance that he had no opportunity of being heard. Where, as here, a party having had an opportunity to raise a grievance in the earlier proceedings does not do so and makes it a technicality later he cannot be heard to complain. Even in respect of so important jurisdiction as Habeas Corpus, the observation of Gibson J in Re. Tarling [1979] 1 All E.R. 981 at 987 are significant:

Firstly, it is clear to the Court that an applicant for habeas corpus is required to put forward on his initial application then whole of the case which is then fairly available to him he is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the Court.

The true doctrine of estoppel known as res judicata does not apply to the decision of this Court on an application for habeas corpus we refer to the words of Lord Parket CJ delivering the Judgment of the Court in Re. Hastings (No. 2). There is, however, a wider sense in which the doctrine of res judicata may be applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore, should have been litigated in earlier proceedings....

This statement of the law by Gibson J was approved by Sir John Donaldson MR in the Court of appeal in Ali v. Secretary of State for the Home Department [1984] 1 All E.R. 1009 at 1019.

Rules of natural justice embodies fairness in-action. By all standards, they are great assurances of Justice and fairness. But they should not be pushed to a breaking point. It is not inappropriate to recall what Lord Denning said in R. v. Secretary of State for the Home Department ex-parte Mughal [1973] 3 All ER 796:

...The rules of natural justice must not be stretched too far. Only too often the people who have done wrong seek to invoke the rules of natural justice so as to avoid the consequences.

Contention (d) is insubstantial.

133. Re. Contention (e):

The contention that the transfer of the case to the High Court involves the elimination of the appellant's right of appeal to the High Court which he would otherwise have and that the appeal under Article 136 of the Constitution is not as of right may not be substantial

in view of Section 374, Cr.P.C. which provides such an appeal as of right, when the trial is held by the High Court. There is no substance in contention (e) either.

134. Re. Contention (f):

The argument is that the earlier order of the five Judge bench in so far as it violates the fundamental rights of the appellant under Article 14 and 21 must be held to be void and amenable to challenge under Article 32 in this very Court and that the decision of this Court in Premchand Garg's case (supra) supports such a position. As rightly pointed out by Ranganath Misra, J. Premchand Garg's case needs to be understood in the light of the observations made in Naresh Sridhar Mirajkar and Ors. v. State of Maharashtra and Anr. [1966] 3 SCC 744. In Mirajkar's case, Gajendragadkar, CJ., who had himself delivered the opinion in Garg's case, noticed the contention based on Garg's case thus:

In support of his argument that a judicial decision can be corrected by this Court in exercise of its writ jurisdiction under Article 32(2), Mr. Setalvad has relied upon another decision of this Court in Prem Chand Garg v. Excise Commissioner, UP, Allahabad (supra)....

Learned Chief Justice referring to the scope of the matter that fell for consideration in Garg's case stated:

...It would thus be seen that the main controversy in the case of Prem Chand Garg centered round the question as to whether Article 145 conferred powers on this Court to make rules, though they may be inconsistent with the constitutional provisions prescribed by part III. Once it as held that the powers under Article 142 had to be read subject not only to the fundamental rights, but to other binding statutory provisions, it became clear that the ruler which authorised the making of the impugned order was invalid. It was in that context that the validity of the order had to be incidentally examined. The petition was made not to challenge the order as such, but to challenge the validity of the rule under which the order was made....

Repelling the contention, learned Chief Justice said:

...It is difficult to see now this decision can be pressed into service by Mr. Setalvad in support of the argument that a judicial order passed by this Court was held to be subject to the writ jurisdiction of this Court itself....

A passage from Kadish & Kadish "Discretion to Disobey", 1973 Edn. may usefully by recalled:

On one view, it would appear that the right of a citizen to defy illegitimate judicial authority should be the same as his right to defy illegitimate legislative authority. After

all, if a rule that transgresses the Constitution or is otherwise invalid is no law at all and never was one, it should hardly matter whether a court or a legislature made the rule. Yet the prevailing approach of the courts has been to treat invalid court orders quite differently from invalid statutes. The long established principle of the old equity courts was that an erroneously issued injunction must be obeyed until the error was judicially determined. Only where the issuing court could be said to have lacked jurisdiction in the sense of authority to adjudicate the cause and to reach the parties through its mandate were disobedient contemnors permitted to raise the invalidity of the order as a full defence. By and large, American courts have declined to treat the unconstitutionality of a court order as a jurisdictional defect within this traditional equity principle, and in notable instances they have qualified that principle even where the defect was jurisdiction in the accepted sense. (See 111).

Indeed Ranganath Misra, J. in his opinion rejected the contention of the appellant in these terms:

In view of this decision in Mirajkar's case, supra, it must be taken as concluded that judicial proceedings in this Court are not subject to the writ jurisdiction thereof.

There is no substance in contention (f) either.

135. Contention (g):

It is asserted that the impugned directions issued by the five Judge Bench was per-incuriam as it ignored the Statute and the earlier Chaada's case.

But the point is that the circumstance that a decision is reached per-incuriam, merely serves to denude the decision of its precedent-value. Such a decision would not be binding as a judicial precedent. A co-ordinate bench can disagree with it and decline to follow it. A larger bench can over rule such decision. When a previous decision is so overruled it does not happen-nor has the overruling bench any jurisdiction so to do-that the finality of the operative order, inter-parties, in the previous decision is overturned. In this context the word 'decision' means only the reason for the previous order and not the operative-order in the previous decision, binding inter-parties. Even if a previous decision is overruled by a larger-bench, the efficacy and binding nature, of the adjudication expressed in the operative order remains undisturbed inter-parties. Even if the earlier decision of the five Judge bench is per-incuriam the operative part of the order cannot be interfered within the manner now sought to be done. That apart the five Judge bench gave its reason. The reason, in our opinion, may or may not be sufficient. There is advertence to Section 7(1) of the 1952 Act and to the exclusive jurisdiction created thereunder. There is also reference to Section 407 of the Criminal Procedure Code. Can such a decision be characterised as one reached per-incurium? Indeed, Ranganath Misra, J. says this on the point:

Overruling when made by a larger bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without affecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger bench....

I respectfully agree. Point (g) is bereft of substance and merits.

136. Re: Contention (h):

The argument is that the appellant has been prejudiced by a mistake of the Court and it is not only within power but a duty as well, of the Court to correct its own mistake, so that no party is prejudiced by the Court's mistake: Actus Curiae Neminem Gravabit.

I am afraid this maxim has no application to conscious conclusions reached in a judicial decision. The maxim is not a source of a general power to reopen and rehear adjudication which have otherwise assumed finality. The maxim operates in a different and narrow area. The best illustration of the operation of the maxim is provided by the application of the rule of nunc-pro-tunc. For instance, if owing to the delay in what the court should, otherwise, have done earlier but did later, a party suffers owing to events occurring in the interrugnum, the Court has the power to remedy it. The area of operation of the maxim is, generally, procedural. Errors in judicial findings, either of facts or law or operative decisions consciously arrived at as a part of the judicial-exercise cannot be interfered with by resort to his maxim. There is no substance in contention (h).

137. It is true that the highest court in the land should not, by technicalities of procedure forge fetters on its own feet and disable itself in cases of serious miscarriages of justice. It is said that "Life of law is not logic; it has been experience." But it is equally true as Cordozo said: But Holmes did not tell us that logic is to be ignored when experience is silent. Those who do not put the teachings of experience and the lessons of logic out of consideration would tell what inspires confidence in the judiciary and what does not. Judicial vacillations fall in the latter category and undermine respect of the judiciary and judicial institutions, denuding thereby respect for law and the confidence in the even-handedness in the administration of justice by Courts. It would be gross injustice, says an author, (Miller-'data of jurisprudence') to decide alternate cases on opposite principles. The power to alter a decision by review must be expressly conferred or necessarily inferred. The power of review-and the limitations on the power-under Article 137 are implicit recognitions of what would, otherwise, be final and irrevocable. No appeal could be made to the doctrine of inherent powers of the Court either. Inherent powers do not confer, or constitute a source of, jurisdiction. They are to be exercised in aid of a jurisdiction that is already invested. The remedy of the appellant, if any, is recourse to Article 137; no where else. This appears to me both good sense and good law.

The appeal is dismissed.

S. Ranganathan, J.

138. I have had the benefit of perusing the drafts of the judgments proposed by my learned brothers Sabyasachi Mukharji, Ranganath Misra and Venkatachaliah, JJ. On the question whether the direction given by this Court in its judgment dated 16.2.1984 should be recalled, I find myself in agreement with the conclusion of Venkatachaliah, J. (though for slightly different reasons) in preference to the conclusion reached by Sabyasachi Mukharji, J. and Ranganath Misra, J. I would, therefore, like to set out my views separately on this issue.

THE ISSUES

139. This is an appeal by special leave from a judgment of Shah J., of the Bombay High Court. The appellant is being tried for offences under Sections 120B, 420, 161 and 165 of the Indian Penal Code (I.P.C.) read with Section 5(1)(d) and 5(2) of the Prevention of Corruption Act, 1947. The proceedings against the appellant were started in the Court of Sri Bhutta, a Special Judge, appointed under Section 6(1) of the Criminal Law (Amendment) Act, 1952 (hereinafter referred to as 'the 1952 Act'). The proceedings have had a chequered career as narrated in the judgment of my learned brother Sabyasachi Mukharji, J. Various issues have come up for consideration of this Court at the earlier stages of the proceedings and the judgments of this Court have been reported in MANU/SC/0117/1982: 1982CriLJ1581 and MANU/SC/0198/1986: 1986CriLJ1922. At present the appellant is being tried by a learned Judge of the Bombay High Court nominated by the Chief Justice of the Bombay High Court in pursuance of the direction given by this Court in its order dated 16.2.1984 (reported in MANU/SC/0102/1984: 1984CriLJ613. By the order presently under appeal, the learned Judge (s) framed as many as 79 charges against the appellant and (b) rejected the prayer of the appellant that certain persons, named as co-conspirators of the appellant in the complaint on the basis of which the prosecution has been launched should be arrayed as co-accused along with him. But the principal contention urged on behalf of the appellant before us centers not round the merits of the order under appeal on the above two issues but round what the counsel for the appellant has described as a fundamental and far-reaching objection to the very validity of his trial before the learned Judge. As already stated, the trial is being conducted by the learned Judge pursuant to the direction of this Court dated 16.2.1984. The contention of the learned Counsel is that the said direction is per incuriam, illegal, invalid, contrary to the principles of natural justice and violative of the fundamental rights of the petitioner. This naturally raises two important issues for our consideration:

A. Whether the said direction is inoperative, invalid or illegal, as alleged; and

B. Whether, if it is, this Court can and should recall, withdraw, revoke or set aside the same in the present proceedings.

Since the issues involve a review or reconsideration of a direction given by a Bench of five judges of this Court, this seven-judge Bench has been constituted to hear the appeal.

140. It is not easy to say which of the two issues raised should be touched upon first as, whichever one is taken up first, the second will not arise for consideration unless the first is answered in the affirmative. However, as the correctness of the direction issued is impugned by the petitioner, as there is no detailed discussion in the earlier order on the points raised by the petitioner, and as Sabyasachi Mukharji, J. has expressed an opinion on these contentions with parts of which I am unable to agree, it will be perhaps more convenient to have a look at the first issue as if it were coming up for consideration for the first time before us and then, depending upon the answer to it, consider the second issue as to whether this Court has any jurisdiction to recall or revoke the earlier order. The issues will, therefore, be discussed in this order.

A. ARE THE DIRECTIONS ON 16.2.1984 PROPER, VALID AND LEGAL?

141. For the appellant, it is contended that the direction given in the last para of the order of the Bench of five Judges dated 16.2.1984 (extracted in the judgment of Sabyasachi Mukharji, J.) is vitiated by illegality, irregularity and lack of jurisdiction on the following grounds:

(i) Conferment of jurisdiction on courts is the function of the legislature. It was not competent for this Court to confer jurisdiction on a learned Judge of the High Court to try the appellant, as, under the 1952 Act, an offence of the type in question can be tried only by a special Judge appointed thereunder. This has been overlooked while issuing the direction which is, therefore, per incuriam.

(ii) The direction above-mentioned (a) relates to an issue which was not before the Court (b) on which no arguments were addressed and (c) in regard to which the appellant had no opportunity to make his submissions. It was nobody's case before the above Bench that the trial of the accused should no longer be conducted by a Special Judge but should be before a High Court Judge.

(iii) In issuing the impugned direction, the Bench violated the principles of natural justice, as mentioned above. It also overlooked that, as a result thereof, the petitioner (a) was discriminated against by being put to trial before a different forum as compared to other public servants accused of similar offences and (b) lost valuable rights of revision and first appeal to the High Court which he would have had, if tried in the normal course.

The direction was thus also violative of natural justice as well as the fundamental rights of the petitioner under Article 14 and 21 of the Constitution.

Primary Jurisdiction

142. There can be-and, indeed, counsel for the respondent had-no quarrel with the initial premise of the learned Counsel for the appellant that the conferment of jurisdiction on courts is a matter for the legislature. Entry 77 of List I, entry 3 of List II and entries 1, 2, 11A and 46 of List III of the Seventh Schedule of the Constitution set out the respective powers of parliament and the State Legislatures in that regard. It is common ground that the jurisdiction to try offences of the type with which are concerned here is vested by the 1952 Act in Special Judges appointed by the respective State Governments. The first question that has been agitated before us is whether this Court was right in transferring the case for trial from the Court of a Special Judge, to a Judge nominated by the Chief Justice of Bombay.

High Court's Power of Transfer

143. The power of the Supreme Court to transfer cases can be traced, in criminal matters, either to Article 139A of the Constitution or Section 406 of the CrPC ("Cr. P.C.), 1973. Here, again, it is common ground that neither of these provisions cover the present case. Sri Jethmalani, learned Counsel for the respondent, seeks to support the order of transfer by reference to Section 407 (not Section 406) of the Code and Clause 29 of the Letters Patent of the Bombay High Court. Section 407 reads thus:

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

it may order-

(i) that any offence be inquired into or tried by any Court not qualified under Section 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offences;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2)the High Court may act either on the report of the lower court or on the application of a party interested or on its own initiative:

XXX XXX XXX XXX XXX XXX XXX XXX XXX

(9) Nothing in this section shall be deemed to affect any order of Government under Section 197.

And Clause 29 of the Letters Patent of the Bombay High Court runs thus:

And we do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of appeal or superior jurisdiction, and also to direct the preliminary investigation of trial of any criminal case by any officer of Court otherwise competent to investigate or try it though such case belongs, in ordinary course, to the jurisdiction of some other officer, of Court.

The argument is that this power of transfer vested in the High Court can well be exercised by the Supreme Court while dealing with an appeal from the High Court in the case.

144. For the appellant, it is contended that the power of transfer under Section 407 cannot be invoked to transfer a case from a Special Judge appointed under the 1952 Act to the High Court. Learned Counsel for the appellant contends that the language of Section 7(1) of the Act is mandatory; it directs that offences specified in the Act can be tried only by persons appointed, under Section 6(2) of the Act, by the State Government, to be special judges, No other Judge, it is said, has jurisdiction to try such a case, even if he is a Judge of the High Court. In this context, it is pointed out that a person, to be appointed as a special Judge, under Section 6(2) of the 1952 Act, should be one who is, or has been, a Sessions Judge (which expression in this context includes an Additional Sessions Judge and/or an Assistant Sessions Judge) All High Court Judges may not have been Sessions Judges earlier and, it is common ground, Shah, J. who has been nominated by the Chef Justice for trying this case does not fulfill the qualifications prescribed for appointment as a Special Judge. But, that consideration apart, the argument is that, while a High Court can transfer a case from one special judge to another, and the Supreme Court, from a special judge in one State to a special judge in another State, a High Court cannot

withdraw a case from a Special Judge to itself and the Supreme Court cannot transfer a case from a Special Judge to the High Court.

145. On the other hand, it is contended for the respondent that the only purpose of the 1952 Act is to ensure that cases of corruption and bribery do not get bogged up in the ordinary criminal courts which are over-burdened with all sorts of cases. Its object is not to create special courts n the sense of courts manned by specially qualified personnel or courts following any special type of procedure. All that is done is to earmark some of the existing sessions judges for trying these offences exclusively. The idea is just to segregate corruption and bribery cases to a few of the sessions judges so that they could deal with them effectively and expeditiously. It is a classification in which the emphasis is on the types of offences and nature of offenders rather than on the qualifications of judges. That being so, the requirement in Section 7(1) that these cases should be tried by special judges only is intended just to exclude their trial by the other normal criminal courts of coordinate jurisdiction and not to exclude the High Court.

146. Before dealing with these contentions, it may be useful to touch upon the question whether a judge of a High Court can be appointed by the State Government as a special judge to try offences of the type specified in Section 6 of the 1952 Act. It will be seen at once that not all the judges of the High Court (but only those elevated from the State subordinate judiciary) would fulfill the qualifications prescribed under Section 6(2) of the 1952 Act. Though there is nothing in Sections 6 and 7 read together to preclude altogether the appointment of a judge of the High Court fulfilling the above qualifications as a special judge, it would appear that such is not the (atleast not the normal) contemplation of the Act. Perhaps it is possible to argue that, under the Act, it is permissible for the State Government to appoint one of the High Court Judges (who has been a Sessions Judge) to be a Special Judge under the Act. If that had been done, that Judge would have been a Special Judge and would have been exercising his original jurisdiction in conducting the trial. But that is not the case here. In response to a specific question put by us as to whether a High Court Judge can be appointed as a Special Judge under the 1952 Act, Shri Jethmalani submitted that a High Court Judge cannot be so appointed. I am inclined to agree. The scheme of the Act, in particular the provisions contained in Sections 8(3A) and 9, militate against this concept. Hence, apart from the fact that in this case no appointment of a High Court Judge, as a Special Judge, has in fact been made, it is not possible to take the view that the statutory provisions permit the conferment of a jurisdiction to try this case on a High Court Judge as a Special Judge.

147. Turning now to the powers of transfer under Section 407, one may first deal with the decision of this Court in Gurucharan Das Chadha v. State of Rajasthan [1966] 2 S.C.R. 678 on which both counsel strongly relied. That was a decision by three judges of this Court on a petition under Section 527 of the 1898 Cr.P.C. (corresponding to Section 406 of the 1973 Cr.P.C.). The petitioner had prayed for the transfer of a case pending in the court of a Special Judge in Bharatpur, Rajasthan to another criminal court of equal or superior

jurisdiction subordinate to a High Court other than the High Court of Rajasthan. The petition was eventually dismissed on merits. But the Supreme Court dealt with the provisions of Section 527 of the 1898 Cr.P.C. in the context of an objection taken by the respondent State that the Supreme Court did not have the jurisdiction to transfer a case pending before the Special Judge, Bharatpur. The contention was that a case assigned by the State Government under the 1952 Act to a Special Judge cannot be transferred at all because, under the terms of that Act, which is a self-contained special law, such a case must be tried only by the designated Special Judge. The Court observed that the argument was extremely plausible but not capable of bearing close scrutiny. After referring to the provisions of Section 6, 7 and 8 of the 1952 Act, the Court set out the arguments for the State thus:

The Advocate-General, Rajasthan, in opposing the petition relies principally on the provisions of Section 7(1) and 7(2) and contends that the two sub-sections create two restrictions which must be read together. The first is that offences specified in Section 6(1) can be tried by Special Judges only. The second is that every such offence shall be tried by the Special Judge for the area within which it is committed and if there are more special judges in that area by the Special Judge chosen by the Government. These two conditions, being statutory, it is submitted that no order can be made under Section 527 because, on transfer, even if a special judge is entrusted with the case, the second condition is bound to be broken.

Dealing with this contention the Court observed:

This condition, if literally understood, would lead to the conclusion that a case once made over to a special Judge in an area where there is no other special Judge, cannot be transferred at all. This could hardly have been intended. If this were so, the power to transfer a case intra-state under Section 526 of the CrPC, on a parity of reasoning, must also be lacking. But this Court in Ramachandra Parsad v. State of Bihar MANU/SC/0120/1961: 1961CriLJ811 unheld the transfer of a case by the High Court which took it to a special judge who had no jurisdiction in the area where the offence was committed. In holding that the transfer was valid this Court relied upon the third sub-section of Section 8 of the Act. That sub-section preserves the application of any provision of the CrPC if it is not inconsistent with the Act, save as provided in the first two sub-sections of that section. The question, therefore, resolves itself to this: Is there an inconsistency between Section 527 of the Code and the second sub-section of Section 7? The answer is that there is none. Apparently this Court in the earlier case found no inconsistency and the reasons appear to be there: The condition that an offence specified in Section 6(2) shall be tried by a special Judge for the area within which it is committed merely specifies which of several special Judges appointed in the State by the State Government shall try it. The provision is analogous to others under which the jurisdiction of Magistrates and Sessions Judges is determined on a territorial basis. Enactments in the CrPC intended to confer territorial jurisdiction upon courts and Presiding Officers have

never been held to stand in the way of transfer of criminal cases outside those areas of territorial jurisdiction. The order of transfer when it is made under the powers given by the Code invests another officer with jurisdiction although ordinarily he would lack territorial jurisdiction to try the case. The order of this Court, therefore, which transfer(s) a case from one special Judge subordinate to one High Court to another special Judge subordinate to another High Court creates jurisdiction in the latter in much the same way as the transfer by the High Court from one Sessions Judge in a Session Division to another Sessions Judge in another Sessions Division.

There is no comparison between the first sub-section and the second sub-section of Section 7. The condition in the second sub-section of Section 7 is not of the same character as the condition in the first sub-section. The first sub-section creates a condition which is a sine qua non for the trial of certain offences. That condition is that the trial must be before a special Judge. The second sub-section distributes the work between special Judges and lays emphasis on the fact that trial must be before a special Judge appointed for the area in which the offence is committed. This second condition is on a par with the distribution of work territorially between different Sessions Judges and Magistrates. An order of transfer, by the very nature of things must, some times, result in taking the case out of the territory and the provisions of the Code which are preserved by the third sub-section of Section 8 must supervene to enable this to be done and the second sub-section of Section 7 must yield. We do not consider that this creates any inconsistency because the territorial jurisdiction created by the second sub-section of Section 7 operates in a different sphere and under different circumstances. Inconsistency can only be found if two provisions of law apply in identical circumstances and create contradictions. Such a situation does not arise when either this Court or the High Court exercises its powers of transfer. We are accordingly of the opinion that the Supreme Court in exercise of its jurisdiction and power under Section 527 of the CrPC can transfer a case from a Special Judge subordinate to the High Court to another special Judge subordinate to another High Court.

(emphasis added)

148. The attempt of Sri Jethmalani is to bring the present case within he scope of the observations contained in the latter part of the extract set out above. He submits that a special judge, except insofar as a specific provision to the contrary is made, is a court subordinate to the High Court, as explained in MANU/SC/0082/1984: 1984CriLJ647 and proceedings before him are subject to the provisions of the 1973 Cr.P.C.; the field of operation of the first sub-section of Section 7 is merely to earmark certain Sessions Judges for purposes of trying cases of corruption by public servants and this provision is, in principle, not different from the earmarking of cases on the basis of territorial jurisdiction dealt with by Sub-Section 2 of Section 7. The argument is no doubt a plausible one. It does look somewhat odd to say that a Sessions Judge can, but a High Court Judge cannot, try an offence under the Act. The object of the Act, as rightly pointed out by counsel, is only

to segregate certain cases to special courts which will concentrate on such cases so as to expedite their disposal and not to oust the superior jurisdiction of the High Court or its powers of superintendence over subordinate courts under Article 227 of the Constitution, an aspect only of which is reflected in Section 407 of the Cr.P.C. However, were the matter to be considered as res integra, I would be inclined to accept the contention urged on behalf of the appellant, for the following reasons. In the first place, the argument of the counsel for the respondent runs counter to the observations made by the Supreme Court in the earlier part of the extract set out above that the first sub-section of Section 7 and the second sub-section are totally different in character. The first sub-section deals with a sine qua non for the trial of certain offences, whereas the second sub-section is only of a procedural nature earmarking territorial jurisdiction among persons competent to try the offence. They are, therefore, vitally different in nature. The Supreme Court has clearly held in the passage extracted above that the case can be transferred only from one special judge to another. In other words, while the requirement of territorial jurisdiction is subordinate to Section 406 or 407, the requirement that the trial should be by a special judge is not. It is true that those observations are not binding on this larger Bench and moreover the Supreme Court there was dealing only with an objection based on Sub-section (2) of Section 7. It is, however, clear that the Bench, even if it had accepted the transfer petition of Gurcharan Das Chadha, would have rejected a prayer to transfer the case to a court other than that of a Special Judge appointed by the transferee State. I am in respectful agreement with the view taken in that case that there is a vital qualitative difference between the two sub-sections and that while a case can be transferred to a special judge who may not have the ordinary territorial jurisdiction over it, a transfer cannot be made to an ordinary magistrate or a court of session even if it has territorial jurisdiction. If the contention of the learned Counsel for the respondent that Section 7(1) and Section 407 operate in different fields and are not inconsistent with each other were right, it should be logically possible to say that the High Court can, under Section 407, transfer a case from a special judge to any other Court of Session. But such a conclusion would be clearly repugnant to the scheme of the 1952 Act and plainly incorrect. It is, therefore, difficult to accept the argument of Sri Jethmalani that we should place the restriction contained in the first sub-section of Section 7 also as being on the same footing as that in the second sub-section and hold that the power of transfer contained in the Criminal Procedure Code can be availed of to transfer a case from a Special Judge to any other criminal court or even the High Court. The case can be transferred only from one special judge to another special judge; it cannot be transferred even to a High Court Judge except where a High Court Judge is appointed as a Special Judge. A power of transfer postulates that the court to which transfer or withdrawal is sought is competent to exercise jurisdiction over the case, (vide, Raja Soap Factory v. Shantaraj MANU/SC/0231/1965: [1965]2SCR800).

149. This view also derives support from two provisions of Section 407 itself. The first is this. Even when a case is transferred from one criminal court to another, the restriction as to territorial jurisdiction may be infringed. To obviate a contention based on lack of

territorial jurisdiction in the transferee court in such a case, Clause (ii) of Section 407 provides that the order of transfer will prevail, lack of jurisdiction under Sections 177 to 185 of the Code notwithstanding. The second difficulty arises, even under the Cr.P.C. itself, by virtue of Section 197 which not only places restriction on the institution of certain prosecutions against public servants without Government sanction but also empowers the Government, inter alia, to determine the court before which such trial is to be conducted. When the forum of such a trial is transferred under Section 407 an objection may be taken to the continuance of the trial by the transferee court based on the order passed under Section 197. This eventuality is provided against by Section 407(9) of the Act which provides that nothing in Section 407 shall be deemed to affect an order passed under Section 407. Although specifically providing for these contingencies, the section is silent in so far as a transfer from the court of a Special Judge under the 1952 Act is concerned though it is a much later enactment.

150. On the contrary, the language of Section 7(1) of the 1952 Act places a definite hurdle in the way of construing Section 407 of the Cr.P.C. as overriding its provisions. For, it opens with the words:

Notwithstanding anything contained in the CrPC, 1898 or in any other law.

In view of this non-obstante clause also, it becomes difficult to hold that the provisions of Section 407 of the 1973 Cr.P.C. will override, or even operate consistently with, the provisions of the 1952 Act. For the same reason it is not possible to hold that the power of transfer contained in Clause 29 of the Letters Patent of the Bombay High Court can be exercised in a manner not contemplated by Section 7(1) of the 1952 Act.

151. Thirdly, whatever may be the position where a case is transferred from one special judge to another or from one ordinary subordinate criminal Court to another of equal or superior jurisdiction, the withdrawal of a case by the High Court from such a Court to itself for trial places certain handicaps on the accused. It is true that the court to which the case has been transferred is a superior court and in fact, the High Court. Unfortunately, however, the high Court judge is not a person to whom the trial of the case can be assigned under Section 7(1) of the 1952 Act. As pointed out by the Supreme Court in Surajmal Mohta v. Viswanatha Sastry MANU/SC/0026/1954: [1954]26ITR1(SC) at pp. 464 in a slightly different context, the circumstance that a much superior forum is assigned to try a case than the one normally available cannot by itself be treated as a "sufficient safeguard and a good substitute" for the normal forum and the rights available under the normal procedure. The accused here loses his right of coming up in revision or appeal to the High Court from the interlocutory and final orders of the trial court. He loses the right of having two courts-a subordinate court and the High Court-adjudicate upon his contentions before bringing the matter up in the Supreme Court. Though, as is pointed out later, these are not such handicaps as violate the fundamental rights of such

an accused, they are circumstances which create prejudice to the accused and may not be overlooked in adopting one construction of the statute in preference to the other.

152. Sri Jethmalani vehemently contended that the construction of Section 407 sought for by the appellant is totally opposed to well settled canons of statutory construction. He urged that the provisions of the 1952 Act should be interpreted in the light of the objects it sought to achieve and its amplitude should not be extended beyond its limited objective. He said that a construction of the Act which leads to repugnancy with, or entails pro tanto repeal of, the basic criminal procedural law and seeks to divest jurisdiction vested in a superior court should be avoided. These aspects have been considered earlier. The 1952 Act sought to expedite the trial of cases involving public servants by the creation of courts presided over by experienced special judges to be appointed by the State Government. There is however nothing implausible in saying that the Act having already earmarked these cases for trial by experienced Sessions Judges made this provision immune against the applicability of the provisions of other laws in general and the Cr.P.C. in particular. Effect is only being given to these express and specific words used in Section 7(1) and no question arises of any construction being encouraged that is repugnant to the Cr.P.C. or involves an implied repeal, pro tanto, of its provisions. As has already been pointed out, if the requirement in Section 7(1) were held to be subordinate to the provisions contained in Section 406 or 407, then in principle, even a case falling under the 1952 Act can be transferred to any other Sessions Judge and that would defeat the whole purpose of the Act and is clearly not envisaged by it.

Supreme Court's power of transfer

153. It will have been noticed that the power of transfer under Section 407 or Clause 29 of the Letters Patent which has been discussed above is a power vested in the High Court. So the question will arise whether, even assuming that the High Court could have exercised such power, the Supreme Court could have done so. On behalf of the respondent, it was contended that, as the power of the High Court under Section 407 can be exercised on application of a party or even suo motu and can be exercised by it at any stage irrespective of whether any application or matter in connection with the case is pending before it or not, the Supreme Court, as an appellate Court, has a co-equal jurisdiction to exercise the power of transfer in the same manner as the High Court could. In any event, the Supreme Court could exercise the power as one incidental or ancillary to the power of disposing of a revision or appeal before it. The appellants, however, contend that, as the power of the Supreme Court to order transfer of cases has been specifically provided for in Section 406 and would normally exclude cases of intra-state transfer covered by Section 407 of the Code, the statute should not be so construed as to imply a power of the Supreme Court, in appeal or revision, to transfer a case from a subordinate court to the High Court. The argument also is that what the Supreme Court, as an appellate or revisional Court, could have done was either (a) to direct the High Court to consider whether this was a fit case for it to exercise its power under Section

407(1)(iv) to withdraw the case to itself and try the same with a view to expeditiously dispose it of or (b) to have withdrawn the case to itself for trial. But, it is contended, no power which the Supreme Court could exercise as an appellate or revisional Court could have enabled the Supreme Court to transfer the case from the Special Judge to the High Court.

154. Here also, the contentions of both parties are nicely balanced but I am inclined to think that had the matter been res integra and directions for transfer were being sought before us for the first time, this Court would have hesitated to issue such a direction and may at best have left it to the High Court to consider the matter and exercise its own discretion. As already pointed out, the powers of the Supreme Court to transfer cases from one court to another are to be found in Article 139-A of the Constitution and Section 406 of the Cr.P.C The provisions envisaged either inter-state transfers of cases i.e. from a court in one State to a court in another State or the withdrawal of a case by the Supreme Court to itself. Intra-State transfer among courts subordinate to a High Court inter-se or from a court subordinate to a High Court to the High Court is within the jurisdiction of the appropriate High Court. The attempt of counsel for the respondent is to justify the transfer by attributing the powers of the High Court under Section 407 to the Supreme Court in its capacity as an appellate or revisional Court. This argument overlooks that the powers of the Supreme Court, in disposing of an appeal or revision, are circumscribed by the scope of the proceedings before it. In this case, it is common ground that the question of transfer was not put in issue before the Supreme Court.

155. The reliance placed in this context on the provisions contained in Articles 140 and 142 of the Constitution and Section 401 read with Section 386 of the Cr.P.C. does not also help. Article 140 is only a provisions enabling Parliament to confer supplementary powers on the Supreme Court to enable it to deal more effectively to exercise the jurisdiction conferred on it by or under the Constitution. Article 142 is also not of much assistance. In the first place, the operative words in that article, again are "in the exercise of its jurisdiction." The Supreme Court was hearing an appeal from the order of discharge and connected matters. There was no issue or controversy or discussion before it as to the comparative merits of a trial before a special judge vis-a-vis one before the High Court. There was only an oral request said to have been made, admittedly, after the judgment was announced. Wide as the powers under Article 141 are, they do not in my view, envisage an order of the type presently in question. The Nanavati case (1961 SCR 497, to which reference was made by Sri Jethmalani, involved a totally different type of situation. Secondly, it is one of the contentions of the appellant that an order of this type, far from being necessary for doing complete justice in the cause or matter pending before the Court, has actually resulted in injustice, an aspect discussed a little later. Thirdly, however wide and plenary the language of the article, the directions given by the Court should not be inconsistent with, repugnant to or in violation of the specific provisions of any statute. If the provisions of the 1952 Act read with Article 139-A and Sections 406-407 of the Cr.P.C. do not permit the transfer of the case from a special judge to the High Court,

that effect cannot be achieved indirectly, it is, therefore, difficult to say, in the circumstances of the case, that the Supreme Court can issue the impugned direction in exercise of the powers under Article 142 or under Section 407 available to it as an appellate court.

156. Learned Counsel for the complainant also sought to support the order of transfer by reference to Section 386 and 401 of the 1973 Cr.P.C. He suggested that the Court, having set aside the order of discharge, had necessarily to think about consequential orders and that such directions as were issued are fully justified by the above provisions. He relied in this context on the decision of the Privy Council in Hari v. Emperor, MANU/PR/0036/1935. It is difficult to accept this argument. Section 401 provides that, in the revision pending before it, the High Court can exercise any of the powers conferred on a court of appeal under Section 386. Section 386, dealing with the powers of the appellate court enables the court, in a case such as this: (i) under Clause (a), to alter or reverse the order under appeal/revision; or (ii) under Clause (e), to make any amendment or any consequential or incidental order that may be just or proper. The decision relied on by counsel, Hari v. Emperor, MANU/PR/0036/1935, is of no assistance to him. In that case, the Additional Judicial Commissioner, who heard an appeal on a difference of opinion between two other judicial commissioner had come to the conclusion that the conviction had to be set aside. Then he had the duty to determine what should be done aid Section 426 of the 1898 Cr.P.C. (corresponding to Section 386 of the 1973 Cr.P.C.) exactly provided for the situation and empowered him:

to reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction subordinate to such appellate Court.

In the present case, the Special Judge, Sri Sule, had discharged the accused because of his conclusion that the prosecution lacked the necessary sanction. The conclusion of the Supreme Court that this conclusion was wrong meant, automatically, that the prosecution had been properly initiated and that the proceedings before the Special Judge should go on. The direction that the trial should be shifted to the High Court can hardly be described as a consequential or incidental order. Such a direction did not flow, as a necessary consequence of the conclusion of the court on the issues and points debated before it. I am, therefore, inclined to agree with counsel for the appellant that this Court was in error when it directed that the trial of the case should be before a High Court Judge.

157. It follows from the above discussion that the appellant, in consequence of the impugned direction, is being tried by a Court which has no jurisdiction-and which cannot be empowered by the Supreme Court-to try him. The continued trial before the High Court, therefore, infringes Article 21 of the Constitution.

Denial of equality and violation of Article 21.

158. It was vehemently contended for the appellant that, by giving the impugned direction, this Court has deprived the appellant of his fundamental rights. He has been denied a right to equality, inasmuch as his case has been singled out for trial by a different, though higher, forum as compared to other public servants. His fundamental right under Article 21, it is said, has been violated, inasmuch as the direction has deprived him of a right of revision and first appeal to the High Court which he would have had from an order or sentence had he been tried by a Special Judge and it is doubtful whether he would have a right to appeal to this Court at all. It is pointed out that a right of first appeal against a conviction in a criminal case has been held, by this Court, to be a part of the fundamental right guaranteed under Article 21 of the Constitution. It is not necessary for me to consider these arguments in view of my conclusion that the High Court could not have been directed to try the petitioner's case. I would, however, like to say that, in my opinion, the arguments based on Articles 14 and 21 cannot be accepted, in case it is to be held for any reason that the transfer of the appellant's case to the High Court was valid and within the competence of this Court. I say this for the following reason: If the argument is to be accepted, it will be appreciated, it cannot be confined to cases of transfer to the High Court of cases under the 1952 Act but would also be equally valid to impugn the withdrawal of a criminal case tried in the normal course under the Cr.P.C. from a subordinate court trying it to the High Court by invoking the powers under Section 407. To put it in other words, the argument, in substance, assails the validity of Section 407 of the 1973 Cr.P.C. In my opinion, this attack has to be repelled. The section cannot be challenged under Article 14 as it is based on a reasonable classification having relation to the objects sought to be achieved. Though, in general, the trial of cases will be by courts having the normal jurisdiction over them, the exigencies of the situation may require that they be dealt with by some other court for various reasons. Likewise, the nature of a case, the nature of issues involved and other circumstances may render it more expedient, effective, expeditious or desirable that the case should be tried by a superior court or the High Court itself. The power of transfer and withdrawal contained in Section 407 of the Cr.P.C. is one dictated by the requirements of justice and is, indeed, but an aspect of the supervisory powers of a superior court over courts subordinate to it: (see also Sections 408 to 411 of the Cr.P.C.). A judicial discretion to transfer or withdraw is vested in the highest court of the State and is made exercisable only in the circumstances set out in the section. Such a power is not only necessary and desirable but indispensable in the cause of the administration of justice. The accused will continue to be tried by a court of equal or superior jurisdiction. Section 407(8) read with Section 474 of the Cr.P.C. and Section 8(3) of the 1952 Act makes it clear that he will be tried in accordance with the procedure followed by the original Court or ordinarily by a Court of Session. The accused will, therefore, suffer no prejudice by reason of the application of Section 407. Even if there is a differential treatment which causes prejudice, it is based on logical and acceptable considerations with a view to promote the interest of justice. The transfer or withdrawal of a case to another court or the High Court, in such circumstances, can hardly be said to result in hostile discrimination against the accused in such a case.

159. Considerable reliance was placed on behalf of the appellant on State v. Anwar Ali Sarkar MANU/SC/0033/1952: 1952CriLJ510. This decision seems to have influenced the learned judges before whom this appeal first came up for hearing in referring the matter to this larger Bench and has also been applied to the facts and situation here by my learned brother, Sabyasachi Mukharji, J. But it seems to me that the said decision has no relevance here. There, the category of cases which were to be allocated to a Special Judge were not well defined; the selection of cases was to be made by the executive; and the procedure to be fallowed by the special courts was different from the normal criminal procedure. As already pointed out, the position here is entirety different. The 1952 legislation has been enacted to give effect to the Tek Chand Committee and to remedy a state of affairs prevalent in respect of a well defined class of offences and its provisions constituting special judges to try offences of corruption is not under challenge. Only a power of transfer is being exercised by the Supreme Court which is sought to be traced back to the power of the High Court under Section 407. The vires of that provision also is not being challenged. What is perhaps being said is that the Supreme Court ought not to have considered this case a fit one for withdrawal for trial to the High Court. That plea should be and is being considered here on merits but the plea that Article 14 has been violated by the exercise of a power under Section 407 on the strength of Anwar Ali Sarkar's case wholly appears to be untenable. Reference may be made in this context to Kathi Raning Rawat v. The State of Saurashtra [1952] 3 S.C.R. 435 and Re: Special Courts Bill, 1978 MANU/SC/0039/1978: [1979]2SCR476 and Shukla v. Delhi Administration [1980] 3 S.C.R. 500, which have upheld the creation of special judges to try certain classes of offences.

160. It may be convenient at this place to refer to certain observations by the Bench of this Court, while referring this matter to the larger Bench, in a note appended to their order on this aspect. The learned Judges have posed the following questions in paragraphs 4 and 6 of their note:

4. The Criminal Law Amendment Act, 1952 as its preamble says is passed to provide for speedier trial? Does not further speeding up of the case by transferring the case to the High Court for speedy disposal violate the principle laid down by seven learned Judges of this Court in Anwar Ali Sarkar's case (1952) S.C.R. 284 and result in violation of Article 14 of the Constitution? The following observations of Vivian Bose, J. in Anwar Ali Sarkar's case at pages 366-387 of the Report are relevant:

Tested in the light of these considerations, I am of opinion that the whole of the West Bengal Special Courts Act of 1950 offends the provisions of Article 14 and is therefore bad. When the froth and the foam of discussion is cleared away and learned dialectics placed on one side, we reach at last the human element which to my mind is the most important of all. We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows, and however much the

new procedure may give them a few crumbs of advantage, in the bulk they are deprived of substantial and valuable privileges of defence which others, similarly charged, are able to claim. It matters not to me, nor indeed to them and their families and their friends, whether this be done in good faith, whether it be done for the convenience of government, whether the process can be scientifically classified and labelled, or whether it is an experiment in speedier trials made for the good of society at large. It matters now how lofty and laudable the motives are. The question with which I charge myself is, can fair-minded, reasonable, unbiassed and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad.'

(Underlining by us)

Do not the above observations apply to judicial orders also?

6. Does the degree of heinousness of the crime with which an accused is charged or his status or the influence that he commands in society have any bearing on the applicability or the constriction of Article 14 or Article 21.?

161. In my opinion, the answers to the questions posed will, again, depend on whether the impugned direction can be brought within the scope of Section 407 of the 1973 Cr.P.C. or not. If I am right in my conclusion that it cannot, the direction will clearly be contrary to the provisions of the Cr.P.C. and hence violative of Article 21. It could also perhaps be said to be discriminatory on the ground that, in the absence of not only a statutory provision but even any well defined policy or criteria, the only two reasons given in the order-namely, the status of the petitioner and delay in the progress of the trial-are inadequate to justify the special treatment meted out to the appellant. On the other hand, if the provisions of Section 407 Cr.P.C. are applicable, the direction will be in consonance with a procedure prescribed by law and hence safe from attack as violative of Article 21. The reasons given, in the context of the developments in the case, can also be sought to be justified in terms of Clauses (a), (b) or (c) of Section 407(1). In such an event, the direction will not amount to an arbitrary discrimination but can be justified as the exercise of a choice of courses permitted under a valid statutory classification intended to serve a public purpose.

162. The argument of infringement of Article 21 is based essentially on the premise that the accused will be deprived, in cases where the trial is withdrawn to the High Court of a right of first appeal. This fear is entirely unfounded. I think Sri Jethmalani is right in contending that where a case is thus withdrawn and tried by the Court, the High Court will be conducting the trial in the exercise of its extraordinary original criminal

jurisdiction. As pointed out by Sabyasachi Mukharji, J., the old Presidency-town High Courts once exercised original jurisdiction in criminal matters but this has since been abolished. One possible view is that now all original criminal jurisdiction exercised by High Court is only extraordinary original criminal jurisdiction. Another possible view is that still High Courts do exercise ordinary original criminal jurisdiction in habeas corpus and contempt of court matters and also under some specific enactments (e.g. Companies' Act Sections 454 and 633). They can be properly described as exercising extraordinary original criminal jurisdiction, where though the ordinary original criminal jurisdiction is vested in a subordinate criminal Court or special Judge, a case is withdrawn by the High Court to itself for trial. The decision in Madura Tirupparankundram etc. v. Nikhan Sahib, MANU/WB/0033/1931: 35 C.W.N. 1088, Kavasji Pestonji v. Rustomji Sorabji, MANU/MH/0034/1948: AIR 1949 Bom 42, Sunil Chandra Roy and Anr. v. The State, MANU/WB/0110/1954: AIR1954Cal305, People's Insurance Co. Ltd. v. Sardul Singh Caveeshar and Ors. MANU/PH/0028/1961 and People's Patriotic Front v. K.K. Birla and Ors. MANU/DE/0037/1983: 23(1983)DLT499 cited by him amply support this contention. If this be so, then Sri Jethmalani is also right in saying that a right of first appeal to the Supreme Court against the order passed by the High Court will be available to the accused under Section 374 of the 1973 Cr.P.C. In other words, in the ordinary run of criminal cases tried by a Court of Sessions, the accused will be tried in the first instance by a court subordinate to the High Court; he will then have a right of first appeal to the High Court and then can seek leave of the Supreme Court to appeal to it under Article 136. In the case of a withdrawn case, the accused has the privilege of being tried in the first instance by the High Court itself with a right to approach the apex Court by way of appeal. The apprehension that the judgment in the trial by the High Court, in the latter case, will be final, with only a chance of obtaining special leave under Article 136 is totally unfounded. There is also some force in the submission of Sri Jethmalani that, if that really be the position and the appellant had no right of appeal against the High Court's judgment, the Supreme Court will consider any petition presented under Article 136 in the light of the inbuilt requirements of Article 21 and dispose of it as if it were itself a petition of appeal from the judgment, (see, in this context, the observations of this Court in Sadananthan v. Arunachalam [1980] 2 S.C.R. 673. That, apart it may be pointed out, this is also an argument that would be valid in respect even of ordinary criminal trials withdrawn to the High Court under Section 407 of the Cr.P.C. and thus, like the previous argument regarding Article 14, indirectly challenges the validity of Section 407 itself as infringing Article 21. For the reasons discussed, I have come to the conclusion that an accused, tried directly by the High Court by withdrawal of his case from a subordinate court, has a right of appeal to the Supreme Court under Section 374 of the Cr.P.C. The allegation of an infringement of Article 21 in such cases is, therefore, unfounded. Natural Justice

163. The appellant's contention that the impugned direction issued by this Court on 16.2.1984 was in violation of the principles of natural justice appears to be well founded. It is really not in dispute before us that there was no whisper or suggestion in the

proceedings before this Court that the venue of the trial should be shifted to the High Court. This direction was issued suo motu by the learned Judges without putting it to the counsel for the parties that this was what they proposed to do. The difficulties created by observations or directions on issue's not debated before the Court have been highlighted by Lord Diplock) in Hadmor Productions Ltd. v. Hamilton [1983] A.C. 191. In that case, Lord Denning, in the Court of Appeal, had in his judgment, relied on a certain passage from the speech of Lord Wedderburn in Parliament as reported in Hansard (Parliamentary Reports) in support of the view taken by him. The counsel for the parties had had no inkling or information that recourse was likely to be had by the Judge to this source, as it had been authoritatively held by the House of Lords in Davis v. Johns [1979] A.C. 264 that these reports should not be referred to by counsel or relied upon by the court for any purpose. Commenting on this aspect, Lord Diplock observed:

Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is. In the instant case, counsel for Hamilton and Bould complained that Lord Denning M.R. had selected one speech alone to rely upon out of many that had been made...and that, if he has counsel had known that (Lord Denning) was going to do that, not only would he have wished to criticise what Lord Wedderburn had said in his speech...but he would also have wished to rely on other speeches disagreeing with Lord Wedderburn if he, as counsel, had been entitled to refer to Hansard....

The position is somewhat worse in the present case. Unlike the Hamilton case (supra) where the Judge had only used Hansard to deal with an issue that arose in the appeal, the direction in the present case was something totally alien to the scope of the appeal, on an issue that was neither raised nor debated in the course of the hearing and completely unexpected.

164. Shri Jethmalani submitted that, when the judgment was announced, counsel for the complainant (present respondent) had made an oral request that the trial be transferred to the High Court and that the Judges replied that they had already done that. He submitted that, at that time and subsequently, the appellant could have protested and put forward his objections but did not and had thus acquiesced in a direction which was, in truth, beneficial to him as this Court had only directed that he should be tried by a High Court Judge, a direction against which no one can reasonably complain. This aspect of the respondent's arguments will be dealt with later but, for the present, all that is necessary is to say that the direction must have come as a surprise to the appellant and had been issued without hearing him on the course proposed to be adopted.

Conclusion

165. To sum up, my conclusion on issue A is that the direction issued by the Court was not warranted in law, being contrary to the special provisions of the 1952 Act, was also not in conformity with the principles of natural justice and that, unless the direction can be justified with reference to Section 407 of the Cr.P.C., the petitioner's fundamental rights under Articles 14 and 21 can be said to have been infringed by reason of this direction. This takes me on to the question whether it follows as a consequence that the direction issued can be, or should be, recalled, annulled, revoked or set aside by us now.

B. CAN AND SHOULD THE DIRECTION OF 16.2.84 BE RECALLED?

166. It will be appreciated that, whatever may be the ultimate conclusion on the correctness, propriety or otherwise of the Court's direction dated 16.2.1984, that was a direction given by this Court in a proceeding between the same parties and the important and far-reaching question that falls for consideration is whether it is at all open to the appellant to seek to challenge the correctness of that direction at a later stage of the same trial.

Is a review possible?

167. The first thought that would occur to any one who seeks a modification of an order of this Court, particularly on the ground that it contained a direction regarding which he had not been heard, would be to seek a review of that order under Article 137 of the Constitution read with the relevant rules. Realising that this would be a direct and straight forward remedy, it was contended for the appellant that the present appeal may be treated as an application for such review.

168. The power of review is conferred on this Court by Article 137 of the Constitution which reads thus:

Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

It is subject not only to the provisions of any law made by Parliament (and there is no such law so far framed) but also to any rules made by this Court under Article 145. this Court has made rules in pursuance of Article 145 which are contained in Order XL in Part VIII of the Supreme Court Rules. Three of these rules are relevant for our present purposes. They read as follows:

(1) The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, Rule 1

of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.

(2) An application for review shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly its grounds for review.

(3) Unless otherwise ordered by the Court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.

169. It is contended on behalf of the respondent that the present pleas of the appellant cannot be treated as an application for review, firstly, because they do not seek to rectify any error apparent on the face of the record; secondly, because the prayer is being made after the expiry of the period of thirty days mentioned in Rule 2 and there is no sufficient cause for condoning the delay in the making of the application and thirdly, for the reason that a review petition has to be listed as far as practicable before the same Judge or Bench of Judges that delivered the order sought to be reviewed and in this case at least two of the learned Judges, who passed the order on 16.2.1984, are still available to consider the application for review. These grounds may now be considered.

170. For reasons which I shall later discuss, I am of opinion that the order dated 16.2.1984 does not suffer from any error apparent on the face of the record which can be rectified on a review application. So far as the second point is concerned, it is common ground that the prayer for review has been made beyond the period mentioned in Rule 2 of Order XL of the Supreme Court Rules. No doubt this Court has power to extend the time within which a review petition may be filed but learned Counsel for the respondent vehemently contended that this is not a fit case for exercising the power of condo nation of delay. It is urged that, far from this being a fit case for the entertainment of the application for review beyond the time prescribed, the history of the case will show that the petitioner has deliberately avoided filing a review petition within the time prescribed for reasons best known to himself.

171. In support of his contention, learned Counsel for the respondent invited our attention to the following sequence of events and made the following points:

(a) The order of this Court was passed on 16.2.1984. At the time of the pronouncement of the said order, counsel for the present respondent had made a request that the trial of the case may be shifted to the High Court and the Court had observed that a direction to this effect had been included in the judgment. Even assuming that there had been no issues

raised and no arguments advanced on the question of transfer at the time of the hearing of the appeals, there was nothing to preclude the counsel for the appellant, when the counsel for the complainant made the above request, from contending that it should not be done, or, at least, that it should not be done without further hearing him and pointing out this was not a matter which had been debated at the hearing of the appeal. But no, the counsel for the accused chose to remain quiet and did not raise any objection at that point of time. He could have filed a review application soon thereafter but he did not do so. Perhaps he considered, at that stage, that the order which after all enabled him to be tried by a High Court Judge in preference to a Special Judge was favourable to him and, therefore, he did not choose to object.

(b) The matter came up before the trial judge on 13th March, 1984. The accused, who appeared in person, stated that he did not want to engage any counsel "at least for the present'. He would not put down his arguments in writing and when he argued the gravemen of his attack was that this Court's order transferring the trial from the Special Judge to the High Court was wrong on merits. Naturally, the learned Judge found it difficult to accept the contention that he should go behind the order of the Supreme Court. He rightly pointed out that if the accused had any grievance to make, his proper remedy was to move the Supreme Court for review of its judgment or for such further directions or clarifications as may be expedient. Thus, as early as 13th March, 1984, Khatri, J., had given a specific opportunity to the accused to come to this Court and seek a review of the direction. It can perhaps be said that on 16.2.1984, when this Court passed the impugned direction, the appellant was not fully conscious of the impact of the said direction and that, therefore, he did not object to it immediately. But, by the 13th March, 1984, he had ample time to think about the matter and to consult his counsel. The appellant himself was a barrister. He chose not to engage counsel but to argue himself and, even after the trial court specifically pointed out to him that it was bound by the direction of this Court under Articles 141 and 144 of the Constitution and that, if at all, his remedy was to go to the Supreme Court by way of review or by way of an application for clarification, he chose to take no action thereon.

(c) On 16th March, 1984, Khatri, J. disposed of the preliminary objections raised by the accused challenging the jurisdiction and competence of this Court to try the accused. Counsel for the respondent points out that, at the time of the hearing, the appellant had urged before Khatri, J. all the objections to the trial, which he is now putting forth. These objections have been summarised in paragraph 3 of the order passed by the learned Judge and each one of them has been dealt with elaborately by the learned Judge. It has been pointed out by him that the Supreme Court was considering not only the appeals preferred by the accused and the complainant, namely, Crl. Appeal Nos. 246, 247 and 356 of 1983 but also two revision petitions being C.R. Nos. 354 'and 359 of 1983 which had been withdrawn by the Supreme Court to itself for disposal along with Crl. Appeal No. 356 of 1983. A little later in the order the learned Judge pointed out that, even assuming that in the first instance the trial can be conducted only by a Special Judge, the

proceedings could be withdrawn by the high Court to itself under powers vested in it under Article 228(a) of the Constitution as well as Section 407 of the Cr.P.C. When the criminal revisions stood transferred to the Supreme Court (this was obviously done under Article 139-A though that article is not specifically mentioned in the judgment of the Supreme Court), the Supreme Court could pass the order under Article 139-A read with Article 142. The learned Judge also disposed of the objections based on Article 21. He pointed out that as against an ordinary accused person tried by a special judge, who gets a right of appeal to the High Court, a court of superior jurisdiction, with a further right of appeal to the Supreme Court under Section 374 of the Cr.P.C. and that an order of transfer passed in the interest of expeditious disposal of a trial was primarily in the interests of the accused and could hardly be said to be prejudicial to the accused. Despite the very careful and fully detailed reasons passed by the High Court, the appellant did not choose to seek a review of the earlier direction.

(d) Against the order of the learned Judge dated 16.3.1984 the complainant came to the Court because he was dissatisfied with certain observations made by the trial Judge in regard to the procedure to be followed by the High Court in proceeding with the trial. This matter was heard in open court by same five learned Judges who had disposed of the matter earlier on 16.2.1984. The accused was represented by a senior counsel and the Government of Maharashtra had also engaged a senior counsel to represent its case. Even at this hearing the counsel for the appellant did not choose to raise any objection against the direction given in the order dated 16.2.1984. The appeal before the Supreme Court was for getting a clarification of the very order dated 16.2.1984. This was a golden opportunity for the appellant also to seek a review or clarification of the impugned direction, if really he had a grievance that he had not been heard by the Court before it issued the direction and that it was also contrary to the provisions of the 1952 Act as well as violative of the rights of the accused under Article 21 of the Constitution.

(e) The petitioner instead filed two special leave petitions and a writ petition against the orders of Khatri, J. dated 13.3.1984 and 16.3.1984. In the writ petition, the petitioner had mentioned that the impugned direction had been issued without hearing him. In these matters counsel for the accused made both oral and written submissions and all contentions and arguments, which have now been put forward, had been raised in the written arguments. The appeals and writ petition were disposed of by this Court. this Court naturally dismissed the special leave petitions pointing out that the High Court was quite correct in considering itself bound by the directions of the Court. The Court also dismissed the writ petition as without merit. But once again it observed that the proper remedy of the petitioner was elsewhere and not by way of a writ petition. These two orders, according to the learned Counsel for the respondent, conclude the matter against the appellant. The dismissal of the writ petition reminded the petitioner of his right to move the Court by other means and, though this advice was tendered as early as 17.4.1984, the petitioner did nothing. So far as the special leave petition was concerned, its dismissal meant the affirmation in full of the decision given by Justice Khatri

dismissing and disposing of all the objections raised by the petitioner before him. Whatever may have been the position on 16.2.1984 or 16.3.1984, there was absolutely no explanation or justification for the conduct of the petitioner in failing to file an application for review between 17.4.1984 and October, 1986.

172. Recounting the above history, which according to him fully explained the attitude of the accused, learned Counsel for the respondent submitted that in his view the appellant was obviously trying to avoid a review petition perhaps because it was likely to go before the same learned Judges and he did not think that he would get any relief and perhaps also because he might have felt that a review was not an adequate remedy for him as, under the rules, it would be disposed of in chamber without hearing him once again. But, whatever may be the reason, it is submitted, the delay between April 1984 and October, 1986 stood totally unexplained and even now there was no proper review petition before this Court. In the circumstances, it is urged that this present belated prayer for review.

173. There is substance in these contentions. The prayer for review is being made very belatedly, and having regard to the circumstances outlined above there is hardly any reason to condone the delay in the prayer for review. The appellant was alive to all his present contentions as is seen from the papers in the writ petition. At least when the writ petition was dismissed as an inappropriate remedy, he should have at once moved this Court for review. The delay from April 1984 to October 1986 is totally inexplicable. That apart, there is also validity in the respondent's contention that, even if we are inclined to condone the delay, the application will have to be heard as far as possible by the same learned Judges who disposed of the earlier matter. In other words, that application will have to be heard by a Bench which includes the two learned Judges who disposed of the appeal on 16.2.1984 and who are still available in this Court to deal with any proper review application, that may be filed. However, since in my view, the delay has not been satisfactorily explained, I am of opinion that the prayer of the appellant that the present pleas may be treated as one in the nature of a review application and the appellant given relief on that basis has to be rejected.

Is a writ maintainable?

174. This takes one to a consideration of the second line of attack by the appellant's counsel. His proposition was that a judicial order of a court-even the High Court or this Court may breach the principles of natural justice or the fundamental rights and that, if it does so, it can be quashed by this Court in the exercise of its jurisdiction under Article 32. In other words, the plea would seem to be that the present proceedings may be treated as in the nature of a writ petition to quash the impugned order on the above ground. The earliest of the cases relied upon to support this contention is the decision in Prem Chand Garg v. Excise Commissioner [1963] Su. 1 S.C.R. 885, which may perhaps be described as the sheet-anchor of the appellant's contentions on this point. The facts of that case have been set out in the judgment of Sabyasachi Mukharji, J. and need not be repeated. The

case was heard by a Bench of five judges. Four of them, speaking through Gajendragadkar, J. held that Rule 12 of Order XXXV of the Supreme Court Rules violated Article 32 and declared it invalid. This also set aside an earlier order dated 12.12.1961 passed by the Court in pursuance of the rule calling upon the petitioner to deposit cash security. Sri Rao contended that this case involved two separate issues for consideration by the Court: (a) the validity of the rule and (b) the validity of the order dated 12.12.1961; and that the decision is authority not only for the proposition that a writ petition under Article 32 could be filed to impugn the constitutional validity of a rule but also for the proposition that the Court could entertain a writ petition to set aside a judicial order passed by the Court earlier on discovering that it is inconsistent with the fundamental rights of the petitioner. Counsel submitted that an impression in the minds of some persons that the decision in Prem Chand Garg is not good law after the decision of the nine-Judge Bench in Naresh Sridhar Mirajkar v. State MANU/SC/0044/1966: [1966]3SCR744 is incorrect. He submitted that, far from Garg's case being overruled, it has been confirmed in the later case.

175. Mirajkar was a case in which the validity of an interlocutory order passed by a judge of the Bombay High Court pertaining to the publication of reports of the proceedings in a suit pending before him was challenged by a journalist as violating his fundamental rights under Article 19 of the Constitution. The matter came to the Supreme Court by way of a writ petition under Article 32. The validity of the order was upheld by the majority of the Judges while Hidayatullah J. dissented. In this connection it is necessary to refer to a passage at p. 767 in the judgment of Gajendragadkar, C.J.

Mr. Setalvad has conceded that if a court of competent jurisdiction makes an order in a proceeding before it, and the order is inter-partes, its validity cannot be challenged by invoking the jurisdiction of this Court under Article 32, though the said order may affect the aggrieved party's fundamental rights. His whole argument before us has been that the impugned order affects the fundamental rights of a stranger to the proceeding before the Court; and that, he contends, justifies the petitioners in moving this Court under Article 32. It is necessary to examine the validity of this argument.

The question before the Supreme Court was thus as to whether, even at the instance of a stranger to the earlier proceedings, the earlier order could be challenged by means of a writ petition under Article 32. One of the questions that had to be considered by the Court was whether the judicial order passed by the learned judge of the High Court was amenable to be writ jurisdiction of the Court under Article 32. On this question, the judges reacted differently:

(i) Gajendragadkar, CJ and Wanchoo, Mudholkar, Sikri and Ramaswamy, JJ. had this to say:

The High Court is a superior Court of Record and it is for it to consider whether any matter falls within its jurisdiction or not. The order is a judicial order and if it is erroneous, a person aggrieved by it, though a stranger, could move this Court under Article 136 and the order can be corrected in appeal but the question about the existence of the said jurisdiction as well as the validity or the propriety of the order cannot be raised in writ proceedings under Article 32.

(ii) Sarkar J. also concurred in the view that this Court had no power to issue a certiorari to the High Court. He observed:

I confess the question is of some haziness. That haziness arises because the courts in our country which have been given the power to issue the writ are not fully analogous to the English courts having that power. We have to seek a way out for ourselves. Having given the matter my best consideration, I venture to think that it was not contemplated that a High Court is an inferior court even though it is a court of limited jurisdiction. The Constitution gave power to the High Court to issue the writ. In England, an inferior court could never issue the writ. I think it would be abhorrent to the principle of certiorari if a Court which can itself issue the writ is to be made subject to be corrected by a writ issued by another court. When a court has the power to issue the writ, it is not according to the fundamental principles of certiorari, an inferior court or a court of limited jurisdiction. It does not cease to be so because another Court to which appeals from it lie has also the power to issue the writ. That should furnish strong justification for saying that the Constitution did not contemplate the High Courts to be inferior courts so that their decisions would be liable to be quashed by writs issued by the Supreme Court which also had been given power to issue the writs. Nor do I think that the cause of justice will in any manner be affected if a High Court is not made amenable to correct by this Court by the issue of the writ. In my opinion, therefore, this Court has not power to issue a certiorari to a High Court.

(iii) Bachawat J. held:

The High Court has jurisdiction to decide if it could restrain the publication of a. document or information relating to the trial of a pending suit or concerning which the suit is brought, if it erroneously assume a jurisdiction not vested in it, its decision may be set aside in appropriate proceedings but the decision is not open to attack under Article 32 on the ground that it infringes the fundamental right under Article 19(1)(a). If a stranger is prejudiced by an order forbidding the publication of the report of any proceeding, his proper course is only to apply to the Court to lift the ban.

(iv) Justice Shah thought that, in principle, a writ petition could perhaps be filed to challenge an order of a High Court on the ground that it violated the fundamental rights of the petitioner under Articles 20, 21 and 22 but he left the question open. He, however,

concluded that an order of the nature in issue before the Court could not be said to infringe Article 19.

176. Hidayatullah J., as His Lordship then was, however, dissented. He observed:

Even assuming the impugned order means a temporary suppression of the evidence of the witness, the trial Judge had no jurisdiction to pass the order. As he passed no recorded order, the appropriate remedy (in fact the only effective remedy) is to seek to quash the order by a writ under Article 32.

There may be action by a Judge which may offend the fundamental rights under Articles 14, 15, 19, 20, 21 and 22 and an appeal to this Court will not only be practicable but will also be an ineffective remedy and this Court can issue a writ to the High Court to quash its order under Article 32 of the Constitution. Since there is no exception in Article 32 in respect of the High Courts there is a presumption that the High Courts are not excluded. Even with the enactment of Article 226, the power which is conferred on the High Court is not in every sense a coordinate power and the implication of reading Articles 32, 136 and 226 together is that there is no sharing of the powers to issue the prerogative writs possessed by this Court. Under the total scheme of the Constitution, the subordination of the High Courts to the Supreme Court is not only evident but is logical.

His Lordship proceeded to meet an objection that such a course might cast a slur on the High Courts or open the floodgates of litigation. He observed:

Article 32 is concerned with Fundamental Rights and Fundamental Rights only. It is not concerned with breaches of law which do not involve fundamental rights directly. The ordinary writs of certiorari, mandamus and prohibition can only issue by enforcement of Fundamental Rights. A clear cut case of breach of Fundamental Right alone can be the basis for the exercise of this power. I have already given examples of actions of courts and judges which are not instances of wrong judicial orders capable of being brought before this Court only by appeal but breaches of Fundamental Rights clear and simple. Denial of equality as for example by excluding members of a particular party or of a particular community from the public Court room in a public hearing without any fault, when others are allowed to stay on would be a case of breach of fundamental right of equal protection given by this Constitution. Must an affected person in such a case ask the Judge to write down his order, so that he may appeal against it? Or is he expected to ask for special leave from this Court? If a High Court judge in England acted improperly, there may be no remedy because of the limitations on the rights of the subject against the Crown. But in such circumstances in England the hearing is considered vitiated and the decision voidable. This need not arise here. The High Court in our country in similar circumstances is not immune because there is a remedy to move this Court for a writ against discriminatory treatment and this Court should not in a suitable case shirk to issue a writ to a High Court Judge, who ignores the fundamental rights and his

obligations under the Constitution. Other cases can easily be imagined under Article 14, 15, 19, 20, 21 and 22 of the Constitution, in which there may be action by a Judge which may offend the fundamental rights and in which an appeal to this Court will not only be not practicable but also quite an ineffective remedy.

We need not be dismayed that the view I take means a slur on the High Courts or that this Court will be flooded with petitions under Article 32 of the Constitution. Although the High Courts possess a power to interfere by way of high prerogative writs of certiorari, mandamus and prohibition, such powers have not been invoked against the normal and routine work of subordinate courts and tribunals. The reason is that people understand the difference between an approach to the High Court by way of appeals etc. and approach for the purpose of asking for writs under Article 226. Nor have the High Courts spread a Procrustean bed for high prerogative writs for all actions to lie. Decisions of the courts have been subjected to statutory appeals and revisions but the losing side has not charged the Judge with a breach of fundamental rights because he ordered attachment of property belonging to a stranger to the litigation or by his order affected rights of the parties or even strangers. This is because the people understand the difference between normal proceedings of a civil nature and proceedings in which there is a breach of fundamental rights. The courts acts, between parties and even between parties and strangers, done impersonally and objectively are challengeable under the ordinary law only. But acts which involve the court with a fundamental right are quite different.

One more passage from the judgment needs to be quoted. Observed the learned Judge:

I may dispose of a few results which it was suggested, might flow from my view that this Court can issue a high prerogative writ to the High Court for enforcement of fundamental rights. It was suggested that the High Courts might issue writs to this Court and to other High Courts and one Judge or Bench in the High Court and the Supreme Court might issue a writ to another judge or Bench in the same Court. This is an erroneous assumption. To begin with High Courts cannot issue a writ to the Supreme Court because the writ goes down and not up. Similarly, a High Court cannot issue a writ to another High Court. The writ does not go to a court placed on an equal footing in the matter of jurisdiction

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I must hold that this English practice of not issuing writs in the same court is in the very nature of things. One High Court will thus not be able to issue a writ to another High Court nor even to a court exercising the powers of the High Court. In so far as this Court is concerned, the argument that one Bench or one Judge might issue a writ to another Bench or Judge, need hardly be considered. My opinion gives no support to such a view and I hope I have said nothing to give countenance to it. These are imaginary fears which have no reality either in law or in fact.

177. I have set out at length portions from the judgment of Hidayatullah, J. as Shri Rao placed considerable reliance on it. From the above extracts, it will be seen that the majority of the Court was clearly of opinion that an order of a High Court cannot be challenged by way of a writ petition under Article 32 of the Constitution on the ground that it violates the fundamental rights, not even at the instance of a person who was not at all a party to the proceedings in which the earlier order was passed. Even Hidayatullah, J. has clearly expressed the view that, though a writ of certiorari might issue to quash the order of a High Court in appropriate case, it cannot lie from a Bench of one court to another Bench of the same High Court. Subba Rao, C.J. has also made an observation to like effect in regard to High Court Benches inter se in Ghulam Sarwar v. Union MANU/SC/0062/1966: 1967CriLJ1204. The decision in Prem Chand Garg, seems to indicate to the contrary. But it is clearly distinguishable and has been distinguished by the nine judge Bench in Mirajkar. The observations of Gujendragadkar, C.J. (at p. 766), and Sarkar, J. (at p. 780), be seen in this context. In that case, it is true that the order passed by the Court directing the appellant to deposit security was also quashed but that was a purely consequential order which followed on the well-founded challenge to the validity of the rule. Hidayatullah, J. also agreed that this was so and explained that the judicial decision which was based on the rule was only revised. (p. 790).

178. Sri Rao also referred to Sadhanatham v. Arunachalam MANU/SC/0083/1980: [1980]2SCR873. In that case, the petitioner was acquitted by the High Court, in appeal, of charges under Section 302 and 148 of the Indian Penal Code. The brother of the deceased, not the State or the informant, petitioned this Court under Article 136 of the Constitution for special leave to appeal against the acquittal. Leave was granted and his appeal was eventually allowed by the High Court. The judgment of the High Court was set aside and the conviction and sentence imposed by the trial court under Section 302 was upheld by the Supreme Court in his earlier decision reported in MANU/SC/0073/1979: 1979CriLJ875. Thereupon, the petitioner filed a writ petition under Article 32 of the Constitution, challenging the validity of the earlier order of this Court. Eventually, the petition was dismissed on the merits of the case. However, learned Counsel for the appellant strongly relied on the fact that in this case a Bench of five judges of this Court entertained a petition under Article 32 to reconsider a decision passed by it in an appeal before the Court. He submitted that it was inconceivable that it did not occur to the learned judges who decided the case that, after Mirajkar, a writ petition under Article 32 was not at all entertain able. He, therefore, relied upon this judgment as supporting his proposition that in an appropriate case this Court can entertain a petition under Article 32 and review an earlier decision of this Court passed on an appeal or on a writ petition or otherwise. This decision, one is constrained to remark, is of no direct assistance to the appellant. It is no authority for the proposition that an earlier order of the court could be quashed on the ground that it offends the Fundamental Right. As the petition was eventually dismissed on the merits, it was not necessary for the court to consider whether,

if they had come to the conclusion that the earlier order was incorrect or invalid, they would have interfered therewith on the writ petition filed by the petitioner.

179. Two more decisions referred to on behalf of the appellant may be touched upon here. The first was the decision of this Court in Attorney-General v. Lachma Devi,: 1986CriLJ364. In that case the High Court had passed an order that certain persons found guilty of murder should be hanged in public. This order was challenged by a writ petition filed under Article 32 by the Attorney-General of India, on the ground that it violated Article 21 of the Constitution. This petition was allowed by this Court. The second decision on which reliance was placed is that in Sukhdas v. Union Territory MANU/SC/0140/1986: 1986CriLJ1084. In that case the petitioner, accused of a criminal offence had not been provided with legal assistance by the court. The Supreme Court pointed out that this was a constitutional lapse on the part of the court and that the conviction on the face of the record suffered from a fatal infirmity. These decisions do not carry the petitioner any further. Sukhdas was a decision on an appeal and Lachma Devi does not go beyond the views expressed by Hidayatullah, J. and Shah, J. in Mirajkar.

180. On a survey of these decisions, it appears to me that Prem Chand Garg cannot be treated as an authority for the proposition that an earlier order of this Court could be quashed by the issue of a writ on the ground that it violated the fundamental rights. Mirajkar clearly precludes such a course. It is, therefore, not possible to accept the appellant's plea that the direction dated 16.2.1984 should be quashed on the grounds put forward by the petitioner.

Inherent power to declare orders to be null and void

181. The next line of argument of learned Counsel for the appellant is that the order dated 16.2.1984, in so far as it contained the impugned direction, was a complete nullity. Being an order without jurisdiction, it could be ignored by the person affected or challenged by him at any stage of the proceedings before any Court, particularly in a criminal case, vide Dhirendra Kumar v. Superintendent MANU/SC/0060/1954: [1955]1SCR224. Counsel also relied on the following observations made in Kiran Singh v. Chaman Paswan MANU/SC/0116/1954: AIR [1955]1SCR117.

The answer to these contentions must depend on what the position in law is when a Court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under

consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgments and decree would be nullities.

(emphasis added)

He also extensively quoted from the dicta of this Court in M.L. Sethi v. R.P. Kapur MANU/SC/0245/1972: [1973]1SCR697, where after setting out the speeches of Lord Reid and Lord Pearce in Anisminic Ltd. v. Foreign Compensation Commissioner [1969] 2 A.C. 147 this Court observed:

The dicta of the majority of the House of Lords in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "impose an unwarranted condition" or "addressing themselves to a wrong question." The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess or jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the Court is prepared to allow. In the end it can only be a value judgment (see R.W.R. Wade, "Constitutional and Administrative Aspects of the Anisminic case", Law Quarterly Review, Vo. 85, 1969 p. 198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error and liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata could oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of this Court.

He also referred to Badri Prasad v. Nagarmal [1959] 1 Su. S.C.R. 769 which followed the clear law laid down in Surajmul Nagarmul v. Triton Insurance Co. Ltd. MANU/PR/0044/1924, Balai Chandra Hazra v. Shewdhari Jadav MANU/SC/0375/1978: [1978]3SCR147 which followed Ledgard v. Bull, L.R. 13 I.A.p 134; Meenakshi Naidu v. Subramaniya Sastri, L.R. 14 I.A 140 and Sukhrani v. Hari Shankar MANU/SC/0538/1979: [1979]3SCR671. Sr Rao, citing a reference from Halsbury's Laws of England (4th Edition) Vol. X, para 713, pages 321-2, contended that

the High Court's jurisdiction clearly stood excluded by Section 7(1) of the 1952 Act and, hence, the direction of the Supreme Court was also one without jurisdiction.

182. In dealing with this contention, one important aspect of the concept of jurisdiction has to be borne in mind. As pointed out by Mathew J. in Kapur v. Sethi, (supra), the word "jurisdiction is a verbal coat of many colours." It is used in a wide and broad sense while dealing with administrative or quasi-judicial tribunals and subordinate courts over which the superior Courts exercise a power of judicial review and superintendence. Then it is only a question of "how much latitude the court is prepared to allow" and "there is no yardstick to determine the magnitude of the error other than the opinion of the court." But the position is different with superior Courts with unlimited jurisdiction. These are always presumed to act with jurisdiction and unless it is clearly shown that any particular order is patently one which could not, on any conceivable view of its jurisdiction, have been passed by such court, such an order can neither be ignored nor even recalled, annulled, revoked or set aside in subsequent proceedings by the same court. This distinction is well brought out in the speeches of Lord Diplock, Lord Edmund-Devier and Lord Scarman in Re. Racal Communications Ltd. [1980] 2 A.E.R. 634. In the interests of brevity, I resist the temptation to quote extracts from the speeches here.

183. In the present case, the order passed is not one of patent lack of jurisdiction, as I shall explain later. Though I have come to the conclusion, on considering the arguments addressed now before us, that the direction in the order dated 16.2.1984 cannot be justified by reference to Article 142 of the Constitution or Section 407 of the 1973 Cr.P.C., that is not an incontrovertible position. It was possible for another court to give a wider interpretation to these provisions and come to the conclusion that such an order could be made under those provisions. If this Court had discussed the relevant provisions and specifically expressed such a conclusion, it could not have been modified in subsequent proceedings by this Bench merely because we are inclined to hold differently. The mere fact that the direction was given, without an elaborate discussion, cannot render it vulnerable to such review.

184. Shri P.P. Rao then placed considerable reliance on the observations of the Privy Council in Isaacs v. Robertson [1984] 3 A.E.R. 140 an appeal from a decision of the Court of Appeal of St. Vincent and the Grenadines. Briefly the facts were that Robertson had obtained an interim injunction against Isaacs and two others on 31.5.1979 which the latter refused to obey. The respondents motion for committal of the appellant for contempt was dismissed by the High Court of Saint Vincent. The Court of Appeal allowed the respondents application; the appellants were found to be in contempt and also asked to pay respondents costs. However, no penalty, was inflicted because the appellant would have been entitled to succeed on an application for setting aside the injunction, has he filed one. The main attack by the appellant on the Court of Appeal's judgment was based on the contention that, as a consequence of the operation of certain rules of the Supreme

Court of St. Vincent, the interlocutory injunction granted by the High Court was a nullity: so disobedience to it could not constitute a contempt of court. Lord Diplock observed:

Glosgow J. accepted this contention, the Court of Appeal rejected it, in their Lordships' view correctly, on the short and well established ground that an order made by a court of unlimited jurisdiction, such as the High Court of Saint Vincent must be obeyed unless and until it has been set aside by the court. For this proposition Robotham AJA cited the passage in the judgment of Romer L.J. in Hadkinson v. Hadkinson [1952] 2 All. E.R. 567.

It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cotteniiam, Leven to cases where the person affected by an order believes it to be irregular or even void. Lord Cotteniiam, L.C. said in Chuck v. Cremer [1946] 1 CTC 338: "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.... It would be most dangerous to hold that the suitors. or their solicitOrs. could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be obeyed." Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court...is in contempt and may be published by committal or attachment or otherwise.

It is in their Lordships view, says all that needs to be said oh this topic. It is not itself sufficient reason for dismissing this appeal.

Having said this, the learned Law Lord proceeded to say:

The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind, what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deals expressly with proceedings to set aside orders for irregularity and give to the Judge a discretion as to the order he will make. The judges in the case that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order in the category that attracts ex debito justitiae the right to have it set aside save that specifically it includes orders that have been obtained in breach of rules of natural justice. The contrasting legal concepts of voidness and voidability form part of the English law

of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentions litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court, if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies.

Sri Rao strongly relied on this passage and, modifying his earlier, somewhat extreme, contention that the direction given on 16.2.1984 being a nullity and without jurisdiction could be ignored by all concerned-even by the trial judge-he contended, on the strength of these observations., that he was at least entitled ex debito justitiae to come to this Court and request the court, in the interests of justice, to set aside the earlier order "without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity", if only on the ground that the order had been made in breach of the principles of natural justice. Violation of the principles of natural justice, he contended, renders the direction a nullity without any further proof of prejudice (see Kapur v. Jagmohan MANU/SC/0036/1980: [1981]1SCR746).

185. Learned Counsel contended, in this context, that the fact the direction had been given in the earlier proceedings in this very case need not stand in the way of our giving relief, if we are really satisfied that the direction had been issued per incuriam, without complying with the principles of natural justice and purported to confer a jurisdiction on the High Court which it did not possess. In this context he relied on certain decisions holding that an erroneous decision on a point of jurisdiction will not constitute res judicata. In Mathura Prasad v. Dossibai MANU/SC/0420/1970: [1970]3SCR830, this Court observed:

A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute, the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly, by an erroneous decision, if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be re-opened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties.

xxxx xxxx

Where, however the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

Counsel also relied on the decision of this Court in Ghulam Sarwar v. Union of India [1965] 2 S.C.C. 271, where it was held that the principle of constructive res judicata was not applicable to habeas corpus proceedings. He also referred to the observations of D.A. Desai J. in Soni Vrijlal Jethalal v. Soni Jadavji Govindji, MANU/GJ/0033/1972: AIR1972Guj148 that no act of the court or irregularity can come in the way of justice being done and one of the highest and the first duty of all courts is to take care that the act of the court does no injury to the suitors. He also made reference to the maxim that an get of, or mistake on the part, of a court shall cause prejudice to no one, vide: Jang Singh v. Brij Lal MANU/SC/0006/1963: [1964]2SCR145. Relying on these decisions and passages from various treatises which I do not consider it necessary to set out in in extenso here, Sri Rao contended that this Court should not consider itself bound by the earlier order of the Bench or any kind of technicality where the liberty of an individual and the rights guaranteed to him under Articles 14 and 21 of the Constitution are in issue. It is urged that, if this Court agrees with him that the direction dated 16.2.1984 was an illegal one, this Court should not hesitate nay, it should hasten-to set aside the said order and repair the injustice done to the appellant without further delay. On the other hand, Sri Jethmalani vehemently urged that the present attempt to have the entire matter reopened constitutes a gross abuse of the process of court, that it is well settled that the principle of res judicata is also available in criminal matters (vide Bhagat Ram v. State MANU/SC/0090/1972: 1972CriLJ909 and State v. Tara Chand [1973] S.C.C. Crl. 774 that in the United States the principle of res judicata governs even jurisdictional issues and that "the slightest hospitality to the accused's pleas will lead to a grave miscarriage of justice and set up a precedent perilous to public interest."

186. I have given careful thought to these contentions. The appellant's counsel has relied to a considerable extent on the maxim "actus curiae neminem gravabit" for contending that it is not only within the power, but a duty as well, of this Court to correct its own mistakes in order to see that no party is prejudiced by a mistake of the Court. I am not persuaded that the earlier decision could be reviewed on the application of the said maxim. I share the view of my learned brother Venkatachaliah, J. that this maxim has very limited application and that it cannot be availed of to correct or review specific conclusions arrived at in a judicial decision. My brother Venkatachaliah, J. has further taken the view that this Court cannot exercise any inherent powers for setting right any injustice that may have been caused as a result of an earlier order of the Court. While alive to the consideration that "the highest court in the land should not, by technicalities of procedure, forge fetters on its own feet and disable itself in cases of serious miscarriages of justice", he has, nevertheless, come to the conclusion that "the remedy of

the appellant, if any, is by recourse to Article 137 and nowhere else." It is at this point that I would record a dissent from his opinion. In my view, the decisions cited do indicate that situations can and do arise where this Court may be constrained to recall or modify an order which has been passed by it earlier and that when ex facie there is something radically wrong with the earlier order, this Court may have to exercise its plenary and inherent powers to recall the earlier order without considering itself bound by the nice technicalities of the procedure for getting this done. Where a mistake is committed by a subordinate court or a High Court, there are ample powers in this Court to remedy the situation. But where the mistake is in an earlier order of this Court, there is no way of having it corrected except by approaching this Court. Sometimes, the remedy sought can he brought within the four corners of the procedural law in which event there can be no hurdle in the way of achieving the desired result. But the mere fact that, for some reason, the conventional remedies are not available should not, in my view, render this Court powerless to give relief. As pointed out by Lord Diplock in Isaac v. Robertson [1984] 3 A.E.R. 140, it may not be possible or prudent to lay down a comprehensive list of defects that will attract the ex debito justitiae relief. Suffice it to say that the court can grant relief where there is some manifest illegality or want of jurisdiction in the earlier order or some palpable injustice is shown to have resulted. Such a power can be tract d either to Article 142 of the Constitution or to the powers inherent in this Court as the apex court and the guardian of the Constitution.

187. It is, however, indisputable that such power has to be exercised in the "rarest of rare" cases. As rightly pointed out by Sri Jethmalani, there is great need for judicial discipline of the highest order in exercising such a power, as any laxity in this regard may not only impair the eminence, dignity and integrity of this Court but may also lead to chaotic consequences. Nothing should be done to create an impression that this Court can be easily persuaded to alter its views on any matter and that a larger Bench of the Court will not only be able to reverse the precedential effect of an earlier ruling but may also be inclined to go back on it and render it ineffective in its application and binding nature even in regard to subsequent proceedings in the same case. In Bengal Immunity Company Limited v. The State of Bihar and Ors. MANU/SC/0083/1955: [1955]2SCR603, this Court held that it had the power, in appropriate cases, to reconsider a previous decision given by it. While concurring in this conclusion, Venkatarama Ayyar, J. sounded a note of warning of consequences which is more germane in the present context:

The question then arises as to the principles on which and the limits within which this power should be exercised. It is of course not possible to enumerate them exhaustively, nor is it even desirable that they should not crystallised into rigid and inflexible rules. But one principle stands out prominently above the rest, and that is that in general, there should be finality in the decisions of the highest courts in the land, and that is for the benefit and protection of the public. In this connection, it is necessary to bear in mind that next to legislative enactments, it is decisions of Courts that form the most important source of law. It is on the faith of decisions that rights are acquired and obligations

incurred, and States and subjects alike shape their course of action. It must greatly impair the value of the decisions of this Court, if the notion came to be entertained that there was nothing certain or final about them, which must be the consequence if the points decided therein came to be re-considered on the merits every time they were raised. It should be noted that though the Privy Council has repeatedly declared that it has the power to reconsider its decisions, in fact, no instance has been quoted in which it did actually reverse its previous decision except in ecclesiastical cases. If that is the correct position, then the power to reconsider is one which should be exercised very sparingly and only in exceptional circumstances, such as when a material provision of law had been overlooked, or where a fundamental assumption on which the decision is based turns out to be mistaken. In the present case, it is not suggested that in deciding the question of law as they did in The State of Bombay v. The United Motors (India) Ltd. MANU/SC/0095/1953: [1953]4SCR1069 the learned Judges ignored any material provisions of law, or were under any misapprehension as to a matter fundamental to the decision. The arguments for the appellant before us were in fact only a repetition of the very contentions which were urged before the learned Judges and negatived by them. The question then resolves itself to this. Can we differ from a previous decision of this Court, because a view contrary to the one taken therein appears to be preferable? I would unhesitatingly answer it in the negative, not because the view previously taken must necessarily be infallible but because it is important in public interest that the law declared should be certain and final rather than that it should be declared in one sense or the other. That, I conceive, in the reason behind Article 141. There are questions of law on which it is not possible to avoid difference of opinion, and the present case is itself a signal example of it. The object of Article 141 is that the decisions of this Court on these questions should settle the controversy, and that they should be followed as law by all the Courts, and if they are allowed to be reopened because a different view appears to be the better one, then the very purpose with which Article 141 has been enacted will be defeated, and the prospect will have been opened of litigants subjecting our decisions to a continuous process of attack before successive Benches in the hope that with changes in the personnel of the Court which time must inevitably bring, a different view might find acceptance. I can imagine nothing more damaging to the prestige of this Court or to the value of its pronouncements. In James v. Commonwealth, 18 C.L.R. 54, it was observed that a question settled by a previous decision should not be allowed to be reopened "upon a mere suggestion that some or all of the Members of the later Court might arrive at a different conclusion if the matter was res integra. Otherwise, there would be grave danger of want of continuity in the interpretation of the law" (per Griffiths, C.J. at p. 58). It is for this reason that Article 141 invests decisions of this Court with special authority, but the weight of that authority can only be what we ourselves give to it.

Even in the context of a power of review, properly so called, Venkataramiah, J. had this to say in Sheonandan Paswan v. State of Bihar and Ors. MANU/SC/0206/1986: 1987CriLJ793:

The review petition was admitted after the appeal had been dismissed only because Nandini Satpathy cases,: 1987CriLJ778 and: [1987]1SCR680 had been subsequently referred to a larger bench to review the earlier decisions. When the earlier decisions are allowed to remain intact, there is no justification to reverse the decision of this Court by which the appeal had already been dismissed. There is no warrant for this extraordinary procedure to be adopted in this case. The reversal of the earlier judgment of this Court by this process strikes at the finally of judgments of this Court and would amount to the abuse of the power of review vested in this Court, particularly in a criminal case. It may be noted that no other court in the country has been given the power of review in criminal cases. I am of the view that the majority judgment of Baharul Islam and R.B. Misra, JJ. should remain undisturbed. This case cannot be converted into an appeal against the earlier decision of this Court.

The attempt of the appellant here is more far-reaching. He seeks not the mere upsetting of a precedent of this Court nor the upsetting of a decision of a High Court or this Court in accordance with the normal procedure. What he wants from us is a declaration that an order passed by a five judge Bench is wrong and that it should, in effect, be annulled by us. This should not be done, in my view, unless the earlier order is vitiated by a patent lack of jurisdiction or has resulted in grave injustice or has clearly abridged the fundamental rights of the appellant. The question that arises is whether the present case can be brought within the narrow range of exceptions which calls for such interference. I am inclined to think that it does not.

188. I have indicated earlier, while discussing the contentions urged by Shri P.P. Rao that some of them were plausible and, that, if I were asked to answer these questions posed by counsel for the first time, I might agree with his answers. But I have also indicated that, in my view, they do not constitute the only way of answering the questions posed by the learned counsel. Thus, to the question: did this Court have the jurisdiction to issue the impugned direction, a plausible answer could well be that it did, if one remembers that one of the transferred cases before this Court was the revision petition before the Bombay High Court in which a transfer of the case to the High Court has been asked for and if one gives a wide interpretation to the provisions of Article 142 of the Constitution. On the question whether this Court could transfer the case to a High Court Judge, who was not a Special Judge, a court could certainly accept the view urged by Sri Ram Jethmalani that Section 7(1) of the 1952 Act should not be so construed as to exclude the application of the procedural provisions of the Cr.P.C. in preference to the view that has found favour with me. Though the order dated 16.2.1984 contains no reference to, or discussion of, Section 407 Cr.P.C, this line of thinking of the judges who issued the direction does surface in their observations in their decision of even date rendered on the complainant's special leave petition MANU/SC/0082/1984: 1984CriLJ647. I have already pointed out that, if the transfer is referable to Section 407 of the 1973 Cr.P.C, it cannot be impugned as offending Article 14 and 21 of the Constitution. The mere fact that the judges did not discuss at length the facts or the provisions of Section 407 Cr.P.C vis-a-vis the

1952 Act or give a reasoned order as to why they thought that the trial should be in the High Court itself cannot render their direction susceptible to a charge of discrimination. A view can certainly be taken that the mere entrustment of this case to the High Court for trial does not perpetrate manifest or grave injustice. On the other hand, prima facie, it is something beneficial to the accused and equitable in the interest of justice. Such trial by the High Court, in the first instance, will be the rule in cases where a criminal trial is withdrawn to the High Court under Section 407 of the Cr.P.C. or where a High Court judge has been constituted as a Special Judge either under the 1952 Act or some other statute. The absence of an appeal to the High Court with a right of seeking for further leave to appeal to the Supreme Court may be considered outweighed by the consideration that the original trial will be in the High Court (as in Sessions cases of old, in the Presidency Towns) with a statutory right of appeal to the Supreme Court under Section 374 of the Cr.P.C. In this situation, it is difficult to say that the direction issued by this Court in the impugned order is based on a view which is manifestly incorrect, palpably absurd or patently without jurisdiction. Whether it will be considered right or wrong by a different Bench having a second-look at the issues is a totally different thing. It will be agreed on all hands that it will not behave the prestige and glory of this Court as envisaged under the Constitution if earlier decisions are revised or recalled solely because a later Bench takes a different view of the issues involved. Granting that the power of review is available, it is one to be sparingly exercised only in extraordinary or emergent situations when there can be no two opinion about the error or lack of jurisdiction in the earlier order and there are adequate reasons to invoke a resort to an unconventional method of recalling or revoking the same. In my opinion, such a situation is lot present here.

189. The only question that has been bothering me is that the appellant had been given no chance of being heard before the impugned direction was given and one cannot say whether the Bench would have acted in the same way even if he had been given such opportunity. However, in the circumstances of the case, I have come to the conclusion that this is not a fit case to interfere with the earlier order on that ground. It is true that the audi altarem partem rule is a basic requirement of the rule of law. But judicial decisions also show that the degree of compliance with this rule and the extent of consequences flowing from failure to do so will vary from case to case. Krishna Iyer, J. observed thus in Nawabkhan Abbaskhan v. State MANU/SC/0068/1974: 1974CriLJ1054 thus:

an order which infringed a fundamental freedom passed in violation of the audi alteram partem rule was a nullity. A determination is no determination if it is contrary to the constitutional mandate of Article 19. On this footing the externment order was of no effect and its violation was not offence. Any order made without hearing the party affected is void and ineffectual to bind parties from the beginning if the injury is to a constitutionally guaranteed right. May be that in ordinary legislation or at common law a Tribunal having jurisdiction and failing to hear the parties may commit an illegality which may render

the proceedings voidable when a direct attack was made thereon by way of appeal, revision or review but nullity is the consequence of unconstitutionality and so the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void ab initio and of no legal efficacy. The duty to hear manacles his jurisdictional exercise and any act is, in its inception, void except when performed in accordance with the conditions laid down in regard to hearing.

(emphasis added)

So far as this case is concerned, I have indicated earlier that the direction of 16.2.1984 cannot be said to have infringed the fundamental rights of the appellant or caused any miscarriage of justice. As pointed out by Sri Jethmalani, the appellant did know, on 16.2.84, that the judges were giving such a direction and yet he did not protest. Perhaps he did think that being tried by a High Court Judge would be more beneficial to him, as indeed was likely to be. That apart, as discussed earlier, several opportunities were available for the appellant to set this right. He did not move his little finger to obtain a variation of this direction from this Court. He is approaching the Court nearly after two years of his trial by the learned judge in the High Court. Volumes of testimony, we are told, have been recorded and numerous exhibits have been admitted as evidence. Though the trial is only at the stage of the framing charges, the trial being according to the warrant procedure, a lot of evidence has already gone in and the result of the conclusions of Sabyasachi Mukharji, J. would be to wipe the slate clean. To take the entire matter back at this stage to square No. 1 would be the very negation of the purpose of the 1952 Act to speed up all such trials and would result in more injustice than justice from an objective point of view A& pointed out by Lord Denning in R. v. Secretary of State for the Home Department ex parte Mughal [1973] 3 All E.R. 796, the rules of natural justice must not be stretched too far. They should not be allowed to be exploited as a purely technical weapon to undo a decision which does not in reality cause substantial injustice and which, had the party been really aggrieved thereby, could have been set right by immediate action. After giving my best anxious and deep thought to the pros and cons of the situation I have come to the conclusion that this is not one of those cases in which I would consider it appropriate to recall the earlier direction and order a retrial of the appellant de novo before a Special Judge. I would, therefore, dismiss the appeal.

ORDER

190. In view of the majority judgments the appeal is allowed; all proceedings in this matter subsequent to the directions of this Court on 16th February, 1984 as indicated in the judgment are set aside and quashed. The trial shall proceed in accordance with law, that is to say, under the Act of 1952.

MANU/UP/0180/1968

Back to Section 391 of Indian Penal Code, 1860

IN THE HIGH COURT OF ALLAHABAD

Decided On: 18.09.1968
Ghamandi and Ors. Vs. State

Hon'ble Judges/Coram:
T.P. Mukerjee, J.

JUDGMENT
T.P. Mukerjee, J.

1. (1-5) (After stations the facts, His Lordship proceeded.)

2. A point of law has now been raised by the learned Counsel for the defence that out of the six dacoits, two having been acquitted, it was not possible to sustain the conviction of the remaining four on a charge under Section 395, I. P. C. which contemplates participation of at least five persons in the offence. In support of his contention he relied on two decisions. The first is a decision of the High Court of Andhra Pradesh in the case of In re, K. Appalaswami MANU/AP/0164/1955: AIR 1957 AP 954 and the case of Devi v. State MANU/RH/0016/1953. Both these decisions were by single judges of the respective Courts. In the first case seven persons who were, apparently, known to the complainant had been named in the first information report as having committed a dacoity by forcibly harvesting and removing his crop. The Sessions Judge found that there was no case against three of the accused persons and he acquitted them for want of proof. He, however, convicted the other four under Section 395, I. P. C. Before the High Court a point was taken on behalf of the appellants that in the circumstances of the case, three of the accused persons having been acquitted the charge of dacoity against the other four under Section 395, I. P. C. could not be sustained. The learned Judge accepted the contention observing as under:

I am impressed with this argument. It is true that in the Sessions Court the prosecution witnesses stated, that apart from these accused there were a number of persons cutting the crops but this is belied by Exhibit P-12 the charge-sheet and by the admission made by the investigating officer. Nor does the Sessions Judge say that there were seven people who were engaged in removing the crop but the identity of persons other than the appellant has not been satisfactorily established.
It would thus be found that in that case the learned Judge was not satisfied that seven persons had participated in the dacoity. In point of fact, the learned Judge ultimately acquitted all the three accused persons who had appealed against their conviction. The observation of Chandra Reddy, J" quoted above, proceeded entirely on the basis that there was no evidence in the case to show that more than three persons were engaged in

the alleged dacoity. It was on this basis that it was held that conviction of the three appellants under Section 395. I, P. C. was not tenable.

7. In the other case which came from the Rajasthan High Court, there were five accused persons who were put on trial, but two of them were acquitted on the ground that only three had taken part in committing the offence. It was, therefore, held that those three persons could not be convicted under Section 395, I. P. C. for the offence of dacoity. In this case also the Court held that even as regards the three appellants who had been convicted by the Sessions Judge, no offence was proved beyond a reasonable shadow of doubt. The result was that all the appellants were acquitted. In the course of his judgment the learned Judge observed as follows:

The learned Sessions Judge has made an obvious error in convicting the three accused under Section 395 of the Penal Code. It was alleged that there were only five accused who committed the offence. Out of five, two were acquitted by the Sessions Judge himself. According to his finding only three accused took part in the offence, and therefore, the offence could not, in any case be one under Section 395 of the Indian Penal Code.
In view of what has been stated above it would appear that the observation of the learned Judge in point was in the nature of an obiter. In any case, the observation has to be read in the context of the facts of that case which are very different from the facts of the present case.

8. As I have already noticed, in the present case all the prosecution witnesses have clearly stated that there were six miscreants who were engaged in the commission of the dacoity and, as a matter of fact, two of them namely Ghamandi and Hetram were actually arrested by the villagers after a hot chase, The arrested dacoits were beaten up by the villagers and they gave out the names of the other four dacoits as Ramphal, Zalim alias Jagrua, Sarman and Gudru. Of these four dacoits, two of them have been acquitted by the learned sessions Judge on the ground that the evidence of identification as against those two accused could not be safely relied upon. It is possible that the two appellants viz., Ghamandi and Hetram who had been apprehended on the spot, had given out two wrong names purposely. The fact that two of the accused persons viz., Sarman and Gudru, were acquitted on the ground that the evidence of identification against them was not satisfactory, does not necessarily mean that the offence in the present case was committed by only four persons.

The learned Counsel for the State has produced before me certain authorities to support this view. The earliest case in point appears to be the decision of the Calcutta High Court in the case of Rashidazaman v. Emperor 12 Cri LJ 193 (Cal). In that case eight persons were charged with dacoity, but four of them were acquitted. It was contended on behalf of the defence that in consequence of the acquittal, the charge of dacoity under Section 395, I. P. C. could not be sustained against the remaining four. The learned Judges negatived the contention and upheld the conviction of the four appellants on the charge

of dacoity. The decision of the Calcutta High Court in this case was cited with approval by the Nagpur High Court in the case of Narayan Dinba v. Emperor MANU/NA/0061/1946 in which it was laid down that the mere fact that the evidence was not sufficient to convict four of the accused persons actually charged could not in any way affect the question of the number of persons engaged.

In a case before the Orissa High Court, Suka Misra v. State MANU/OR/0071/1950: AIR1951Ori71 a similar question arose. Twelve persons were put on trial, to answer a charge of dacoity. Nine of them were, ultimately, acquitted and three convicted under Section 395, I. P. C. The case was heard by a Division Bench of the High Court constituted of Jagannadhadas and Panigrahi. JJ. Panigrahi, J., who delivered the leading judgment had no hesitation in holding that the conviction of the three of the appellants on the charge of dacoity was quite correct, Jagannadhadas, J., however, came to the same conclusion with some amount of apparent hesitation, Ultimately, he agreed with Panigarhi, J. The correct position is that, in spite of the acquittal of a number of persons, if it is found as a fact that along with the persons convicted there were other unidentified persons who participated in the offence, bringing the total number of participants to five or more, the conviction of the identified persons, though less than five, is perfectly correct. In the present case, as I have pointed out above, there is the consistent testimony of the prosecution witnesses that there were six dacoits including the four appellants. This is also specifically the case stated in the first information report. If, therefore, two of the dacoits could not be traced and identified, there is no reason why the remaining four cannot be convicted of the offence of dacoity under Section 395, I. P. C.

9. Lastly the learned Counsel for the appellants pleaded that the sentences imposed on the appellants were too severe and should be appreciably reduced. I am unable to accept the contention. The sentences imposed by the learned Sessions Judge were perfectly justified in view of the seriousness of the crime.

10. The appeal is dismissed. Appellants Nos. 1 and 2 are in gaol. They will serve out the sentences imposed upon them. Appellants Nos. 3 and 4 are on bail. Their bail bonds are cancelled. They must immediately surrender and serve out the sentences imposed on them.

MANU/SC/0110/1962

Back to Section 405 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Delhi Appeal Nos. 7 to 9 of 1961

Decided On: 05.04.1962

R.K. Dalmia Vs. Delhi Administration

Hon'ble Judges/Coram:
K. Subba Rao, Raghubar Dayal and S.K. Das, JJ.

JUDGMENT
Raghubar Dayal, J.

1. These three appeals are by special leave. Appeal No. 7 of 1961 is by R. K. Dalmia. Appeal No. 8 of 1961 is by R. P. Gurha. Appeal No. 9 of 1961 is by G. L. Chokhani and Vishnu Prasad. All the appellants were convicted of the offence under section 120B read with section 409 I.P.C., and all of them, except Vishnu Prasad, were also convicted of certain offences arising out of the overt acts committed by them. Dalmia and Chokhani were convicted under section 409 I.P.C. Chokhani were convicted under section 477A read with section 110, I.P.C. Gurha was convicted under section 477A I.P.C.

2. To appreciate the case against the appellants, we may first state generally the facts leading to the case. Bharat Insurance Company was incorporated in 1896. In 1936 Dalmia purchased certain shares of the company and became a Director and Chairman of the company. He resigned from these offices in 1942 and was succeeded by his brother J. Dalmia. The head office of the Bharat Insurance Company was shifted from Lahore to 10, Daryaganj, Delhi, in 1947. Dalmia was co-opted a Director on March 10, 1949 and was again elected Chairman of the company on March 19, 1949 when his brother J. Dalmia resigned.

3. R. L. Chordia, a relation of Dalmia and principal Officer of the Insurance Company, was appointed Managing Director on February 27, 1950. Dalmia was appointed Principal Officer of the company with effect from August 20, 1954. He remained the Chairman and Principal Officer of the Company till September 22, 1955. The period of criminal conspiracy charged against the appellant is from August 1954 to September 1955. Dalmia was therefore, during the relevant period, both Chairman and Principal Officer of the Insurance Company.

4. During this relevant period, this company had its current account in the Chartered Bank of India, Australia and China Ltd. (hereinafter called the Chartered Bank) at

Bombay. The Company also had an account with this bank for the safe custody of its securities the company also had a separate current account with the Punjab National Bank, Bombay.

5. At Delhi, where the head office was, the company had an account for the safe custody of securities with the Imperial Bank of India, New Delhi.

6. Exhibit P-785 consists of the Memorandum of Association and the Articles of Association of the Bharat Insurance Company. Articles 116 and 117 deal with the powers of the Directors.

7. Exhibit P-786 is said to be the original Bye-laws passed by the Directors on September 8, 1951. The pages are signed by K. L. Gupta, who was the General Manager of the company during the relevant period, and not by Dalmia the Chairman, as should have been the case in view of the resolution dated May 8, 1951. The genuineness of this document is not, however, admitted.

8. Exhibit P-15 and P-897 are said to be copies of these Bye-laws which were sent to Shri K. Annadhanam (Chartered Accountant, appointed by the Government of India on September 19, 1955, to investigate into the affairs of the Bharat Insurance Company under section 33(1) of the Insurance Act) and to the Imperial Bank of India, New Delhi, respectively, and the evidence about their genuineness is questioned.

9. Bye-law 12 deals with the powers of the Chairman. Clause (b) thereof empowers the Chairman to grant loans to persons with or without security, but from August 30, 1954, the power was restricted to grant of loans on mortgages. Clause (e) empowers the Chairman to negotiate transfer buy and sell Government Securities and to pledge, indorse, withdraw or otherwise deal with them.

10. On January 31, 1951, the Board of Directors of the Insurance Company passed resolutions to the following effect: (1) To open an account in the Chartered Bank at Bombay. (2) To authorise Chokhani to operate on the account of the Insurance Company. (3) To arrange for the keeping of the Governments Securities held by the company, in safe custody, with the Chartered Bank. (4) To instruct the Bank to accept instructions with regard to withdrawal from Chokhani and Chordia.

11. On the same day, Dalmia and Chordia made an application for the opening of the account at Bombay with the result that Current Account No. 1120 was opened. On the same day Chokhani was appointed Agent of the company at Bombay. He was its agent during the relevant period. From 1951 to 1953, Chokhani alone operated on that account. On October 1, 1953, the Board of Directors directed that the current account of the company with the Chartered Bank, Bombay, be operated jointly by Chokhani and Raghunath Rai P.W. 4.

12. Raghunath Rai, joined the company in 1921 as a Clerk, became Chief Accountant in 1940 and Secretary-cum-Chief Accountant of the company from August 17, 1954.

13. The modus operandi of the joint operation of the bank account by Chokhani and Raghunath Rai amounted, in practice to Chokhani's operating that account alone. Chokhani used to get a number of blank cheques signed by Raghunath Rai, who worked at Delhi. Chokhani signed those cheques when actually issued. In order to have signed cheques in possession whenever needed, two cheque books were used. When the signed cheques were nearing depletion in one cheque book, Chokhani would send the other cheque book to Raghunath Rai for signing again a number of cheques. Thus Raghunath Rai did not actually know when and to whom and for what amount the cheques would be actually issued and therefore, so far as the company was concerned, the real operation of its banking account was done by Chokhani alone. This system led to the use of the company's funds for unauthorized purposes.

14. Chokhani used to purchase and sell securities on behalf of the company at Bombay. Most of the securities were sent to Delhi and kept with the Imperial Bank of India there. The other securities remained at Bombay and were kept with the Chartered Bank. Sometimes securities were kept with the Reserve Bank of India and inscribed stock was obtained instead. The presence of the inscribed stock was a guarantee that the securities were in the Bank.

15. Chokhani was not empowered by any resolution of the Board of Directors to purchase and sell securities. According to the prosecution, he purchased and sold securities under the instructions of Dalmia. Dalmia and Chokhani state that Dalmia had authorised Chokhani in general to purchase and sell securities and that it was in pursuance of such authorisation that Chokhani on his own purchased and sold securities without any further reference to Dalmia or further instruction from Dalmia.

16. The transactions which have given rise to the present proceedings against the appellants consisted of purchase of securities for this company and sale of the securities which the company held. The transactions were conducted through recognised brokers and ostensibly were normal transactions. The misappropriation of funds of the company arose in this way. Chokhani entered into a transaction of purchase of securities with a broker. The broker entered into a transaction of purchase of the same securities from a company named Bhagwati Trading Company which was owned by Vishnu Prasad appellant, nephew of Chokhani and aged about 19 years in 1954. The entire business for Bhagwati Trading Company was really conducted by Chokhani. The securities purchased were not delivered by the brokers to Chokhani. It is said that Chokhani instructed the brokers that he would have the securities from Bhagwati Trading Company. The fact, however, Chokhani however was that Bhagwati Trading Company did not deliver the securities. Chokhani however issued cheques on payment of the

purchase price of the securities to Bhagwati Trading Company. Thus, the amount of the cheques was paid out of the company's funds without any gain to it.

17. The sale transactions consisted in the sale of the securities held or supposed to be held by the company to a broker and the price obtained from the sale was unutilised in purchasing formally further securities which were not received. The purchase transaction followed the same pattern, viz., Chokhani purchased for the company from a broker, the broker purchased the same securities from Bhagwati Trading Company and the delivery of the securities was agreed to be given by Bhagwati Trading Company to Chokhani. Bhagwati Trading Company did not deliver the securities but received the price from the Insurance Company. In a few cases, securities so purchased and not received were received later when fresh genuine purchase of similar securities took place from the funds of the Bharat Union Agencies or Bhagwati Trading Company. These securities were got endorsed in favour of the Insurance Company.

18. The funds of the company, ostensibly spent on the purchase of securities, ultimately reached another company the Bharat Union Agencies.

19. Bharat Union Agencies (hereinafter referred to as the Union Agencies) was a company which dealt in speculation in shares and, according to the prosecution was practically owned by Dalmia who held its shares either in his own names or in the names of persons or firms connected with him. The Union Agencies suffered losses in the relevant period from August 1954 to September, 1955. The prosecution case is that to provide funds for the payments of these losses at the due time, the accused persons entered into the conspiracy for the diversion of the funds of the Insurance Company to the Union Agencies. To over up this unauthorised transfer of funds, the various steps for the transfer of funds from one company to the other and the falsification of accounts of the Insurance Company and the Union Agencies took place and this conduct of the accused gave rise to the various offences they were charged with and convicted of.

20. The real nature of the sale and purchase transactions of the securities did not come to the notice of the head office of the Insurance Company at Delhi as Chokhani communicated to the head office the contracts of sale and purchase with the brokers' Dagduas of accounts, with a covering letter stating the purchase of securities from the brokers, without mentioning that the securities had not been actually received or that the cheques in payment of the purchase price were issued to Bhagwati Trading Company and not to the brokers.

21. Raghunath Rai, the Secretary-cum-Accountant of the Insurance Company, on getting the advice about the purchase of securities used to inquire form Dalmia about the transaction and used to get the reply that Chokhani had purchased them under Dalmia's instructions. Thereafter, the usual procedure in making the entries with respect to the purchase of securities was followed in the office and ultimately the purchase of securities

used to be confirmed at the meeting of the Board of Directors. It is said that the matter was put up in the meeting with an office note which recorded that the purchase was under the instructions of the Chairman. Dalmia however, denies that Raghunath Rai ever approached him for the confirmation or approval of the purchase transaction and that he told him that the purchase transaction was entered into under his instructions.

22. The firm of Khanna and Annadhanam, Chartered Accountants, was appointed by the Bharat Insurance Company, its auditors for the year 1954. Shri Khanna carried out the audit and was not satisfied with respect to certain matters and that made him ask for the counterfoils of the cheques and for the production of securities and for a satisfactory explanation of the securities not with the company at Delhi.

23. The matter, however, came to a head not on account of the auditors' report, but on account of Shri Kaul, Deputy Secretary, Ministry of Finance, Government of India, hearing at Bombay in September 1955 a rumour about the unsatisfactory position of the securities of the Insurance Company. He contacted Dalmia and learnt on September 16, 1955 from Dalmia's relative that there was a short-fall securities. He pursued the matter Departmentally and eventually, the Government of India appointed Shri Annadhanam under section 33(1) of the Insurance Act, to investigate into the affairs of the company. This was done on September 19, 1955. Dalmia is said to have made a confessional statement to Annadhanam on September 20. Attempt was made to reimburse the Insurance Company with respect to the short-fall in securities. The matter was, however, made over to the Police and the appellants and a few other persons, acquitted by the Sessions Judge, were proceeded against as a result of the investigation.

24. Dalmia's defence, in brief, is that he had nothing to do with the details of the working of the company, that he had authorised Chokhani, in 1953, to purchased and sell securities and that thereafter Chokhani on his own purchased and sold securities. He had no knowledge of the actual modus operandi of Chokhani which led to the diversion of the funds of the company to the Union Agencies. he admits knowledge of the losses incurred by the Union Agencies and being told by Chokhani that he would arrange funds to meet them. He denies that he was a party to what Chokhani did.

25. Chokhani admits that he carried out the transactions in the form alleged in order to meet the losses of the Union Agencies of which he was an employee. He states that he did so as he expected that the Union Agencies would, in due course make up the losses and the money would be returned to the Insurance Company. According to him, he was under the impression that what he did amounted to giving of a loan by the Insurance Company to the Union Agencies and that there was nothing wrong in it. He asserts emphatically that if he had known that he was doing was wrongful, he would have never done it and would have utilised other means to raise the money to meet the losses of the Union Agencies as he had large credit in the business circle at Bombay and as the Union Agencies possessed shares which would be sold to meet the losses.

26. Vishnu Prasad expresses his absolute ignorance about the transactions which were entered into on behalf of Bhagwati Trading Company and states that what he did himself was under the instructions of Chokhani, but in ignorance of the real nature of the transactions.

27. Gurha denies that he was a party to the fabrication of false accounts and vouchers in the furtherance of the interests of the conspiracy.

28. The learned Sessions Judge found the offences charged against the appellants proved on the basis of the circumstances established in the case and, accordingly, convicted them as stated above. The High Court substantially agreed with the findings of the Sessions Judge except that it did not rely on the confession of Dalmia.

29. Mr. Dingle Foot, counsel for Dalmia, has raised a number of contentions, both of law and of facts. We propose to deal with the points of law first.

30. In order to appreciate the points of law raised by Mr. Dingle Foot, we may now state the charged which were framed against the various appellants.

31. The charge under section 120-B read with section 409, I.P.C., was against the appellants and five other persons and read:

"I, Din Dayal Sharma, Magistrate Class, Delhi do hereby charge you,

R. Dalmia (Ram Krishna Dalmia) s/o etc.

2. G. L. Chokhani s/o etc.

3. Bajranglal Chokhani s/o etc.

4. Vishnu Pershad Bajranglal s/o etc.

5. R. P. Gurha (Raghubir Pershad Gurha) s/o etc.

6. J. S. Mittal (Jyoti Swarup Mittal) s/o etc.

7. S. N. Dudani (Shri Niwas Dudani) s/o etc.

8. G. S. Lakhotia (Gauri Shanker Lakhotia) s/o etc.

9. V. G. Kannan Vellore Govindaraj Kannan s/o etc. accused as under:-

That you, R. Dalmia, G. L. Chokhani, Bajrang Lal Chokhani, Vishnu Pershad Bajranglal, R. P. Gurha, J. S. Mittal, S. N. Dudani, G. S. Lakhotia and V. G. Kannan,

during the period between August 1954 and September 1955 at Delhi, Bombay and other places in India.

were parties to a criminal conspiracy to do and cause to be done illegal acts; viz., criminal breach of trust of the funds of the Bharat Insurance Company Ltd.,

by agreeing amongst yourselves and with others that criminal breach of trust be committed by you R. Dalmia and G. L. Chokhani in respect of the funds of the said Insurance Company in current account No. 1120 of the said Insurance Company with the Chartered Bank of India, Australia and China, Ltd., Bombay,

the dominion over which funds was entrusted to you R. Dalmia in your capacity as Chairman and the Principal Office of the said Insurance Company, and

to you G. L. Chokhani, in your capacity as Agent of the said Insurance Company,

for the purposes of meeting losses suffered by you R. Dalmia in forward transaction (of speculation) in shares; which transactions were carries on in the name of the Bharat Union Agencies Ltd., under the directions and over all control of R. Dalmia, by you, G. L. Chokhani, at Bombay, and by you R. P. Gurha, J. S. Mittal and S. N. Dudani at Calcutta; and for other purposed not connected with the affairs of the said Insurance Company,

by further agreeing that current account No. R1763 be opened with the Bank of India, Ltd., Bombay and current account No. 1646 with the United Bank of India Ltd., Bombay, in the name of M/s. Bhagwati Trading Company, by you Vishnu Pershad accused with the assistance of you G. L. Chokhani, and Bajranglal Chokhani accused for the illegal purpose of diverting the funds of the said Insurance Company to the said Bharat Union Agencies, Ltd.,

by further agreeing that false entries showing the defalcated funds were invested in Government Securities by the said Insurance Company be got made in the books of accounts of the said Insurance Company at Delhi, and

by further agreeing to the making false and fraudulent entire by you R. P. Gurha, J. S. Mittal, G. S. Lakhotia, V. G. Kannan, and others relating to the diversion of funds of the Bharat Insurance Company to the Bharat Union Agencies Ltd., through M/s. Bhagwati Trading Company, in the books of account of the said Bharat Union Agencies Ltd., and its allied concern known as Asia Udyog Ltd., and

that the same acts were committed in pursuance of the said agreement and

thereby you committed an offices punishable under section 120-B read with section 409 I.P.C., and within the cognizance of the Court of Sessions."

32. Dalmia was further charged on two counts for and offence under section 409 I.P.C. These charges were as follows:

"I, Din Dayal Sharma, Magistrate I Class, Delhi charge you, R. Dalmia accused as under:-

FIRSTLY, that you R. Dalmia, in pursuance of the said conspiracy between the 9th day of August 1954 and the 8th day of August 1955, at Delhi.

Being the Agent, in your capacity as Chairman of the Board of Directors and the Principal Officer of the Bharat Insurance Company Ltd., and as such being entrusted with dominion over the funds of the said Bharat Insurance Company,

committed criminal breach of trust of the funds of the Bharat Insurance Company Ltd., amounting to Rs. 2,37,483-9-0,

by wilfully suffering you co-accused G. L. Chokhani to dishonestly misappropriate the said funds and dishonestly use or depose of the said funds in violation of the directions of law and the implied contract existing between you and the said Bharat Insurance Company, prescribing the mode in which such trust was to be discharged,

by withdrawing the said funds from current account No. 1120 of the said Bharat Insurance Company with the Chartered Bank of India, Australia & China, Ltd., Bombay, by means of cheque Nos. B-540329 etc., issued in favour of M/s. Bhagwati Trading Company, Bombay, and cheque No. B-540360 in favour of F.C. Podder, and

by dishonestly utilising the said funds for meeting losses suffered by you in forward transaction sin shares carried on in the name of Bharat Union Agencies, Ltd., and for other purposes not connected with the affairs of the said Bharat Insurance Company; and

thereby committed an offence punishable under section 409, I.P.C., and within the cognizance of the Court of Sessions;

SECONDLY, that you R. Dalmia, in pursuance of the said conspiracy between the 9th day of August 1955 the 30th day of September 1955, at Delhi,

Being the Agency in you capacity as Chairman of the Board of Directors and the Principal Officer of the Bharat Insurance Company, Ltd., and as such being entrusted with dominion over the funds of the said Bharat Insurance Company,

committed criminal breach of trust of the funds of the Bharat Insurance Company Ltd., amounting to Rs. 55,43,220-12-0,

by wilfully suffering you co-accused G. L. Chokhani to dishonestly misappropriate the said funds and dishonestly use of dispose of the said funds in violation of the direction of the and the implied contract existing between you and the said Bharat Insurance Company prescribing the mode in which such trust was to be discharged,

by withdrawing the said funds from current account No. 1120 of the said Bharat Insurance Company with the Chartered Bank of India, Australia & China, Ltd., Bombay by means of Cheque Nos. B-564835..... issued favour of M/s Bhagwati Trading Company Bombay, and,

by dishonestly utilising the said funds for meeting losses suffered by you in forward transactions in shares carried on in the name of the Bharat Union Agencies Ltd., and for other purposes not connected with the affairs of the said Bharat Insurance Company, and

thereby committed an offence punished under section 409 I.P.C., and within the cognizance of the Court of Sessions."

33. Mr. Dingle Foot has raised the following contentions:

(1) The Delhi Court had no territorial jurisdiction to try offences of criminal breach of trust committed by Chokhani at Bombay.

(2) therefore, there had been misjoinder of charges.

(3) The defect of misjoinder of charges was fatal to the validity of the trial and was not curable under section 531 of the Code.

(4) The substantive charge of the offence under section 409, I.P.C., against Dalmia offended against the provisions of section 233 of the Code; therefore the whole trial was bad.

(5) The funds of the Bharat Insurance Company in the Chartered Bank, Bombay, which were alleged to have been misappropriated were not 'property' within the meaning of sections 405 and 409, I.P.C.

(6) If they were, Dalmia did not have dominion over them.

(7) Dalmia was not an 'agent' within the meaning of section 409 I.P.C., as only that person could be such agent who professionally carried on the business of agency.

(8) If Dalmia's conviction for an offence under section 409 I.P.C., fails, the conviction for conspiracy must also fail as conspiracy must be proved as laid.

(9) The confessional statement Exhibit P-10 made by Dalmia on September 20, 1955, was not admissible in evidence.

(10) If the confessional statement was not in admissible in evidence in view of section 24 of the Indian Evidence Act, it was inadmissible in view of the provisions of clause (3) of Article 20 of the constitution.

(11) The prosecution has failed to establish that Dalmia was synonymous with Bharat Union Agencies Ltd.

(12) Both the Sessions Judge and the High Court failed to consider the question of onus of proof i.e., failed to consider whether the evidence on record really proved or established the conclusion arrived at by the Courts.

(13) Both the Courts below erred in their approach to the evidence of Raghunath Rai.

(14) Both the Courts below were wrong in holding that there was adequate corroboration of the evidence of Raghunath Rai who was an accomplice or at least such a witness whose testimony required corroboration.

(15) It is not established with the certainty required by law that Dalmia had knowledge of the impugned transactions at the time they were entered into.

34. We have Heard the learned counsel for the parties on facts, even though there are concurrent findings of fact, as Mr. Dingle Foot has referred us to a large number of inaccuracies, most of them not of much importance, in the narration of facts in the Judgment of the High Court and has also complained of the omission from discuss of certain matters which were admittedly urged before the High Court and also of misapprehension of certain arguments presented by him.

35. We need not, however, specifically consider points No. 12 to 15 as questions urged in that form. In discussing the evidence of Raghunath Rai, was would discuss the relevant contentions of Mr. Dingle Foot, having a bearing on Raghunath Rai's reliability. Our view of the facts will naturally dispose of the last point raised by him.

36. Mr. Dingle Foot's first four contention relating to the illegalities in procedure may now be deal with. The two charge under section 409, I.P.C., against Chokhani mentioned that the committed criminal breach of trusts in pursuance of the said conspiracy. One of the charge related to the period from August 9, 1954 to August 8, 1955 and the other related to the period from August 9, 1955 to September 30, 1955.

37. This Court held in Purushottam Das Dalmia v. State of West Bengal MANU/SC/0121/1961: 1961CriLJ728 that the Court having jurisdiction to try the offence conspiracy has also jurisdiction to try an offence constituted by the overt acts which are committed, in pursuance of the conspiracy, beyond its jurisdiction. M. Dingle Foot submitted that this decision required reconsideration and we heard him and the learned Solicitor General on the point and, having considered their submissions, came to the conclusion that no case for reconsideration was made out and accordingly expressed our view during the hearing of these appeals. We need not, therefore, discuss the first contention of Mr. Dingle Foot and following the decision in Purushottam Das Dalmia's case MANU/SC/0121/1961: 1961CriLJ728 hold that the Delhi court had jurisdiction to try Chokhani of the offence under section 409 I.P.C. as the offence was alleged to have been committed in pursuance of the criminal conspiracy with which he and the other co-accused were charged.

38. In view of this opinion, the second and third contentions do not arise for consideration.

39. The fourth contention is developed by Mr. Dingle Foot thus. The relevant portion of the charge under section 409 I.P.C., against Dalmia reads:

"Firstly, that you Dalmia, in pursuance of the said conspiracy between..... being the Agent, in your capacity as Chairman of the Board of Directors and as Principal Officer of the Bharat Insurance Company Ltd., and as such being entrusted with dominion over the funds of the said Bharat Insurance Company, committed criminal breach of trust of the funds... by wilfully suffering you co-accused G. L. Chokhani to dishonestly misappropriate the said funds and dishonestly use or dispose of the said funds in violations of the directions of law and the implied contract existing between you and the said Bharat Insurance Company prescribing the mode in which such trust was to be discharged....."

40. This charge can be split up into four charges, each of the charges being restricted to one particular mode of committing the offence of criminal breach of trust. These four offences of criminal breach of trusts were charged in one count, each of these four amounting to the offence of criminal breach of trust 'by wilfully suffering Chokhani (i) to dishonestly misappropriate the said funds; (ii) to dishonestly use the said funds in violation the directions of law; (iii) to dishonestly dispose of the said funds in violation of the directions of law; (iv) to dishonestly use the said funds in violation of the implied contract existing between Dalmia and the Bharat Insurance Company'.

41. Section 233 of the Code or Criminal Procedure permits one charge for every distinct offence and directs that every charge shall be tries separately except in the cases mentioned in sections 234, 235, 236 and 239. Section 234 allows the trial, together of offences up to three in number, when they be of the same kind and be committed within

the space of twelve months. The contention, in this case is that four offences into which the charge under section 409 I.P.C. against Dalmia can be split up were distinct offences and therefore cold not be tried together. We do not agree with this contention. The charge is with respect to no offence though the mode of committing it is not stated precisely. If it be complained that the charge framed under section 409 I.P.C. is vague because it does not specifically state one particular mode in which the offence was committed, the vagueness of the charge will not make the trial illegal, especial when no prejudice is caused to the accused and no contention has been raised that Dalmia was prejudiced by the form of the charge.

42. We my now pass on the other points raised by Mr. Dingle Foot.

43. Section 405 I.P.C. defines what amounts to criminal breach of trust. It reads:

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

44. Section 406 provides for punishment for criminal breach of trust. Section 407 provides for punishment for criminal breach of trust committed by a carrier, wharfinger or warehouse-keeper, with respect to property entrusted to them as such and makes their offence more severe than the offence under section 406. Similarly, section 408 makes the criminal breach of trust committed by a clerk or servant entrusted in any manner, in such capacity, with property or with any dominion over property, more severely punishable than the offence of criminal breach of trust under section 406. Offences under sections 407 and 408 are similarly punishable. The last section in the series is section 409 which provided for a still heavier punishment when criminal breach of trust is committed by persons mentioned in that section. The section reads:

"Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the ways of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extended to ten years, and shall be liable to fine."

45. Both Dalmia and Chokhani have been convicted of the offence under section 409 I.P.C.

46. Mr. Dingle Foot contends that no offence of criminal breach of trust has been committed as the funds of the Bharat Insurance Company in the Bank do not come with the expression 'property' in section 405 I.P.C. It is urged that the word 'property' is used in the Indian Penal Code in different senses, according to the context, and that in section 405 it refers to movable property and not to immovable property or to a chose in action.

47. It is then contended that the funds which customer has in a bank represent chosen in action as the relationship between the customer and this banker is that of a creditor and a debtor, as held in Attorney General for Candy v. Attorney General for Province of Quebec & Attorneys General for Saskatchewan, Alberta & Manitoba [1947] A.C. 33 and in Foley v. Hill [1848] 2 H.L.C. 28 9 E.R. 1002.

48. Reliance is also placed for the suggested restricted meaning of 'property' in section 405 I.P.C, on the cases Reg. v. Girdhar Dharamdas [1869] 6 Bom. 33; Jugdown Sinha v. Queen Empress I.L.R. (1895) Cal. 372 and Ram Chand Gurvala v. King Emperor A.I.R. 1926 Lah 385 and also on the scheme of the Indian Penal Code with respect to the use of the expressions 'property' and 'movable property' in its various provisions.

49. The learned Solicitor General has, on the other hand, urged that the word 'property' should be given its widest meaning and that the provisions of the various sections can apply to property other than movable property. It is not to be restricted to movable property only but includes chose in action and the funds of a company in Bank.

50. We are of opinion that is no good reason to restrict the meaning of the word 'property' to movable property only when it is used without any qualification in section 405 or in other sections of the Indian Penal Code. Whether the offence defined in a particular section of the Indian Penal Code can be committed in respect of any particular kind of property will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section. It is in this sense that it may be said that the word 'property' in a particular section covers only that type of property with respect to which the offence contemplated in that section can be committed.

51. Section 22 I.P.C. defines 'movable property'. The definitions not exhaustive. According to the section the words 'movable property' are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth. The definition is of the expression 'movable property' and no of 'property' and can apply to all corporal property except property excluded from the definition. It is thus clear that the word 'property' is used in the Code in a much wider sense than the expression 'movable property'. It is not therefore necessary to consider in detail what type of property will be included in the various sections of the India Penal Code.

52. In Reg. v. Girdhar Dharamdas (1869) 6 Bom. 33 it was held that reading sections 403 and 404 I.P.C. together section 404 applied only to movable property. No reasons are given in the Judgment.

53. It is to be noticed that though section 403 I.P.C. speaks of dishonestly misappropriating or converting to one's own uses any movable property, section 404 speaks of only dishonestly misappropriating or converting to one's own use property. If the Legislature had intended to restrict the operation of section 404 to movable property only, there was no reason why the general work was used without the qualifying word 'movable'. We thereof do not see any reason to restrict the word 'property' to 'movable property' only. We need not express any opinion whether immovable property could be the subject of the offence under section 404 I.P.C.

54. Similarly, we do not see any reason to restrict the work 'property' in section 405 to 'movable property' as held in Jugdown Sinha v. Queen Empress I.L.R. (1895) Cal. 372. In that case also the learned Judges gave no reason for their view and just referred to the Bombay Case (1869) 6 Bom 33. Further, the learned Judges observed at page 374:

"In this case the appellant was not at most entrusted it the supervision or management of the factory lands, and the fact that he mismanaged the land does not in our opinion amount to a criminal offence under Section 408."
55. A different view has been expressed with respect to the content of the word 'property' in certain section of the Indian Penal Code, including section 405.

56. In Emperor v. Bishan Prasad I.L.R. [1914] All. 128 the right to sell drugs was held to come within the definition of the word 'property' in section 185, I.P.C. which makes certain conduct at any sale of property an offence.

57. In Ram Chand Gurwala v. King Emperor MANU/LA/0334/1926: A.I.R. 1926 Lah. 385 the contention that mere transfer of amount from the bank account to his own account of by the accused did not amount to misappropriation was repelled, it being held that in order to establish a charge of dishonest misappropriation or criminal breach of trust, it was not necessary that the accuses should have actually taken tangible property such as cash from the possession of the bank and transferred it to is own possession, as on the transfer of the amount from the account of the Bank to his own account, the accused removed it form the control of the bank and placed it at his own disposal. The conviction of the accused for criminal breach of trust was confirmed.

58. In Manchersha Ardeshir v. Ismail Ibrahim I.L.R. (1935) 60 Bom. 706 it was held that the word 'property' in section 421 is wide enough to include a chose in action.

59. In Daud Khan v. Emperor MANU/UP/0140/1925: AIR1925All673 it was said at page 674:

"Like section 378, section 403 refers to movable property. Section 404 and some of the other sections following it refer to property without any such qualifying description; and

in each case the context must determine whether the property there referred to is intended to be property movable or immovable."
The case law, therefore, is more in favour of the wider meaning being given to the word 'property' in sections where the word is not qualified by any other expression like 'movable'.

60. In The Delhi Cloth and General Mills Co. Ltd. v. Harnam Singh MANU/SC/0058/1958: [1955]2SCR402 this court said

"That a debt is property is, we think clear. It is a chose in action and is heritable and assignable and it is treated as property in India under the Transfer of Property Act which calls it an 'actionable claim'."
61. In Allchin v. Coulthard [1942] 2 K.B. 228 the meaning of the expression 'fund' has been discussed it is said:

"Much of the obscurity which surrounds this matter is due to a failure to distinguish the two senses in which the phrase 'payment out of fund' may be used. The word 'fund' may mean actual cash resources of a particular kind (e.g., money in a drawer or a bank), or it may be a mere accountancy expression used to describe a particular category which a person used in making up his accounts. The words 'payment out of' when used in connection with the word 'fund' in its first meaning connection actual payment, e.g., by taking the money out of the drawer or drawing a cheque on of bank. When used in connection with the word 'fund' in its second meaning they connote that, for the purposes of the account in which the fund finds place, the payment is debits to that fund, an operation which, of course, has no relation to the actual method of payment or the particular cash resources out of which the payment is made. Thus, if a company marked a payment out its reserved fund - and example of the second meaning of the word 'fund' - the actual payment is made by cheque drawn on the company's banking account, the money in which may have been derived from a number of sources".
62. The expression 'funds' in the charge is used in the first sense meaning thereby that Dalmia and Chokhani had dominion over the amount credited to the Bharat Insurance Company in the accounts of the Bank inasmuch as they could draw cheques on that account.

63. We are therefore of opinion that the funds referred to in the charge did amount to 'property' within the meaning of that term in section 405 I.P.C.

64. It is further contended for Dalmia that he had not been entrusted with dominion over the funds in the Banks at Bombay and had no control over them as the Banks had no been informed that Dalmia was empowered to operate on the company's accounts in the Banks and no specimen signatures of his had been applied to the Bank. The omission in inform the Banks that Dalmia was entitled to operate on the account may disable Dalmia to actually issue the cheques on the company's accounts, but that position does not mean

that he did not have any demotion over those accounts. As Chairman and Principal Officer of the Bharat Insurance Company, he had the power, on behalf of the company, to operate on those accounts. If no further steps are taken on the execution of the plan, that does not mean that the power which the company had entrusted to him is nullified. One may have dominion over property but may not exercises any power which he could exercise with respect to it. Non-exercise of the power will not make the dominion entrusted to him nugatory.

65. Article 116 of the Articles of Association of the Bharat Insurance Company provides that the business of the company shall be managed by the Directors, who may exercises all such powers of the company as are not, under any particular law or regulation, not to be exercised by them. Article 117 declares certain powers of the Directors. Clause (7) of the Article authorises them to draw, make, give, accept endorse, transfer, discount and negotiate such bill of exchange, promissory notes and other similar obligation as may be desirable for carrying on the business of the company. Clause (10) authorizes them to let, mortgage, sell, or otherwise dispose of any property of the company either absolutely. Clauses (12) authorises them to invest such parts of the fund of the company as shall not be required to satisfy or provide for immediate demands, upon such security or investments as they may think advisable. It also provided that the funds of the company shall not be applied in making any loan or guaranteeing any loan made to a Directors of the company or to a firm of which such Director is a partner or to a private company of which such Direction is a Director. Clause (23) empowers the Directors to deal with and invest and moneys of the company not immediately required for the purposes there of in Government Promissory, Notes, Treasury Bills Bank Deposits, etc.

66. The bye-laws of the company entrusting the Chairman with dominion over its property were reviews in 1951. The Board of Directors, at their meeting held on September 8, 1951, resolved:

"The bye-laws as per draft signed by the Chairman for identification be and are hereby approved, in substitution and to the exclusion of the existing bye-laws of the company."
67. No such draft as signed by the Chairman has been produced in this case. Instead, K. L. Gupta, P.W. 112, who was the Manager of the Bharat Insurance Company in 1951 and its General Manager from 1952 to August, 1956, has proved the bye-laws Exhibit P. 786, to be the draft revised bye-laws approved by the Board of Director at that meeting. He states that he was present at that meeting and had put up these draft bye-laws before the Board of Directors and that the Directors, while passing these bye-laws, issued a directive that they should come into force on January 1, 1952, and that, accordingly, be added in ink in the opening words of the bye-laws that they would be effective from January 1, 1952. When cross-examined by Dalmia himself, he stated that he did not attend any other meeting of the Board of Directors and his presence was not notes in the minutes of the meeting. He further stated emphatically:

"I am definite that I put up the bye-laws P-786 in the meeting of the Board of Directors. I did not see any bye-laws signed by the Chairman."

68. There is so reason why Gupta should depose falsely. His statement finds corroboration from other facts. It may be that, as noted in the resolution, it was contemplated that the revised bye-laws be signed by the Chairman for the purposes of their identity in future, but by over-sight such signatures were not obtained. There is no evidence that he bye-laws approved by the Board of Directors were actually signed by the Chairman Dalmia. Dalmia has stated so. It is not necessary for he proof of the bye-laws of the company that the original copy of the bye laws bearing any mark of approval of the Committee be produced. The bye-laws of the company can be proved from other evidence K. L. Gupta was present at the meeting when the bye-laws were passed. It seems that it was not his draft to attend meetings of the Board of Directors. He probably tended that meeting because he had prepared the draft of the revised bye-laws. His presence was necessary or at least desirable for explaining the necessary changed in the existing by-laws. He must have got his own copy of the revised by-laws put up before the meeting and it is expected that he would make necessary corrections in his copy in accordance with the form of the bye-laws as finally approved at the meeting. The absence of the copy signed by the Chairman, if ever one existed, does not therefore make the other evidence about the bye-laws of the company in admissible. The fact that Gupta signed each page of Exhibit P. 786 supports is statement. There was no reason to sing every page of the copy if it was merely a draft office-copy the was with him. He must have signed each page on account of the importance attached to that copy and that could only be if that copy was to be the basis of the future bye-laws of the company.

69. Copies of the bye-laws were supplied to the Imperials Bank, New Delhi, and to the auditor. They are Exhibits P. 897 and P. 15. Raghunath Rai deposed about sending the bye-laws, Exhibits P. 897 to the Imperial Bank, New Delhi, with a covering letter signed by Dalmia on September 4, 1954. Mehra, P.W. 15, Sub-Accountant of the State Bank of India (which took over the under taking of the Imperial Bank of India on July 1, 1955) at the time of his deposition, stated that the State Bank of India was the successor of the Imperial Bank of India. Notice was issued by the Court to the State Bank of India to produce latter dated September 4, 1954, addressed by Dalmia to the Agent, Imperial Bank of India, and other documents. Mehra deposed that in spite of the best search made by the Bank officials that letter could not be found and that Exhibit P. 897 was the copy of the bye-laws of the Bharat Insurance Company which he was producing in pursuance of the notice issued by the Court. It appears from his statement in cross-examination that the words 'received 15th September 1954' meant that that copy of the bye laws was received by the Bank on that date. Mehra could not personally speak about it. Only such bye-laws would have been supplied to the Bank as would have been the corrected bye-laws. These bye-law Exhibit P. 897 tally with the bye-laws Exhibit P. 786. Raghunath Rai proves the letter Exhibit P. 896 to be a copy of the letter sent along with these bye-laws to the Bank and states that both the original and P. 896 were signed by Dalmia. He deposed:

"Ex. p. 786 are the bye-laws of the Bharat Insurance Company which came into operation on 1-1-52..... I supplied copy of Ex. P. 786 as the copy of the bye-laws of the Bharat Insurance Company to the State Bank of India, New Delhi..... Shri Dalmia thereupon certified as true copies of the resolutions which were sent along with the copy of the bye-laws. He also signed the covering letter which was sent to the State Bank of India along with the copy of the bye-laws Ex. P. 786 and the copies of the resolutions.

.....

I produce the carbon copy of the letter dated 4-9-54 which was sent as a covering letter with the bye-laws of the Bharat Insurance Company to the Imperial Bank of India, New Delhi. It is Ex. p. 896. The carbon copy bears the signatures of R. Dalmia accused, which signatures I identify..... The aforesaid Bank (Imperial Bank) put a stamp over Ex. p. 896 with regard to the receipt of its original. The certified copy of the bye-laws of the Bharat Insurance Company which was sent for registration to the Imperial Bank along with the original letter of which Ex. p. 896 is carbon copy is Ex. p. 897 (heretofore marked C). The copy of the bye-laws has been certified to be true by me under my signatures."

70. Dalmia states in answer to question No. 15 (put to him under section 342, Cr.P.C.) that the signatures on Ex. p. 896 appear to be his.

71. Letter Exhibit P. 896 may be usefully quoted here:

"SEC The Agent, Imperial Bank of India, New Delhi. Dear Sir,

4-9-54

Re: Safe Custody of Govt. Securities.

We are sending herewith true copies of Resolution No. 4 dated 10th March, 1949 Resolution No. 3 dated 19th March, 1949, and Resolution No. 8 dated 8th September, 1951, along with a certified copy of the Bye-laws of the Company for registration at your end.

By virtue of Article 12 clause (e) of the Bye-laws of the Company I am empowered to deal in Government Securities etc. The specimen signatures Card of the undersigned is also sent herewith.

Encls. 5

Yours faithfully,
Sd/ R. Dalmia
Chairman."

72. By Resolution No. 4 dated March 10, 1949, Dalmia was co-opted Director of the Company. By Resolution No. 3 dated March 19, 1949, Dalmia was elected Chairman of the Board of Director. Resolution No. 8 dated September 8, 1951 was:

"Considered the draft bye-laws of the Company and Resolved that the Bye-laws as per draft signed by the Chairman for identification be and are hereby approved in substitution and to the exclusion of the existing bye-laws of the Company."
73. The letter Exhibit P. 896 not only supports the statement of Raghunath Rai about the copy of the bye-laws supplied to the Bank to be a certified copy but also the admission of Dalmia that be was empowered to deal in Government Securities etc., by virtue of article 12, clause (e) of the bye-laws of the company. There therefore remains no room for doubt that bye-laws Exhibit P. 897 are the certified copies of the bye-laws of the company passed on September 8, 1951 and in force on September 4, 1954.

74. We are therefore of opinion that either due to oversight the draft bye-laws said to be signed by the Chairman Dalmia were not signed by him or that such signed copy is no more available and that bye-laws Exhibits P. 786 and P. 897 are the correct bye-laws of the company.

75. Article 12 of the company's bye-laws provides that the Chairman shall exercise the powers enumerated in that article in addition to all the powers delegated to the Managing Director. Clause (e) of this article authorises him to negotiate, transfer, buy and sell Government Securities, etc., and to pledge, endorse, withdraw or otherwise deal with charm. Article 13 of the bye-laws mentions the powers of the Managing Director. Clause (12) of this article empowers the Managing Director to make, draw, sign or endorse, purchase, sell, discount or accept cheques, drafts, hundies, bills of exchange and other negotiable instruments in the name and on behalf of the company.

76. Article 14 of the bye-laws originally mentioned the powers of the Manager. The Board of Directors by, resolution No. 4 dated October 6, 1952 resolved that these powers be exercised by. K. L. Gupta as General Manager and the necessary corrections be made.

77. By resolution No. 4 dated August 30, 1954, of the Board of Directors, the General Manager was empowered to make, draw, sign or endorse, purchase, sell discount or accept cheques, drafts, hundies, bills of exchange and other negotiable instruments in the name and on behalf of the company and to exercise all such powers from time to time incidental to the post of the General Manager of the Company and not otherwise excepted. By the same resolution, the words 'Managing Director' in Article 12 of the Bye-laws, stating the powers of the Chairman were substituted by the words General Manager. Thereafter, the Chairman could exercise the powers of the General Manager conferred under the bye-laws or other resolutions of the Board.

78. It is clear therefore from these provisions of the articles and bye-laws of he company and the resolutions of the Board of Directors, that the Chairman and the General Manager had the power to draw on the funds of the company.

79. Chokhani had authority to operate on the account of the Bharat Insurance Company at Bombay under the resolution of the Board of Directions dated January 31, 1951.

80. Both Dalmia and Chokhani therefore had dominion over the funds of the Insurance Company.

81. In Peoples Bank v. Harkishen Lal MANU/LA/0060/1935: A.I.R. 1936 Lah. 408 it was stated

"Lala Harkishen Lal as Chairman is a trustee of all the moneys of the Banks."
82. In Palmer's Company Law, 20th Edition, is stated at page 517:

"Directors are not only agents but they are in some sense and to some extent trustees or in the position of trustees."
83. In G.E. Ry. Co. v. Turner I.L.R. (1872) Ch. App. 149 Lord Selborne said:

"The directors are the mere trustees or agents of the company - trustees of the company's money and property - agents in the trisections which they enter into on behalf of the company.
84. In Re. Forest of Dean etc., Co. I.L.R. (1878) Ch. D. 450 Sir Garage Jessel said:

"Directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control."
85. We are therefore of opinion that Dalmia and Chokhani were entrusted with the dominion over the funds of the Bharat Insurance Company in the Banks.

86. It has been urged for Chokhani that the could not have committed the offence of criminal breach of trust when he alone had not the dominion over the funds of the Insurance Company, the accounts of which he could not operate alone. Both Raghunath Rai and he could operate on the accounts jointly. In support of this contention, reliance is placed on the case reported as Bindeshwari v. King Emperor I.L.R. (1947) Pat. 703. We do not agree with the contention.

87. Bindeshwari's Case I.L.R. (1947) Pat. 703 does not support the contention. In that case, a joint family firm was appointed Government stockiest of food grain. The partners of the firm were Bindeshwari and his younger brother. On check, shortage in food grain was found. Bindeshwari was prosecuted and convicted by the trial Court of an offence under section 409 I.P.C. On appeal, the High Court set aside the conviction of Bindeshwari of the offence under section 409 I.P.C. and he him not guilty of the offence

under that section as the entrustment of the grain was made to the firm and no to him personally. The High Court convicted him, instead, of the offence under section 403 I.P.C. This is clear form the observation:

"In my opinion, the Government rice was entrusted to the firm of which the petitioner and his younger brother were the proprietors. Technically speaking, there was no entrustment to the petitioner personally."
88. This case clearly did not deal directly with the question whether a person who, jointly with another, has dominion over certain property, can commit criminal breach of trust with respect to that property or not.

89. On the other hand, a Full Bench of the Calcutta High Court took a different view in Nrigendro Lall Chatterjee v. Okhoy Coomar Shaw (1874) 21 W.R. 59. The Court said:

"We think the words of Section 405 of the Penal Code are large enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property, or with a dominion over it, and has dishonestly misappropriated it, or converted it to his own use."
90. Similar view was expressed in Emperor v. Jagannath Raghunathdas. (1931) 33 Bom. L.R. 1518 Beaumont C.J., said at.

But, in my opinion, the words of the section (section 405) are quite wide enough to cover the case of partner. Where one partner is given authority by the other partners to collect moneys or property of the firm I think that he is entrusted with dominion over that property, and if he dishonestly misappropriates it, then I think he comes within the section."
91. Barlee J., agreed with this opinion.

92. The effect of Raghunath Rai's delivering the blank cheques signed by him to Chokhani may amount to putting Chokhani in sole control over the funds of the Insurance Company in the Bank and there would not remain any question of Chokhani's having joint dominion over those funds and this contention, therefore, will not be available to him.

93. It was also urged for Chokhani that he had obtained control over the funds of the Insurance Company by cheating Raghunath Rai inasmuch as he got blank cheques signed by the latter on the representation that they would be used for the legitimate purpose of the company but latter used them for purposes not connected with the company and that, therefore, he could not commit the offence of criminal breach of trust. This may be so, but Chokhani did not get dominion over the funds on account of Raghunath Rai's signing blank cheques. The signing of the blank cheques merely facilitated Chokhani's committing breach of trust. He got control and dominion over the funds under the powers conferred on him by the Board of Directors, by its resolution authorising him and

Raghunath Rai to operate on the accounts of the Insurance Company with the Chartered Bank Bombay.

94. The next contention is that Dalmia and Chokhani were not agents as contemplated by section 409 I.P.C. The contention is that the word 'agent' in this section refers to a 'professional agent' i.e., a person who carried on the profession of agency and that as Dalmia and Chokhani did not carry on such profession, they could not be covered by the expression 'agent' in his section.

95. Reliance is placed on the case reported as Mahumarakalage Edward Andrew Cooray v. The Queen (1953) A.C. 407. This case approved of what was said in Reg. v. Portugal (1885) 16 Q.B.D. 487 and it would better to discuss that case first.

96. That case related to an offence being committed by the accused under section 75 of the Larceny Act, 1861 25 Vict. c. 96. The relevant portion on the Section reads.

"Whosoever, having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund..... or in any stock or fund of any body corporate, &c., for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith and contrary to the object or purpose for which such chattel &c., was intrusted to him sell, negotiate, pledge, &c., or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted..... shall be guilty of a misdemeanor.

97. The accused in that case was employed by firm of Railway contractors for commission, to use his influence to obtain for them a contract for the construction of a railway and docks in France. In the course of his employment, he was entrusted with a cheque for Pounds 500/- for the purpose of opening a credit in their name on one of the two specified banks in Paris. He was alleged to have misappropriated the cheque to his own used fraudulently. He was also alleged to have fraudulently dealt with another bill for Pounds 250/- and other securities which had been entrusted to him for a special purpose. He was committed for trial for the offence under section 75. He, on arrest under an extradition warrant, was committed to prison with a view to his extradition in respect of an offence committed in France. It was contended on his behalf:

"To justify the committal under the Extradition Act, it was incumbent on the prosecutors to offer prima facie evidence that the money and securities which the prisoner was charged with having misappropriated were intrusted to him in the capacity of 'agent', that is, a person who carries on the business or occupation of an agent, and intrusted with them in that capacity, and without any authority to sell, pledge, or negotiate, and not one who upon one solitary occasion acts in a fiduciary character."

98. It was held, in view of the section referring to 'banker, merchant, broker, attorney or other agent', that section 75 was limited to a class, and did not apply to everyone who, might happen to be intrusted as prescribed by the section, but only to the class of persons therein mentioned. It was further said:

"In our Judgment, the 'other agent' mentioned in this section means one whose business or profession it is to receive money, securities or chattels for safe custody or other special purpose; and that the term does not include a person who carries on no such business or profession, or the like. The section is aimed at those classes who carry on the occupations or similar occupations to those mentioned in the section, and not at those who carry on no such occupation, but who may happened from time to time to undertake some fiduciary position, whether for money or otherwise".

99. This case therefore is authority to this effect only that the term 'agent' in that section does not include a person who just acts as an agent for another for a particular purpose with respect to some property that is entrusted to him i.e., does not include a person who becomes an agent was a consequence of what he has been charged to do, and who has been asked to do a certain thing with respect the property entrusted to him, but includes such person who, before such entrustment and before being asked to do something, already carried on such business for profession or the like as necessitates, in the course of such business etc., his receiving money securities or chattels for safe custody or other special purpose. That is to say, he is already an agent for the purpose of doing such acts and is subsequently entrusted with property with direction to deal with it in a certain manner. It is not held that a person to be an agent within that Section must carry on the profession of an agent or must have an agency. The accused, in that case, was therefore, not held to be an agent.

100. It may also be noticed that he was so employed for a specified purpose which was to use his influence to obtain for his employers a contract for the construction of a railway and docks in france. This assignment did not amount to making him an agent of the employers for receiving money etc. In Mahumarakalage Edward Andrew Cooray's Case (1953) A.C. 407 the Privy Council was dealing with the appeal of a person who had been convicted under section 392 of the Penal Code of Ceylon. Sections 388 to 391 of the Ceylon Penal Code correspond to sections 405 to 408 of the Indian Penal Code. Section 392 corresponds to section 409 I.P.C. It was contended before the Privy Council that the offence under section 392 was limited to the case of the one who carried on an agency business and did not comprehend a person who was casually entrusted with money either on one individual occasion or a number of occasions, provided that the evidence did not establish that he carried on an agency business. Their Lordships were of opinion that the reasoning in Reg. v. Portugal (1885) 16 Q.B.D. 487 for the view that section 75 of the Larceny Act was limited to the class of persons mentioned in it, was directly applicable to the case they were considering, subject to some immaterial variations, and finally said:

"In enunciating the construction which they have placed on section 392 they would point out that they are in no way impugning the decisions is certain cases that one act of entrustment may constitute a man a factor for another provided he is entrusted in his businesses as a mercantile agent, nor are they deciding what activity is required to establish that an individual is carrying on the business of an agent".
101. These observations mean that the view that section 75 was limited to the class of persons mentioned therein did not affect the correctness of the view that a certain act of entrustment may constitute a person a factor for another provided he was entrusted in his business as a mercantile agent. It follows that a certain entrustment, provided it be in the course of business as a mercantile agent, would make the person entrusted with a factor, i.e., would make him belong to the class of factors. The criterion to hold a person a factor, therefore, is that his business be that of a mercantile agent and not necessarily that he be a professional mercantile agent.

Further, the Lordships left it open as to what kind of activity on the part of person alleged to be an agent would establish that he was carrying on the business of an agent. This again makes it clear that the emphasis is not on the person's carrying on the profession of an agent, but on his carrying on the business of an agent.

102. These cases, therefore, do not support the contention for Dalmia and Chokhani that the terms 'agent' in section 409 I.P.C., which corresponds to section 392 of the Ceylon, Penal Code, is restricted only to those persons who carry on the profession of agents. These cases are authority for the view that the word 'agent' would include a person who belongs to the class of agents, i.e., who carries on the business of an agent.

103. Further, the accused in the Privy Council Case [1953] A.C. 407 was not held to be an agent. In so holdings, their Lordships said:

"In the present case the appellant clearly was not doing so, and was in no sense entitles to receive the money entrusted to him in any capacity, nor indeed, had Mr. Ranatunga authority to make him agent to hand it over to the bank."
104. To appreciate these reasons, we may mention here the facts of that case. The accused was the President of the Salpiti Koral Union. The Union supplied goods to its member societies through three depots. The accused was also President of the Committee which controlled one of these depots. He was also Vice-President of the Co-operative Central Bank which advanced moneys to business societies to enable them to buy their stocks. The societies repaid the advance weekly through cheques and/or money orders, except when the advance be of small sums. The Central Bank, in its turn, paid in the money orders cheques and cash to its account with the Bank of Ceylon. The accused appointed one Ranatunga to be the Manager of the deport which was managed by the Committee of which he was the President. The payments to the Central Bank used to be made through him. The accused instructed this Manager to follow a course other than the prescribed routine. I was that he was to collect the amounts from the stores in cash and

hand then over to him for transmission to the Bank. The accused thus got the cash from the Manager and sent his own cheques in substitution for the amounts to the Central Bank. He also arranged as the Vice-President of that Bank that in certain cases those cheques be not sent forward for collection and the result was that he could thus misappropriate a large sum of money. The Privy Council said that the accused was not entitled to receive the money entrusted to him in any capacity, that is to say as the Vice-President of the Cooperative Central Bank or the President of the Union controlling the depots or as the President of the Committee.

105. It follows from this that he could not have received the money in the course of his duties as, any of these office-bearers. Further, the Manager of the depot had no authority to make the accused an agent for purposes of transmitting the money to the Bank. The reason why the accused was not held to be an agent was not that he was not a professional agent. The reason mainly was that the amount was not entrusted to him in the course of the duties he had to discharge as the office-bearers of the various institutions.

106. Learned counsel also made reference to the case reported as Rangamannar Chatti v. Emperor (1935) M.W.M. 649. It is not of much help. The accused there is said to have denied all knowledge of the jewels which had been given to him by the complainant for pledging and had been pledged and redeemed. It was said that it was not a case under section 409 I.P.C. The reason given was:

"There is no allegation that the jewels were entrusted to the accused 'in the way of his business as an agent'. No doubt he is said to have acted as the complainant's agent, but he is not professionally the complainants agent nor was this affair a business transaction."
107. The reasons emphasize both those aspects we have referred to in considering the Judgment of the Privy Council in Mahumarakalag Edward Andrew Cooray's Case (1953) A.C. 407, and we need not say anything more about it.

108. What section 409 I.P.C. requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression 'in the way of his business' means that property is entrusted to him 'in the ordinary course of his duty or habitual occupation or profession or trade'. He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of section 409 I.P.C. if any breach of trust is committed by that person. This interpretation in no way goes against what has been held in Reg. v. Portugal (1885) 16 Q.B.D. 487 or in Mahumarakalage Edward Andrew Cooray's Case (1953) A.C. 407, and finds support from the fact that the section also deals with

entrustment of property or with any dominion over property to a person in his capacity of a public servant. A different expression 'in the way of his business' is used in place of the expression 'in his capacity,' to make it clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make the criminal breach of trust by the agent a graver offence than any of the offences mentioned is sections 406 to 408 I.P.C. The criminal breach of trust by an agent would be graver offence only when he is entrusted with property not only in his capacity as an agent but also in connection with his duties as an agent. We need not speculate about the reasons which induced the Legislature to make the breach of trust by an agent more severely punishable than the breach of trust committed by any servant. The agent acts mostly as a representative of the principal and has more powers in dealing with the property of the principal and, consequently, there are greater chances of his misappropriating the property if he be so minded and less chance of his detection. However, the interpretation we have put on the expression 'in the way of his business' is also borne out from the Dictionary meanings of that expression and the meanings of the words 'business' and 'way', and we give these below for convenience.

'In the way of' - of the nature of, belonging to the class of, in the course of or routine of

(Shorter Oxford English Dictionary)

- in the matter of, as regards, by way of

(Webster's New International Dictionary,

II Edition, Unabridged)

'Business' - occupation, work

(Shorter Oxford English Dictionary)

- mercantile transactions, buying and selling, duty, special imposed or undertaken service, regular occupation

(Webster's New International Dictionary,

II Edition Unabridged)

- duty, province, habitual occupation,

profession, trade

(Oxford Concise Dictionary)

'Way' - scope, sphere, range, line of occupation

(Oxford Concise Dictionary)

II Edition Unabridged)

- duty, province, habitual occupation,

profession, trade

(Oxford Concise Dictionary)

'Way' - scope, sphere, range, line of occupation

(Oxford Concise Dictionary)

109. Chokhani was appointed agent of the Bharat Insurance Company on January 31, 1951. He admits this in his statement under section 342, Cr.P.C. He signed various cheques as agent of this company and he had been referred to in certain documents as the agent of the company.

110. Dalmia, as a Director and Chairman of the company, is an agent of the company.

111. In Palmer's Company Law, 20th Edition, is stated, at page 513:

"A company can only act by agents, and usually the persons by whom it acts and by whom the business of the company is carried on or superintended are termed directors....."
112. Again, at page 515 is noted:

"Directors are, in the eye of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors."
113. It was held in Gulab Singh v. Punjab Zamindara Bank A.I.R. 1942 Lah. 47 and in Jaswant Singh v. V. V. Puri A.I.R. 1951 Pun. 99 that a director is an agent of the company.

114. Both Dalmia and Chokhani being agents of the company the control, if any, they had over the securities and the funds of the company, would be in their capacity as agents of the company and would be in the course of Dalmia's duty as the chairman and Director or in the course of Chokhani 's duty appointed agent of the company. If they committed any criminal breach of trust with respect to the securities and funds of the company, they would be committing an offence under sections 409 I.P.C.

115. In view of our opinion with respect to Dalmia and Chokhani being agents within the meaning of section 409 I.P.C. and being entrusted with dominion over the funds of the Bharat Insurance Company in the Banks which comes within the meaning of the words 'property' in section 409, these appellant would commit the offence of criminal breach of trust under section 409 in cased they have dealt with this 'property' in the manner mentioned in section 405 I.P.C.

116. We may now proceed to discuss the detailed nature of the transactions said to have taken place in pursuance of the alleged conspiracy. It is, however, not necessary to give details of all the impugned transaction. The details of the first few transactions will illustrate how the whole scheme of diverting the funds of the Insurance Company to the Union Agencies was worked.

117. The Union Agencies suffered losses in its shares-speculation business in the beginning of August, 1954. The share brokers sent Dagduas of accounts dated August 6, 1954, to Chokhani and made demand of Rs. 22,25,687-13-0 in respect of the losses. The total cash assets of the Union Agencies in all its banks and offices at Bombay, Calcutta and Delhi amounted to Rs. 2,67,857-11-7 only. The Union Agencies therefore needed a large sum of money to meet this demand and to meet expected future demands in connection with the losses.

118. At this crucial time, telephone communications did take place between presumably Dalmia and Chokhani. The calls were made from Telephone No. 45031, which is Dalmia's number at 3, Sikandara Road, New Delhi, to Bombay No. 33726, of Chokhani. Two calls were made on August 7, 1954, three on August 8, two on August 11 and one each on August 13 and August 14, respectively. Of course, three is no evidence about the conversation which took placed at these talks. The significance of these calls lies in their taking place during the period when the scheme about the diversion of funds was coming into operation for the first time, but in the absence of evidence as to what conversation took place, they furnish merely a circumstance which is not conclusive by itself.

119. On August 7 and 9, 1954, the Punjab National Bank, Bombay, received Rs. 20,000 and Rs. 3,00,000 respectively in the account of the Union Agencies, telegraphically from Delhi.

120. On the same day, Vishnu Prasad, appellant, opened an account with the Bank of India, Bombay, in the name of Bhagwati Trading Company. He gave himself out as the sole proprietor and mentioned the business of the company in the form for opening account as 'merchants and commission agents'. He made a deposit of Rs. 1,100 said to have been supplied to him by Chokhani.

121. On August 11, 1954, Vishnu Prasad made another deposit of Rs. 1,100, again said to have been supplied by Chokhani, as the first deposit in the account he opened with the United Bank of India, Bombay, in the name of Bhagwati Trading Company. The business of the company was described in the form for opening account as 'merchants, piece-goods dealers.'

122. There is no dispute now that Bhagwati Trading Company did not carry on any business either as merchants and commission agents or as merchants and piece-goods dealers. Vishnu Prasad states that he acted just at Chokhani told him and did not know the nature of the transactions which were carried on in the name of this company. It is

however clear from the accounts and dealings of this company that its main purpose was simply to act in such a way as to let the funds of the Insurance Company pass on to the Union Agencies, to avoid easy detection of such transfer of funds.

123. Chokhani states that he did this business as the Union Agencies needed money at that time. He thought that the Union Agencies would make profit after some time and thereafter pay it back to Bhagwati Trading Company for purchasing securities and therefore he postponed the dates of delivery of the securities to the Insurance Company. He added that in case of necessity he could raise money by selling or mortgaging the shares of the Union Agencies in the exercise of his power of attorney on it behalf.

124. We may now revert to the actual transaction gone through to meet the demands in connection with the losses of the Union Agencies.

125. On August 9, 1954, Chokhani purchased 3% 1963-65 securities of the face value of Rs. 22,00,000 on behalf of the Insurance Company from Naraindas and Sons, Security Brokers. Chokhani entered into a cross-contract with the same firm of brokers for the sale of similar securities of the same face value on behalf of the Bhagwati Trading Company. He informed the brokers that the payment of purchase price would be made by the Insurance Company to Bhagwati Trading Company from whom it would get the securities. Thus the actual brokers practically got out of the transaction except for their claim of brokerage.

126. On August 11, 1954, a similar transaction of purchase on behalf of the Insurance Company from the brokers and sale by Bhagwati Trading Company to those brokers, of 3% 1963-65 securities of the face value of Rs. 5,00,000, was entered into by Chokhani.

127. It may be mentioned, to avoid repetition, that Chokhani always acted in such transaction - which may be referred to as usual purchase transactions - both on behalf to the Insurance Company and on behalf of Bhagwati Trading Company, and that the same arrangement was made with respect to the payment of the purchase price and the delivery of securities.

128. The securities were not delivered to the Insurance Company by Bhagwati Trading Company and yet Chokhani made payment of the purchase price from out of the funds of the Insurance Company.

129. On August 11, 1954, Chokhani got the statement of accounts from the brokers relating to the purchase of securities Worth Rs. 22,00,000. The total cost of those securities worked out at Rs. 20,64,058-6-9. Chokhani made the payment by issuing two cheques in favour of Bhagwati Trading Company, one for Rs. 10,00,000 and the other for the balance i.e., Rs. 10,64,058-6-9. Needless to say that he utilised the cheques which had already been

signed by Raghunath Rai, in pursuance of the arrangement to facilitate transactions on behalf of the Insurance Company.

130. On August 12, 1954, the statement of account with respect to the purchase of securities worth Rs. 5,00,000 was received. The cost worked out to Rs. 4,69,134-15-9. Chokhani made the payment by issuing a cheque for the amount in favour of Bhagwati Trading Company. All these cheques were drawn on the Chartered Bank, Bombay.

131. On August 12, 1954, Vishnu Prasad drew cheques for Rs. 9,00,000 in the account of Bhagwati Trading Company in the United Bank of India. The amount was collected by his father Bajranglal. He drew another cheque for Rs. 9,60,000 in the account of the Bhagwati Trading Company with the Bank of India, Bombay, and collected the amount personally. The total amount withdrawn by these two cheques viz., Rs. 18,60,000 was passed on to the Union Agencies through Chokhani that day. Thereafter Chokhani deposited Rs. 7,00,000 in the account of the Union Agencies with the Bank of India, Rs. 7,00,000 in the account of the Union Agencies with the United Bank of India and Rs. 4,40,000 in the account of the Union Agencies with the Punjab National Bank Ltd. The Punjab National Bank Ltd., Bombay, as already mentioned, had received deposits of Rs. 2,00,000 and Rs. 3,00,000 on August 7 and August 9, 1954, respectively, in the account of the Union Agencies from Delhi.

132. Between August 9 and August 19, 1954, Chokhani made payment to the brokers on account of the losses suffered by the Union Agencies. He issued cheques for Rs. 9,37,473-5-9 between August 9 and August 13, 1954, on the account with the Punjab National Bank. On August 13, he issued cheques on the account of the Union Agency with the United Bank of India in favour of the Bombay brokers on account of the losses of the Union Agencies, for Rs. 7,40,088-5-9. He also issued, between August 13 and August 19, 1954, cheque for Rs. 6,84,833-14-0 on the Bank of India, in favour of the share brokers at Bombay on account of the losses suffered by the Union Agencies.

133. Chokhani informed the head office at Delhi about these purchase transaction of securities worth Rs. 27,00,000 through letter dated August 16, 1954, and along with that letter sent the contract note and Dagduas of accounts received from the brokers. No mentioned was made in the letter about the payment being made to Bhagwati Trading Company through cheques or about the arrangement about getting the securities from Bhagwati Trading Company or about the postponement of the delivery of the securities by that company. On receipt of the letter, Raghunath Rai contacted Dalmia and, on being told that the securities were purchased under the latter's instructions, made over the letter to the office where the usual entries where made and records were prepared, as had to be done in pursuance of the office routine. Ultimately, the formal confirmation of the purchases was obtained on August 30, 1954, from the Board of Directors as its meeting for which the office note stating that the securities were purchase under the instruction of the Chairman (Dalmia) was prepared. the office note, Exhibit P. 793, with respect to

the purchased of these securities worth Rs. 27,00,000 was signed by Chordia, who was then the Managing Director of the Bharat Insurance Company.

134. On August 16, 1954, Vishnu Prasad withdrew Rs. 2,200 from the account of the Bhagwati Trading Company with the Bank of India, according to his statement, gave this money to Chokhani in return for the amount Chokhani had advanced earlier for opening accounts for Bhagwati Trading Company with the Bank of India and the United Bank of India. Thereafter, whatever money was in the account of Bhagwati Trading Company with these Banks was the money obtained through the dealings entered into on behalf of Bhagwati Trading Company, the funds for most of which came from the Bharat Insurance Company.

135. On August 18, 1954, Vishnu Prasad drew a sum of Rs. 50,000 from Bhagwati Trading Company's account with the Bank of India and passed on the amount to the Union Agencies through Chokhani. On August 23, 1954, he withdrew Rs. 90,000 from Bhagwati Trading Company's account with the United Bank of India and Rs. 5,10,000 from its account with the Bank of India and passed on these amounts also to the Union Agencies through Chokhani. Chokhani then issued cheques totalling Rs. 5,88,380-13-0 from August 23 to August 26, 1954, on the account of the Union Agencies with the Chartered Bank, Bombay, in favour of the brokers on account of the losses suffered by that company. Thus, out of the total amount of Rs. 25,33,193-6-6 withdrawn by Chokhani from the account of the Bharat Insurance Company and paid over to Bhagwati Trading Company Rs. 25,10,000 went to the Union Agencies, which mostly utilised the amount in payment of the losses suffered by it.

136. The Union Agencies suffered further losses amounting to about Rs. 23,00,000. Demands for payment by the brokers were received on September 3, 1954, and subsequent days.

137. The Bharat Insurance Company had no sufficient liquid funds in the Banks at Bombay. There was therefore necessity to deposit funds in the Bank before they could be drawn ostensibly to pay the price of securities to be purchased. This time the transactions of sale of securities held by the Insurance Company and the usual purchase transactions relating to certain other securities were gone through. The details of these transactions are given below.

138. On September 4, 1954, securities of the face value of Rs. 17,50,000 held by the Insurance Company were withdrawn from its safe-custody account with the Imperial Bank of India, New Delhi, by letter Exhibit P. 1351 under the signature of Dalmia. Securities worth Rs. 10,00,000 were 2-1/4% 1954 securities and the balance were 2-1/2% 1955 securities. These securities were then sent to Bombay and sold there. On September 9, 1954, Rs. 6,25,000 were transferred from Delhi to the account of the Insurance Company with the Chartered Bank, Bombay, by telegraphic transfer. Thus the balance of the funds

of the Insurance Company with the Chartered Bank rose to an amount out of which the losses of about Rs. 23,00,000 suffered by the Union Agencies could be met. The 1954 securities sold were to mature on November 15, 1954. The 1955 securities would have matured much later. No ostensible reason for their premature sale has been given.

139. On September 6, 1954, Chokhani purchased 3% 1959-61 securities of the face value of Rs. 25,00,000 on behalf of the Insurance Company from M/s. Naraindas & Sons, Brokers. A cross-contract of sale of similar securities by Bhagwati Trading Company to the brokers was also entered into. Steps which were taken in connection with the purchase of securities worth Rs. 27,00,000 in August 1954 were repeated. On September 9, 1954, Chokhani issued two cheques, one for Rs. 15,00,000 and the other for Rs. 9,20,875 on the account of the Insurance Company with the Chartered Bank, in favour of Bhagwati Trading Company which deposited the amount of the cheques into its account with the Bank of India, Bombay. Vishnu Prasad passed on Rs. 24,00,000 to the Union Agencies through Chokhani. This amount was utilised in meeting the losses suffered by the Union Agencies to the extent of Rs. 22,81,738-2-0. A sum of Rs. 75,000 was paid to Bennett Coleman Co. Ltd., of which Dalmia was a director and a sum of Rs. 15,000 was deposited in the Punjab National Bank.

140. It is again significant to note that telephonic communication took place between Dalmia's residence at New Delhi at Chokhani's at Bombay, between September 4 and September 10, 1954. There was two communications on September 4, one on September 5, three on September 6 and one on September 10, 1954.

141. The Union Agencies suffered further losses amounting to about Rs. 10,00,000 in the month of September. Again, the accounts of the Union Agencies or of the Insurance Company, at Bombay, did not have sufficient balance to meet the losses and, consequently, sale of certain securities held by the Insurance Company and purchase of other securities again took place. this time, 3% 1957 securities of the face value of Rs. 10,00,000 held by the Insurance Company in its safe-custody deposit with the Chartered Bank, Bombay, were sold on September 21, 1954, and Rs. 9,84,854-5-6, the net proceeds, were deposited in the Bank. On the same day, Chokhani purchased 3% 1959-61 securities of the face value of Rs. 10,00,000 on behalf of the Insurance Company following the procedure adopted in the earlier usual purchase transactions.

142. No telephonic communication appears to have taken place between Delhi and Bombay, on receipt of the demand from the brokers on September 17, 1954, for the payment of the losses, presumably because necessary steps to be taken both in connection with the fictitious purchase of securities, in order to pay money to Bhagwati Trading Company for being made over to the Union Agencies when funds were needed and also or providing funds in the Insurance Company's account with the Chartered Bank, Bombay, in case the balance was not sufficient to meet the losses, had already been adopted in the previous transactions, presumably, after consultations between Dalmia

and Chokhani. This lends weight to the significance of the telephonic communications between Delhi and Bombay in the critical period of August and early September, 1954.

143. To complete the entire picture, we may now mention the steps taken to cover up the non-receipt of securities purchased, at the proper time.

144. By November, 19, 1954, securities of the face-value of about Rs. 80,00,000 had been purchased by Chokhani on behalf of the Insurance Company and such securities had not been sent to the head office at Delhi. Raghunath Rai referred the matter to Dalmia and, on his approval, sent a letter on November 19, 1954, to Chokhani, asking him to send the distinctive numbers of those securities. The copy of the latter is Exhibit P. 805. The securities referred to were 3% Loan of 1959-61 of the face value of Rs. 35,00,000, 3% Loan of 1963-65 of the face value of Rs. 27,00,000 and 2-3/4% Loan of 1960 of face value of Rs. 18,00,000.

145. It was subsequent to this that stock certificates with respect to 3% 1963-65 securities of the face value of Rs. 27,00,000 and with respect to 2-3/4% 1960. Loan securities of the face value of Rs. 18,00,000 were received in Delhi.

146. We may now refer to the transactions which led to the obtaining of these stock certificates. The due dates of interest of 3% 1963-65 securities purchased in August 1954 were June 1 and December 1. It was therefore necessary to procure these securities or to enter into a paper transaction of their sale prior to December 1, as, otherwise, the non-obtaining of the income-tax deduction certificate from the Reserve Bank would have clearly indicated that the insurances Company did not hold these securities, Chokhani, therefore, entered into a genuine contract of purchase of 3% 1963-65 securities of the face value of Rs. 27,00,000 on behalf of Bhagwati Trading Company with Devkaran Nanjee, Brokers, Bombay, on November 3, 1954. He instructed the brokers to endorse the securities in favour of the Insurance Company, even though the securities were being sold to Bhagwati Trading Company. These securities so endorsed were received on November 24, 1954, and were converted into inscribed stock (Stock Certificate Exhibit P. 920) from the Reserve Bank of India on December 7, 1954. The stock certificate does not mention the date on which the securities were purchased and therefore it existence could prevent the detection of the fact that these securities were not purchased in August 1954 when, according to the books of the Insurance Company, they were shown to have been purchased.

147. The Insurance Company did not ostensibly pay for the purchase of these shares but partially paid for it through another share-purchase transaction. In order to enable Bhagwati Trading Company to pay the purchase price, Chokhani paid Rs. 16,00,000 to it from the account of the Bharat Union Agencies with the Banks at Bombay, and Rs. 10,08,515-15-0 from the account of the Insurance Company with the Chartered Bank by a fictitious purchase of 2-1/2% 1961 securities of the face value of Rs. 11,00,000 on behalf

of the Insurance Company. These 2-1/2% 1961 securities of the face value of Rs. 11,00,000 were purchased by Chokhani on November 16, 1954, by taking a step similar to those taken for the purchase of securities in August and September, 1954, already referred to.

148. Interest on the 2-3/4% Loan of 1960 of the face value of Rs. 18,00,000 was to fall due on January 15, 1955. Both on account of the necessity for obtaining the interest certificate and also on account of the expected check of securities by the auditors appointed for auditing the accounts of the Insurance Company for the year 1954, it became necessary to procure these securities or it sell them off. Chokhani purchased, on December 9, 1954, 2-3/4% 1960 securities of the face value of Rs. 18,00,000 on behalf of Bhagwati Trading Company. The purchase price was paid out of the funds of the Union Agencies and Bhagwati Trading Company. The securities were, however, got endorsed in the name of the Insurance Company. Chokhani got the securities sometimes about December 21, 1954, and, therefore, got them converted into stock certificates which were then sent to the head office at Delhi.

149. There still remained 3% 1959-61 securities of face value of Rs. 35,00,000 to be accounted for. They were purchased in September, 1954, as already mentioned, but had not been received up to the end of December. On December 27, 1954, Chokhani purchased 2-3/4% 1962 securities of the face value of Rs. 46,00,000 in two lots of Rs. 11,00,000 and Rs. 35,00,000 respectively, on behalf of the Insurance Company. He also entered into the usual cross-contract with the brokers for the sale of those securities of behalf of the Union Agencies. This was a fictitious transaction, as usual, and these securities were not received from the Union Agencies. On the same day, Chokhani entered into a contract for the sale of 3% 1959-61 securities of the face value of Rs. 35,00,000 on behalf of the Insurance Company and also entered into a cross-contract on behalf of the Union Agencies for the purchase of these securities from the same brokers. As these securities did not exist with the Insurance Company, these transactions were also paper transactions.

150. We need not give details of the passing of money from one concern to the other in connection with these transactions. For purposes of audit 3% 1959-61 securities of the face value of Rs. 35,00,000 had been sold. New securities viz., 2-3/4% 1962 securities of the face value of Rs. 46,00,000 had been ostensibly purchased. The auditors could demand inspection of these newly purchased securities. Chokhani therefore entered into another purchase transaction. This time a genuine transaction for the purchase of 2-3/4% 1962 securities of the face value of Rs. 46,00,000 was entered into on January 11, 1955. The purchase price was paid by the sale of 3% 1957 securities of the face value of Rs. 46,00,000 which the Insurance Company possessed. For this purpose, Chokhani withdrew these securities of the face value of Rs. 8,25,000 from the Chartered Bank, Bombay, and Rs. 37,75,000 worth of securities were sent to Bombay from Delhi. These securities were than converted into inscribed stock.

151. The Insurance Company was now supposed to have purchased 2-3/4% 1962 securities of the face value of Rs. 92,00,000 having purchased Rs. 46,00,000 worth of securities in December 1954 and Rs. 46,00,000 worth of securities in January 1955. It possessed securities worth Rs. 46,00,000 only and inscribed stock certificate with respect to that could serve the purpose of verifying the existence of the other set of Rs. 46,00,000 worth of securities. These transactions are sufficient to indicate the scheme followed by Chokhani in the purchase and sale of securities on behalf of the Insurance Company. It is clear that the transactions were not in the interests of the Insurance Company but were in the interests of the Union Agencies inasmuch as the funds were provided to it for meeting its losses. It is also clear that the system adopted of withdrawing the funds of the Insurance Company ostensibly for paying the purchase price of securities after the due date of payment of interest and selling the securities off, if not actually recouped from the funds of the Union Agencies or Bhagwati Trading Company prior to the next date of payment of interest, was not in the interests of the Insurance Company. When, however, the sale price could not be paid out of the funds of the Union Agencies or Bhagwati Trading Company, Chokhani, on behalf of the Insurance Company, entered into a fresh transaction of purchase of securities which were not actually received and thus showed repayment of the earlier funds, though out of the funds withdrawn from the same company (viz., the Insurance Company) ostensibly for paying the purchase price of newly purchased securities.

152. Turning to the evidence on record, the main statement on the basis of which, together with other circumstances, the Courts below have found that Dalmia had the necessary criminal intent as what Chokhani did was known to him and was under his instructions, is that of Raghunath Rai, Secretary-cum-Account of the Bharat Insurance Company. Mr. Dingle Foot has contended firstly that Raghunath Rai was an accomplice of the alleged conspirators and, if not, he was a witness whose testimony should not, in the circumstances be believed without sufficient corroboration which does not exit. He has also contended that the Courts below fell into error in accepting the Dagduas made by him which favoured the prosecution case without critically examining them, that they ignored his Dagduas in favour of the accused for the reason that he was under obligation to Dalmia and ignored his Dagduas inconsistent with his previous statement as he was not confronted with them in cross-examination.

153. An accomplice is a person who participates in the commission of the actual crime charged against an accused. He is to be a particeps criminis. There are two cases, however, in which a person has been held to be an accomplice even if he is not a particeps criminis. Receivers of stolen property are taken to be accomplices of the thieves from whom they receive goods, on a trial for theft. Accomplices in previous similar offences committed by the accused on trial are deemed to be accomplices in the offence for which the accused is on trial, when evidence of the accused having committed crimes of identical type on other occasions be admissible to prove the system and intent of the

accused in committing the offence charged: Davies v. Director of Public Prosecutions I.L.R. 1954 A.C. 378..

154. The contention that Raghunath Rai was an accomplice is mainly based on he facts that (i) Raghunath Rai did not produce the counterfoils of the cheques for the inspection of the auditors, though asked for by them, in spite of the fact that the counterfoils must have come to Delhi during the period of audit; (ii) the alleged scheme of the conspirators could not have been carried out without his help in signing blank cheques which were issued by Chokhani subsequently. The mere signing of the blank cheques is hardly an index of complicity when the bank account had to be operated both by Chokhani and Raghunath Rai, jointly. Raghunath Rai had to sign blank cheques in order to avoid delay in payments and possible occasional falling through of the transactions. No sinister intention can be imputed to Raghunath Rai on account of his signing blank cheques in the expectation that those cheques would be properly used by Chokhani. The counterfoils have not been produced and there is no evidence that they showed the real state of affairs, i.e., that the cheques were issued to Bhagwati Trading Company and not to the brokers from whom the securities were purchased.

155. It is not expected that the name of Bhagwati Trading Company would have been written on the counterfoils of the cheques when its existence and the part it took in the transactions were to be kept secret from the head office. When counterfoils were sent for in August, 1955, they were not received from Bombay. Chokhani states that he did not get that letter.

156. Moreover, counterfoils reach the head office after a long time and there is no particular reason why Raghunath Rai should notice the counterfoils then. He does not state in his evidence that he used to look over the counterfoils when the cheque books came to him for further signatures.

157. We do not therefore agree that Raghunath Rai was an accomplice.

Even if it be considered that Raghunath Rai's evidence required corroboration as to the part played by Dalmia, the circumstances to which we would refer later in this Judgment afforded enough corroboration in that respect.

Raghunath Rai made a statement. Exhibit P. 9, before Annadhanam on September 20, 1955. He made certain Dagduas in Court which were at variance with the statement made on that occasion. This variation was not taken into consideration in assessing the veracity of Raghunath Rai as he had not been cross-examined about it. The argument of Mr. Dingle Foot is that such variation, if taken into consideration, considerably weakness the evidence of Raghunath Rai. He has urged that no cross examination of Raghunath Rai was directed to the inconsistencies on any particular point in view of the general attack on his veracity through cross-examination with respect to certain matters. He has

contended that in view of section 155 of the Indian Evidence Act, any previous statement of a witness inconsistent with his statement in Court, if otherwise proved, could be used to impeach his credit and that therefore the Courts below were not right in ignoring the inconsistencies in the statement of Raghunath Rai merely on the ground that they were not put to him in cross-examination. On the other hand, the learned Solicitor General contends that section 155 of the Indian Evidence Act is controlled by section 145 and that previous inconsistent Dagduas not put to the witness could not be used for impeaching his credit. We do not consider it necessary to decide this point as we are of opinion that the inconsistent Dagduas referred to are not of any significance in impeaching the credit of Raghunath Rai.

158. The specific inconsistent statement are: (i) 'I never of my own accord send securities to Bombay nor am I authorised to do so': In Court Raghunath Rai said that certain securities were sent by him to Bombay on his own accord because those securities were redeemable at Bombay and the maturity date was approaching. (ii) Before the Administrator, Raghunath Rai had stated: 'I cannot interfere in the matter as, under Board Resolution, Chokhani is authorised to deal with the securities. Chokhani always works under instructions from the Chairman.' In Court, however, he stated that there was no resolution of the Board of Directors authorising Chokhani to sell and purchase securities. The mis-statement by Raghunath Rai, in his statement P. 9 to the Investigator made on September 20, 1955, about Chokhani's being authorised by a Board resolution to deal with the securities, is not considered by Dalmia to be a false statement as he himself stated, in answer to question No. 21, that such a statement could possibly be made by Raghunath Rai in view of the Board of Directors considering at the meeting the question whether Chokhani be authorised to purchase and sell securities on behalf of the company in order to make profits. (iii) 'Roughly 1.3/4 crores of securities were sent to Bombay from here during the period from April 1955 to June 1955'. The period was wrong and was really from July to August 1955. Raghunath Rai admitted the error and said that he had stated to Annadhanam without reference to books. (iv) 'Securities are sent to Chokhani at Bombay through a representative of Dalmia'. The statement is not quite correct as securities were sent to Bombay by post also.

159. Raghunath Rai stated that on the receipt of the advice from Chokhani about the purchase or sale of securities, he used to go to Dalmia on the day following the receipt of the advice for confirmation of the contract of purchase or sale of securities and that after Dalmia's approval the vouchers about the purchase of those securities and the crediting of the amount of the sale prince of those securities to the account of the Insurance Company with the Chartered Bank, as the case may be, used to be prepared.

160. Kashmiri Lal and Ram Das, who prepared the vouchers, describe the procedure followed by them on receipt of the advice but do not state anything about Raghunath Rai's seeking confirmation of the purchase transactions form Dalmia and therefore do not, as suggested for the appellants, in any way, contradict Raghunath Rai.

161. It is urged by Mr. Dingle Foot that it was somewhat unusual to put off the entire with respect to advices received by a day, that the entire must have been made on the day the advices were received and that in this manner the entries made by these clerks contradict Raghunath Rai. A witness cannot be contradicted by first supposing that a certain thing must have taken place in a manner not deposed to by any witness and then to find that that was not consistent with the statement made by that witness. Further, we are of opinion that there could be no object in making consequential entries on receipt of the advice about the purchase of securities if the purchase transaction itself is not approved of and is consequently cancelled. The consequent entire were to be with respect to the investments of the Insurance Company and not with respect to infructuous transactions entered into by its agents.

162. It has also been urged that if Dalmia's confirmation was necessary, it was extraordinary that no written record of his confirming the purchase of securities was kept in the office. We see no point in this objection. If confirmation was necessary, the fact that various entries were made consequent on the receipt of advice is sufficient evidence of the transaction being confirmed by Dalmia, as, in the absence of confirmation, the transaction could not have been taken to be complete. Further, office notes stating that securities had been purchased or sold 'under instructions of the Chairman' used to be prepared for the meeting of the Board of Directors when the matter of confirming sale and purchase of securities went before it. The fact that office notes mentioned that the securities had been purchased under the instructions of the Chairman is the record of the alleged confirmation.

163. The proceedings of the meeting of the Board of Directors with respect to the confirmation of the purchase and also of securities do not mention that that action was taken on the basis of the office notes. Minutes with respect to other matters do refer to the office notes. This does not, however, mean that office notes were not prepared. Confirmation of the purchase and sale of he shares was a formal matter for the Board.

164. All the office notes, except one, were signed by Raghunath Rai. The one not signed by him is Exhibit P. 793. It is signed by Chordia and is dated August 18, 1954. This also mentions 'under instructions of the Chairman certain shares have been purchased'. Chordia was a relation of Dalmia and had no reason to write the expression 'Under instructions of the Chairman' falsely. Such a note cannot be taken to be a routine note when the power to purchase and sell securities vested in Chordia as Managing Director of the company. Clause (4) of article 13 of the Bye-laws empowered the Managing Director to transfer, buy and sell Government securities. When Chordia, the Managing Director, wrote in this office note that securities were purchased under the instructions of the Chairman, it can be taken to be a true statement of fact. It is true that he has not been examined as a witness to depose directly about his getting it from Dalmia that the purchase of securities referred to in that note was under his instructions. This does not

matter as we have referred to this office note in connection with Raghunath Rai's statement that office notes used to be prepared after Dalmia's statement that the particular purchase of shares was under his instructions.

165. The Dagduas made by Raghunath Rai which are said to go in favour of the accused may now be dealt with. Raghunath Rai was cross-examined with respect to certain letters he had sent to Chokhani. He stated, in his deposition on July 29, 1958, that Dalmia accepted his suggestion for writing to Chokhani to sent him the distinctive numbers of the securities which had been purchased, but not received at the head office, and that when he reported non-compliance of Chokhani in communicating the distinctive numbers and suggested to Dalmia to ring up Chokhani to sent the securities to the head office, Dalmia agreed. This took place in November and December 1954. Dalmia's approval of the suggestion does not go in his favour. He could not have refused the suggestion.

166. Raghunath Rai also stated that in September or October 1954 there was a talk between heir, K. L. Gupta and Dalmia about the law yield of interest on the investments of the Insurance Company and it was suggested that the money be invested in securities, shares and debentures. Dalmia then said that he had no faith in private shares and debentures but had faith in Government securities and added that he would ask Chokhani to invest the funds of the Insurance Company in the purchase and sale of Government securities. He, however, denied that Dalmia had said that the investment of funds would be in the discretion of Chokhani, and added that Chokhani was not authorised to purchase or sell securities on behalf other Insurance Company unless he was authorised by the Chairman. The statement does not support Dalmia's authorising Chokhani to purchase and sell securities in his discretion.

167. Another statement of Raghunath Rai favourable to Dalmia is said to be that according to him he told the auditors on September 9, 1955, that the securities not then available were with Chokhani at Bombay from whom advices about their purchased had been received. Annadhanam stated that Raghunath Rai had told him that Dalmia would give the explanation of the securities not produced before the auditors. There is no reason to prefer Raghunath Rai's statement to that of Annadhanam. Annadhanam's statement in the letter Exhibit P. 2 about their being informed that in March, 1954, after the purchase, the securities were kept in Bombay in the custody of Chokhani refer to what they were told in the first week of January, 1955, and not to what Raghunath Rai told him on September 9, 1954.

168. Raghunath Rai stated that on one or two occasions he, instead of going to Dalmia, talked with him on telephone regarding the purchase and sale of securities by Chokhani and that Dalmia told him on telephone that he had instructed for the purchase and sale of securities and that he was confirming the purchases or sales. This does not really favour Dalmia as Raghunath Rai maintains that Dalmia did confirm the purchase or sale

reported to him. It is immaterial whether that was done on telephone or on Raghunath Rai actually meeting him.

169. Questions put to the Administrator, Mr. Rao, in cross-examination, implied that Raghunath Rai was a reliable person and efforts to win him over failed. It was suggested to the Administrator that the reasons for the appointment of Sundara Rajan as the Administrator's Secretary was that he wanted to conceal certain matters from Raghunath Rai. His reply indicated different reasons for the appointment. Another suggestion put to him was that Raghunath Rai offered to retire, but he kept his offer pending because of this case. This suggestions too was denied.

170. It was brought out in the cross-examination of Raghunath Rai that he was in a position in which he could be influenced by the Administrator. Raghunath Rai was using the office car. Its use was stopped by the Administrator in January, 1956. He was not paid any conveyance allowance. In April, 1958, he made a representation to the Administrator for the payment of that allowance to him. The Administrator passed to necessary order in May, 1958, with retrospective effect from January 1956. The amount of conveyance allowance was Rs. 75 per mensem. Raghunath Rai could not give any satisfactory explanation as to why he remained silent with regard to his claim for conveyance allowance for a period of over two years, but denied that he was given the allowance with retrospective effect in order to win him over to the prosecution.

171. Raghunath Rain applied for extension of service in the end of 1956 or in the beginning of 1957 and, in accordance with the resolution passed on August 17, 1954, by the Board of Directors, his service was extended up to 1961. The Administrator forwarded the application to the higher authorities. This matter had not been decided by July 29, 1958.

172. The amount of his gratuity and provident fund in the custody of he Insurance Company amounted to Rs. 35,000.

173. We do not think that the Administrator had any reason to influence Raghunath Rai's statement and acted improperly in sanctioning car allowance to him retrospectively and would have so acted with respect to Raghunath Rai's gratuity if Raghunath Rai had not made statement's supporting the prosecution case.

174. Raghunath Rai stated on July 29, 1958, that in July, 1955, when he informed Dalmia that the bulk of the securities were at Bombay and the rest were at Delhi, Dalmia asked him to write to Chokhani to deposited all the securities in Bombay in the Chartered Bank. At this he told Dalmia that if the sale and purchase of securities was to be carried on as hitherto fore there was no use depositing them in the Bank and thus pay frequent heavy withdrawal charges, and suggested that the securities could be deposited in the Bank if the sale and purchase of them had to be stopped altogether and that Dalmia then said

that the securities should be sent for to Delhi in the middle of December, 1955 for inspection by the auditors.

175. Raghunath Rai was re-examined on July 30 and stated that the aforesaid conversation took place on July 14, 1955, and added that he had, in the same context, a further talk with Dalmia in August, 1955. The Public Prosecutor, with the permission of the Court, then questioned him about the circumstances in which he had to go a second time to Dalmia and talk about the matter. His reply was that he had the second talk as the securities purchased in May, 1955, and those purchased in July and August, 1955, had not been received at the head office. He asked Dalmia to direct Chokhani to deposited all the securities in the Chartered Bank or to send them to Head Office. Dalmia then said that the sale and purchase of securities had to be carried on for some time and therefore the question of depositing those securities in the Bank or sending them to the head office did not arise for the time being and that the securities should be sent to the head office in December, 1955.

176. Raghunath Rai thus made a significant change in his statement. On July, 29, 1958, he opposed the direction of Dalmia for writing to Chokhani to deposit the securities in the Bank as that would entail heavy withdrawal charges in case the sale and purchase so securities were not to be stopped while, according to his statement the next day, he himself suggested to Dalmia in August, 1955, that Chokhani be asked to deposit all the securities in the Bank or to send them to the head office. He denied the suggestion that he made this change in his statement under pressure of the Police.

177. The cross-examination was really directed to show that he had been approached by the police between the close of his examination on July 29 and his further examination on July 30, 1958. Raghunath Rai admitted in court that after giving evidence he went to the room allotted in the Court building to the Special Police Establishment and that the Investigating Officer and the Secretary to the Administrator of the Insurance Company were there. He went there in order to take certain papers which he had kept there. He, however, had not brought any papers on July 30 as, according to him, his main cross-examination had been over. He however denied that the had been dictated notes by the police in order to answer questions in cross-examination or that he remained with the police till 9 p.m. or that the Secretary to the Administrator held out a threat about the forfeiture of his gratuity in case he did not make a statement favourable to the prosecution.

178. We see no reason for the police to bring pressure on Raghunath Rai to introduce falsely the conversation in August. Between July 14, 1955, and middle of August, 1955, the head office learnt of the purchase of securities of the face value of Rs. 74,00,000 and again, on or about August 26, of the purchase of securities of the face value of Rs. 40,00,000. A further conversation in August is therefore most likely as deposed to. The

main fact remains that Dalmia said that the securities be sent for in December, 1955, which implies his knowledge of the transactions in question.

179. We are of opinion that the discrepancies or contradictions pointed put in Raghunath Rai's statement are not such as to discredit him and make him an unreliable witness and that he is not shown to be under the influence of the prosecution. Further, his various Dagduas connecting Dalmia with the crime, find corroboration from other evidence.

180. Letter Exhibit P. 1351 dated September 4, 1954, was sent to the Imperial Bank of India, Delhi Branch, under the signature of Dalmia as Chairman. The letter directed bank to deliver certain securities to the bearer. Dalmia admits his signatures on this document and also on the letter Exhibit P. 1352 acknowledging the receipt of the securities sent for, thus corroborating Raghunath Rai's statement that the securities were withdrawn under this instructions.

181. Letters Exhibit D. 3, dated March 16, 1955, and P. 892 dated August 5, 1955, from Raghunath Rai to Chokhani, mentioned that the stock certificates were being sent under the instruction of the Chairman. They corroborate Raghunath Rai's Dagduas in Court of the despatch of these stock certificate under Dalmia's instructions. He had no reason to use this expression if he was sending them on his own.

182. It is true that the date on which the Chairman gave the instruction is not proved, but it stands to reason that the stock certificates must have been dispatched soon after the receipt of the instruction from the Chairman. It cannot be presumed that in such transactions there could be such delay as would make statement in these letters not corroborative evidence under section 157, of the Evidence Act which provides that previous Dagduas made at or about the time a fact took place can be used for corroborating the statement in Court.

183. Chokhani's statement that he did not mention the name of Bhagwati Trading Company in his letter to the head office as he did not want Dalmia to know about the dealings with Bhagwati Trading Company, implies that in the ordinary course of business the information conveyed in those letters would be communicated to Dalmia and thus tends to support Raghunath Rai statement that he used to visit Dalmia on receipt of the statement of account and inform him about the purchase or sale of the securities.

184. Chokhani had been inconsistent about Raghunath Rai's later knowledge of the existence of Bhagwati Trading Company. In answer to question No. 66, on November 13, 1958, he stated:

"I did not contradict the statement made in Ex. P. 813 that cheque No. B564809 dated 17-11-54 had been issued in favour of Narain Das and Sons although that cheque had in fact been issued in favour of Bhagwati Trading Company and not in favour of Narain Das

and Sons because those at the Head Office did not know anything about Bhagwati Trading Company".
185. In answer to question No. 149. on November 14, 1958, he stated:

"I did not mention the name of Bhagwati Treading Company in my letters addressed to the Head Office of the Bharat Insurance Company as the party with whom there were cross contracts because Raghunath Rai would not have known as to what was Bhagwati Trading Company. I also did not mention the name of Bhagwati Trading Company in my letter to the Head Office of the Bharat Insurance Company because I did not want Shri Dalmia to know that I was having dealings with Bhagwati Trading Company. I also want to add that Raghunath Rai must have known that the cross-contract were with Bhagwati Trading Company because the name of Bhagwati Trading Company was mentioned as the payee on the counterfoils of the cheques issued in favour of Bhagwati Trading Company."
186. Chokhani seems to have attempted to undo the effect of his statement on November 13, but being of divided mind, made inconsistent Dagduas even on November 14, 1958. he was in difficult position. He attempted to show that Dalmia did not know about Bhagwati Trading Company and also to show that Raghunath Rai had reasons to know about it and was therefore in the position of an accomplice, a stand which is also taken by Dalmia.

187. We may now deal first with the case of Chokhani, appellant. Chokhani has admitted his entering into the various transactions of purchase and sale and to have set up Bhagwati Trading Company for convenience to carry out the scheme of diverting the funds of the Insurance Company to the Union Agencies by way of temporary loan. His main plea is that he had no attention to cause loss to the Insurance Company and did not know that the way he arranged funds for the Union Agencies from the Insurance Company was against law. He contends that the had no dishonest intentions and therefore did not commit any of the offences he had been charged with, and convicted of.

188. Learned counsel for Chokhani has urged two points in addition to some of the points of law urged by learned counsel for Dalmia. He urged that the transactions entered into by Chokhani were ordinary genuine commercial transactions and that there was not evidence of Chokhani's acting dishonestly in entering into those transactions. It is further said that the High Court recorded not finding on the latter point though it was necessary to record such a finding, even though this point was not seriously urged.

189. In support of the contention that the purchase and sale transactions were genuine commercial transactions, it is urged that to meet the losses of the Union Agencies Chokhani was in a position to sell the shares held by it or could have raised the money on its credit. He did not sell the shares as they were valuable and as their sale would have affected the credit of the Union Agencies. Chokhani had been instructed in September, 1954, that the yield from the investment of the Insurance Company was not good and

that the funds of the Insurance Company be invested in securities. Such instructions are said to have been given when he was authorised by Dalmia to purchase and sell securities on behalf of the Insurance Company. It is suggested that these instructions were given in 1953, and not in 1954 when Dalmia was going abroad. In view of this authority, Chokhani decided on a course of action by which he could invest the insurance money in securities and also help the Union Agencies. It is submitted that it was not necessary to mention Bhagwati Trading Company to the head office as the Insurance Company was going to suffer no loss and was simply converted in knowing of the sale and purchase transactions. Chokhani's payment of the purchase price in anticipation of the delivery of the securities, was bona fide.

190. We have already expressed the opinion that the transaction in connection with the investment of the fund of the Insurance Company were not bonafide purchase an sale transactions. They were transactions with a purpose. They were motivated in the interests of the Union Agencies and not in the interests of the Insurance Company.

191. The mere fact that on account of the non-delivery of securities within a reasonable time of the payment of the purchase money made the brokers or Bhagwati Trading Company or both of them liable to an action, does not changes the nature of the transactions. That liability can co-exist with the criminal liability of Chokhani if the transactions were such which could amount to his committing breach of trust. In fact, the offence of breach of trust ins not with respect to his entering into the sale and purchase transactions. It is really on the basis of his paying the money out of the Insurance Company's funds to the Union Agencies through Bhagwati Trading Company, in contravention of the manner in which he was to deal with that money. These purchase and sale transactions were just a device for drawing on those funds.

192. We do not believe that Chokhani really intended to purchase the securities thought he did purchase some, in certain circumstances, and that the non-delivery of the securities was not a case of just his slightly postponing the delivery of he securities. No reason is given why such a concession should have been made to the seller of the securities and the period during which such purchased securities remained undelivered is much longer than what can be said to be a reasonable period during which purchased securities for ready delivery should be delivered. The fact, if true, that the Insurance Company suffered no monetary loss on account of the purchase and sale transactions and the passing of its money to the Union Agencies, does to suffice to make the transaction an honest one. The gain which the Union Agencies made out of the money it got from the Insurance Company was wrongful gain. It was not entitled to profit by that money. One is said to act dishonestly when he does any thing with the intention of causing wrongful gain to one person or wrongful loss to another. Wrongful gain means gain by unlawful means of property to which the person gaining is not legally entitled and wrongful loss is loss by unlawful means of property to which the person using it is legally entitled.

193. It is urged that Chokhani's keeping Bhagwati Trading Company secret from Delhi was not the result of a guilty conscience, but could be due to his nervousness or fear. We do not agree with this suggestion. He had nothing to fear when he was acting honestly and, according to him, when he was doing nothing wrong.

194. It is further submitted that what Chokhani did amounted simply to the mixing of the funds of the Insurance Company and the Union Agencies. We do not think that this would be the correct interpretation of what Chokhani did. It was not a case of mixing of funds but was a case of making over the funds of the Insurance Company to the Union Agencies.

195. The fact that the Administrator did to cancel any contract entered into on behalf of he Insurance Company under the powers given to him by section 52(c) of the Insurance Act, does not mean that every such contract was in the interest of the Insurance Company. The Administrator has stated that he did not know the legal position as to whether those contracts stood or not.

Of the points of law urged for Chokhani, we have already dealt with those relating to the jurisdiction of the Delhi Court to try the various offences, to the content of the words 'property', 'dominion' and 'agency' in s. 409, I. P. C. The only other points raised are that the offence under s. 477A could not be said to be committed in pursuance of the conspiracy and that it was not a case of one conspiracy but of several conspiracies.

196. The charge under section 477A, I.P.C. is based on the letter written by Chokhani from Bombay to Delhi intimating his entering into the contracts of purchase of securities and indicating that cheques had been issued in payment to the brokers. It is true that these letters did not specifically state that the cheques had been issued to the brokers, but that is the implication when the letters refer to the contacts and the statement sent along with them and which relate simply to the transactions between the Insurance Company and the brokers and in no way indicate the cross-contracts between the brokers and Bhagwati Trading Company. It is further said that the payment of Bhagwati Trading Company was as an agent of the brokers. There is no evidence that the broker appointed Bhagwati Trading Company as their agent for the purpose. The evidence is that on Chokhani's representation that the Insurance Company would pay to Bhagwati Trading Company and get the securities from Bhagwati Trading Company that the brokers neither got the price nor delivered the securities.

197. It is also contended that Chokhani was not a 'servant' of the Insurance Company and therefore does not come within section 477A. I.P.C. which makes certain conduct of a clerk, office or servant an offence Chokhani was a servant of the Insurance Company as he was its Agent and received payment for doing work as an agent. His being a full-time servant of the Union Agencies does not mean that he could not be a servant of any other company, or other employer.

198. We do not agree with the contention that it was a case of several conspiracies, each transaction to meet the losses, as they occurred, giving rise to an independent conspiracy. The conspiracy was entered into in the beginning of August, 1954, when such circumstances arose that funds had no provided to the Union Agencies to meet its losses. The conspiracy must have been to continue up to such time when it be possible to anticipate that such a situation would not more arise. Similar steps to meet the losses were taken whenever the occasion arose. The identity of purpose and method is to be found in all the transactions and they must be held to have taken place in pursuance of the original conspiracy.

199. We next come to the case of Vishnu Prasad, appellant. He was the sole proprietor of Bhagwati Trading Company. His main defence is that the was ignorant of the various transactions entered into by Chokhani on behalf of Bhagwati Trading Company and that it was Chokhani who kept the books of accounts and entered into those transactions. The courts below have found that he knew of transactions and the nature of the conspiracy. We agree with this opinion. There is sufficient material on record to establish his knowledge and part in the conspiracy.

200. Bhagwati Trading Company came into existence just when the Union Agencies suffered losses and was not in a position to pay them and, consequently, there arose the necessity for Dalmia and Chokhani to devise means to raise funds for meeting those losses. Vishnu Prasad opened the banking accounts in two banks at Bombay on August 9 and August 11, 1954, depositing the two sums of Rs. 1,100 each in each of the two banks. He states that the got this money from Chokhani. The money was, however, withdrawn after a short time and paid back to Chokhani and no further contribution to the funds of the Bhagwati Trading Company was made on his behalf. The Company functioned mainly on the amounts received from the Insurance Company. Vishnu Prasad, therefore, cannot be said to be quite innocent of the starting other company and the nature of its business.

201. He started, in answer to question No. 24:

"I started business in the name of Bhagwati Trading Company in 1953, or beginning of 1954. I however did no business in the name of that company. G. L. Chokhani stated that I should do business for the purchase or sale of securities."
and in answer to question No. 26 he stated that he had no knowledge about Chokhani's entering into contracts on behalf of the Bharat Insurance Company for the purchase of securities and his entering into cross-contracts with the same firm of brokers for the sale of those securities on behalf of Bhagwati Trading Company but admitted that he knew that Chokhani was doing business for the purchase and sale of securities on behalf of Bhagwati Trading Company. He expressed ignorance about similar future contracts for

purchase of securities on behalf of the Insurance Company and cross-contracts for the sale of those securities on behalf of Bhagwati Trading Company.

202. Vishnu Prasad, however, made a statement at the close of the day when he had made the above statement and said:

"In answer to question No. 24 I want to state that I did not start business of Bhagwati Trading Company in 1953 or the beginning of 1954 but only intended to start that business."
203. The latter statement deserves no acceptance and is a clear indication that the implications of his earlier statement worked on his mind and he attempted to indicate that he was not even responsible in any way for the starting of the business of Bhagwati Trading Company. Bhagwati Trading Company did come into existence and ostensibly did business. The latter statement therefore cannot be true.

204. Vishnu Prasad further knew, as his answer to question No. 157 indicates, that Chokhani did shares speculation business at Bombay. He, however, stated that he did not know on behalf of which company he did that business.

205. What Vishnu Prasad actually did in connection with the various transactions which helped in the diversion of the funds of the Insurance Company to the Union Agencies has to be looked at in this background. He cashed a number of cheques issued on behalf of the Insurance Company and made over that money to Chokhani, who passed it on the Union Agencies. he issued cheques on behalf of Bhagwati Trading Company in favour of Bharat Union Agencies after the amounts of the cheques of the Insurance Company in favour of Bhagwati Trading Company had been deposited in the Bank. Some of these cheques issued in favour of Union Agencies were filled in by Vishnu Prasad himself and therefore he must have known that he was passing on the money to the Union Agencies. In fact, some of the cheques issued on behalf of Bhagwati Trading Company in favour of the Union Agencies were deposited in the bank by Vishnu Prasad himself.

206. It is therefore no possible to believe that Vishnu Prasad did not know that the amounts which his company viz., Bhagwati Trading Company, received from the Insurance Company must have purported to be on account of securities sold to the Insurance Company, as that was the business which Bhagwati Trading Company professed to do and, according to him, he knew to be its business. He knew that most of this amount was passed on to the Union Agencies. Both these facts must have put him on enquiry even if he did not initially know of the nature of the business which brought in the money to, and took out the money form, Bhagwati Trading Company. he is expected to knew that the Insurance Company was not likely to purchase securities so frequently. If he had made enquiries, he would have learned about the nature of receipts and payment and in fact we are inclined to the view that the must have known of their nature and that it is not reasonable that he would be completely in the dark.

207. The business of Bhagwati Trading Company is said to have been started as Vishnu Prasad was not taking interest in the other business. This should indicate that he must have evinced interest in the activities of Bhagwati Trading Company which continued for over a year and which made him receive and dispose of lakhs Rupees. Surely, it is not expected that he would have made no effort to know what is required to be know by one carrying on business for the purchase and sale of securities, and any attempt to have known this would have necessarily led him to know that securities were being purchased on behalf of he Insurance Company and were not delivered to it and that Bhagwati Trading Company purchased no securities form the Union Agencies and that any payment by it to the latter was for something which Bhagwati Trading Company was not liable to pay. It follows that he must have known that money was being received from the Insurance Company for nothing which was due to Bhagwati Trading Company from that company and that most of that money was being paid to the Union Agencies for payment of which Bhagwati Trading Company had no liability and that the net result of the transactions of receipt of money from the Insurance company and payment of it to the Union Agencies was that Bhagwati Trading Company was acting to help the diversion of fund form the Insurance Company to the Union Agencies.

208. We therefore hold that Vishnu Prasad has been rightly found to be in the conspiracy.

209. We may now deal with the case of Dalmia, appellant. The fact that the funds of the Bharat Insurance Company were diverted to Union Agencies by the transactions proved by the prosecution, is no challenged by Dalmia. his main contention is that he did not know what Chokhani had been doing in connection with the raising of funds for meeting the losses of the Union Agencies. There is, however, ample evidence to indicate that Dalmia known of the Scheme of the transactions and was a party to the scheme inasmuch as the transactions were carried through under his instructions and approval:

210. The facts which have a bearing on this matter are:

(1) Dalmia had the clearest motive to devise means for meeting the losses of the Union Agencies.

(2) Dalmia actually looked after the share business of the Union Agencies at Calcutta and Delhi. He had knowledge of the losses of the Union Agencies.

(3) The frequency of telephonic calls between him and Chokhani during the period when the losses took place and steps were taken to meet them, especially during the early stages in August and September, 1954, when the scheme was being put into operation, and in July and August, 1955, when there had been heavy and recurring losses.

(4) Dalmia's informing the Imperial Bank, Delhi, on September 4, 1954, about his powers to deal with securities and actually withdrawing securities that day, which were shortly after sold at Bombay and whose proceeds were utilised for meeting the losses.

(5) The gradually increasing retention of securities in the office of the Insurance Company and consequently the gradually reduced deposit of securities in the Banks.

(6) The transfer of securities held by the Insurance Company from Delhi to Bombay when fund were low there to meet the losses.

(7) The purchase and sale of securities in the relevant period in order to meet the losses were under his instructions.

(8) A larger use of converting securities into inscribed stock certificates which was used for concealing the disclose of the interval between the date of purchase of the securities which were then not received, and the date when those securities were recouped later.

(9) Dalmia's annoyance and resentment on September 9, 1955, when the auditors made a surprise inspection of the office of the insurance company and wanted to see the securities.

(10) His conduct on September 15, 1955.

(11) His not going to meet Mr. Kaul on September 16, 1955, and instead, sending his relatives to state what was not the full and correct statement of facts which, according to his own statements, were known to him by then.

(12) His confession P. 10 together with the statement Exhibit p. 11 and the statement made to Annadhanam that he carried on his speculative business in shares in the name of the Union Agencies.

211. One of the main factors urged in support of the contention that Dalmia was in the conspiracy is that the entire scheme of conspiracy was entered into for the sole benefit of Dalmia. It is to reasonable probable that such a conspiracy would come into existence without the knowledge or consent of Dalmia. The conspiracy charge framed against Dalmia mentioned the object of the conspiracy as 'meeting losses, suffered by you, R. Dalmia, in forward transactions, of speculation in shares, which transactions were carried on in the name of the Bharat Union Agencies Limited...' and the charge under section 409 I.P.C. referred to the dishonest utilisation of he funds of the Insurance Company.

212. This matter has been considered form several aspects. The first is that Dalmia is said to have owned the entire shares issued by the Union Agencies, or at lest to have owned a substantial part of them and was in a position to control the other shareholders. The

appreciate his aspect, it is necessary to give an account to the share-holding in this company. The Union Agencies was incorporated at Bombay on April 1, 1948, as a private limited company, with its registered office at Bombay. It also had an office at 10, Daryaganj, Delhi, where the head office of the Bharat Insurance Company was. Its authorised capital was Rs. 5,00,000. The total number of shares issued in 1949 was 2,000. Out of these Dalmia held 1,200 shares, Dalmia Cement & Paper Marketing Company Ltd. (hereinafter called the Marketing Company) 600 shares, Shriyans Prasad Jain brother of S. P. Jain, 100 shares and Jagat Prasad Jain, the balance of 100 shares. The same position of share-holding continued in 1950. In 1951, Dalmia continued to hold 1,200 shares, but the other 800 shares were held by Govan Brothers. The position continued in 1952 as well and, in the first half of 1953, Dalmia increased the number of his shares to 1,800 and Govan Brothers increased theirs to 1,200 and the total shares issued thus stood at 3,000. This position continued up to September 21, 1954.

213. On September 22, 1954, 2,000 shares were further issued to S. N. Dudani, a nominee of Asia Udyog. The total shares on that date stood at 5,000 of which Dalmia held 1,800, Govan Brothers 1,200, and Dudani 2,000. On October 4, 1954. R. P. Gurha and J. S. Mittal each got 100 shares from Govan Brother with the result that thereafter the position of shares-holding was: Dalmia 1,800; Govan Brothers 1000; Dudani 2,000; Gurha 100; and Mittal 100, out of the total number of issued shares of 5000.

214. It is said that Dalmia transferred his 1,800 shares to one. L. R. Sharma on October 30, 1954. Sharma's holding 1,800 shares was mentioned in the return, Exhibit P. 3122 filed by the Union Agencies as regard shares capital and shares as on December 31, 1955, in the office of the Register of Companies in January 1956 with respect of the year 1955. The return showed that the transfer and taken place on January 31, 1955. It would appear that the alleged sale of shares to Sharma in October 1954 was no mentioned in a similar return which must have been submitted to the Registrar of Companies in January, 1955, and that therefore its transfer was shown on January 31, 1955, probably a date subsequent to the submission of the relevant return for the year 1954.

215. A brief account of the various share-holders may be given. Dalmia was a Director of Govan Brothers Ltd., and was succeeded, on his resignation, by O. P. Dhawan, who was an Accountant in the Delhi Office of the Union Agencies. He was also an employee of another company named Asia Udyog Ltd. Another Director of Govan Brothers Ltd. was D. A. Patil, Income-tax Adviser in the concerns of Dalmia. The shares scrapes in the Marketing Company standing in the name of Govan Brother Ltd. and three blank shares transfer from signed by S. N. Dudani as Secretary of Govan Brother Ltd., in the column entitled 'seller' were recovered form Dalmia's house on search on November 25, 1955. Dudani was the personal accountant of Dalmia and Manager of the Delhi Office of Bharat Union Agencies. The inference drawn by the Courts below from these circumstances is that Govan Bothers Ltd. was the concern of Dalmia, and this is reasonable. No

Satisfactory explanation is given why the shares standing in the name of Govan Brothers Ltd. and the blank transfer forms should be found in Dalmia's residence.

216. Dudani was the personal accountant of Dalmia and Manager of the Delhi Office of the Union Agencies, and was also Secretary of Asia Udyog Ltd. Asia Udyog appears to be a sister concern of the Union Agencies. It was previously known as Dalmia Jain Aviation Ltd. It installed a telephone at one of Dalmia's residences in January, 1953. Its offices were in the same room in which the offices of the Union Agencies were. Dhawan, who succeeded Dalmia as Director of Govan Brothers Ltd., was an employee of Asia Udyog. Gurha was the Accountant of Asia Udyog, in addition to being Director of the Union Agencies. He had powers over the staff of both the companies. J. S. Mittal was Director of Union Agencies and held 100 shares in the Union Agencies as nominee of Govan Brothers Ltd., from October 4, 1954, and 1,000 shares as nominee of Crosswords Ltd., from some time about January 31, 1955. L. N. Pathak, R. B. Jain and G. L. Dalmia, were authorised to operate on the account of both the Union Agencies, Calcutta, and Asia Udyog Ltd., with the United Bank of India, Calcutta.

217. The issue and transfer of shares of the Union Agencies in September and October, 1954, seem to be in pursuance of an attempt to meet a contention, as at present urged for the State, that Dalmia was the largest shareholder in it. The same idea seemed to have led to the transfer of shares to Sharma by Dalmia. The verbal assertion of the sale having taken place in October, 1954, is not supported by the entry in Exhibit P. 3122 and what may be taken to be the entries in a similar return for the year 1954. This can go to support the allegation that Dalmia knew about the shady transactions which were in progress from early August, 1954.

218. The learned Sessions Judge relied on the following circumstances for his conclusion that Dalmia was synonymous with Bharat Union Agencies.

"1. The speculation business of Dalmia Cement and Paper Marketing Co. Ltd., the paid up capital of which nearly all belonged to Dalmia was on the liquidation of that company taken over by Bharat Union Agencies and more or less the same persons conducted the business of Bharat Union Agencies who were previously looking after Dalmia Cement & Paper Marketing Company.

2. Bharat Union Agencies was known and taken to be the concern of Dalmia by its then Accountant Dhawan and by the brokers with whom it had dealings.

3. Chokhani, who held power of attorney on behalf of Dalmia and Bharat Union Agencies, told the brokers at the time he gave business of Bharat Union Agencies to them that it was the business of Dalmia.

4. The salaries of personal and domestic employees of Dilemma were paid by Bharat Union Agencies sand those payments were debited to the Salaries Account of the company. The personal employees of Dalmia were thus treated as the employees of Bharat Union Agencies.

5. The business done in the name of Dalmia with Jagdish Jagmohan Kapadia was treated as the business of Bharat Union Agencies.

6. The funds of Bharat Union Agencies were used to discharge an obligation personally undertaken by Dalmia. The price of the shares purchased in the process in the name of Dalmia was paid out of the fund of Bharat Union Agencies and the purchase of those shares was treated in the books of Bharat Union Agencies as part of its investment.

7. When sister-in-law of Dalmia wanted money it was lent to her out of the found of Bharat Union Agencies and in the books of that company no interest was charged form her".

219. It has been strenuously urged by Mr. Dingle Foot that what certain persons considered to be the nature of the Union Agencies or what Chokhani told them could not be evidence against Dalmia with respect to the question whether he could be said to be identical with the Union Agencies. We need not consider this legal objection as it is not very necessary to rely on these considerations for the purposes of the finding on this point. It may be said, however, that prima facie there seems to be no legal bar to the admissibility of Dagduas that Chokhani told certain persons that Union Agencies was the business of Dalmia. He had authority to represent Dalmia and Union Agencies on the basis of the power of attorney held by him from both. His statement would thus appear to be the statement of their 'agent' in the course of the business. We have considered the reasons given for the other findings by the learned Sessions Judge and accepted by the High Court and are of opinion that the findings are correct and that they can lead to no other conclusion than that no distinction existed between Dalmia and the Union Agencies and that whenever it suited Dalmia or the interests of the Union Agencies such transactions of one could be changed to those on behalf of the other. We may, however, refer to one matter.

220. Dalmia admits having purchased shares of Dalmia Jain Airways of the face value of Rs. 6,00,000/- from Anis Haji Ali Mohammad, on behalf of the Union Agencies, in his own name, though the real purchaser was the Union Agencies and that he did so as the seller and his solicitor did not agree to sell the shares in the name of the latter. The explanation does not appear to be satisfactory. The seller had no interest in whose name the sale took place so long as he gets the money for the shares he was selling.

221. Mr. Dingle Foot has urged that these various considerations may indicate strong association of Dalmia with the Union Agencies but are not sufficient to establish his

complete identity with it, as is necessary to establish in view of the charges framed. Dalmia's identity with Union Agencies or having great interest in it is really a matter providing motive for Dalmia's going to the length of entering into a conspiracy to raise fund of meeting the losses of the Union Agencies by diverting the funds of he Insurance Company and which would amount to committing criminal breach of trust.

222. Dalmia admits having given instructions about the business of the Union Agencies in 1954 when he was not a Director of that company, and in 1955 when he was not even a shareholder.

223. Dalmia's own statement to Annadhanam on September 20, 1955, goes to support the conclusion in this respect. He stated to him then that the had lost other moneys in speculation which he did through his private companies and that most of those transactions were through the Union Agencies.

224. Further, the charge said that he committed criminal breach of trust of the funds of the Insurance Company by wilfully suffering Chokhani to dishonestly misappropriate them and dishonestly use them or dispose of them in violation of the directions of law and the implied contract existing between Dalmia and the Insurance Company prescribing the mode in which such trust was to be discharged. It was in describing the manner of the alleged dishonest misappropriation or the use or disposal of the said funds in violation of the legal and contractual directions that the charge under section 409 I.P.C. described the manner to consist of withdrawing the funds from the banks by cheques in favour of Bhagwati Trading Company and by the utilisation of those funds for meeting losses suffered by Dalmia in forward transactions in shares carried on in the name of Bharat Union Agencies, and for other purposed not connected with the affairs of the Insurance Company. Even in this description of the manner, the emphasis ought to be placed on the expression 'for meeting losses suffered by Dalmia in forward transactions in shares carried on in the name of the Bharat Union Agencies and for other purposes not connected with the affairs of the said Bharat Insurance Company' and not on the alleged losses suffered by Dalmia personally. We are therefore of opinion that firstly the evidence is adequate to establish that Dalmia and the Union Agencies can be said to be interchangeable and, secondly, that even if that is not possible to say, Dalmia had sufficient motive, on account of his intimate relations with the Union Agencies, for committing breach of trust, and thirdly, that the second finding does not in any way adversely affect the establishment of the offence under section 409 I.P.C. against Dalmia even though the charge described the utilisation of the money in a somewhat different manner.

225. The entire scheme of the transactions must start at the instance of the person or persons who were likely to suffer in case the losses of the Union Agencies were not paid at the proper time. There is no doubt that in the first instance it would be the Union Agencies as a company which would suffer in its credit and its activities. We have found

that Dalmia was so intimately connected with this company as could make him a sort of sole proprietor to the company. He was to lose immensely in case the credit of the Union Agencies suffered, as it was commonly believed to be his concern and he had connections and control over a number of business concerns and had a gift stake in the business world. His prestige and credit were abound to suffer severely as a result of the Union Agencies losing credit in the market. There is evidence on record that if the losses are not promptly paid, the defaulter would suffer in credit and may not be able to persuade the brokers to enter into contracts with him.

226. It is suggested for Dalmia that Chokhani had a greater interest in seeing that Union Agencies does no suffer in credit. We do not agree. If the Union Agencies failed on account of its losing credit in the market on its failure to meet the losses, Chokhani may stand to lose his service with the Union Agencies. That would have meant the loss of a few hundred rupees a month. In fact, he need not have suffer any loss. He could have been employed by Dalmia who had great confidence in him and whom he had been serving faithfully for a long time. Chokhani, as agent of Dalmia, had certainly credit in the market. There is evidence of his good reputation, but much of it must be have been the result of his association with Dalmia and his concerns. He really enjoyed reflected glory. He had no personal interest in the matter as Dalmia had. We therefore do not consider this suggestion to be sound and are of opinion that Dalmia was the only person who had to devise means to meet the losses of the Union Agencies.

227. Further, Dalmia admits that he used to give instructions with regard to the speculation-in-shares business of the Union Agencies at Calcutta and Delhi during 1954 and 1955, and stated, in answer to question No. 210 with respect to the evidence that Delhi Office of the Union Agencies used to supply funds for meeting the losses suffered by it in the speculation business at Calcutta and Delhi:

"It is correct that as the result of shares, speculation business at Calcutta and Delhi Bharat Union Agencies suffered losses in the final analysis. I was once told by R. P. Mittal on telephone from Calcutta that G. L. Chokhani had informed him that the Bombay Office would arrange for funds for the loses suffered by the Calcutta Office of the Bharat Union Agencies. It was within my knowledge that if the Bombay Office of the Bharat Union Agencies was not in a position to supply full fund for meeting the losses at Calcutta the Delhi Office of the Company would supply those funds."

228. And, in answer to question No. 211 which referred to the evidence about the Delhi Office of the Union, Agencies being short of liquid fund from August, 1954, onward and in 1955, to meet the losses, he said:

"It was within my knowledge that Bharat Union Agencies was holding very large number of shares. But I did not know the name of the Companies of which the shares were held by the Bharat Union Agencies and the quantum of those shares."

229. Dalmia also admitted his knowledge that Chokhani had entered into contract for the forward sale of Tata Shares at Bombay on behalf of the Union Agencies during 1954 and 1955 and that the Union Agencies suffered losses on this business, but stated that he did not know the extent or details of the losses. Dalmia must be expected not only to know the losses which the Union Agencies suffered, but also their extent. He is also expected to devise or at least know the ways in which those loses would be met. A mere vague knowledge, as stated, about the Union Agencies possessing a number of shares could not have been sufficient satisfaction about the losses being successfully met. It is to be noted that he did to deny that the Delhi Office was short of funds and that it used to supply funds to meet the losses.

230. Further, if Dalmia's statement about Mittal's communication to him be correct, it would appear that when the Bombay Office of the Union Agencies was not in a position to meet the losses, Chokhani would not think of arranging, on his own, funds to meet the losses, but would first approach the Delhi Office of the Union Agencies. The Delhi Office, then, if unable to meet the losses, would necessarily obtain instructions from Dalmia. It can therefore be legitimately concluded that Dalmia alone, or in consultation with Chokhani devised the scheme of the transactions which led to the diversion of the fund of the Insurance Company to the Union Agencies and carried it out with the help of the other appellants.

231. It has been contended both for Chokhani and for Dalmia that funds could have been found to meet the losses of the Union Agencies by means other than the diversion of the Insurance Company's funds. We need not discuss whether the shares held by the Union Agencies at the time could be sold to raise the funds or whether on the mere credit of Dalmia funds could be raised in no time. These courses were not adopted. The selling of the shares which the Union Agencies possessed, might itself affect its credit, and that no business concern desires, especially a concern dealing in share speculation business.

232. Dalmia had been in telephonic communication with Chokhani. It is significant, even thought there is no evidence about the content of the conversations, that there had been frequent calls, during the period of the losses in August and September, 1954, between Dalmia's telephone and that of Chokhani at Bombay. That was the period when Dalmia was confronted with the position of arranging sufficient funds at Bombay for the purpose of diverting them to the Union Agencies. Very heavy losses were suffered in July and August, 1955. Securities of the face value of Rs. 79,00,000 and Rs. 60,00,000 were purchased in July and August, 1955, respectively. A very large number of telephone calls took place during that period between Dalmia at Delhi and Chokhani at Bombay. It is true that during certain periods of losses, the record of telephonic communications does not indicate that any telephonic communication took place. We have already stated, in considering the transactions, that the pattern of action to be taken had been fully determined by the course adopted in the first few transactions. Chokhani acted according to that pattern. The only thing that he had to do in connection with further contingencies

of demands for losses, was to sent for securities form Delhi when the funds at Bombay were low. Such requests for the transfer of securities could be made in good time or by telephonic communication or even by letter addressed to Dalmia personally. The fact remains that a number of securities were sent form Delhi to Bombay under the directions of Dalmia when there was not apparent reason to sent them other then the need to meet losses incurred or expected.

233. Dalmia informed the Imperial Bank at Delhi about his power to deal with securities on September 4, 1954, though he had that power form September, 1951, itself. This was at the really stage of the commencement of the losses of the Union Agencies suffered for a period of over a year and the planned diversion of the funds of the Insurance Company to meet the losses of the Union Agencies.

234. Raghunath Rai states that on the resignation of Chordia it was deemed necessary that the powers of the Chairman be registered with the Bank so that he be in a position to operate on the securities' safe-custody account of the company with the Bank, and that the sent the copy of the bye-laws etc., without the instructions of Dalmia, though with his knowledge, as he was told that it was necessary for the purpose of the withdrawal of the securities for which he had given instructions. This was, however, not necessary, as Raghunath Rai had the authority to endorse, transfer, negotiate and or deal with Government securities, etc., standing in the name of the company. We are of opinion that Dalmia took this step to enable him to withdrawn the securities form the Bank when urgently required and another person authorised to withdraw be not available or be not prepared to withdraw them on his own.

235. The position of the securities may be briefly described on the basis of Appendix I of the Investigator's report Exhibit D. 74. The amount of securities at Bombay with the Chartered Bank, on June 30, 1953, was Rs. 53,25,000 out of a total worth Rs. 2,69,57,200. The amount of securities in the Bank continued to be the same till March 31, 1954, even thought the total amount of securities rose to Rs. 3,04,88,600. Thereafter, there had been a depletion of securities with the Chartered Bank at Bombay with the result that on December 31, 1954, it had no securities in deposit. The amount of securities in the Imperial Bank of India, New Delhi, also fell subsequent to June 30, 1954. It came down to Rs. 2,60,000 on March 31, 1955, from Rs. 59,11,100 on June 30, 1954.

236. Securities worth Rs. 52,00,000 were in the two office on June 30, 1953. The amount of such securities kept on steadily increasing. It was Rs. 1,88,47,500 from September, 1953, to March 31, 1954. Thereafter, it rapidly increased every quarter, with the result that on March 31, 1955, the securities worth Rs. 3,76,50,804 out of the total worth Rs. 3,86,97,204 were in the offices. The overall position of the securities must have been known to Dalmia. The saving of Bank charges is no good explanation for keeping the securities of such a large amount, which formed a large percentage of the Company's holdings, in the

office and not in deposit with a recognized bank. The explanation seems to be that most of the securities were to really in existence.

237. Raghunath Rai states that he spoke to Dalmia a number of times, presumably, in July and August, 1955, about the non-receipt of the securities of the value of Rs. 81,25,000, Rs. 75,00,000 and Rs. 69,00,000 which were purchased in the months of April-May, July and August 1955 respectively, and Dalmia used to tell him that as the purchases and sale of securities had to be effected at Bombay, Chokhani could send them to the head office only after it had been decided about which securities would be finally retained by the Insurance Company. This statement implies that Dalmia knew and anticipated the sale of those securities and such a sale of those securities, as already mentioned, could not be in the usual courses of business of the company. The securities were to be sold only if by the next due date for payment of interest they could not be recouped and did not exist with the company. Such an inference is sufficient to impute Dalmia with the knowledge of the working of the scheme.

238. Securities were sent to Bombay from Delhi seven times during the relevant period and they were of the face value of Rs. 2,14,82,500. Securities of the face value of Rs. 17,50,000 were withdrawn from the Imperial Bank, Delhi, on September 4, 1954 - vide Exhibit P. 1351. They were sold at Bombay on September 9, 1954. Thereafter, 3% 1957 securities of the face value of Rs. 37,75,000 were sent on January 6, 1955. Raghunath Rai depose that he withdrew these from the Imperial Bank, Delhi, under the directions of Dalmia, and that he handed them over to Dalmia. These securities did reach Bombay. There is no clear evidence as to how they went from Delhi to Bombay. They were sold on January 11, 1955.

239. Eleven stock certificates of the face value of Rs. 57,72,000 were sent to Bombay on March 16, 1955, vide letter Ex, D. 3. Thereafter, stock certificates were sent thrice in July 1955. Stock certificate in respect of 3% Bombay Loan of 1955, of the face value of Rs. 29,75,000 was sent to Bombay on July 15, 1955 - vide Exhibit P. 923. On the next day, i.e., on July 16, 1955, stock certificates of 3% Bombay Loan of 1955 of the face value of Rs. 15,50,000 and stock certificates of 3% Loan of Government of Madhya Pradesh of the face value of Rs. 60,500 were sent to Bombay - vide Exs. D. 1 and D. 2 respectively.

240. Lastly, stock certificates of 2 3/4% Loan of 1962 of the face value of Rs. 56,00,000 were sent to Bombay on August 5, 1955.

241. Letters Exhibits D. 3 and P. 892 state that the stock certificates mentioned therein were bring sent 'under instructions of the Chairman'.

242. Raghunath Rai has deposed that the other stock certificates send with letters Exhibits D. 1, D. 2 and P. 923, were sent by him as the securities with respect to which those certificates were granted were maturing in September and were redeemable at Bombay.

It has been urged that they could have been redeemed at Delhi and that they need not have been sent by Raghunath Rai on his own a couple of months earlier. We do not consider the sending of the securities a month and a half or two months earlier than the date of maturity to be unjustified in the cause of business. It is to be notices that what was sent were the stock certificates and it might have been necessary to get the securities covered by those certificates for the purpose of redemption and that might have taken time. No pointed question was put to Raghunath Rai as to why he sent the securities two moths ahead of the date of maturity.

243. Dalmia denies that he gave any instructions for the sending of the securities. There seems to us to be no good reason why the expression 'under the instructions of the Chairman' would be noted in letters Exhibits D. 3 and P. 892, unless that represented the true statement of fact.

244. We have already discussed and expressed the opinion, in 'considering the evidence of Raghunath Rai, that Raghunath Rai was told by Dalmia, when informed of the purchase or sale of securities, that had been done under instructions and that he had confirmed them. We may further state that there is no resolution of the Board of Directors empowering Chokhani to deal with the securities. He was, however, empowered by resolutions at the meeting of the Board data June 29, 1953, to lodge and receive G. P. Notes from the Reserve Bank of India for verification and endorsement on the same and to endorse or withdraw the G. P. Notes on behalf of the company in the capacity of an agent. Chokhani was also empowered by a resolution dated October 1, 1953, to deposit and withdraw Government securities held in safe custody account by the company. The aforesaid powers conferred on Chokhani are different from the powers of sale or purchase of securities.

245. Dalmia has stated that he authorised Chokhani to purchase securities in about October, 1953, when he was to leave for abroad and that thereafter Chokhani had been purchasing and selling securities in the exercise of that authority without consulting him. It is urged for him that Raghunath Rai's statement that he used to obtain confirmation of the purchase and sale of the securities from him cannot be true, as there was no necessity for such confirmation. Chokhani does not appear to have exercised any such authority during the period Dalmia was aboard or till August, 1954, and therefore Dalmia's statement does not appear to be correct.

246. Chokhani and Raghunath Rai were authorised to operate upon the Bank account at Bombay on October 1, 1953. Dalmia states, in paragraph 17 of the written statement data March 30, 1959, that this wad done as Chokhani had been given the authority for the sale and purchases of securities at the same time. The Board did not give any such authority to Chokhani and if the system of joint signatures was introduced for the reason alleged, there seems to be no good reason why the Board itself did not resolve that Chokhani be

empowered to sell and purchase securities. The explanation for the interdict of joint-signature scheme does not stand to reason.

247. Even if it be not correct that Raghunath Rai had to obtain confirmation, it stands to reason that he should report such transactions on the part of Chokhani to the Chairman, if not necessarily for his approval, at least for his information, as Chokhani had no authority to purchase and sell securities. These transaction have to be confirmed by the Board of Directors and therefore confirmation of the Chairman who was the only person authorised to purchase and sell securities was natural.

248. Raghunath Rai states that when he received no reply to his letter dated November 19, 1954, asking for distinctive numbers of securities not received at headquarters. Dilemma said that he would arrange for the dispatch of those securities from Bombay to the head office. No action was apparently taken in that connection. Raghunath Rai further states that on March 23, 1955, when he spoke to Dalmia about the non-receipt of certain securities Dalmia told him that he had already instructed Chokhani for the conversion of those securities into stock certificates and that it was in view of its statement of Dalmia that he had written letter Exhibit P. 916 to Chokhani stating therein.

"Your were requested for conversion of the above said G. P. Notes into Stock Certificate. The said certificate has not been received by us as yet. It may be sent now immediately as it is required for the inspection of the company's auditors."
249. This indicates that Dalmia was in the know of the position of securities and, on his own, gave instructions to Chokhani to convert certain securities into inscribed stock.

250. Dalmia admits Raghunath Rai's speaking to him about the non-receipt of the securities and his telling him that he would ask Chokhani to send them when he would happen to talk to him on the telephone.

251. Mention has already been made of securities of the face value of Rs. 17,50,000 being sent to Bombay from Delhi in the first week of September 1954. At the time securities of the face value of Rs. 53,25,000 were in deposit in the Chartered Bank at Bombay. There was thus no need for sending these securities from Delhi. Chokhani could have withdrawn the necessary securities from the Bank at Bombay. This indicates that on learning that there were no liquid funds for meeting the losses at Bombay, Dalmia himself decided to send these securities to Bombay for sale and for thus providing for the liquid funds there for meeting the cost of the intended fictitious purchase of securities to meet the losses of the Union Agencies. It is not suggested that these securities were sent to Bombay at the request of Chokhani.

252. Securities withdrawn in January, 1955, and stock certificates sent in March and August, 1955, coincided with the period when the Union Agencies suffered losses and

the funds of the Insurance Company at Bombay were low and were insufficient to meet the losses of the Union Agencies.

3% 1957 securities of the face value of Rs. 46,00,000 (Rs. 37,75,000 sent from Delhi and Rs. 8,25,000 withdrawn from the Chartered Bank at Bombay) were sold on January 11, 1955, and the proceeds were utilised in purchasing 2-3/4% 1962 securities of the face values of Rs. 46,00,000 in two lots, one of Rs. 35,00,000 and the other of Rs. 11,00,000.

253. On January 11, 1955, Rs. 3,34,039-15-3 the balance of the sale proceeds was deposited in the accounts of the Insurance Company. Inscribed stock for these securities worth Rs. 46,00,000 was duly obtained. Dalmia himself handed over inscribed stock certificate to Raghunath Rai some time in the end of January 1955.

254. This purchases, though genuine, was not a purchase in the ordinary course of business, but was for the purpose of procuring the inscribed stock certificate to satisfy the auditors, as already discussed earlier, that similar securities purchased in December, 1954 existed. The auditor were than to audit accounts of 1954 and not of 1955. In this connection reference may be made to Dalmia's attitude to the auditors surprise inspection on September 9, 1954, on the ground that they could not ask for inspection of securities purchased in 1955.

255. It may also be mentioned that purchasing and selling securities was not really the business of the Insurance Company. The Insurance Company had to invest its money and, under the statutory requirements, had to invest a certain portion at least in Government Securities. The value of Government securities does not fluctuate much. Dalmia states, in answer to question No. 25 (under section 342 Cr.P.C): 'Government securities are gift edged securities and there is very small fluctuation in these.' The question of purchasing and selling of securities with view - to profit could not therefore be the ordinary business of the Insurance Company. It has to purchase securities when the statutory requirements make it necessary, or when it has got funds which could be invested.

256. The Insurance Company had Government of India 3% Loan of 1957 in deposit with the Chartered Bank, Bombay, the face value of the securities being Rs. 53,25,000, from April 6, 1951, onward. The fact that these securities remained intact for a period of over three years, bears out our view that the purchasing and selling of securities was not the normal business of the Insurance Company, Securities are purchased for investment and are redeemed on the date of maturity.

257. In this connection, reference may be made to Khanna's statement in answered to question in cross-examination - The frequency of transactions relating to purchase and sale of securities depends upon the share market and its trends? His answer was that that was so, but that it also depended on the character of the company making the investment

in securities. It may be said that the trend of the share market will only guide the purchase or sale transactions of securities of a company speculating in shares, like the Union Agencies, but will not affect the purchases and sale by a company whose business is not speculation of shares like the Insurance Company.

258. Raghunath Rai states that when on September 9, 1955, the auditors wanted the production of the securities, said to be at Bombay, in the next two days, he informed Dalmia about it and Dalmia said that he would arrange for their production after two days. Dalmia, however, took no steps to contact Chokhani at Bombay, but rang up Khanna instead and asked him to certify the accounts as they had to be laid before the Company by September 30, and told him that everything was in order, that he would give all satisfaction later, soon after Chokhani was available and that he did not ask for an extension of time for the filling of the accounts as that word affect the prestige of the company. On September 10, 1955, when Raghunath Rai handed over the letter Exhibit P. 2 of even date from the auditors asking him to produce a statement of investments as on September 9, 1955, along with the securities or evidence if they were with other persons, by Tuesday, September 13, Dalmia had stated that Chokhani's mother had died and that he would himself arrange for the inspection of securities direct with the auditors. Chokhani's mother died on September 4, 1955. Dalmia had no reason to tell Raghunath Rai on September 9 that the securities would be produced for inspection in the next two days, unless he believed that he could get them in that time on contacting Chokhani, or did not wish to tell him the real position. Dalmia states that he contacted Chokhani for the first time on September 15, the last days of the morning and then learnt form Chokhani that the securities were not in existence, the money withdrawn for their purchase having been lent to the Union Agencies. The various statement made by Dalmia in these circumstances and his conduct go to show that he had a guilty mind and when he made the statement to Raghunath Rai that the securities would be produced within two days, he trusted that he would be persuasive enough for the auditors to pass the accounts without further insistence on the production of those securities.

259. Dilemma's not going to Mr. Kaul's Officer on September 16, and sending and relation to inform the latter of the shortfall in securities can have no other explanation than that he was guilty and therefore did not desire to have any direct talk about the matter with Mr. Kaul. There was no need to avoid meeting him and miss the opportunity of explaining fully what Chokhani had done without his own knowledge.

260. Dalmia has admitted that he sent his relations to Mr. Kaul and has also admitted that what they stated to Mr. Kaul was under his instructions. He states in answer to questions No 450, that after the telephonic talk with Chokhani on the evening of September 15, he consulted his brother Jai Dayal Dalmia and his son-in-law S. P. Jain about the position and about the action to be taken and that it was decided between them before they left for the office of Mr. Kaul that they would tell him that either the securities would be restored or their price would be paid off as would be desired by the Government and in

answer to question No. 451, said that it was correct that these persons told Mr. Kaul that considerable amount of the securities were missing and that they were to make good the loss. It is clear that these persons decided not to disclose to Mr. Kaul that the securities were not in stock because they were not actually purchased and the amount shown to be spend on them was lend to the Union Agencies. It was not a case of the securities missing but a case of the Insurance Company not getting those securities at all. It is a reasonable inference from this conduct of Dalmia that he did not go himself to Mr. Kaul as he was guilty and would have around it inconvenient to explain to him how the shortfall had taken place.

261. We may now discuss the evidence relating to Dalmia's making a confession to Annadhanam. Annadhanam was a Chartered Accountant and partner of the Firms of Chartered Accountants M/s. Khanna and Annadhanam, New Delhi, and he was appointed by the Central Government, in exercise of its powers under section 33(1) of the Insurance Act, 1938 on September 19, 1955, to investigate into the affairs of the Bharat Insurance Company and to report to the Government on such investigation. He started this work on "September 20. Annadhanam, having learnt from Raghunath Rai about the missing of a number of Government securities and the amount of their value form the statement prepared by him, called Dalmia to his office that evening in order to make a statement. Dalmia made the Dagduas Exhibits P. 10 and P. 11. P. 10 reads:

"I have misappropriated securities of the order of Rs. 2,20,00,000 of the Bharat Insurance Company Ltd. I have lost this money in speculation."
262. Exhibit P. 11 reads:

"Further states on solemn affirmation.

At any cost, I want to pay full amount by requesting my relatives or myself in the interest of the policy holders."

263. Dalmia admits having made the statement Exhibit P. 11. but made some inconsistent Dagduas about his making the statement Exhibit P. 10. It is said that he never made that statement, but in certain circumstance he asked the Investigator to write what he considered proper and that he signed what Annadhanam recorded. He did not directly state, but it was suggested in cross-examination of Annadhanam and in his written statement that he made that statement as a result of inducement and promise held out by either Annadhanam of Khanna (the other partner of M/s. Khanna and Annadhanam, Chartered Accountants, New Delhi) or both.

264. Dalmia's contention that Exhibit P. 10 was inadmissible in evidence, it being not voluntary, was repelled by the learned Sessions Judge, but was, in a way, accepted by the High Court which did not cancer it safe to rely on it. The learned Solicitor General urged that the confession Exhibit P. 10 was voluntary and was wrongly not taken into

consideration by the High Court. Mr. Dingle Foot contended that the High Court took the proper view and the confession was not voluntary. He further urged that the confession was hit by the provision of clause (3) of Article 20 of the Constitution.

265. The only witnesses with respect to the recording of the statement Exhibit P. 10 are Annadhanam and Khanna. The third person who knew about it and has stated about it is Dalmia himself. He has given his version both in his statement recorded under section 342 Cr.P.C., and in his written statement filed on October 24, 1958.

266. We may first note the relevant statement in this connection before decussating the question whether the alleged confession is voluntary and therefore admissible in evidence. Annadhanam made the following relevant statements:

Dalmia came to the office at 6.30 p.m., though the appointment was for 5.30 p.m. His companion stayed outside the office room. Annadhanam asked Dalmia the explanation with regard to the missing securities. Dalmia wanted two hours' time to give the explanation. The was refused. He then asked for half-an-hour's time at least. This was allowed. Dalmia went out of the office, but returned within ten minutes and said that he would make the statement and it be recorded. Annadhanam, in the exercise of the powers under section 33(3) of the Insurance Act, administered oath to Dalmia and recorded the statement Exhibit P. 10. It was read over to Dalmia. Dalmia admitted it to be correct and signed it. Shortly after, Dalmia stated that he wanted to add one more sentence to his statement. He was again administered oath and his further statement, Exhibit P. 11 was recorded. This was also read over and Dalmia signed it, admitting its accuracy.

267. Annadhanam states that no threat or inducement or promise was offered to Dalmia before he made these statements.

268. A third statement is also attributed to Dalmia and it is that when Dalmia was going away and was nearing the stairs-case, Annadhanam asked him whether the speculation in which he had lost the money was carried on by him in the company's account or in his private account. Dalmia replied that he had lost that money in his personal speculation business which was carried on chiefly thought one of his private companies, viz., the Union Agencies. This statement was not recorded in writing. Annadhanam did not consider it necessary, but this was mentioned by Annadhanam in his supplementary interim report, Exhibit P. 13, which he submitted to the Deputy Secretary, Ministry of Finance, on September 21, 1955. Annadhanam also mentioned about the statement recorded in Exhibit P. 10 in his interim report, Exhibit P. 12, dated September 21, 1955, to the Deputy Secretary Ministry of Finance.

269. In-cross-examination, Annadhanam stated that he did not send for Dilemma to the office of the Bharat Insurance Company when he had examined Raghunath Rai, as he had not made up his mind with respect to the further action to be taken. He denied that he had any telephonic talk with Mr. Kaul, the Deputy Secretary, Ministry of Finance,

prior to the recording of the statements, Exhibits P. 10 and P. 11. His explanation for keeping Khanna with him during the examination of Dalmia was that Khanna had done the detailed auditing of the accounts of the company in pursuance of the firm Khanna and Annadhanam being appointed auditors for 1954 by the Insurance Company. He denied that Dalmia told him that he had no personal knowledge of the securities and that the only information he had form Chokhani was that the latter had given money on loan to the Union Agencies. He stated that the statements Exhibits P. 10 and 11 were recorded in the very words of Dalmia. The statements were not actually read over to Dalmia but Dalmia himself read them over.

270. Annadhanam denied that he told Dalmia that he would not be prosecuted if he made the Dagduas Exhibit P. 10 and P. 11 and deposited the money alleged to have been embezzled and further stated that Khanna did not tell this to Dalmia. He denied that Exhibit P. 10 was never made by Dalmia and was false and reiterated that that statement was made by Dalmia. He did not consider it proper to reduce to writing every word of what transpired between him and Dalmia from the moments of the latter's arrival in his office till the time of his departure, and considered it proper to reduce in writing the statement which was made with regard to the missing securities. He further stated that his statement above Dalmia's making Dagduas Exhibits P. 10 and P. 11 voluntarily was on account of the facts that Dalmia himself volunteered to make those statement and that he himself had offered no inducements or promises.

271. In cross-examination by Mr. T. C. Mathur, he denied that he told Dalmia that as Chairman of the Insurance Company he should own responsibility for the missing securities and that that would make him a greater Dilemma because he was prepared to pay for the short-fall and further denied that it was on account of the suggested statement that Dalmia had asked for two hours' time before making his statement.

272. In cross-examination by Dalmia personally, Annadhanam explained the discrepancy in the amount of the securities admitted to be misappropriated. Exhibit P. 10, mentions the securities to be of the order of Rs. 2,20,00,000/- In his report Exhibit P. 12, he stated the admission to be with respect to securities of the face value of Rs. 2,22,22,000/-. The explanation is that in the interim report he worked out the face value of the missing securities to be Rs. 2,22,22,000/-, and he mentioned this figures in his report as Dalmia had admitted the misappropriation of the securities. Nothing sinister can be inferred from this variation.

273. Khanna practically supports the statement of Annadhanam, not only with respect of Exhibit P. 10 and P. 11, but also with respect to the third statement said to have been made near the staircase. His statement in cross-examination that it was possible that Annadhanam might haves asked the companion of Dalmia to stay outside the offices as the proceedings were of a confidential nature, does not in any way belie Annadhanam's statement as this statement itself is not define. In answer to the question whether it struck

him rather improper that Dalmia made the statement Exhibit P. 10 in view of his previous statement to Khanna that satisfaction would be afforded to the auditors on the points raised by them after Chokhani was available, he replied, that his own feeling was that the Dagduas Exhibits P. 10 and P. 11 were the natural culminate of what he learned in the office of Mr. Kaul on September 16, 1955. He also denied that he told Dalmia that whoever was at fault, the ultimate responsibility would fall on the Chairman and other Directors as well as the officers of the Insurance Company by ways of misfeasance, and that Dalmia should sign the statement which would be prepared by himself and Annadhanam so that the other Directors and the officers of the Insurance Company be not harassed and that if this suggestion was accepted by Dalmia he would save every one and become a greater Dalmia. he denied the suggestion that when Dalmia talked of his charitable disposition in his office on September 20, 1955, is should have been in answer to his (Khanna's) provocative remarks wherein he had makes insinuations regarding Dilemma's interior and stated that he was merely a silent spectator of who actually had happened in the office that day. He further stated that no question arises of Annadhanam's attacking the integrity of Dalmia on September 20, 1955. He denied that Mr. Kaul had told him or Annadhanam on September 19, when the order appointing Annadhanam Investigator was delivered, that Dilemma had to be implicated in a criminal case.

274. Khanna denied that his tone and remarks during the discussion were very persuasive and that told Dalmia that it was very great of him that he was going to pay the amount represented by the short-fall of the securities. He also denied the suggestion that Dalmia told him and Annadhanam on September 20, at their office, that he had no knowledge of the missing securities, that it, appeared that the securities had either been sold or pledged and that the money had been paid to the Union Agencies, which Dalmia did not like, and that in the interest of the policy holders and the Insurance Company Dalmia was prepared to pay the amount of he short-fall of securities, and also that when Dalmia spoke about the securities being sold or pledged, Khanna and Annadhanam remarked that the securities has been misappropriated. He denied that he told Dalmia that if he took, personal responsibility in the matter, it would be only then that no action would be taken and stated that he and Annadhanam were nobody to give any assurance to Dalmia.

275. Dalmia stated, in this statement under section 342 Cr.P.C. on November 7, 1958, that his companion Raghunath Das Dalmia stayed out because he was not allowed to stay with him inside the office. He denied that he first spoke about his charitable disposition and piety when asked by Annadhanam to explain about the missing securities and stated that there could be no occasion for him to talk at that time of his piety and charitable disposition when he had been specifically called to explain with regard to the missing securities. His version of what took place may now be quoted (answer to question No. 471) in his own words:

"What actually happened was that I told Shri Annadhanam that I had learnt from G. L. Chokhani that the amount of the missing securities had been lent temporarily on behalf of the Bharat Insurance Company by Shri G. L. Chokhani to Bharat Union Agencies and that the amount had been lost in speculation. Shri Annadhanam then asked me about the missing securities. I then told him that I did not know as to whether the securities had been sole or mortgaged. My replies here being noted by Shri Annadhanam on a piece of paper. Shri Annadhanam then asked me as to when the securities has been sold or mortgaged I replied that I did not know with regard to the time when the securities had been sold or mortgaged. Shri Annadhanam then asked me as to what were the places where there were offices of Bharat Union Agencies. I then told him that the offices were at Bombay and Delhi. I than remarked that whatever has happened, I wanted to pay the amount of the missing securities as the interest of the policy holders of the Bharat Insurance Company were close to my heart. During the course of that talk sometime Shri Annadhanam questioned and sometimes the questioned were asked by Shri Khanna. Shri Khanna then stated that I should forget the events of 9-9-1955. Shri Khanna further stated. 'We too are men of hearts. And not bereft of all feelings. We too have children. I am very much impressed by your officer of such a huge amount'. Shri Khanna also remarked that Shri Annadhanam had been appointed under section 33 of the Insurance Act to investigate into the affairs of the Bharat Insurance Company and as such the words of Shri Khanna and Shri Annadhanam would carry weight with the Government. Shri Khanna also stated other things but I do not remember them. I however distinctly remember that Shri Khanna stated to me that I should go to Shri C. D. Deshmukh and that Shri Khanna would also help me. I than replied that I would not like to go to Shri Deshmukh. Shri Khanna then remarked that the Government attached great importance to the interests of the policy holder and that if the matter got undue publicity it would cause a great loss to the policy holders. Shri Khanna accordingly stated that if I agreed to his suggestion the matter would be settled satisfactorily and without and publicity. It was in those circumstances that I asked for two hours' time to consult my brother and son-in-law."

276. He further stated that when Annadhanam told him that he could have half-an-hour's time and that more time could not be given as the report had to be given to the Government immediately, he objected to the shortness of time as he could not during that interval go to meet his brother and son-in-law and return to the office after consulting them and further told Annadhanam and Khanna to write whatever they considered proper as he has trust in them.

277. His reply to question No. 476 is significant and reads:

"The statement was read over to me. I then pointed out that what I has stated had not been incorporated in Ex. P. 10. I made no mention that the statement Ex. P. 10 was correct or not. Shri Annadhanam then reduced to writing, whatever was stated by me. That writing if Ex. P. 11 and is in the very words used by me."

278. He does not directly answer question No. 479:

"It is in evidence that the statement Ex. P. 11 was read over to you, you admitted it to be correct and signed it. Do your want to say anything with regard to that?"
and simply stated, 'I did sing that statement'. He denied the third statement alleged to have been made near the staircase.

279. Dalmia also stated that he had mentioned some facts about the statements Exhibits P. 10 and 11 in his written statement.

Paragraphs 53 to 59 of the written statement dated October, 24, 1958, refer to the circumstances about the making of the Dagduas Exhibits P. 10 and P. 11. In paragraph 53 Dalmia sates that the recording of his statement in Annadhanam's office took place as it was only there that Annadhanam and Khanna could get the necessary privacy. The insinuation is that they did not want any independent person to know of what transpired between them.

Paragraph 54 refers to a very minor discrepancy. Paragraph 55 really given the version of what took place in, Annadhanam's office.

280. We refer only to such portions of this version as do not find a place either in the suggestions made to Annadhanam and Khanna in their cross-examination or in the statement of Dalmia under section 342 or which be inconsistent with either of them. Dalmia stated that he told Annadhanam that the money that had been received by Bharat Union Agencies as loan belonged to Bharat Insurance Company and it appeared that the Union Agencies has lost that money in speculation. He further made Dagduas which tend to impute an inducement on the part of Khanna to him. These statement may be quoted in Dalmia's own words:

"On this Shri Khanna said that I was a gentleman, that I was prepared to pay such a heavy amount which has never been paid so far by anybody, that I should accept his advice and that I should act according to his suggestion and not involve myself in this dispute, the Government was not such a fool that they would not arrive at a quite settlement with a man who thought that his first duty was to protect the policy holders and thus by spoiling the credit of the Bharat Insurance Co. would harm its policy holders. If the Government did so it would be an act of cruelty to the policy holder, and when I was prepared to pay the money it (Government) would not take any such course by which I may have to face troubles, that my name would go very high, that he advised me as being my well-wisher that I should confess that I had taken the securities, that they would help me. They added that Shri Annadhanam has been appointed as Investigator by the Government and therefore their words carry weight with the Government, that it was my responsibility, being the Chairman and Principal Officer of the Bharat Insurance to pay the money. At that time I was restless to pay the money. I was influenced by their talk and anybody in my place would have trusted their words. I was impressed by their saying to me that no

wise Government or officers would take such action which would harm the policyholders through publicity. therefore I took that whatever Shri Khanna and Annadhanam were saying was for my good".
281. He stated that he asked Annadhanam and Khanna for two hours' time to consult his brother and son-in-law and that one of them said that they could not give more than half-an-hour. This is inconsistent with what he stated under section 342. He further stated:

"I told them to write in whatever way they thought best and whatever they wrote I simply signed. After signing when I read it, I pointed out to them that they had not written that I wanted to pay every pie of the policy holders and then they wrote as I told them and I signed".
282. The statement referred to his a short one, and it is nor possible to believe that he signed it without reading it.

283. Paragraph 56 makes no reference to the events of that evening, but paragraph 57 refers to the improbability of his writing things which brought trouble to him when just before it he has been talking irrelevantly. The question in cross-examination did suggest that he was forced to make irrelevant talk due to certain provocation. That does not fit in with the explanation in paragraph 57 that his talk about a temple was invented to supported the statement Annadhanam has made to the policy about Dalmia's talking irrelevantly. His statement 'How could I have acted in such a way without any positive assurances, implies that he did make the Dagduas though on getting assurances. In paragraph 58 he states:

"On 20th September Shri Khanna and Annadhanam had put all sorts of questions to Raghunath Rai but let me off after recording my statement in just one or two lines. Their design had succeeded and therefore they did not care to record any further question".
284. This again implies his making the statement P. 10. of course, after he had made the statement P. 10 there was no necessity of asking anything further. His statement explained the missing of the securities.

285. Reference may now be made to what Raghunath Rai, who was the Secretary of the Bharat Insurance Company, states in reference to the statement make by Dalmia to Annadhanam. Raghunath Rai states that when he went to Dalmia about 7 p.m. on September 20, 1955, and told him about the recording of his own statement by Annadhanam and the preparation of the statement about Exhibit P. 8 and about his talk regarding the securities at Bombay, Dalmia said: 'I have been myself in the office of the Investigator. He has recorded my statement wherein I have admitted the short-fall of the securities'. This also points to Dalmia's making the statement Exhibit P. 10.

286. Raghunath Rai and no admit, but simply said that Dalmia did tell him something when he was questioned as to whether Dalmia told him that he had been told by

Annadhanam and Khanna that if he has made the statement in accordance with their desire, there would be no trouble.

287. Dalmia evaded a direct answer to the question put to him under section 342, Cr.P.C. When question No. 482 was put to him with reference to this statement of Raghunath Rai he simply stated that he had briefly told Raghunath Rai with regard to what has transpired between him and Khanna and Annadhanam and that he had told Raghunath Rai that he need not worry.

288. The various Dagduas of Dalmia suggesting that inducement was held out to him by Khanna have not been believed by the Courts below, and we see no good reason to differ from their view. There was no reason for Annadhanam to record an incriminating statement like P. 10 and get it signed by Dalmia.

289. The High Court does not also hold that the confession was the result of some threat extended by Annadhanam. It did not consider it safe to rely upon it as it considered the confession to be no voluntary in a certain sense. It said:

"In that sense, therefore, it was not a voluntary statement, because although no words of threat or inducement were uttered by Mr. Annadhanam or anyone else, the circumstances had shaped themselves in such a manner that there was an implied offer of amnesty being granted to him if he did not persist in his negative behavior. He therefore made a statement that he had misappropriated the securities and immediately offered to make good the loss through his relatives".

290. What are those circumstances which implied an offer of amnesty being granted to him if he did not persist in his negative behavior, presumably in not giving out full information about the missing securities? Such circumstances, as can be gathered from the judgment of the High Court seem to be these: (1) Dalmia, a person of considerable courage in commercial affairs was not expected to make a voluntary confession. (2) He had evaded meeting the issue full-face whenever he could do so and did not appear before Mr. Kaul on September 16, 1955, to communicate to him the position about the securities. (3) He not only appeared before Annadhanam on hour late, but further asked for two hours' time before answering a simple question about the missing securities. (4) He made the statement when he felt cornered on account of the knowledge that Annadhanam has the authority of law to question and thought that the only manner of postponing the evil consequence of his act was by making the statement which would soften the attitude of the authorities toward him.

291. We are of opinion that none of these circumstance would make the confession invalid. Dalmia's knowledge that Annadhanam could record his statement under law and his desire to soften the attitude of the authorities by making the statement do not establish that he was coerced or compelled to make the statement. A person of the position, grit and intelligence of Dalmia could not be so coerced. A person making a

confession may be guided by any considerations which, according to him, would benefit him. Dalmia must have made the statement after weighing the consequences which he thought would be beneficial to him. His making the confession with a view to benefit himself would not make the confession not voluntary. A confession will not be voluntary only when it is make under some threat or inducement or promise, form a person in authority. Nothing of the kind happened in this case and the considerations mentioned in the High Court's judgment do not justify holding the confession to be not voluntary. We are therefore of opinion that Dalmia made the confession Exhibit P. 10, voluntarily.

292. It was argued in the High Court, for the State, that Dalmia thought it best to make the statement because, by doing so, he hoped to avoid the discovery of his entire scheme of conspiracy which had make it possible for him to misappropriate such a large amount of the assets of the Insurance Company. The High Court held that even if the confession was made for that purpose, it would not be a voluntary confession. We consider this ground to hold the confession involuntary unsound.

293. Mr. Dingle Foot has contended that the statement, Exhibit P. 10, is not correct, that Annadhanam and Mr. Kaul colluded and wanted to get a confession from Dalmia and that is why Annadhanam extracted the confession and that various circumstances would show that the confession was not voluntary in the sense that it was induced or obtained by threat. He has also urged that Annadhanam was 'a person in authority' for the purpose of section 24 of the Indian Evidence Act. These circumstances, according to him, are that Dalmia's companion was not allowed to stay in the office, that only half-an-hour was allowed for Dalmia to make consultations, that there had been a discussion before the recording of Exhibit P. 10, that no record on the discussion was maintained, that Annadhanam, as Investigator, was a public servant, that section 176, I.P.C. was applicable to Dalmia if he had not made the statement and that the statement on oath really amounted to an inquisition. It was further contended that if the confession was not inadmissible under section 24 of the Evidence Act; it was inadmissible in vie of clause (3) of Article 20 of the Constitution.

294. Mr. Dingle Foot has further contended that the statement, Ex. P. 10, is not correct inasmuch as it records; 'I have misappropriated securities of the order of rupees two crores, twenty lakhs of the Bharat Insurance Company Ltd.', that it could not be the language of Dalmia and that these facts supported Dalmia's contention that he simply signed what Annadhanam had written.

295. The public prosecutor had also questioned the correctness of this statement inasmuch as the actual misappropriation was done by Chokhani and Dalmia had merely suffered it and as the accurate statement would have been that there was misappropriation of he money equivalent of the securities.

296. We are of opinion that any vagueness in the expression could have been deliberate. The expression used was not such that Dalmia, even if he has a poor knowledge of English, could not have used. The statement was undoubtedly very brief. It cannot be expected that every word was used in that statement in the strict legal sense. The expression 'I misappropriated the securities' can only mean that he misappropriated the amount which had been either spent on the purchase of the securities which were not in existence, or realised by the sale of securities, and which was shown to be utilised in the fictitious purchase of securities. The main fact is that Dalmia did admit his personal part in the loss of the amount due to the shortfall in the securities.

297. There is nothing on record to justify any conclusion that Annadhanam and Mr. Kaul had colluded and wanted to get a confession from Dalmia. It is suggested that Annadhanam was annoyed with Dalmia on account of the latter's resentment at the conduct of Annadhanam and Khanna in conducting a surprise inspection of the accounts and securities on September 9, 1955. Raghunath Rai protested saying that they had already verified the securities and that they, as auditors for the year 1954, has no right to ask for the inspection of securities in the year 1955. At their insistence Raghunath Rai showed the securities.

298. After their return to the office, Dalmia rang them up and complained that they were unnecessarily harassing the officers of the Bharat insurance Company and had no right to inspect the securities. Dalmia was not satisfied with their assertion of their right to make a surprise inspection. There was nothing in this conduct of Dalmia which should have annoyed Annadhanam or Khanna. They did what they considered to be their duty and successfully met the opposition of Raghunath Rai. If there could be any grievance on account of their inspection, it would be to Dalmia who, as a result, would not be easily induced by them to make the confession.

299. Mr. Kaul, as Deputy Secretary, Ministry of Finance, did take part in the bringing of the matter to a head, not on account of any personal animus against Dalmia - such animus is not even alleged - but on account of his official duties, when he heard a rumour in Bombay that Dalmia has incurred heavy losses amounting to over tow crores of rupees through his speculative activities and had been drawing upon the funds of the Insurance company of which he was the Chairman to cover his losses. He asked Dalmia on September 14, 1955, to see him on the 15th in connection with the securities of the Insurance Company. When Dalmia met him on the 15th in the presence of Mr. Barve, Joint Secretary, he asked whether he had brought with him an account of the securities of the Bharat Insurance Company. Dalmia expressed his inability to do so for want of sufficient time and promised to bring the account on September 16. On the 16th, Dalmia did not go to Mr. Kaul's office; instead, his relations S. P. Jain and others met Mr. Kaul and made certain statements. Mr. Kaul submitted a note, Ex. D. 67, to the Finance Minister on September 18, 1955, and in his note suggested that of all the courses of action open to the Government, the one to the taken should be to proceed in the matter in the legal

manner and launch a prosecution as the acceptance of S. P. Jain's offer would amount to compounding with a criminal offender. Mr. Kaul stated that he did not consider it necessary to make any enquiry because the merits of the case against Dalmia remained unaffected whether the loss was rupees to crores or a few lakhs, more or less. On the basis of the aforesaid suggestion of Mr. Kaul and his using the expression 'courses against Shri Dalmia' it is urged that criminal action was contemplated against Dalmia and that there must have been some understanding between Mr. Kaul and Annadhanam about securing some sort of confession form Dalmia for the purpose of the case which was contemplated. We consider this suggestion farfetched and not worthy of acceptance. As a part of his duty, Mr. Kaul has to consider the various course of action open to the Government in connection with the alleged drawing upon the funds of the Insurance Company to cover his losses in the speculative activities. Mr. Kaul did not know what had actually transpired with respect to the securities. He had heard something in Bombay and then he was told about the short-fall in the securities of the Bharat Insurance Company and, naturally, he could contemplate that the alleged conduct could amount to a criminal offence. In fact, according to Mr. Kaul, a suggestion had been made to him by S. P. Jain that on the making up of the short-fall in securities no further action be taken which might affect the position of Dalmia and his other associates in business and of various businesses run by them. The fact that Annadhanam knew that there had been a short-fall of over rupees two crores prior to Dalmia's making the statement Exhibit P. 10 cannot justify the conclusion that Annadhanam and Mr. Kaul were in collusion.

300. Annadhanam does not admit he had ordered Dalmia's companion to stay out of he office. Even if he did, as stated by Dalmia, that would not mean that Annadhanam did it on purpose, the purpose being that he would act unfairly towards Dalmia and that there be not any witness of such an attempt. Similarly, the non-maintenance of the record of what conversation took place between Dalmia and the Investigator, does not point out to any sinister purpose on the part of Annadhanam. It was Annadhanam's discretion to examine a person in connection with the affairs of the Insurance Company. He put simple question to Dalmia and that required him to explain about the missing securities. So long as Dalmia did not make a statement in that connection, it was not necessary to make any record of the talk which might taken place between the two. In fact, Annadhanam had stated that the word 'discussion' used by him in his supplementary interim report Exhibit P. 13, really be read as 'recording of the statement of Shri Dalmia and the talk he had with when he came to Annadhanam's office and which he had with him while going to the staircase'. This explanation seems to fit in which the context in which the word 'discussion' is used in Exhibit P. 13.

301. The interval of time allowed to Dalmia for consulting his relations might have been considered to be insufficient considering for confession voluntary in case that was the time allowed to a confessing accused produced before a Magistrate for recording a confession. But that was not the position in the present case. Annadhanam was not going to record the confession of Dalmia. He was just to examined him in connection with the

affairs of the Insurance Company and had simply to tell him that he had called him to explain about he missing securities. There was therefore no question of Annadhanam allowing any time to Dalmia for pondering over the pros and cons of his making a statement about whose nature and effect he would have had no idea. We do not therefore consider that this fact that Dalmia was allowed half-an-hour to consult his relations can point to compelling Dalmia to make the statement.

302. We do not see that examination of Dalmia on oath be considered to be an inquisition. Sub-Section (3) of section 33 of the Insurance Act empowers the Investigator to examine on oath any manager, managing director or other officer of the insures in relation to his business. Section 176 of the Indian Penal Code has no application to the examination of Dalmia under section 33 of the Insurance Act. Section 176 reads:

"Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be published with simple imprisonment for a term which may extent to one month, or with fine which may extend to five hundred rupees, or with both.

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a terms which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the notice or information required to be given is required by an order passed under sub-section (1) of section 565 of the Code of Criminal Procedure, 1898, with imprisonment of either description for a terms which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

303. For the application of this section, it is necessary that Annadhanam, as Investigator, be a public servant. Annadhanam cannot be said to be a servant. He was not an employee of Government. He was a Chartered Accountant and had been directed by the order of the Central Government to investigate into the affairs of the Insurance Company and to report to the Government on the investigation made by him. Of course, he was to get some remuneration for the work he was entrusted with.

304. 'Public servant's is defined in section 21 of Indian Penal Code. Mr. Dingle Foot has argued that Annadhanam was a public servant in view of the ninth clause of section 21. According to this clause, every officer in the service or pay of the Government or remunerated by fees or commission for the purpose of any public duty would be a public servant. A person who is directed to investigate into the affairs of an Insurance Company under section 33(1) of the Insurance Act, does not ipso facto become an officer. There is

no office which he holds. He is not employed in service and therefore this definition would not apply to Annadhanam.

305. The making of a statement to the Investigator under section 33(3) of the Insurance Act does not amount to furnishing information on any subject to any public servant as contemplated by section 176 I.P.C., an omission to furnish which would be an offence under that section. This section refers to information to be given in Dagduas required to be furnished under some provision of law. We are therefore of opinion that section 176 I.P.C. did in no way compel Dalmia to make the statement Exhibit P. 10.

306. We believe the Dagduas of Annadhanam and Khanna about Dalmia's making the statement Exhibit P. 10 without his being induced or threatened by them. Their Dagduas find implied support from the statement of Raghunath Rai with respect to what Dalmia told him in connection with the making of the statement to Annadhanam and from certain Dagduas of Dalmia himself in his written statement and in answers to questions put to him under section 342, Cr.P.C.

307. We therefore hold the statement Exhibit P. 10 is a voluntary statement and is admissible in evidence.

308. We also hold that it is not inadmissible in view of clause (3) of Article 20 of the Constitution. It was not made by Dalmia at a time when he was accused of an offence, as is necessary for the application of that clause, in view of the decision of this Court in The State of Bombay v. Kathi Kalu Oghad MANU/SC/0134/1961: 1961CriLJ856 where the contention that the statement need not be made by the accused person at a time when the fulfilled that character was not accepted. Dalmia was not in duress at the time he made that statement and therefore was not compelled to make it. It was said in the aforesaid case:

"'Compulsion', in the context, must mean what in law is called 'duress'..... The compulsion in this sense is a physical objective act and not the state of mind of the persons making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted."

309. The various circumstances preceding the making of the statement Exhibit P. 10 by Dalmia have all been considered and they fall far short of proving that Dalmia's mind had been so conditioned by some extraneous process as to render the making of this statement involuntary and therefore extorted.

310. We believe the statement of Annadhanam that Dalmia had told him near the staircase that he has lost the money in his personal speculation business which was carried on chiefly through one of his private companies, viz., the Union Agencies. The later part of his confession, Exhibit P. 10, is an admission of Dalmia's losing the money in

speculation. His further statement was only an amplification of it as to the name under which speculation was carried on. The statement find support from the fact established by other evidence that the speculation business carried on by the Union Agencies was really the business of Dalmia himself, though, ostensibly, it was the business of the company of which there were a few shareholders other than Dalmia.

311. Mr. Dingle Foot has urged that adverse inference be drawn against the prosecution case on account of the prosecution not producing certain documents and certain witnesses. We have considered the objection and are of opinion that there is no case for raising such an inference against the prosecution.

312. The prosecution did not lead evidence about the persons holding shares in Asia Udyog Ltd., and in Govan Brothers Ltd. Such evidence would have at best, indicated how many shares Dalmia held in these companies. That was not necessary for the prosecution case. The extend to shares Dalmia held in these companies had no direct bearing on the matter under inquiry in the case.

313. The prosecution led evidence about the telephonic calls up to August 31, 1955, and did not lead evidence about the calls between September 1 and September 20, 1955. It is urged that presumption be raised that Dalmia and Chokhani had not telephonic communication in this period Admittedly, Dalmia had telephonic communication with Chokhani on September 15. the prosecution has no impugned any transaction entered into by Chokhani during his period. It is not therefore essential for the prosecution to have led evidence of telephonic calls between Dalmia and Chokhani during this period.

314. Another documents which the prosecution is said not to have produced is the Dak Receipt Register. The Register could have at best shown on which dates the various advices received from Bombay about the transactions were received. On that point there had been sufficient evidence led by the prosecution. The production of the Register was therefore not necessary. The accused could have summoned it if he has particular reason to rely on its entries to prove his case.

Lastly, complaint is made of the non-production of certain document in connection with the despatch of certain securities from Delhi to Bombay. Again, there is oral evidence with respect to such despatch of securities and it was not essential for the prosecution to produce the documents in that connection.

Of the witnesses who were not produced, complaint is made about the prosecution not examining Mr. Barve, Joint-Secretary, Ministry of Finance, who was present at the interview which Dalmia had with Mr. Kaul on September 15, 1954, and of the non-production of the Directors of the Insurance Company. It was quite unnecessary to examine Mr. Barve when Mr. Kaul has been examined. It was also not necessary to examine the Directors of the company who are not alleged to have had any first-hand

knowledge about the transactions. They could have spoken about the confirmation of the sale and purchase transactions and about the passing of the bye-laws and other relevant resolutions at the meeting of the Board of Directors. The minute of the proceedings of the Board's meetings served this purpose.

315. It is admitted by Dalmia that there was no resolution of the Board of Directors conferring authority on Chokhani to purchase and sell securities.

Certain matters have been referred to at pages 206-210 of Dalmia's statement of case, which, according to Dalmia, could have been proved by the Directors. All these matters are such which were not necessary for the unfolding of the prosecution case and could be proved by the accused examining them if considered necessary. We therefore see no force in this contention.

316. It is urged for Dalmia that he could not have been a party to a scheme which would cause loss to the Insurance Company, because he was mainly responsible for the prosperity of the company. The Union Agencies has assets. The Government was displeased with Dalmia. The company readily agreed to the appointment of M/s. Khanna and Annadhanam as auditors. There was the risk of detection of the fraud to be committed and so Dalmia would have acted differently with respect to such affairs of the Union Agencies as have been used as evidence of Dalmia being synonymous with it. We are of opinion that these considerations are not such which would offset the inferences arrived at form the proved facts.

317. It cannot be a matter of mere coincidence that frequent telephonic conversations took place between Dalmia and Chokhani when the Union Agencies suffered losses, that the usual purchase transactions by which the funds of the Insurances Company were derived to the Union Agencies took place then, that such purchases should recur several times during the relevant period, that such securities which could not be recouped had to be shown as sold and when the Union Agencies or Bhagwati Trading Company could not pay of the sale price which had to be credited to the account of the Insurance Company, a further usual purchase transaction took place.

318. We are therefore satisfied form the various facts considered above that the transactions which led to the diversion of funds of the Insurance Company to the Union Agencies were carried through under the instructions and approval of Dalmia. It is clear that he had a dishonest intention to cause at lest temporary loss of it funds to the Insurance Company and gain to the Union Agencies. This could be achieved only as a result of the conspiracy between him and Chokhani. Vishnu Prasad was taken in the conspiracy to facilitate diversion of funds and Gurha to facilitate the making up of false accounts etc. in the officers of the Union Agencies and Asia Udyog Ltd., as would be discussed hereafter.

319. We may now turn to the charges against Gurha, appellant. He was charged under section 120-B read with section 409 I.P.C. and also on three counts under section 477A for making or abetting the making of false entries in three journal vouchers Nos. 98, 106 and 107 dated January 12, 1955, of the Union Agencies. It is necessary to give a brief account of how these vouchers happened to be made.

320. Gurha was a Director of the Union Agencies and looked after the work of its office at Delhi. He was also the Accountant of Asia Udyog Ltd.

At Delhi there was a ledger with respect to the account of the transactions by the Bombay Officer of the Union Agencies. Under the directness of Chokhani who was an agent of the Union Agencies at Bombay and also held power of attorney on its behalf. Kannan used to send a cash statement and a journal to the Bombay Office and the Union Agencies at Delhi. These documents used to sent to Gurha personally. Now, the cash statement from Bombay showed correctly entries of the amounts received from Bhagwati Treading Company. Such amounts were noted to the credit of Bhagwati Trading Company. When the Union Agencies made payment to Bhagwati Trading Company, an entry to that effect was noted in the cash statement to the debit of Bhagwati Trading Company. On receipt of these cash Dagduas in 1955, it is alleged, Gurha used to get the genuine cash statement substituted by another fictitious cash statement in which no mention was made of Bhagwati Trading Company. Entries to the credit of Bhagwati Trading Company used to be shown to be entries showing the receipt of those moneys from the Delhi Office of the Union Agencies through Chokhani. The debit entry in the name of Bhagwati Trading Company used to be shown as a debit to the Delhi office of the Union Agencies. This substituted cash statement was then made over to one Lakhotia, who worked in the Delhi Office of the Union Agencies on behalf of the Bombay Office of the company. He was also prosecuted, but was acquitted. Lakhotia issued credit advises on behalf of the Bombay Office of the Union Agencies to the Delhi Office of the Union Agencies in reference to the entry in the cash statement which, in the original statement, was in respect of the amount received from Bhagwati Trading Company, intimating that that amount had been credited by the Bombay Office to the account of the Delhi Office. A debit advice on behalf of the Bombay Office to the Delhi Office was issued intimating that the amount had been debited to the account of the Delhi Office when in fact, the original entry debited that amount to the account of Bhagwati Treading Company. Lakhotia also made entries in the ledger of the Bombay Officer which was maintained in the Delhi Office of the company. In its column entitled 'folios' reference to the folio of the cash statement was given by writing the letter 'C' and the number of the folio of the cash statement from which the entry was posted.

321. On receipt of such advices from Lakhotia on behalf of the Bombay Office, Dhawan, P.W. 19, Accountant of the Delhi Office of the Union Agencies used to prepare the Journal voucher. In the case of the credit advices, the amount was debited to the Bombay Office of the Union Agencies and credited to Asia Udyog Ltd. In the case of he debit advices,

the amount was debited to Asia Udyog Ltd., and credited to the Bombay Office of the Union Agencies. According to the statement of Dhawan, he did so under the instructions of Gurha. Gurha used to sign these voucher and when he fell ill, they were signed by another Director, J. S. Mittal. Corresponding entire used to be made in the account of the Bombay Office and the Asia Udyog Ltd., in the ledger of the Delhi Office of the Union Agencies.

After Dhawan has prepared these vouchers he also used to issue advices to Asia Udyog Ltd. intimating that the amount mentioned therein had been credited or debited to its account. Thus the name of Bhagwati Trading Company did not appear in the various advices, vouchers and the ledgers prepared at Delhi.

322. In the office of Asia Udyog Ltd., on receipt of the credit advice, a journal voucher crediting the amount to the Bombay Office and debiting it to the Delhi Office of the Union Agencies was prepared. A journal voucher showing the entries in the reverse order was prepared not the receipt of the debit advices. Asia Udyog Ltd., issued advice to the Bombay Office intimating that the amount had been credits or debited to the Bombay Officer of the Union Agencies in the case of vouchers relating to the credit of debit advice form that Office. All such vouchers in Asia Udyog Ltd. were signed by Gurha even during the period when he was ill and was not attending the office of the Union Agencies.

The result of all such entries in the vouchers was that on paper it appeared in the case of credit advices that the Delhi Office of the Union Agencies advanced money to the Bombay Office which paid in the money to Asia Udyog Ltd., which in its turn paid the money to the Delhi Office of the Union Agencies, and in the case of debit advices, the Bombay Office debited the amount to Delhi Office of the Union Agencies and that debited it to Asia Udyog Ltd., which in its turn debited it to the Bombay Office. All these entries were against facts and they must have been done with a motive and apparently it was to keep off the records any mention of Bhagwati Trading Company. No explanation has been given as to why this course of making entire was adopted.

323. The genuine cash Dagduas are on record. The alleged fictitious statements are not on the record. It is not admitted by Gurha that any fictitious cash statement was prepared. It is not necessary for our purposes to hold whether a fictitious cash statement in lieu of the genuine cash statement received from Bombay was prepared under the directions of Gurha or not. The fact remains that the entire in the various advices prepared by Lakhotia on the basis of the cash Dagduas received, did not represent the true entries in the genuine cash Dagduas and that journal vouchers prepared by Dhawan also showed wrong entries and did not represent facts correctly.

Of the journal vouchers with respect to which the three charges under section 477A, I.P.C. had been framed, two are the vouchers prepared by Dhawan crediting the amounts mentioned the rein to Asia Udyog Ltd., and debiting them to the Bombay Office of the

Union Agencies. They are Exhibits P. 2055 and P. 2060. Each of them is addressed to Asia Udyog Ltd. and states that the amount mentioned therein was the amount received by the former, i.e. the Bombay Office form Chokhani on account of the latter, i.e., Asia Udyog Ltd., on January 7 and January 10, 1955, respectively and adjusted. One Exhibit P. 2042 debits the amount to Asia Udyog Ltd., and credits it to the Bombay Office of Union Agencies and states the amount mentioned therein to have been paid by the latter, i.e., Bombay Office to Chokhani on account of the former, i.e. Asia Udyog Ltd., and adjusted.

Other facts which throw light on the deliberate preparation of these false vouchers are that there had been tampering of the ledger of the Bombay Office in the Delhi Office of the Union Agencies and also in the journal statement of that office. The letter 'C' in the folio column of the ledger had been altered to 'J' indicating that that entry referred to an entry in the journal statement received from Bombay. Sheets of the journal statement on which corresponding entries are noted have also been changed. These two documents remained in the possession of the Union Agencies till November 12, 1955, though the advices and vouchers in the Delhi Office were seized by the Police on September 22, 1955, and therefore interested persons could make alterations in them. It has been suggested for Gurha that the alterations were made by the Police. The suggestion has not been accepted by the learned Sessions Judge for good reasons. The changed entries did not in any way support the procession case and therefore the police had no reason to get those entire concocted. The entries did show the receipt of the amounts from Bhagwati Trading Company, but the prosecution case was that the amount was received in cash and not through transfers which transactions had to be adjusted. The learned Sessions Judge, did not, however, believer the statement of Sri Kishen Lal who investigated the case that he has noticed these alterations earlier than his statement in Court which was some time in 1958, for the reason that Dhawan was not questioned by the prosecution in this regard and no reference was made by Sri Kishen Lal in the case diary about his questioning Dhawan about the alterations. The learned Sessions Judge appears to have overlooked the statement of Sir Kishen Lal to the effect:

"I made a note in the case diary about myself having put the overwriting to Lakhotia and about having asked his explanation about that."
324. The Court could have verified the fact from the case diary. It is too much to suppose that Sri Kishen Lal would make a wrong statement whose inaccuracy could be very easily detected. However, the learned Session Judge himself has given good reasons for not accepting the suggestion that the over-writing of the letter 'C' by the letter 'J' and the changing of the journal papers were made by the police.

325. The part that Gurha played in getting these false entries prepared is deposed to by Dhawan, P.W. 19, who used, occasionally, to approach Gurha for instructions.

326. Further, Gurha, as the accountant of Asia Udyog Ltd., must have known that Asia Udyog Ltd., had neither advanced any amounts to the Bombay Office of the Union

Agencies nor received any amounts from the Bombay Office of the Union Agencies. He however signed all the vouchers prepared in the office of Asia Udyog Ltd., in connection with these transactions. He did so even during his illness (May, 1955, to July, 1955, which, according to the statement of Gurha, in answer, to question No. 134 was from March 15 to August 12, 1955, during which period he did not attend the office of the Union Agencies). He signed them deliberately to state false facts.

327. Dhawan particularly stated that on receipt of the advice, Exhibit P. 2041, on the basis of which journal entry No. 98 was prepared by him he went to Gurha to consult as it was not clear form that advice to whom the amount mentioned in it had been paid. Gurha, on looking up the Journal statement received from the Bombay Office told him to debit that amount to Asia Udyog Ltd. Dhawan prepared journal voucher P. 2042, accordingly, and Gurha initialled it. It may be mentioned that this debit advice was addressed to M/s. Delhi Office and therefore could be taken to refer either to the Delhi Office of the union Agencies or the Delhi Office of Asia Udyog Ltd., both these offices being in the same building and being looked after by Gurha. Gurha admits in his statement under section 342, Cr.P.C., that Dhawan referred this matter to him and that he asked him to debit the amount to Asia Udyog Ltd., The journal statement of the Bombay Office at the relevant time could have no reference to this item which was really entered in the cash statement and Gurha's conduct in looking up them journal was a mere ruse to show to Dhawan that was giving instructions on the basis of the entries and not on his own.

328. Gurha stated, in answer to question No. 45, that he remembered to have seen an entry relation to this amount of Rs. 4,61,000 which is the amount mentioned in Ex. P. 2042 in the cash statement of the Bombay Office of the Union Agencies when O. P. Dhawan referred an advice relating to that amount to him. In answer to questions Nos. 217 and 218, in connection with his advising Dhawan about the debiting of this amount to Asia Udyog Ltd., he stated that he gave that advice after tracing the relevant entry in the journal statement of the Bombay Office. This answer is not consistent with his earlier answer to question No. 45 as entry with respect to the same amount could not have existed simultaneously both in the cash statement and the journal statement of the Bombay Office. If his later answer is correct, his referring to the journal would have been just a ruse as already stated. If his earlier answer is correct that would indicate that either Gurha had supplied the office with them facetious cash statement of the Bombay Office as alleged by the prosecution or that seeing in the journal cash statement that the entry related to Bhagwati Trading Company, deliberately told Dhawan, in accordance with the scheme, to debit that amount to Asia Udyog Ltd. In either view of the matter, this conduct of Gurha in advising Dhawan to debit the amount to Asia Udyog Ltd., is sufficient to indicate his complicity in the whole scheme, as otherwise, he had no reason to behave in that manner.

329. Gurha, among these accused, must have been chosen for the purpose of the conspiracy because he had connection both with the Union Agencies and with Asia

Udyog Ltd. He had been in the employ of a Dalmia concern from long before. He was the Accountant of the Dalmia Cement and Paper Marketing Company from 1948 till its liquidation in 1953. Gurha, as Director of the Union Agencies, knew that it had suffered losses as a result of share speculation business in 1954-55 and that the Delhi Office was short of liquid funds to meet these losses. He must have knows how the funds to meet the losses were being secured form the funds of the Insurance Company thorough Bhagwati Trading Company. He musts have also known that this was wrong. It is only with such knowledge that he could have been a party to the making of false advice and vouchers. There could be not other reason. It could not have been possible for the prosecution to lead direct evidence about Gurha's knowledge with respect to the full working of the scheme to provide for the losses for the Union Agencies from the funds of the Insurance Company. It is further not necessary that each member of a conspiracy must know all the details of the conspiracy.

330. Mr. Kohli, for Gurha, has urged that Gurha could have had nothing to do with the diversion of the funds of the Insurance Company to the Union Agencies, even though he was a Director of the latter as he never issued instructions regarding the activities of the Union Agencies, had no knowledge of the passing of money from the funds of the Insurance Company to the Union Agencies as he had nothing to do with the movement of the securities held by the Insurance Company or the receipt of cash or the other transactions, his role having begun, according to the prosecution, after the offence under s. 409 I. P. C. had been actually committed, i.e., after Chokhani had issued cheques on the bank accounts of the Insurance Company with the Chartered Bank in favour of Bhagwati Trading Company, and therefore could know nothing regarding the diversion of funds and the desirability of falsifying the accounts and papers of the Offices he had to deal with. Great reliance is placed on the letter, Exhibit B. 956 in submitting that Gurha did not know about the whole affair and simply knew, as stated by him, that Chokhani had borrowed money, for the Union Agencies to pay its losses, from Bhagwati Trading Company. This letter is of significance and we quote it in full:

"Girdharilal Chokhani Times of India Building, Hornby Road, Bombay-1.

CONFIDENTIAL

17th September 55.

Bharat Union Agencies Ltd., Delhi.

Attn. Mr. R. P. Gurha

Dear Sir,

I have to inform you that the various a months arranged by me as temporary loans to Bharat Union Agencies Ltd., Bombay Office from time to time in the name of Bhagwati

Trading Company, actually represented the months movies relating to the under noted securities belonging to Bharat Insurance Company Limited.

	Face Value
2 1/2% 1961	Rs. 56,00,000
3% 1963-65	Rs. 79,00,000
3% 1966-68	Rs. 60,00,000

	Rs. 1,94,00,000

I have now to request you to please arrange at your earliest to pay about Rs. 1,80,00,000 in cash or purchase the aforesaid securities (or their equivalent) and deliver the same to Bharat Insurance Company Ltd., 10, Daryaganj, Delhi on my behalf debiting the amount to the credit standing in the books of the Company's Bombay Office in the name of M/s. Bhagwati Trading Company. Any debit or credit balance left thereafter in the said account would be settled later on.

I am getting this letter also signed by Vishnuprasad on behalf of Bhagwati Trading Company although he had neither any knowledge of these transactions nor had any connection with these affairs.

For :	Yours faithfully,
Bhagwati Trading Company	
	Sd/ G. L. Chokhani.
Sd. Illegible	
Vishnuprasad Bajranglal	
Proprietor."	

331. We are of opinion that this is a letter written for the purpose of the case and was, as urged for the State, ante-dated. There is inherent evidence in this letter to support this view. The letter makes a reference to Vishnu Prasad's having no knowledge of the transactions and having no connection with the affairs. Mention of these facts was quite out of place in a letter which chokhani was addressing to Gurha in the course of business for his immediately arranging for the payment of Rs. 1,80,00,000 in cash or securities to Bharat Insurance Company. Further, the opening expression in the letter does not necessarily mean that Gurha was being informed for the first time that the temporary loans arranged by him for the Union Agencies Ltd., in the name of Bhagwati Trading Company actually represented the moneys belonging to the Bharat Insurance Company. If it meant so, that must have been done so by design, just as the concluding portion of the letter was, as already mentioned, put in by design to protect Vishnu Prasad's interest.

332. The letter is dated September 17, 1955, and thus purports to have been written a few days before the formal complaint was made to the police. Even if it was written on September 17, it was written at a time when the mater of securities had come to the notice of the authorities and Dalmia was being pressed to satisfactorily explain the position of the securities. Chokhani could have written a letter of this kind in that setting.

333. Another fact relied upon by the learned Sessions Judge in considering this letter to be antedated is that it does not refer to one kind of securities which were not in the passion of the Insurance Company even though they had been ostensibly purchased. It does not mention of the securities worth Rs. 26,25,000 which were really supplied to the Insurance Company on September 23, 1955. This letter should have included securities of that amount and should have asked Gurha to make up for that amount to the Insurance Company. This is a clear indication that this letter was written after September 23, 1955.

334. Mr. Kohli has, however, urged that the contract for the purchases of these securities had taken place on September 16, 1955, and that therefore Chokhani did not include those securities in this letter. Reference is made to the statement of Jayantilal, P.W. 6, a partner of the Firm Devkaran Nanjee, Brokers in Shares and securities. He states that Bhagwati Trading Company wanted to purchases for immediate delivery 3% 1966-68 securities of the face value of Rs. 21,25,000 and that a contract about it was entered into. Securities of this amount were not available in the market. Securities worth Rs. 1,75,000 were available and were delivered to Chokhani that day. They had to purchased securities of the face value of Rs. 20,00,000, from the Reserve Bank of India in order to effect delivery and had to sell some other securities of that value. The result was that the required securities were received by them on September 22, 1955. Even this statement does not account for not including securities of the value of Rs. 4,50,000 in this letter Ex. P. 956.

335. It was further urged in the alternative that Chokhani had very extensive powers in all this alleged concerns of Dalmia and so could get any thing done due to his influence without divulging securities. That was not the position taken by Gurha in his statement. He did not say that he deliberately got false documents prepared due to directions from Chokhani and which he could not disregard. Even if it be so, that means that Gurha got false documents made deliberately.

336. Another submission for Gurha is that the case held proved for convicting him is different from the case as sought to be made out in the police charge sheet submitted to the Court under section 173 of the Code of Criminal Procedure. The charge-sheet is hardly a complete or accurate thesis of the prosecution case. Clause (a) of sub-section (1) of section 173, Cr.P.C., requires the officer-in-charge of the police station to forward to the Magistrate empowered to take cognizance of the offence on a place report, the report in the prescribed form setting forth the names of the parties, the nature of the information, and the names of the persons who appear to be acquainted with the circumstances of the case. Nothing further need be said on this point.

337. Further, it is submitted that the prosecution case has changed form stage to stage. This can only mean that facts came on the record which were not known before and therefore the complexion of the allegations against Gurha's conduct varied. Even if this is so, he can have no grievance against it unless he had been unable to meet it in defence. No such inability has been expressed. It is however stated that the prosecution based its ultimate case against him on the allegation that the cash statement received from Bombay was suppressed and another false cash statement was prepared at Delhi under the directions of Gurha. We have already dealt with this matter. There was no such allegation on the basis of the statement of any prosecution witness. This way really a suggestion to explain how despite certain entries in the cash statements received from Bombay different entries were made in the advices issued by Lakhotia which advices ought to have been in accordance with the entries in the cash statement. The suggestion may be correct or may not be correct. It cannot, however, be said on its basis that there has been such a change in the prosecution case as would make the prosecution cases reasonably doubtful.

338. In the same connection, a grievance has been made that Gurha was not questioned about the allegation that the cash statement had been suppressed and substituted by another fictitious one. No such question could have been put to him when there was no evidences about it. An accused is questioned under section 342 Cr.P.C., to explain any circumstances appearing in the evidence against him. It is not necessary to ask him to explain any inference that a Court may be asked to draw and be prepared to draw from the evidence on record.

339. Another point stressed for Gurha is that the cash Dagduas would not have mentioned Bhagwati Trading Company when the prosecution case is that Chokhani took deliberate steps to keep the Delhi Office of the Insurance Company in the dark about it. The fact is that the cash statement sent from Bombay did mention Bhagwati Trading Company. They were sent to Gurha personally. In the circumstances the reasonable conclusion can be that they mentioned Bhagwati Trading Company as that represented the true state of affairs and Chokhani had to inform the Delhi Office of the Bharat Union Agencies about the source of the money he was receiving for the Union Agencies to meet its losses. Chokhani did not disclose the true source, but disclosed a source fictitiously created to cancel the real source. There was no harm in disclosing Bhagwati Trading Company to the office of the Union Agencies at Delhi. With the same frankness it could not have been disclosed to the Insurance Company Office at Delhi both because that would required the complicity of the entire staff of the Insurance Company in the conspiracy and because otherwise, it would at once disclose to the Insurance Company and those who had to check its working that its funds were being misused. Disclosure of Bhagwati Trading Company to the Union Agencies was necessary and there was no harm in any way in informing Gurha confidentially about it. After Gurha had got possession of the cash statement it was for him how to direct the necessary entries to be made in the

advices prepared by Lakhotia on behalf of the Bombay Office at Delhi and on the basis of which journal vouchers were to be prepared by Dhawan and entries were to be made in the accounts of the Union Agencies at Delhi. We therefore do not consider that this contention in any way favours the appellant.

340. The fact that the account of the Asia Udyog Ltd., in the ledger Exhibit P. 2226 is not alleged to be fictitious and records in the column 'folio' the letter 'J' is of no help as the entries in that ledger must have been made on the basis of the journal vouchers issued by Dhawan. In fact once it is alleged that the advices issued by Lakhotia were fictitious any entry which can be traced to it must also be fictitious.

341. It is argued that the alleged scheme of making the circuitous entries could not have worked in keeping the source of money concealed as the Income tax Authorities could have detected by following the entire in the Bank records with respect to the source of payment of money (by cheques issued by Bhagwati Trading Company) to the Union Agencies at Bombay. They could have thus known only about Bhagwati Trading Company and, as already stated, it was not necessary to keep Bhagwati Trading Company secret from the Union Agencies. What was really to be kept secret was that the money came from the Insurance Company. The various circuitous entries were not really made to keep Bhagwati Trading Company unknowns, but were made to make it difficult to trace that he money really was received from the Insurance Company.

342. A suggestion has been made by Mr. Kohli that Chokhani might have showed the same amount both in the cash statement and in the journal statement. No such case, however, seems to have been raised in the Courts below and has been made in the appellant's statement of case.

It has been contended that an offence under section 477A I.P.C. has not been established against the accused as it is not proved that he falsified any book, papers, etc., in the possession of his employer with intent to defraud and that the intention to defraud should be to defraud someone in future and should not relate to an attempt to cover up what had already happened. It is submitted that an intent to defraud connotes and intention to deceive and make the person deceived suffer some loss, that the entries made in the journal vouchers did not make anyone suffer and therefore the entries could not be said to have been made with intent to defraud.

343. The expression 'intent to defraud' is not defined in the Penal Code but section 25 defines 'fraudulently' thus:

"A person is said to do a thing fraudulently, if he does that thing with intent to defraud and not otherwise."
344. The vouchers were falsified with one intention only and that was to let it go unnoticed that the Union Agencies had got funds from the Insurance Company. If they

had shown the money received and paid to Bhagwati Trading Company, it was possible to trace the money back to the Insurance Company through Bhagwati Trading Company which received the money from the Insurance Company through cross cheques as well. Whoever would have tried to find out the source of the money would have been deceived by the entries. The Union Agencies made wrongful gain from the diversion of the Insurance Company's funds to it through Bhagwati Trading Company and the Insurance Company suffered loss of funds. The false entries were made to cover up the diversion of funds and were thus to conceal and therefore to further the dishonest act already committed.

345. We agree with respect with the following observation in Emperor v. Ragho Ram MANU/UP/0302/1933: I.L.R. [1933] All. 783:

"If the intention with which as false document is made is to conceal a fraudulent or dishonest act which had been previously committed, we fail to appreciate how that intention could be other than an intention to commit fraud. The concealment of an already committed fraud is a fraud."

And, again, at pages 789:

"Where, therefore, there is an intention to obtain an advantage by deceit there is fraud and if a document is fabricated with such intent, it is forgery. A man who deliberately makes a false document in order to conceal fraud already committed by him is undoubtedly acting with intent to commit fraud, as by making the false document he intends the party concerned to believe that no fraud had been committed. It requires no argument to demonstrate that steps taken and devices adopted with a view to prevent persons already defrauded from ascertaining that fraud had been perpetrated on them, and thus to enable the person who practised the fraud to retain the illicit gain which he secured by the fraud, amount to the commission of a fraud. An act that is calculated to conceal fraud already committed and to make the party defrauded believe that no fraud had been committed is a fraudulent act and the person responsible for the acts fraudulently within the meaning of section 25 of the Code."

We agree, with this observation, and repel the contention for the appellant.

346. It has then been submitted that the falsification should have been necessarily connected with the commission of the breach of trust. There is no question of immediate or remote connection with the commission of breach of trust which is sought to be covered up by the falsification, so long as the falsification is to cover that up. In the present case, introduction of Bhagwati Trading Company in the transactions was the first step to carry out deception about the actual payment of money out of the funds of the Insurance Company to the Union Agencies.

347. The second step of suppressing the name of Bhagwati Trading Company in the papers of the Union Agencies Delhi, made it more difficult to trace the passing of the money of the Insurance Company to the Union Agencies and therefore the falsification of the journal vouchers related back to the original diversion of the Insurance Company's

moneys to the Union Agencies and was with a view to deceive any such person in future who be tracing the source of the money received by the Union Agencies.

348. A grievance is made of the fact that certain witnesses were not examined by the prosecution. Of the persons working for the Union Agencies, five were accused at the trial, Kannan, Lakhotia, Gurha, Mittal and Dudani. Only Gurha among them was convicted. The other were acquitted. The remaining person were Krishnan, Panchawagh and the clerks O. D. Mathur and Attarshi. Of the persons connected with Asia Udyog, one R. S. Jain of the Accounts Branch was not examined. Panchawagh who was an Accountant of the Union Agencies and had custody of the cash statement and journal was given up by the prosecution on the grounds that he was won over. We do not consider that it was necessary to examine him for the unfolding of the prosecution case against Gurha. Similarly it was not necessary to examine the others for that purpose. A mere consideration that they might have given a further description of how things happened in those office would not justify the conclusion that the omission to examine them was an oblique motive and could go to benefit the accused.

349. A grievance was made that the High Court did not deal with the questions whether the police tampered with the cash statement and the journal. It is not clear whether such a point was raised in the High Court. It was however not mentioned in the grounds of appeal. The trial Court did deal with the point and held against the appellant Gurha. In fact, paragraph 22 of the grounds of appeal by Gurha simply said that no value should have been attached to the said cuttings when it was not proved on the record as to who made the said cuttings and when they were not calculated to conceal the true facts or the further interest of the conspiracy.

350. We are therefore of opinion that Gurha has been rightly held to have been in the conspiracy and to have abetted the making of the false journal vouchers.

351. In view of the above, we are of opinion that the appellants have been rightly convicted of the offences charged.

352. It has been urged for Chokhani that his sentience be reduced to the period already undergone as he made no profit for himself out of the impugned transactions, that he is 59 years old and had already been ten days in jail. We do not consider these to justify the reduction of the sentence when he was the chief person to carry out the main work of the conspiracy.

353. We also do not consider Dalmia's sentence, in the circumstances of the case, to be severe.
354. We therefore dismiss these appeals.
355. Appeals Dismissed.

MANU/SC/0581/1980

Back to Section 408 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Writ Petn. No. 1543 and Civil Appeal No. 1379 of 1977, Writ Petns. Nos. 838 and 2360-2363 of 1978 and SLP (C) Nos. 2333 and 2530 of 1978 and 1927 of 1979 and SLP (C) No. 2529 of 1978 and W.P. No. 228 of 1979

Decided On: 09.05.1980

Ambika Prasad Mishra Vs. State of U.P. and Ors.

Hon'ble Judges/Coram:
Y.V. Chandrachud, C.J., P.N. Bhagwati, V.R. Krishna Iyer, V.D. Tulzapurkar and A.P. Sen, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: M.S. Gupta, Adv. in W.Ps. Nos. 838, 1542 and 1543 and C.A. 1379 of 1977, Arvind Kumar, Lakshmi Arvind and Prakash Gupta, Advs. in S.L.Ps. Nos. 1727, 2333 and 2530 of 1978, P.R. Mridul, Sr. Adv., R.K. Jain and Sukumar Sahu, Advs. in W.Ps. Nos. 2360-63 of 1978, Veda Vyasa, Sr. Adv., S.K. Gupta and A.K. Sharma, Advs. in S.L.P. No. 2599 and W.P. No. 228 of 1979

For Respondents/Defendant: B.P. Singh Chauhan, Addl. Adv.-General, U.P. and C.P. Rana, Adv.

JUDGMENT
V.R. Krishna Iyer, J.

1. This judgment deals with a flood of cases from Uttar Pradesh relating to limitation on agricultural land holdings, and specifically disposes of the writ petitions, civil appeals and petitions for special leave listed below.

2. The pervasive theme of this litigative stream is not anti-land-reform as such but the discriminatory flaws in the relevant legislation which make it 'unlaw' from the constitutional angle.

3. The march of the Indian nation to the Promised Land of Social Justice is conditioned by the pace of the process of agrarian reform. This central fact of our country's progress has made land distribution and its inalienable ally, the ceiling on land holding, the cynosure of legislative attention. And when litigative confrontation with large holders has imperilled the implementation of this vital developmental strategy, Parliament, in exercise of its constituent power, has sought to pre-empt, effectively and protect

impregnably such statutory measures by enacting Article 31A as the very first amendment in the very first year after the Constitution came into force. Consequent on the Constitution (First Amendment) Act, 1951, this Court repelled the challenges to land reform laws as violative of fundamental rights in State of Bihar v. Kameshwar Singh MANU/SC/0020/1952: AIR 1952 SC 252 but the constant struggle between agrarian reform legislation and never-say-die litigation has led to a situation where every such enactment has been inevitably accompanied by countless writ petitions assailing its vires despite Article 31A, not to speak of the more extensive Chinese walls like Articles 31B, 31C and 31D. The forensic landscape is cluttered up in this Court with appeals and writ petitions and petitions for leave to appeal, the common feature of each of which is a challenge to the validity of one or other of the State laws imposing ceiling on land holding in an in egalitarian milieu of the landed few and the landless many. Of course, the court is bound to judge the attack on the legislative projects for acquisition and distribution, on their constitutional merits and we proceed to essay the task with special reference to the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (abbreviated hereafter as the Act). Several counsel have argued and plural objections have been urged but we will grapple with only those contentions which have been seriously pressed and omit others which have either been only formally mentioned or left to lie in silent peace, or but feebly articulated, In this judgment, we side-step the bigger issue of the vires of the constitutional amendments in Articles 31A, 31B and 31C as they are dealt with in other cases disposed of recently. Indeed, the history of land reform, in its legislative dimension has been a perennial race between judicial pronouncements and constitutional amendments.

4. The anatomy of the Act must be scanned as a preliminary exercise so that the constitutional infirmities alleged may be appreciated in the proper setting. The long title gives the primary purpose of the Act as imposition of ceiling on land holdings in Uttar Pradesh and the Preamble amplifies it further. All this is tersely spelt out in the Statement of Objects and Reasons which runs thus:

With a view to provide for more equitable distribution of land by making the same available to the extent possible to landless agricultural labourers and to provide for cultivation on co-operative basis and to conserve part of the available resources in land so as to increase the production and up reserve stock of foodgrains against lean years by carrying on cultivation on scientific lines in State-owned farms, it is expedient to impose ceiling on existing large land holdings. It is necessary to provide some land to the village communities for their common needs, such as establishment of fuel and fodder reserves. The Bill is, therefore, being introduced to promote the economic interest of the weaker section of community and to subserve the common good.

5. Thus we get the statutory perspective of agrarian reform and so, the constitutionality of the Act has to be tested on the touchstone of Article 31A which is the relevant protective armour for land reform laws. Even here, we must state that while we do refer to the range of constitutional immunity Article 31A confers on agrarian reform measures

we do not rest our decision on that provision. Independently of Article 31A, the impugned legislation can withstand constitutional invasion and so the further challenge to Article 31A itself is of no consequence. The comprehensive vocabulary of that purposeful provision obviously catches within its protective net the present Act and, broadly speaking, the antiseptic effect of that Article is sufficient to immunise the Act against invalidation to the extent stated therein. The extreme argument that Article 31A itself is void as violative of the basic structure of the Constitution has been negatived by my learned brother, Bhagwati, J. in a kindred group of cases of Andhra Pradesh. The amulet of Article 31A is, therefore, potent, so far as it goes, but beyond its ambit it is still possible, as counsel have endeavoured, to spin out some sound argument to nullify one section or the other. Surely, the legislature cannot run amok in the blind belief that Article 31A is omnipotent. We will examine the alleged infirmities in due course. It is significant that even apart from the many decisions upholding Article 31A, Golak Nath's case (MANU/SC/0029/1967: (1967) 2 SCR 762: AIR 1967 SC 1643) decided by a Bench of 11 Judges, while holding that the Constitution (First Amendment) Act exceeded the constituent power still categorically declared that the said amendment and a few other like amendments would be held good based on the doctrine of prospective overruling. The result, for our purpose, is that even Golak Nath's case has held Article 31A valid. The note struck by later cases reversing Golak Nath does not militate against the vires of Article 31A. Suffice it to say that in the Kesavananda Bharti's case, (MANU/SC/0445/1973: 1973 Supp SCR 1: AIR 1973 SC 1461) Article 31A was challenged as beyond the amendatory power of Parliament and, therefore, invalid. But, after listening to the marathon erudition from eminent counsel, a 13 Judge Bench of this Court upheld the vires of Article 31A in unequivocal terms. That decision binds, on the simple score of stare decisis and the constitutional ground of Article 141. Every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. In this view, other submissions sparkling with creative ingenuity and presented with high pressure advocacy, cannot persuade us to re-open what was laid down for the guidance of the nation as a solemn proposition by the epic fundamental rights case. From Kameshwar Singh, AlR 1952 SC 252 and Golak Nath (1967) through Kesavananda (1973) and Kannan Devan, (MANU/SC/0543/1972: (1973) 1 SCR 356: AIR 1972 SC 2301) to Gwalior Rayons, (MANU/SC/0068/1973: (1974) 1 SCR 671: AIR 1973 SC 2734) and after Article 31A has stood judicial scrutiny although, as stated earlier, we do not base the conclusion on Article 31A. Even so, it is fundamental that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyses, by perennial suspense, all legislative and administrative action on vital issues deterred by the brooding threat of forensic blow-up. This, if permitted, may well be a kind of judicial destabilization of State action too dangerous to be indulged in save where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake, or the basic direction of the nation itself is in peril of a shake-up. It is surely wrong to prove Justice Roberts of the United States Supreme Court right when he said: Smith v. Allwright (1944) 321 US 649, 669 and 670--

The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket good for this day and train only.....It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.

6. It is wise to remember that fatal flaws silenced by earlier rulings cannot survive after death because a decision does not lose its authority "merely because it was badly argued, inadequately considered and fallaciously reasoned" (Salmond 'Jurisprudence' p. 215 (11th edition)). And none of these misfortunes can be imputed to Bharti's case (MANU/SC/0445/1973: AIR 1973 SC 1461) (supra). For these reasons, we proceed to consider the contentions of counsel on the clear assumption that Article 31A is good. Its sweep is wide and indubitably embraces legislation on land ceiling. Long years ago, in Ranjit v. State MANU/SC/0245/1964: (1965) 1 SCR 82: AIR 1965 SC 632, a Constitution Bench, speaking through Hidayatullah, J., dwelt on the wide amplitude of Article 31A, referred to Precedents of this Court on agrarian reform vis-a-vis Article 31 A and concluded that equitable distribution of lands, annihilation of monopoly of ownership by imposition of ceiling and regeneration of the rural economy by diverse planning and strategies are covered by the armour of Article 31A. We may quote a part:

The scheme of rural development today envisages not only equitable distribution of land so that there is no undue imbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few on the other, but envisages also the raising of economic standards and bettering rural health and social conditions. Provisions for the assignment of lands to Village Panchayat for the use of the general community, or for hospitals, schools, manure pits, tanning grounds etc. which enure for the benefit of rural population must be considered to be an essential part of the redistribution of holdings and open lands to which no objection is apparently taken. If agrarian reforms are to succeed, mere distribution of lands to the landless is not enough. There must be a proper planning of rural economy and conditions and a body like the Village Panchayat is best designed to promote rural welfare than individual owners of small portions of lands. Further the Village Panchayat is an authority for purposes of Part III as was conceded before us and it has the protection of Article 31A because of this character even if the taking over of shamlat deh amounts to acquisition.....

The setting of a body of agricultural artisans (such as the village carpenter, the village blacksmith, the village tanner, farrier, wheelwright, barber, washerman etc.) is a part of rural planning and can be comprehended in a scheme of agrarian reforms. It is a trite saying that India lives in villages and a scheme to make villages self-sufficient cannot but be regarded as part of the larger reforms which consolidation of holdings, fixing of ceiling on lands, distribution of surplus lands and utilising of vacant and waste lands contemplate: at pp. 94-95.

This view has been reinforced by the later pronouncement of a Constitution Bench in the Gwalior Rayan case, (MANU/SC/0068/1973: (1974) 1 SCR 671: AIR 1973 SC 2734) emphatically expressing support for the conceptual sweep of agrarian reform vis-a-vis Article 31A. The proposition, therefore, is invulnerable that Article 31A repulses all invasion on "ceiling legislation" (armed with Articles 14, 19 and 31).

7. The professed goal of the legislation is to maximise surplus lands for working out distributive justice and rural development, with special reference to giving full opportunities to the agrarian masses to become a major rural resource of the nation. How to maximise surplus lands? By imposition of severe ceiling on ownership of land holdings consistently with the pragmatics of rural economies and the people's way of life. The pervasive, pivotal concepts are, therefore, ceilings on holdings and surrender of surplus land. The working unit with reference to which the legal ceiling is set is the realistic family. So, the flexible concept of 'family' also becomes a central object of legislative definition. Having regard to the diversity of family units among the various communities making up Indian society and having the object of the legislation as the guiding principle the statute under consideration has given a viable and realistic definition of 'family' with provision for some variables and special situations. The machinery for implementing the statute is also set up with adjudicative powers, including appeals. Compensation, without invidious discrimination, has to be paid, according to the scheme, when surplus land is taken away and for the determination and payment of such compensation a whole chapter is devoted. The disposal of lands secured as surplus is, perhaps, the culmination of the legislative project, and so, Chap. 4 stipulates the manner of disposal and settlement of surplus land. Thus, we have the definitional provision in Chap. 1, followed by imposition of "ceilings" with ancillary provisions for exemption. The judicial machinery for enforcement and the provisions for preemption of manipulation and prevention of fraud on the statute, the assessment of compensation and its payment and the like have also been enacted in Chaps. 2 and 3. A miscellaneous chapter deals with a variety of factors, including offences and penalties, mode of hearing and appellate powers and kindred matters. Inevitably, such a progressive legislation runs drastically contrary to the feudal ethos of the landed gentry and the investment instincts of the nouveau riche and green revolutionists. Therefore, the holders who are hurt by the provisions of the Act have chosen to challenge their vires and they must succeed if the ground is good. Since the legislature has plenary power to the extent conferred by the Constitution, the attack has to be based, and, indeed, has been, on constitutional infirmities which, if sound, must shoot down the Act. By way of aside, one might query whether agrarian reform, with all the fanfare and trumpet, has seriously taken off the ground or is still in the hangar? Anyway, the court can only pronounce, the Executive must execute.

8. We will now proceed to formulate the points which, according to counsel, are fatal to the legislation and proceed to scan them in due course.

9. Various miniscule matters have been raised in the plethora of cases largely founded on some real or fancied inequity, inequality, legislative arbitrariness or sense of injustice. Speaking generally and with a view to set the record straight, injustice is conditioned by the governing social philosophy, the prevailing economic approach and, paramountly, by the constitutional parameters which bind the court and the community.

10. The Indian Constitution is a radical document, a charter for socio-politico-economic change and geared to the goals spelt out in the Objectives Resolution which commits the nation to a drive towards an egalitarian society, a note struck more articulately by the adjective 'socialist' to our Republic introduced by a recent Amendment and survives after Parliament, differently composed, had altered the 42nd Amendment. This backdrop suggests that agrarian legislation, organised as egalitarian therapy, must be judged, not meticulously for every individual injury but by the larger standards of abolition of fundamental inequalities, frustration of basic social fairness and shocking unconscionableness. This process involves detriment to vested interests. The perfect art of plucking the goose with the least squealing is not a human gift. A social surgery, supervised by law, minimises, not eliminates, individual hurt while promoting community welfare. The court, in its interpretative role, can neither be pachydermic nor hyperreactive when landholders, here and there lament about lost land. We will examine the contentions from this perspective, without reference to Articles 31B, C and D. Justice Cardozo has a message for us when he says: Cardozo 'Selected Writings' p. 159.--

Law and obedience to law are facts confirmed everyday to us all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer to realities.
11. Shri Mridul, who led the arguments, mounted a three point attack. Article 31A (1) (ii) was the target of an obscure submission which counsel, with characteristic fairness, did not press at a later stage. Linked up with it was the queer nexus between Article 21 and the right to property, deprivation of which was contended to be an unreasonable procedure somehow falling within the lethal spell of Article 21.

12. Proprietary personality was integral to personal liberty and a mayhem inflicted on a man's property was an amputation of his personal liberty. Therefore, land reform law, if unreasonable, violates Article 21 as expansively construed in Maneka Gandhi, MANU/SC/0133/1978: (1978) 1 SCC 248: (AIR 1978 SC 597). The dichotomy between personal liberty, in Article 21, and proprietary status, in Articles 31 and 19 is plain, whatever philosophical justification or pragmatic realisation it may possess in political or juristic theory. Maybe, a penniless proletarian, is unfree in his movements and has nothing to lose except his chains. But we are in another domain of constitutional jurisprudence. Of course, counsel's resort to Article 21 is prompted by the absence of mention of Article 21 in Article 31 A and the illusory hope of inflating Maneka Gandhi to impart a healing touch to those whose property is taken by feigning loss of personal

liberty when the State takes only property. Maneka Gandhi is no universal nostrum or cure-all, when all other arguments fail.

13. The last point which had a quaint moral flavour was that transfers of landed property, although executed after the dates specified in the Act were unreasonably invalidated by the Act even when there was no "mens rea" vis-a-vis the Ceiling Law on the part of the transferor and this was violative of Article 19 (1) (f) and of Article 14 as arbitrary. A facet of over-inclusiveness which breaches Article 14 was also urged. It is perfectly open to the legislature, as ancillary to its main policy to prevent activities which defeat the statutory purpose, to provide for invalidation of such actions. When the alienations are invalidated because they are made after a statutory date fixed with a purpose, there is sense in this prohibition. Otherwise, all the lands would have been transferred and little would have been left by way of surplus. Let us read the text of Section 5(6) which is alleged to be bad being over-inclusive or otherwise anomalous. The argument, rather hard to follow and too subtle for the pragmatic of agrarian law, may be clearer when the provision is unfurled Section 5(6) runs thus:

In determining the ceiling area applicable to a tenure-holder, any transfer of land made after the twenty-fourth day of Jan. 1971, which but for the transfer would have been declared surplus land under this Act, shall be ignored and not taken into account:

Provided that nothing in this sub-section shall apply to:

(a) a transfer in favour of any person (including Government) referred to in Sub-section (2);

(b) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a benami transaction or for immediate or deferred benefit of the tenure-holder or other members of the family.

14. There is no blanket ban here but only qualified invalidation of certain sinister assignments etc. Counsel weaves gossamer webs which break on mere judicial touch when he argues that transfer 'in good faith and for adequate consideration' have been unconstitutionally exempted. The bizarre submission is that 'adequate consideration' is an arbitrary test. We reject it without more discussion. The second limb of the submission is that while Section 5(6) directs the authority to ignore certain transfers it does not void it. The further spin-off adroitly presented by counsel is that the provision violates the second proviso to Article 31A. It is a little too baffling to follow and we dismiss the submission as hollow. The provision in Section 5(6), when read in the light of the Provisos, is fair and valid.

15. Counsel's further argument is to quote his own words that "the impugned provisions do not establish a reasonable procedure" because:

The expression 'in good faith' is over-inclusive and takes within its sweep situations which are not only very different but which may not have any nexus or legitimate relationship with the objects and purposes of the ceiling law.....We are hardly impressed by it and find no substance in it.
16. There is no question of morality or constitutionality even if the clause may be a little overdrawn. On the contrary, it is legislative folly not to preserve, by appropriate preventives and enacted contraceptives, the 'surplus' reservoir of land without seepage or spillover. It is legal engineering, not moral abandonment. Indeed, the higher morality or social legitimacy of the law requires a wise legislature to proscribe transfers, lest the surplus pool be drained off by a rush of transactions. Maybe, individual hardship may happen, very sad in some instances. But every great cause claims human martyrs; Poor consolation for the victim but yet a necessary step if the large owners are not to play the vanishing trick or resort to manipulated alienations After all, this ban comes into force only on a well-recognised date, not from an arbitrarily retroactive past.

17. We cannot discover anything which is morally wrong or constitutionally anathematic in such an embargo. Article 19 (1) (f) is not absolute in operation and is subject, under Article 19 (6), to reasonable restrictions such as the one contained in Section 5(6). We do not think there is merit in the triple submissions spun out by Shri Mridul.

18. Even on the merits, the transfers have been rightly ignored, the vendees who are the grandsons have been held to be not bona fide transferees for adequate consideration; and the findings are of fact and concurrent. We overrule the grounds of grievance as unsustainable. In sum, without reliance on Article 31A, Shri Mridul's contentions can be dismissed as without merit.

19. We will now consider the mini-arguments of the other counsel--some of them do merit serious consideration by the court--and even where direct relief does not flow from the judicial process, State action to avoid anomalies may well be called for in the light of genuine hardships.

20. Shri Veda Vyas, appearing in W.P. No. 228 of 1979 and S.L.P. No. 2599 of 1978, pleaded powerfully for gender justice and sex equity because, according to his reading, the Act had a built-in masculine bias in the definition of 'family unit' and allocation of ceiling on holdings, and therefore, perpetrated unconstitutional discrimination. Indeed, his case illustrated the anti-woman stance of the statute, he claimed. The submission is simple, the inference is inevitable but the invalidation does not follow even if Article 31A is not pressed into service to silence Article 14.

21. We will formulate the objections and examine their merits from the constitutional perspective. Maybe, there is force in the broad generalisation that, notwithstanding all the boasts about the legendary glory of Indian womanhood in the days of yore and the equal status and even martial valour of heroines in Indian history, our culture has suffered a traumatic distortion, not merely due to feudalism and medievalism, but also due to British imperialism. Indeed, the Freedom Struggle led by Mahatma Gandhi, the story of social reforms inspired by spiritual leaders like Swami Vivekananda and engineered by a galaxy of great Indians like Raja Rammohan Roy, Swami Dayananda Saraswati and Maharishi Karve and the brave chapter of participation in the Independence Movement by hundreds and thousands of woman-patriots who flung aside their unfree status and rose in revolt to overthrow the foreign yoke, brought back to Indian womanhood its lustrous status of equal partnership with Indian manhood when the country decided to shape its destiny and enacted a Constitution in that behalf. Our legal culture and corpus juris, partly a heritage of the past, do contain strands of discrimination to set right which a commission elaborately conducted enquiries and made a valuable report to the Central Government. Shri Veda Vyas may be right in making sweeping submissions only to this limited extent but when we reach the concrete statutory situation and tackle the specific provisions in the Act, his argument misses the mark.

22. A better appreciation of his contention must be preceded by excerption of two definitions and consideration of the concepts they embody. Section 3(7) defines 'family' thus:

'family' in relation to a tenure-holder, means himself or herself and his wife or her husband, as the case may be (other than a judicially separated wife or husband), minor sons and minor daughters (other than married daughters);
This definition is incomplete without contextually reading Section 5(3) and so we quote the provision which, in the view of Shri Veda Vyas, enwombs the vice of discrimination against women. Section 5(3)(a) and (b) and Explanation:

Section 5(3). Subject to the provisions of Sub-sections (4), (5), (6) and (7) the ceiling area for purposes of Sub-section (1) shall be--

(a) in the case of a tenure-holder having a family of not more than five members, 7.30 hectares of irrigated land (including land held by other members of his family) plus two additional hectares of irrigated land or such additional land which together with the land held by him aggregates to two hectares, for each of his adult sons, who are either not themselves tenure-holders or who hold less than two hectares of irrigated land, subject to a maximum of six hectares of such additional land;

(b) in the case of a tenure-holder having family of more than five members, 7.30 hectares of irrigated land (including land held by other members of his family), besides, each of

the members exceeding five and for each of his adult sons who are not themselves tenure-holders or who hold less than two hectares of irrigated land, two additional hectares of irrigated land or such additional land which together with the land held by such adult son aggregates to two hectares, subject to a maximum of six hectares of such additional land.

Explanation: The expression 'adult son' in Clauses (a) and (b) includes an adult son who is dead and has left surviving behind him minor sons or minor daughters (other than married daughters) who are not themselves tenure-holders or who hold land less than two hectares of irrigated land.

23. The anti-female kink is patent in that the very definition of family discloses prejudice against the weaker sex by excluding adult daughters without providing for any addition to the ceiling on their account. In the case of an adult son, Section 5(3)(a) of the Act provides for the addition of two hectares of irrigated land for each of his (tenure holder's) sons where the family has a strength of less than five. Section 5(3)(b) similarly provides for two additional hectares of irrigated land for each of his (tenure holder's) adult sons where the strength of the family is more than 5. It must be remembered that this addition is on account of the fact that there are adult sons, even though they are not tenure holders or hold less than two hectares or none. This privilege of adding to the total extent that the family of a tenure holder may keep is denied to an adult daughter, even though unmarried, and, therefore, dependent on the family, for that a married son stands on a different footing from a married daughter, what justice is there in barring a dependent unmarried daughter in the cold? Assuming, without admitting, Shri Veda Vyas further urges that having regard to the Child Marriage Restraint Act, 1929 and the increasing prevalence of unmarried adult daughters in families these days, the discrimination is not theoretical but real because no minor girl can now marry.

24. Another similar invidious provision is the definition of tenure-holder. Ceiling on holdings is fixed with reference to tenure-holders.

25. We wonder whether the Commission on the Status of Women or the Central Government or the State Governments have considered this aspect of sex discrimination in most land reforms laws, but undoubtedly the State should be fair especially to the weaker sex. Adult damsels should not be left in distress by progressive legislations geared to land reforms. This criticism may have bearing on the ethos of the community and the attitude of the legislators, but we are concerned with the constitutionality of the provision. Maybe, in this age of nuclear families and sex equal human rights it is illiberal and contrary to the Zeitgeist to hark back to history's dark pages nostalgically and disguise it as the Indian way of life with a view to deprive women of their undeniable half. Articles 14 and 15 and the humane spirit of the Preamble rebel against the de facto denial of proprietary personhood of womanhood. But this legal sentiment and jural value must not run riot and destroy provisions which do not discriminate between man and

woman qua man and woman but merely organise a scheme where life's realism is legislatively pragmatised. Such a scheme may marginally affect gender justice but does not abridge, even a wee-bit, the rights of women. If land-holding and ceiling thereon are organised with the paramount purpose of maximising surpluses without maiming women's ownership no submission to destroy this measure can be permitted using sex discrimination as a means to sabotage what is socially desirable. No woman's property is taken away any more than a man's property.

26. Section 5(3) reduces daughters or wives to the status of stooges. It forbids excessive holdings having regard to rural realities of agricultural life, 'Family' is defined because it is taken as the unit for holding land--a fact of extant societal life which cannot be wished away. This is only a tool of social engineering in working out the scheme of setting limits to ownership. Section 5(3) does not confer any property on an adult son nor withdraw any property from an adult daughter. That provision shows a concession to a tenure-holder who has propertyless adult sons by allowing him to keep two more hectares per such son. The propertyless son gets no right to a cent of land on this score but the father is permitted to keep some more of his own for feeding this extra mouth. If an unmarried daughter has her own land, this legislation does not deprive her any more than a similarly situated unmarried son. Both are regarded as tenure-holders. The singular grievance of a chronic spinster vis-a-vis a similar bachelor may be that the father is allowed by Section 5(3) to hold an extra two hectares only if the unmarried major is a son. Neither the daughter nor the son gets any land in consequence and a normal parent will look after an unmarried daughter with an equal eye. Legal injury can arise only if the daughter's property is taken away while the son's is retained or the daughter gets no share while the son gets one. The legislation has not done either. So, no tangible discrimination can be spun out. Maybe, the legislature could have allowed the tenure-holder to keep another two hectares of his on the basis of the existence of an unmarried adult daughter. It may have grounds rooted in rural realities to do so. The court may sympathise but cannot dictate that the landholder may keep more land because he has adult unmarried daughters. That would be judicial legislation beyond permissible process.

27. The same perspicacious analysis salvages the provision regarding a wife. True, Section 3(17) makes the husband tenure-holder even when the wife is the owner. So long as the land is within the sanctioned limit it is retained as before without affecting ownership or enjoyment. But where it is in excess, the compensation for the wife's land, if taken away as surplus, is paid to her under Chapter III. And even in the choice of land, to declare surplus, the law, in Section 12A, has taken meticulous care to protect the wife. The husband being treated as tenure-holder even when the wife is the owner is a legislative device for simplifying procedural dealings. When all is said and done, married women in our villages do need their husband's services and speak through them in public places, except, hopefully in the secret ballot expressing their independent political choice. Some of us may not be happy with the masculine flavour of this law but it is difficult to hold that rights of women are unequally treated, and so, the war for equal gender status

has to be waged elsewhere. Ideologically speaking, the legal system, true to the spirit of the Preamble and Article 14, must entitle the Indian women to be equal in dignity, property and personality, with man. It is wrong if the land reforms law denudes woman of her property. If such be the provision, it may be unconstitutional because we cannot expect that "home is the girl's prison and the woman's work-house". But it is not.

28. It must be said in fairness, that the legislature must act on hard realities, not on glittering ideals which fail to work. Nor can large land-holders be allowed to outwit socially imperative land distribution by putting female discrimination as a mask. There is no merit in these submissions of Sri Veda Vyas.

29. In the view we have taken, we need not discuss the soundness of the reasoning in the ruling in Sucha Singh v. State MANU/PH/0077/1974: AIR 1974 P&H 162 at p. 171 (FB). The High Court was right, if we may say so with respect in its justification of the section when it observed:

The subject of legislation is the person owning or holding land and not his or her children.

Section 5 provides for the measure of permissible area that a person with one or more adult sons will be allowed to select out of the area owned or held by him and his children, whether male or female, have not been given any right to make a selection for himself or herself. It cannot, therefore, be said that this section makes a discrimination between a son and a daughter in respect of his or her permissible area on the ground of sex alone. The legislature is the best Judge to decide how much area should be left as permissible area with each owner or holder of land. In so far as no distinction between a male and a female holder or owner of the land has been made in respect of the permissible area in any given circumstances, there is no violation of Article 15 of the Constitution. This section does not provide for any succession to the land; it only provides for the measure of the permissible area to be retained by every holder or owner of the land out of the area held or owned by him or her on the appointed day on the basis of the number of adult sons he or she has. It is for the legislature to prescribe the measure of permissible area and no exception can be taken because only adult sons have been taken into consideration.

30. Shri Veda Vyas objected to the further observations of Tuli, J.:

It is evident that distinction between an adult son and an adult daughter has been made not only on the ground of sex but also for the reason that a daughter has to go to another family after her marriage in due course, marriage being a normal custom which is universally practised. This is an institution of general prevalence which is the foundation of organised and civilised societies and communities.

Our rapidly changing times, when women after long domestic servitude, seek self-expression, cannot forge new legal disabilities and call it legislative wisdom. But, without assent or dissent, we may pass by these observations because no property right of women is taken away, and discrimination, if any, is not inflicted on rights, but sentiments. Shri Arvind Kumar, who followed, also made some persuasive points and seeming dents in the legislation when read in the light of the U. P. Consolidation of Holdings Act, 1953 (hereinafter called the Consolidation Act). In general terms, the submission turned on the operation of the law relating to consolidation of holdings.

31. It is a great pity that a benign agrarian concept--abolition of fragmentation and promotion of consolidation of agricultural holdings--has proved in practice to be a litigative treachery and opened up other vices. The provision for appeals and revisions and the inevitable temptation of the vanquished to invoke Article 226 and Article 136 of the Constitution has paved the protracted way for improvident layout on speculative litigation. More farmers are cultivating litigation than land, thanks to the multi-docket procedure in the concerned law. Even so, we see no force in counsel's contention which we may now state.

32. The thrust of his argument, omitting subsidiary submissions which we will take up presently, is that so long as consolidation proceedings under the sister statute (U.P. Consolidation of Holdings Act, 1953) are under way, two consequences follow: Firstly, all other legal proceedings including the ceiling proceedings must abate. A notification under Section 4 of the Consolidation Act has been issued in regard to many areas in the State. Consolidation has been completed in most places but is still pending in some places. Counsel's argument is that once a notification under Section 4 has been issued. Section 5(2)(a) operates. This latter provision states that

every proceeding for the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference of revision, shall, on an order being passed in that behalf by the court or authority before whom such suit or proceeding is pending stand abated:

Provided that no such order shall be passed without giving to the parties notice by post or in any other manner and after giving them an opportunity of being heard:

Provided further that on the issue of a notification under Sub-section (1) of Section 6 in respect of the said area or part thereof, every such order in relation to the land lying in such area or part as the case may be, shall stand vacated; Thus the ceiling proceeding has abated and surplus land cannot be taken from him. This plea has only meretricious attraction and superficial plausibility as we will presently see.

33. The whole scheme of consolidation of holdings is to restructure agrarian landscape of U.P. so as to promote better farming and economic holdings by eliminating fragmentation and organising consolidation. No one is deprived of his land. What happens is, his scattered bits are taken away and in lieu thereof a continuous conglomeration equal in value is allotted subject to minimal deduction for community use and better enjoyment. Once this central idea is grasped, the grievance voiced by the Petitioner becomes chimerical. Counsel complains that the tenure-holder will not be able to choose his land when consolidation proceedings are in an on going stage. True, whatever land belongs to him at that time, may or may not belong to him after the consolidation proceedings are completed. Alternative allotments may be made and so the choice that he may make before the prescribed authority for the purpose of surrendering surplus lands and preserving 'permissible holding' may have only tentative value. But this factor does not seriously prejudice the holder. While he chooses the best at the given time the Consolidation Officer will give him its equivalent when a new plot is given to him in the place of the old. There is no diminution in the quantum of land and quality of land since the object of consolidation is not deprivation but mere substitution of scattered pieces with a consolidated plot. The tenure-holder may well exercise his option before the prescribed officer and if, later, the Consolidation Officer takes away these lands, he will allot a real equivalent thereof to the tenure-holder elsewhere. There is no reduction or

damage or other prejudice by this process of statutory exchange.

34. Chapter III of the Consolidation Act provides, in great detail, for equity and equality, compensation and other benefits when finalising the consolidation scheme. Section 19(1)(b) ensures that

the valuation of plots allotted to a tenure-holder subject to deductions, if any, made on account of contributions to public purposes under this Act is equal to the valuation of plots originally held by him:
Provided that, except with the permission of the Director of Consolidation, the area of the holding or holdings allotted to a tenure-holder shall not differ from the area of his original holding or holdings by more than twenty-five per cent of the latter."

When land is contributed for public purposes compensation is paid in that behalf, and in the event of illegal or unjust orders passed, appellate and revisory remedies are also provided. On such exchange or transfer taking place, pursuant to the finalisation of the consolidation scheme, the holding, up to the ceiling available to the tenure-holder, will be converted into the new allotment under the consolidation scheme. Thus, we see no basic injustice nor gross arbitrariness in the continuance of the land reforms proceedings even when consolidation proceedings are under way. We are not at all impressed with counsel's citation of the ruling in Agricultural & Industrial Syndicate Ltd. v. State of U.P. MANU/SC/0350/1973: (1974) 1 SCR 253: AIR 1974 SC 1920, particularly because there

has been a significant amendment to Section 5 subsequent thereto. The law as it stood then was laid down by this Court in the above case; but precisely because of that decision an Explanation has been added to Section 5 of the Consolidation Act which reads thus:

Explanation:-- For the purposes of Sub-section (2) a proceeding under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 or an uncontested proceeding under Sections 134 to 137 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, shall not be deemed to be a proceeding in respect of declaration of rights or interest, in any land. The view of the Allahabad High Court in Kshetrapal Singh v. State of U.P. MANU/UP/0346/1975: 1975 RD 366 is correct, and in effect negatives the submission of Shri Arvind Kumar that there should be a stay of ceiling proceedings pending completion of consolidation proceedings. The head note in Kshetrapal Singh's case (supra) brings out the ratio and for brevity's sake, we quote it;

By adding the Explanation after Sub-section (2) of Section 5 of the Act a legal fiction has been created. What is otherwise a proceeding in respect of declaration of rights or interest in any land is deemed not to be such a proceeding. That is the clear legislative intent behind the Explanation. Ordinarily an Explanation is intended to explain the scope of the main section and is not expected to enlarge or narrow down its scope but where the legislative intent clearly and unambiguously indicates an intention to do so, effect must be given to the legislative intent notwithstanding the fact that the legislature named that provision as an Explanation.

35. A feeble submission was made that there was time-wise arbitrariness vitiating the statute in that various provisions in the Act were brought into force on random dates without any rhyme or reason, thus violating, from the temporary angle, Article 14. It is true that neither the legislature nor the Government as its delegate can fix fanciful dates for effectuation of provisions affecting the rights of citizens. Even so, a larger latitude is allowed to the State to notify the date on which a particular provision may come into effect. Many imponderables may weigh with the State in choosing the date and when challenge is made years later, the factors which induced the choice of such dates may be buried under the debris of time. Parties cannot take advantage of this handicap and audaciously challenge every date of coming into force of every provision as capriciously picked out. In the present case, Section 6(1)(g) has been brought into force on 8-6-73, Section 6(3) on 10-10-75, Section 3(4) on 15-8-72, Section 16 on 1-7-73 and Section 6(1)(e) on 24-1-71. This last date which was perhaps the one which gave the learned Advocate General some puzzlement was chosen because on that date the election manifesto of the Congress Party in all the States announced a revised agrarian policy and that party was in power at the Union level and in most of the States. Although a mere election manifesto cannot be the basis for fixation of a date, here the significance is depeer in that it was virtually the announcement of the political government of its pledge to the people that the agrarian policy would be revised accordingly. The other dates mentioned above do not create any problem being rationally related to the date of a preceding Ordinance or

the date of introduction of the bill. The details are not necessary except to encumber this judgment. We would emphasise that the brief of the State when meeting constitutional challenges on the ground of arbitrariness must be a complete coverage, including an explanation for the date of enforcement of the provision impugned. Court and counsel cannot dig up materials to explain fossil dates when long years later an enterprising litigant chooses to challenge.

36. A few other minor infirmities were faintly mentioned but not argued at all or seriously. Such as, for instance, the contention that Section 38B of the Act which understandably excludes res judicata is challenged as violative of the basic structure of the Constitution and otherwise exceeds legislative competence. We do not think there is need to dilate on every little point articulated by one or other of the numerous advocates who justify their Writ Petitions or civil appeals by formal expression of futile submissions.

37. We dismiss all the appeals and all the writ petitions and all the special leave petitions with costs one set in all.

MANU/BH/0100/1937

Back to Section 415 of Indian Penal Code, 1860

IN THE HIGH COURT OF PATNA

Decided On: 26.11.1937

Akhil Kishore Ram Vs. Emperor

Hon'ble Judges/Coram:
Saiyid Fazl Ali and Rowland, JJ.

JUDGMENT
Authored By: Rowland, Saiyid Fazl Ali
Rowland, J.

1. These two applications have been heard together, the facts in both being similar. The petitioner was brought before the Magistrate on six charges which were tried in two batches of three each, and was convicted of cheating on all the charges and sentenced in each trial to undergo rigorous imprisonment for 18 months. These sentences have been directed to run concurrently. He was also sentenced at each trial to pay a fine of Rs. 500, in default, to suffer further rigorous imprisonment for six months; the sentences of fine and of imprisonment in default are cumulative. Appeals to the Sessions Judge of Patna were dismissed.

2. In revision, some technical objections have been taken in the petition against the manner of institution and the regularity of conduct of the proceedings at the trial. But Mr. Manuk at the hearing did not press these; indeed there is nothing in them of substance The main argument put forward on behalf of the petitioner is that assuming him to have done those things which the Court's below have found that he did, he has committed no offence and the second contention is that even if the acts amounted to cheating, the sentences imposed are excessive. The facts are that the petitioner Akhil Kishore Ram resides at Katri Sarai, Police Station Giriak, in Patna District, where in his own name and under thirteen other a liases he carries on a business of selling charms and incantations which he advertises in a number of newspapers in several provinces of India and despatches by value-payable post to persons answering the advertisements. Six of these transactions have been the subject-matter of the charges.

3. Mr. Manuk at the outset asked us to bear in mind that what he called the materialist attitude which regards spells and charms as a fraudulent pretence and sale of them as a swindle, though widely held, is not shared by a large body of opinion in the East particularly in India and among Hindus, where the efficacy of magical incantations is still relied on by many and thought to have a religious basis; and he maintained that there was nothing in the evidence to show that the petitioner did not propound the spells or

incantations advertised by him in good faith and with a genuine and pious belief in their efficacy he urged that a conviction should not be founded on the mere fact that the Court had no faith in the efficacy of the incantations. We may recognise the existence of contrasting points of view, but I would express their opposition differently. One outlook is exemplified by words which the dramatist Shakespeare puts in the mouth of one of his characters:

It's not in mortals to command success

But we'll do more, Sempronius, we'll deserve it.

4. This is the mental attitude of those who will spare no effort to secure results by their own endeavours and to whom, even if results fail them, there is a satisfaction in having done all that man can do. There are those on the other hand who would like success to come to them but are averse from the efforts of securing it by their own sustained exertions; it is not in them to deserve success but they hope by some device to command it. It is to the latter class that the advertisements of the petitioner are designed to appeal.

5. The advertisement Ex. 1 says:

GUPTA MANTRA.
A reward of Rs. 100.

The objects which cannot be achieved by-spending lacs of rupees may be had by repeating this Mantra seven times. There is no necessity of undergoing any hardship to make it effective. It is effective without any preparation. She whom you want may be very hard-hearted and proud, but she will feel a longing for you and she will want to be for ever with you, when you read this Mantra. This is a "Vashi Karan Mantra." It will make you fortunate, give you service, and advancement, make you victorious in litigation, and bring you profits in trade. A reward of Rs. 100, if proved fallible. Price, including postage, etc., Rs. 2-7-0.

Sidh Mantra Ashram, No. 37, P.O. Katri Sarai, Gaya.

6. Those who answered this advertisement received a printed paper headed "Gupta Mantra." A formula follows and then the instructions:

Read the Mantra seven times and look at the moon for fifteen minutes without shutting up your eyes even for a moment. Have a sound sleep with desired object in your heart after that and you will succeed.

I. You should take only the milk of cow, fruit and sweets of pure fresh cow's milk during the day and night time, you should bathe at night and make your mind pure before you begin this process.

II. No other person should be taken into confidence however dear and nearly related he may be to you. If you allow such things it will lose its effects as it is so prepared that it can be used by only one man and that with strict secrecy.

Sidh Mantra Ashram, Katri Sarai, Gaya.

7. The leaflets are printed in English, Bengali, Hindi and Urdu: and it would appear from the registers of the post office that over 25,000 clients paid good money for them. Mr. Manuk argues that the Mantras have not been proved to be ineffective and sold with the knowledge of their uselessness; and therefore he says there was no cheating. But that was not what the prosecution set out to prove. The substance of the prosecution case and the findings of the Courts below was that whereas by the advertisement clients were made to believe that "there is no necessity of undergoing any hardship to make it effective" and that "it is effective without preparation", they were disappointed by finding on receipt of the leaflets that in order to work the oracle they must stare unlinking at the moon for fifteen minutes; a feat which, if not impossible as some of the prosecution witnesses have re-presented it to be, is at any rate beyond the powers of ordinary human beings except by long training and preparation. I have pointed cut that the advertisement is specially directed to those who are not content to win success by patient preparation and effort, and bids for their custom by the assurance that no hardship or preparation is needed.

8. The victims concerned in the six transactions which are before us have all said that had they known of the condition precedent to the using of the Mantra, they would never have sent for it: and the Courts below have accepted that evidence. Mr. Manuk argued that readers of the advertisement must have expected that there would be some instructions for its use; that to gaze at the moon for fifteen minutes was an ordinary instruction; and that a condition of this kind was no breach of faith with them. He referred to defence evidence adduced to show that the feat was not impossible, and submitted that his client had been unfortunate in his failure to secure the attendance of more witnesses on the point though he was unable to say that accused was entitled as of right to more assistance than the Court gave him. He also alluded to an offer by the accused to make a demonstration of moon gazing in the presence of the trying Magistrate, which the latter refused. As to that, the Magistrate was quite right. Section 539-B of the Code which empowers the Court to make a local inspection does not contemplate a procedure by which the presiding officer would, to all intents and purposes, put himself in the position of a witness in the case. The Magistrate rightly said that the accused could adduce no evidence of any such test. The accused examined as a witness a coal merchant who says that he used the Mantra, that he was able to gaze at the moon for fifteen minutes after some days' practice and that the capital of his business has grown from Rs. 300 to 1,500.

The feat of which he boasts does not appear to have been witnessed by any impartial observer and cannot be regarded as a well-authenticated record; his business success also rests on his own word only and he is himself related to the accused and thus not a disinterested witness.

9. The Courts below were fully entitled to refuse to rely on his evidence and to prefer the testimony of prosecution witnesses who have said that the condition attached to the Mantra was impossible or at least beyond the power of ordinary persons. Mr. Manuk argued that the petitioner was not bound to disclose in his advertisement all the procedure that was required to be followed in order to obtain the benefit of the Mantra. That is true; but the advertisement gave a definite assurance that there was no necessity for either hardship or preparation and the condition referred to is contrary to that assurance, on which the witnesses said that they acted, and without which they would not have answered the advertisement. I have no doubt then that the offences charged were committed and the petitioner has been rightly convicted. There remains the question of sentence. Mr. Manuk contended that at the worst the accused had committed a technical breach of the law and that if the Mantra was in fact genuine and effective, he might be, as was argued in the Magistrate's Court, wanting to do good to the universe. Whether the intentions of the accused were beneficent or otherwise can only be inferred from the materials before us, and such as they are, I can find more indications in them of a desire to do good to himself. Paragraph 2 of the instructions following the Mantra appears to be designed to secure the monopoly of his secret by the threat of the Mantra losing its effect if disclosed to others. The reader is presumably expected to forget that the vendor is disclosing it to thousands. This clause should also minimize the danger of victims discussing their experiences with one another and thus being moved to take action against the vendor. Should there be any such discussion, the use of the fourteen aliases might prevent the victims from being fully aware that, they were dealing with the same person. Then the advertisement is shrewdly drawn to disarm the suspicion with which at first sight the average newspaper reader is apt to regard magic, wizardry and incantations. The reward of Rs. 100 is placed in the forefront No time is lost in putting forward this assurance of genuineness in the headline and at the foot again it is said "a reward of Rs. 100 if proved fallible". Prospective purchasers are left to hope that by seven times repeating the Mantra they will attain their object whatever it may be with the assurance that in the event of failure they will get Rs. 100 reward and in case they should still be so sceptical as to wonder whether there is not a catch somewhere, there is the added assurance that the Mantra is effective without preparation and without the necessity of undergoing any hardship. If one may judge by the internal evidence, these compositions are the work of no ascetic or dreamer but of a hard-headed business man with organizing capacity and a flair for publicity. We know that he advertises widely and employs a staff of four clerks. The elements in human nature to which the appeal is made are not industry and patience but laziness and greed. The business is on a large scale and the convictions have been in. respect of six out of an unknown number of offences. These are considerations against treating the accused too lightly or imposing a nominal

sentence. The accused was liable to be sentenced to seven years' imprisonment of either description for any one of the six offences of which he has been convicted, and in my opinion, the sentences of substantive imprisonment imposed, namely eighteen months which will amount to no more than consecutive sentences of three months' for each offence are not excessive; nor are the fines. I would dismiss the applications and discharge the Rules.

Saiyid Fazl Ali, J.

10. I agree.

MANU/SC/0124/1961

Back to Section 420 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 226 of 1959

Decided On: 24.04.1961

Abhayanand Mishra Vs. The State of Bihar

Hon'ble Judges/Coram:
K. Subba Rao and Raghubar Dayal, JJ.

JUDGMENT
Raghubar Dayal, J.

1. This appeal, by special leave, is against the order of the High Court at Patna dismissing the appellant's appeal against his conviction under s. 420, read with s. 511, of the Indian Penal Code.

2. The appellant applied to the Patna University for permission to appear at the 1954 M.A. Examination in English as a private candidate, representing that he was a graduate having obtained his B.A. Degree in 1951 and that he had been teaching in a certain school. In support of his application, he attached certain certificates purporting to be from the Headmaster of the School, and the Inspector of Schools. The University authorities accepted the appellant's statements and gave permission and wrote to him asking for the remission of the fees and two copies of his photograph. The appellant furnished these and on April 9, 1954, proper admission card for him was despatched to the Headmaster of the School.

3. Information reached the University about the appellant's being not a graduate and being not a teacher. Inquiries were made and it was found that the certificates attached to the application were forged, that the appellant was not a graduate and was not a teacher and that in fact he had been de-barred from taking any University examination for a certain number of years on account of his having committed corrupt practice at a University examination. In consequence, the matter was reported to the police which, on investigation, prosecuted the appellant.

4. The appellant was acquitted of the charge of forging those certificates, but was convicted of the offence of attempting to cheat inasmuch as he, by false representations, deceived the University and induced the authorities to issue the admission card, which, if the fraud had not been detected, would have been ultimately delivered to the appellant.

5. Learned counsel for the appellant raised two contentions. The first is that the facts found did not amount to the appellant's committing an attempt to cheat the University but amounted just to his making preparations to cheat the University. The second is that even if the appellant had obtained the admission card and appeared at the M.A. Examination, no offence of cheating under s. 420, Indian Penal Code, would have been committed as the University would not have suffered any harm to its reputation. The idea of the University suffering in reputation is too remote.

6. The offence of cheating is defined in s. 415, Indian Penal Code, which reads:

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

Explanation. - A dishonest concealment of facts is a deception within the meaning of this section."

7. The appellant would therefore have cheated the University if he had (i) deceived the University; (ii) fraudulently or dishonestly induced the University to deliver any property to him; or (iii) had intentionally induced the University to permit him to sit at the M.A. Examination which it would not have done if it was not so deceived and the giving of such permission by the University caused or was likely to cause damage or harm to the University in reputation. There is no doubt that the appellant, by making false statements about his being as graduate and a teacher, in the applications he had submitted to the University, did deceive the University and that his intention was to make the University give him permission and deliver to him the admission card which would have enabled him to sit for the M.A. Examination. This card is 'property'. The appellant would therefore have committed the offence of 'cheating' if the admission card had not been withdrawn due to certain information reaching the University.

8. We do not accept the contention for the appellant that the admission card has no pecuniary value and is therefore not 'property'. The admission card as such has no pecuniary value, but it has immense value to the candidate for the examination. Without it he cannot secure admission to the examination hall and consequently cannot appear at the Examination.

9. In Queen Empress v. Appasami I.L.R(1889). 12 Mad. 151 it was held that the ticket entitling the accused to enter the examination room and be there examined for the Matriculation test of the University was 'property'.

10. In Queen Empress v. Soshi Bhushan MANU/UP/0055/1893: I.L.R(1893). 15 All. 210 it was held that the term 'property' in s. 463, Indian Penal Code, included the written certificate to the effect that the accused had attended, during a certain period, a course of law lectures and had paid up his fees.

11. We need not therefore consider the alternative case regarding the possible commission of the offence of cheating by the appellant, by his inducing the University to permit him to sit for the examination, which it would not have done if it had known the true facts and the appellant causing damage to its reputation due to its permitting him to sit for the examination. We need not also therefore consider the further question urged for the appellant that the question of the University suffering in its reputation is not immediately connected with the accused's conduct in obtaining the necessary permission.

12. Another contention for the appellant is that the facts proved do not go beyond the stage of preparation for the commission of the offence of 'cheating, and do not make out the offence of attempting to cheat. There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; If it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. This is clear from the general expression 'attempt to commit an offence' and is exactly what the provisions of s. 511, Indian Penal Code, require. The relevant portion of s. 511 is:

"Whoever attempts to commit an offence punishable by this Code.....or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished.....".
13. These provisions require that it is only when one, firstly, attempts to commit an offence and, secondly, in such attempt, does any act towards the commission of the offence, that he is punishable for that attempt to commit the offence. It follows, therefore, that the act which would make the culprit's attempt to commit an offence punishable, must be an act which, by itself, or in combination with other acts, leads to the commission of the offence. The first step in the commission of the offence of cheating, therefore, must be an act which would lead to the deception of the person sought to be cheated. The moment a person takes some step to deceive the person sought to be cheated, he has embarked on a course of conduct which is nothing less than an attempt to commit the offence, as contemplated by s. 511. He does the act with the intention to commit the offence and the act is a step towards the commission of the offence.

14. It is to be borne in mind that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it. No exhaustive precise definition of what would amount to an attempt to commit an offence is possible. The cases referred to make this clear.

15. We may refer to some decided cases on the construction of s. 511, Indian Penal Code.

16. In The Queen v. Ramsarun Chowbey (1872) 4 N.W.P. 46 it was said at p. 47:

"To constitute then the offence of attempt under this section (s. 511), there must be an act done with the intention of committing an offence, and for the purpose of committing that offence, and it must be done in attempting the commission of the offence.

Two illustrations of the offence of attempt as defined in this section are given in the Code; both are illustrations of cases in which the offence has been committed. In each we find an act done with the intent of committing an offence, and immediately enabling the commission of the offence, although it was not an act which constituted a part of the offence, and in each we find the intention of the person making the attempt was frustrated by circumstances independent of his own volition.

From the illustrations it may be inferred that the Legislature did not mean that the act done must be itself an ingredient (so to say) of the offence attempted.....".

17. The learned Judge said, further, at p. 49:

"I regard that term (attempt) as here employed as indicating the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done, or omitted, which of itself is a necessary constituent of the offence attempted".
18. We do not agree that the 'act towards the commission of such offence' must be 'an act which leads immediately to the commission of the offence'. The purpose of the illustrations is not to indicate such a construction of the section, but to point out that the culprit has done all that be necessary for the commission of the offence even though he may not actually succeed in his object and commit the offence. The learned Judge himself emphasized this by observing at p. 48:

"The circumstances stated in the illustrations to s. 511, Indian Penal Code, would not have constituted attempts under the English law, and I cannot but think that they were introduced in order to show that the provisions of Section 511, Indian Penal Code, were designed to extend to a much wider range of cases than would be deemed punishable as offences under the English Law".

19. In In the matter of the petition of R. MacCrea [I.L.R. 15 All. 173.] it was held that whether any given act or series of acts amounted to an attempt which the law would take notice of or merely to preparation, was a question of fact in each case and that s. 511 was not meant to cover only the penultimate act towards the completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, and were done with the intent to commit it and done towards its commission. Knox, J., said at p. 179:

"Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon her mind may be several in point of number, and yet the first act after preparations completed will, if criminal in itself, be beyond all doubt, equally an attempt with the ninety and ninth act in the series.

20. Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt in completed".

21. Blair, J., said at p. 181:

"It seems to me that section (s. 511) uses the word 'attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does any act, etc., shall be punishable. The term 'any act' excludes the notion that the final act short of actual commission is alone punishable."
22. We fully approve of the decision and the reasons therefore.

23. Learned Counsel for the appellant relied on certain cases in support of his contention. They are not much to the point and do not in fact express any different opinion about the construction to be placed on the provisions of s. 511, Indian Penal Code. Any different view expressed had been due to an omission to notice the fact that the provisions of s. 511, differ from the English Law with respect to 'attempt to commit an offence'.

24. In Queen v. Paterson I.L.R. 1 All. 316 the publication of banns of marriage was not held to amount to an attempt to commit the offence of bigamy under s. 494, Indian Penal Code. It was observed at p. 317:

"The publication of banns may, or may not be, in cases in which a special license is not obtained, a condition essential to the validity of a marriage, but common sense forbids us to regard either the publication of the banns or the procuring of the license as a part of the marriage ceremony."
25. The distinction between preparation to commit a crime and an attempt to commit it was indicated by quoting from Mayne's Commentaries on the Indian Penal Code to the effect:

"Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations have been made."
26. In Regina v. Padala Venkatasami (1881) I.L.R. 3 Mad. 4. the preparation of a copy of an intended false document, together with the purchase of stamped paper for the purpose of writing that false document and the securing of information about the facts to be inserted in the document, were held not to amount to an attempt to commit forgery, because the accused had not, in doing these acts, proceeded to do an act towards the commission of the offence of forgery.

27. In In the matter of the petition of Riasat Ali (1881) I.L.R. 7 Cal. 352. the accused's ordering the printing of one hundred receipt forms similar to those used by a company and his correcting proofs of those forms were not held to amount to his attempting to commit forgery as the printed form would not be a false document without the addition of a seal or signature purporting to be the seal or signature of the company. The learned Judge observed at p. 356:

"..... I think that he would not be guilty of an attempt to commit forgery until he had done some act towards making one of the forms a false document. If, for instance, he had been caught in the act of writing the name of the Company upon the printed form and had only completed a single letter of the name, I think that he would have been guilty of the offence charged, because (to use the words of Lord Blackburn) 'the actual transaction would have commenced, which would have ended in the crime of forgery, if not interrupted'."
28. The learned Judge quoted what Lord Blackburn said in Reg. v. Chessman [Lee & Cave's Rep. 145.]:

"There is no doubt a difference between the preparation antecedent to an offence and the actual attempt; but if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."

29. He also quoted what Cockburn, C.J., said in M'Pherson's Case [Dears & B. 202.]:

"The word 'attempt' clearly conveys with it the idea, that if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that which, if successful, would amount to the felony charged."
30. It is not necessary for the offence under s. 511, Indian Penal Code, that the transaction commenced must end in the crime or offence, if not interrupted.

31. In In re: Amrita Bazar Patrika Press Ltd. (1920) I.L.R. 47 Cal. 190. Mukherjee, J., said at p. 234:

"In the language of Stephen (Digest of Criminal Law, Art. 50), an attempt to commit a crime is an act done with an intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. To put the matter differently, attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of, its actual commission; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted: Reg. v. Collins (1864) 9 Cox. 497.".
This again is not consistent with what is laid down in s. 511 and not also with what the law in England is.

32. In Stephen's Digest of Criminal Law, 9th Edition, 'attempt' is defined thus:

"An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission if it were not interrupted.

The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case.

An act done with intent to commit a crime, the commission of which in the manner proposed was, in fact, impossible, is an attempt to commit that crime.

The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself."

33. In In re: T. Munirathnam Reddi MANU/AP/0062/1955: AIR1955AP118 it was said at p. 122:

"The distinction between preparation and attempt may be clear in some cases, but, in most of the cases, the dividing line is very thin. Nonetheless, it is real distinction.

34. The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intended that the natural consequence of his act should result in death but was frustrated only by extraneous circumstances, he would be guilty of an attempt to commit the offence of murder. The illustrations in the section (s. 511) bring out such an idea clearly. In both the illustrations, the accused did all he could do but was frustrated from committing the offence of theft because the article was removed from the jewel box in one case and the pocket was empty in the other case."

35. The observations 'the crucial test is whether the last act, if uninterrupted and successful, would constitute a crime' were made in connection with an attempt to commit murder by shooting at the victim and are to be understood in that context. There, the nature of the offence was such that no more than one act was necessary for the commission of the offence.

36. We may summarise our views about the construction of s. 511, Indian Penal Code, thus: A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

37. In the present case, the appellant intended to deceive the University and obtain the necessary permission and the admission card and, not only sent an application for permission to sit at the University examination, but also followed it up, on getting the necessary permission, by remitting the necessary fees and sending the copies of his photograph, on the receipt of which the University did issue the admission card. There is therefore hardly any scope for saying that what the appellant had actually done did not amount to his attempting to commit the offence and had not gone beyond the stage of preparation. The preparation was complete when he had prepared the application for the purpose of submission to the University. The moment he despatched it, he entered the realm of attempting to commit the offence 'cheating'. He did succeed in deceiving the University and inducing it to issue the admission card. He just failed to get it and sit for the examination because something beyond his control took place inasmuch as the University was informed about his being neither a graduate nor a teacher.

38. We therefore hold that the appellant has been rightly convicted of the offence under s. 420, read with s. 511, Indian Penal Code, and accordingly dismiss the appeal.

39. Appeal dismissed.

MANU/SC/0290/1995

Back to Section 494 of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 1079 of 1989

Decided On: 10.05.1995

Sarla Mudgal and Ors. Vs. Union of India (UOI) and Ors.

Hon'ble Judges/Coram:
Kuldip Singh and R.M. Sahai, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: D.N. Diwedi, Additional Solicitir General, V.C. Mahajan, Shankar Ghosh, R.K. Garg and S. Janani, Advs

ORDER
Authored By: Kuldip Singh, R.M. Sahai
Kuldip Singh, J.

1. "The State shall endeavor to secure for the citizens a uniform civil code through-out the territory of India" is an unequivocal mandate under Article 44 of the Constitution of India which seeks to introduce a uniform personal law - a decisive step towards national consolidation. Pandit Jawahar Lal Nehru, while defending the introduction of the Hindu Code Bill instead of a uniform civil code, in the Parliament in 1954, said "I do not think that at the present moment the time is ripe in India for me to try to push it through". It appears that even 41 years thereafter, the Rulers of the day are not in a mod to retrieve Article 44 from the cold storage where it is lying since 1949. The Government - which have come and gone - have so far failed to make any effort towards "unified personal law for all Indians". The reasons are too obvious to be stated. The utmost that has been done is to codify the Hindu law in the form of the Hindu Marriage Act, 1955, The Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956 which have replaced the traditional Hindu law based on different schools of thought and scriptural laws into one unified code. When more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of "uniform civil code" for all citizens in the territory of India.

2. The questions for consideration are whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnised second marriage? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua

the first wife who continue to be Hindu? Whether the apostate husband would be guilty of the offence under Section 494 of the Indian Penal Code (IPC)?

3. These are four petitions under Article 32 of the Constitution of India. There are two petitioners in Writ Petition 1079/89. Petitioner 1 is the President of "KALYANI" - a registered society - which is an organisation working for the welfare of needy- families and women in distress. Petitioner 2, Meena Mathur was married to Jitender Mathur on February 27, 1978. Three children (two sons and a daughter) were born out of the wed-lock. In early 1988, the petitioner was shocked to learn that her husband had solemnised second marriage with one Sunita Narula @ Fathima. The marriage was solemnised after they converted themselves to Islam and adopted Muslim religion. According to the petitioner, conversion of her husband to Islam was only for the purpose of marrying Sunita and circumventing the provisions of Section 494, IPC. Jitender Mathur asserts that having embraced Islam, he can have four wives irrespective of the fact that his first wife continues to be Hindu.

4. Rather interestingly Sunita alias Fathima is the petitioner in Writ Petition 347 of 1990. She contends that she along with Jitender Mathur who was earlier married to Meena Mathur embraced Islam and thereafter got married. A son was born to her. She further states that after marrying her, Jitender Prasad, under the influence of her first Hindu-wife, gave an undertaking on April 28, 1988 that he had reverted back to Hinduism and had agreed to maintain his first wife and three children. Her grievance is that she continues to be Muslim, not being maintained by her husband and has no protection under either of the personal laws.

5. Geeta Rani, petitioner in Writ Petition 424 of 1992 was married to Pradeep Kumar according to Hindu rites on November 13, 1988. It is alleged in the petition that her husband used to maltreat her and on one occasion gave her so much beating that her jaw bone was broken. In December 1991, the petitioner learnt that Pradeep Kumar ran away with one Deepa and after conversion to Islam married her. It is stated that the conversion to Islam was only for the purpose of facilitating the second marriage.

6. Sushmita Ghosh is another unfortunate lady who is petitioner in Civil Writ Petition 509 of 1992. She was married to G.C. Ghosh according to Hindu rites on May 10,1984. On April 20, 1992, the husband told her that he no longer wanted to live with her and as such she should agree to divorce by mutual consent. The petitioner was shocked and prayed that she was her legally wedded wife and wanted to live with him and as such the question of divorce did not arise. The husband finally told the petitioner that he had embraced Islam and would soon marry one Vinita Gupta. He had obtained a certificate dated June 17,1992 from the Qazi indicating that he had embraced Islam. In the writ petition, the petitioner has further prayed that her husband be restrained from entering into second marriage with Vinita Gupta.

7. Marriage is the very foundation of the civilised society. The relation once formed, the law steps in and binds the parties to various obligations and liabilities thereunder. Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilisation can exist.

8. Till the time we achieve the goal - uniform civil code for all the citizens of India - there is an open inducement to a Hindu husband, who wants to enter into second marriage while the first marriage is subsisting, to become a Muslim. Since monogamy is the law for Hindus and the Muslim law permits as many as four wives in India, errand Hindu husband embraces Islam to circumvent the provisions of the Hindu law and to escape from penal consequences.

9. The doctrine of indissolubility of marriage, under the traditional Hindu law, did not recognise that conversion would have the effect of dissolving a Hindu marriage. Conversion to another religion by one or both the Hindu spouses did not dissolve the marriage. It would be useful to have a look at some of the old cases on the subject. In Re Ram Kumari 1891 Cal 246 where a Hindu wife became convert to the Muslim faith and then married a Mohammedan, it was held that her earlier marriage with a Hindu husband was not dissolved by her conversion. She was charged and convicted of bigamy under Section 494 of the IPC. It was held that there was no authority under Hindu law for the proposition that an apostate is absolved from all civil obligations and that so far as the matrimonial bond was concerned, such view was contrary to the spirit of the Hindu law. The Madras High Court followed Ram Kumari in Budansa v. Fatima MANU/TN/0159/1913. In Gul Mohammed v. Emperor MANU/NA/0076/1946 a Hindu wife was fraudulently taken away by the accused a Mohammedan who married her according to Muslim law after converting her to Islam. It was held that the conversion of the Hindu wife to Mohammedan faith did not ipso facto dissolve the marriage and she could not during the life time of her former husband enter into a valid contract of marriage. Accordingly the accused was convicted for adultery under Section 497 of the IPC.

10. In Nandi @ Zainab v. The Crown ILR (1920) Lah 440, Nandi, the wife of the complainant, changed her religion and became a Mussalman and thereafter married a Mussalman named Rukan Din. She was charged with an offence under Section 494 of the Indian Penal Code. It was held that the mere fact of her conversion to Islam did not dissolve the marriage which could only be dissolved by a decree of court. Emperor v. Mt. Ruri AIR (1919) Lah 389, was a case of Christian wife. The Christian wife renounced Christianity and embraced Islam and then married a Mahomedan. It was held that according to the Christian marriage law, which was the law applicable to the case, the first marriage was not dissolved and therefore the subsequent marriage was bigamous.

11. In India there has never been a matrimonial law of general application. Apart from statute law a marriage was governed by the personal law of the parties. A marriage solemnised under a particular statute and according to personal law could not be dissolved according to another personal law, simply because one of the parties had changed his or her religion.

12. In Sayeda Khatoon @ A.M. Obadiah v. M. Obadiah 49 CWN 745, Lodge, J. speaking for the court held as under:

The parties were originally Jews bound by the Jewish personal law... The plaintiff has since been converted to Islam and may in some respects be governed by the Mahommedan Law. The Defendant is not governed by the Mahommedan Law. If this were an Islamic country, where the Mahommedan Law was applied to all cases where one party was a Mahommedan, it might be that plaintiff would be entitled to the declaration prayed for. But this is not a Mahommedan country; and the Mahommedan Law is not the Law of the Land. Now, in my opinion, is it the Law of India, that when any person is converted to Islam the Mahommedan Law shall be applicable to him in all his relationships? I can see no reason why the Mahommedan Law should be preferred to the Jewish Law in a matrimonial dispute between a Mahommdan and a Jew particularly when the relationship, viz.: marriage, was created under the Jewish Law. As I stated in a previous case there is no matrimonial law of general application in India. There is a Hindu Law for Hindus, a Mahommedan Law for Mahommedans, a Christian Law for Christians, and a Jewish Law for Jews. There is no general matrimonial law regarding mixed marriages other than the statute law, and there is no suggestion that the statute law is applicable in the present case. It may be that a marriage solemnised according to Jewish rites may be dissolved by the proper authority under Jewish Law when one of the parties renounces the Jewish Faith. It may be that a marriage solemnised according to Mahommedan Law may be dissolved according to the Mahommedan Law when one of the parties ceases to be a Mahommedan. But I can find no authority for the view that a marriage solemnized according to one personal law can be dissolved according to another personal law simply because one of the two parties has changed his or her religion.
Sayeda Khatoon's case was followed with approval by Blagden, J. of the Bombay High Court in Robasa Khanum v. Khodadad Bomanji Irani [1946] B L R 864. In this case the parties were married according to Zoroastrian law. The wife became Muslim whereas the husband declined to do so. The wife claimed that her marriage stood dissolved because of her conversion to Islam. The learned Judge dismissed the suit. It would be useful to quote the following observations from the judgment:

We have, therefore, this position - British India as a whole, is another governed by Hindu, Mahommedan, Sikh, Parsi, Christian, Jewish or any other law except a law imposed by Great Britain under which Hindus, Mahomedans, Sikhs, Parsis, and all others, enjoy equal rights and the utmost possible freedom of religious observance, consistent in every

case with the rights of other people. I have to decide this case according to the law as it is, and there seems, in principle, no adequate ground for holding that in this case Mahomedan law is applicable to a non-Mahomedan.. Do then the authorities compel me to hold that one spouse can by changing his or her religious opinions (or purporting to do so) force his or her newly acquired personal law on a party to whom it is entirely alien and who does to want it? In the name of justice, equity and good conscience, or, in more simple language, of common sense, why should this be possible? If there were no authority on the point I (personally) should have thought that so monstrous an absurdity carried its own refutation with it, so extravagant are the results that follow from it. For it is not only the question of divorce that the plaintiffs contention affects. If it is correct, it follows that a Christian husband can embrace Islam and, the next moment, three additional wives, without even the consent of the original wife.
Against the judgment of Blagden, J. appeal was heard by a Division Bench consisting of Sir Leonard Stone, Chief Justice and Mr. Justice Chagla (as the learned Judge then was). Chagla, J. who spoke for the Bench posed the question that arose for determination as under: "what are the consequences of the plaintiffs conversion to Islam?" The Bench upheld the judgment of Blagden, J. and dismissed the appeal. Chagla, J. elaborating the legal position held as under:-

We have here a Muslim wife according to whose personal law conversion to Islam, if the other spouse does not embrace the same religion, automatically dissolves the marriage. We have a Zoroastrian husband according to whose personal law such conversion does not bring about the same result. The Privy Council in Waghela Rajsanji v. Shekh Masludin expressed the opinion that if there was no rule of Indian law which could be applied to a particular case, then it should be decided by equity and good conscience, and they interpreted equity and good conscience, to mean the rules of English law if found applicable to Indian society and circumstances. And the same view was confirmed by their Lordships of the Privy Council in Mohammed Raja v. Abbas Bandi Bibi. But there is no rule of English law which can be made applicable to a suit for divorce by a Muslim wife against her Zoroastrian husband. The English law only deals and can only deal with Christian marriages and with grounds for dissolving a Christian marriage. therefore we must decided according to justice and right, or equity and good conscience independently of any provisions of the English law. We must do substantial justice between the parties and in doing so hope that we have vindicated the principles of justice and right or equity and good conscience.... It is impossible to accept the contention of Mr. Peerbhoy that justice and right requires that we should apply Muslim law in dealing this case. It is difficult to see why the conversion of one party to a marriage should necessarily afford a ground for its dissolution. The bond that keeps a man and woman happy in marriage is not exclusively the bond of religion. There are many other ties which make it possible for a husband and wife to live happily and contentedly together. It would indeed be a starting proposition to lay down that although two persons may want to continue to live in a married state and disagree as to the religion they should profess, their marriage must be automatically dissolved. Mr. Peerbhoy has urged that it is rarely possible for two

persons of different communities to be happily united in wedlock. If conversion of one of the spouses leads to unhappiness, then the ground for dissolution of marriage could not be the conversion but the resultant unhappiness. Under Muslim law apostasy from Islam of either party to a marriage operates as a complete and immediate dissolution of the marriage. But Section 4 of the Dissolution of Muslim Marriages Act (VIII of 1939) provides that the renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage. This is a very clear and emphatic indication that the Indian legislature has departed from the rigor of the ancient Muslim law and has taken the more modern view that there is nothing to prevent a happy marriage notwithstanding the fact that the two parties to it professed different religious. We must also point out that the plaintiff and the defendant were married according to the Zoroastrian rites. They entered into a solemn pact that the marriage would be monogamous and could only be dissolved according to the tenets of the Zoroastrian religion. It would be patently contrary to justice and right that one party to a solemn pact should be allowed to repudiate it by a unilateral act. It would be tantamount to permitting the wife to force a divorce upon her husband although he may not want it and although the marriage vows which both of them have taken would not permit it. We might also point out that the Shariat Act (Act XXVI of 1937) provides that the rule of decision in the various cases enumerated in Section 2 which includes marriage and dissolution of marriage shall be the Muslim personal law only where the parties are Muslims; it does not provide that the Muslim personal law shall apply when only one of the parties is a Muslim.

(the single Judge judgment and the Division Bench judgment are reported in 1946 Bombay Law Reporter 864)

13. In Andal Vaidyanathan v. Abdul Allam Vaidya [1946] Madras, a Division Bench of the High Court dealing with a marriage under the Special marriage Act 1872 held:

The Special Marriage Act clearly only contemplates monogamy and a person married under the Act cannot escape from its provisions by merely changing his religion. Such a person commits bigamy if he marries again during the lifetime of his spouse, and it matters not what religion he professes at the time of the second marriage. Section 17 provides the only means for the dissolution of a marriage or a declaration of its nullity.

Consequently, where two persons married under the Act subsequently become converted to Islam, the marriage can only be dissolved under the provisions of the Divorce Act and the same would apply even if only one of them becomes converted to Islam. Such a marriage is not a marriage in the Mahomedan sense which can be dissolved in a Mahomedan manner. It is a statutory marriage and can only be dissolved in accordance with the Statute: MANU/WB/0057/1941: AIR1941Cal582 and (1917) 1 K.B. 634, Rel. on; A.I.R. 1935 Bom. 8, Disting.

14. It is, thus, obvious form the catena of case-law that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses converts and the other refuses to do so. Where a marriage take place under Hindu Law the parties acquire a status and certain rights by the marriage itself under the law governing the Hindu Marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing a new personal law, it would tantamount to destroying the existing rights of the other spouse who continues to be Hindu. We, therefore, hold that under the Hindu Personal Law as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage.

15. The position has not changed after coming into force of the Hindu Marriage Act, 1955 (the Act) rather it has become worse for the apostate. The Act applies to Hindus by religion in any of its forms or developments. It also applied to Buddhists, Jains and Sikhs. It has no application to Muslims, Christians and Parsees. Section 4 of the Act is as under:

Overriding effect of Act. - Save as otherwise expressly provided in this Act, -

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

16. A marriage solemnised, whether before or after the commencement of the Act, can only be dissolved by a decree of divorce on any of the grounds enumerated in Section 13 of the Act. One of the grounds under Section 13(1)(ii) is that "the other party has ceased to be a Hindu by conversion to another religion". Sections 11 and 15 of the Act is as under:-

Void marriages. - Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in Clauses (i), (iv) and (v) of Section 5.

Divorced persons when may marry again.- When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, of there is such a right of appeal the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

17. It is obvious from the various provisions of the Act that the modern Hindu Law strictly enforces monogamy. A marriage performed under the Act cannot be dissolved except on the grounds available under Section 13 of the Act. In that situation parties who have solemnised the marriage under the Act remain married even when the husband embraces Islam in pursuit of other wife. A second marriage by an apostate under the shelter of conversion to Islam would nevertheless be a marriage in violation of the provisions of the Act by which he would be continuing to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate would, therefore, be illegal marriage qua his wife who married him under the Act and continues to be Hindu. Between the apostate and his Hindu wife the second marriage is in violation of the provisions of the Act and as such would be non-est. Section 494 Indian Penal Code is as under:-

Marrying again during lifetime of husband or wife. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
The necessary ingredients of the section are: (1) having a husband or wife living; (2) marries in any case; (3) in which such marriage is void; (4) by reason of its taking place during the life of such husband or wife.

18. It is no doubt correct that the marriage solemnised by a Hindu husband after embracing Islam may not be strictly a void marriage under the Act because he is no longer a Hindu, but the fact remains that the said marriage would be in violation of the Act which strictly professes monogamy.

19. The expression "void" for the purpose of the Act has been defined under Section 11 of the Act. It has a limited meaning within the scope of the definition under the Section. On the other hand the same expression has a different purpose under Section 494, IPC and has to be given meaningful interpretation.

20. The expression "void" under Section 494, IPC has been used in the wider sense. A marriage which is in violation of any provisions of law would be void in terms of the expression used under Section 494, IPC.

21. A Hindu marriage solemnised under the Act can only be dissolved on any of the grounds specified under the Act. Till the time a Hindu marriage is dissolved under the Act none of the spouses can contract second marriage. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the Act. The second marriage by a convert would therefore be in violation of the Act and as such void in terms of Section 494, IPC. Any act which is in violation of mandatory provisions of law is per-se void.

22. The real reason for the voidness of the second marriage is the subsisting of the first marriage which is not dissolved even by the conversion of the husband. It would be giving a go-bye to the substance of the matter and acting against the spirit of the Statute if the second marriage of the convert is held to be legal.

23. We also agree with the law laid down by Chagla, J. in Robasa Khanum v. Khodadad Irani's case (supra) wherein the learned Judge has held that the conduct of a spouse who converts to Islam has to be judged on the basis of the rule of justice and right or equity and good conscience. A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse is obviously not a dispute "where the parties are Muslims" and, therefore, the rule of decision in such a case was or is not required to be the "Muslim Personal Law". In such cases the Court shall act and the Judge shall decide according to justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of Section 494, IPC.

24. Looked from another angle, the second marriage of an apostate-husband would be in violation of the rules of natural justice. Assuming that a Hindu husband has a right to embrace Islam as his religion, he has no right under the Act to marry again without getting his earlier marriage under the Act dissolved. The second marriage after conversion to Islam would, thus, be in violation of the rules of natural justice and as such would be void.

25. The interpretation we have given to Section 494 IPC would advance the interest of justice. It is necessary that there should be harmony between the two systems of law just as there should be harmony between the two communities. Result of the interpretation, we have given to Section 494 IPC, would be that the Hindu Law on the one hand and the Muslim Law on the other hand would operate within their respective ambits without trespassing on the personal laws of each other. Since it is not the object of Islam nor is the intention of the enlighten Muslim community that the Hindu husbands should be encouraged to become Muslims merely for the purpose of evading their own personal laws by marrying again, the courts can be persuaded to adopt a construction of the laws resulting in denying the Hindu husband converted to Islam the right to marry again without having his existing marriage dissolved in accordance with law.

26. All the four ingredients of Section 494 IPC are satisfied in the case of a Hindu husband who marries for the second time after conversion to Islam. He has a wife living, he marries again. The said marriage is void by reason of its taking place during the life of the first wife.

27. We, therefore, hold that the second marriage of a Hindu husband after his conversion to islam is a void marriage in terms of Section 494 IPC.

28. We may at this stage notice the Privy Council judgment in Attorney General Ceylon v. Reid [1965] E.R. 812. A Christian lady was married according to the Christian rites. Years later she embraced Islamic faith and got married by the Registrar of Muslim Marriages at Colombo according to the statutory formalities prescribed for a Muslim marriage. The husband was charged and convicted by the Supreme Court, Ceylon of the offence of bigamy under the Ceylon Penal Code. In an appeal before the Privy Council, the respondent was absolved from the offence of bigamy. It was held by Privy Council as under:-

In their Lordship's view, in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the country notwithstanding an earlier marriage. If such inherent right is to be abrogated, it must be done by statute.
29. Despite there being an inherent right to change religion the applicability of Penal laws would depend upon the two personal laws governing the marriage. The decision of Privy Council was on the facts of the case, specially in the background of the two personal laws operating in Ceylon. Reid's case is, thus, of no help to us in the facts and legal background of the present cases.

30. Coming back to the question " uniform civil code" we may refer to the earlier judgments of this Court on the subject. A Constitution Bench of this Court speaking through Chief Justice Y.V. Chandrachud in Mohd. Ahmed Khan v. Shah Bano Begum MANU/SC/0194/1985: 1985CriLJ875 held as under:

It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably; it has the legislative competence to do so. A counsel is the case whispered, somewhat audibly, that legislative competence in one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made is the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge that gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

In Ms. Jordan Diengdeh v. S.S. Chopra MANU/SC/0195/1985: AIR1985SC935 O. Chinnappa Reddy, J. speaking for the Court referred to the observations of Chandrachud, CJ in Shah Bano Begum's case and observed as under:

It was just the other day that a Constitution Bench of this Court had to emphasise the urgency of infusing life into Article 44 of the Constitution which provides that "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India." The present case is yet another which focuses..on the immediate and compulsive need for a uniform civil code. The totally unsatisfactory state of a affairs consequent on the lack of a uniform civil code is exposed by the facts of the present case. Before mentioning the facts of the case, we might as well refer to the observations of Chandrachud, CJ in the recent case decided by the Constitution Bench (Mohd. Ahmed Khan v. Shah Bano Begum).
One wonders how long will it take for the Government of the day to implement the mandate of the framers of the Constitution under Article 44 of the Constitution of India. The traditional Hindu Law - personal law of the Hindu - governing inheritance, succession and marriage was given go-bye as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country.

31. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus alongwith Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "common civil Code" for the whole of India.

32. It has been judicially acclaimed in the United States of America that the practice of Polygamy is injurious to "public morals", even though some religion may make it obligatory or desirable for its followers. It can be superseded by the State just as it can prohibit human sacrifice or the practice of "Suttee" in the interest of public order. Bigamous marriage has been made punishable amongst Christians by Act (XV of 1872), Parsis by Act (III of 1936) and Hindus, Buddhists, Sikhs and Jains by Act (XXV of 1955).

33. Political history of India shows that during the Muslim regime, justice was administered by the Qazis who would obviously apply the Muslim Scriptural law to Muslims, but there was no similar assurance so far litigations concerning Hindus was concerned. The system, more or less, continued during the time of the East India Company, until 1772 when Warren Hastings made Regulations for the administration of

civil justice for the native population, without discrimination between Hindus and Mahomedans. The 1772 Regulations followed by the Regulations of 1781 whereunder it was prescribed that either community was to be governed by its "personal" law in matters relating to inheritance, marriage, religious usage and institutions. So far as the criminal justice was concerned the British gradually superseded the Muslim law in 1832 and criminal justice was governed by the English common law. Finally the Indian Penal Code was enacted in 1860. This broad policy continued throughout the British regime until independence and the territory of India was partitioned by the British Rulers into two States on the basis of religion. Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be only one Nation - Indian nation - and no community could claim to remain a separate entity on the basis of religion. It would be necessary to emphasise that the respective personal laws were permitted by the British to govern the matters relating to inheritance, marriages etc. only under the Regulations of 1781 framed by Warren Hastings. The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India.

34. The Successive Government till-date have been wholly re-miss in their duty of implementing the constitutional mandate under Article 44 of the Constitution of India.

35. We, therefore, request the Government of India through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and "endeavor to secure for the citizens a uniform civil code throughout the territory of India".

36. We further direct the Government of India through Secretary, Ministry of Law and Justice to file an affidavit of a responsible officer in this Court in August, 1996 indicating therein the steps taken and efforts made, by the Government of India, towards securing a "uniform civil code" for the citizens of India. Sahai, J. in his short and crisp supporting opinion has suggested some of the measures which can be undertaken by the Government in this respect.

37. Answering the questions posed by us in the beginning of the judgment, we hold that the second marriage of a Hindu-husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provisions of Section 494 IPC and the apostate-husband would be guilty of the offence under Section 494 IPC.

38. The question of law having been answered we dispose of the writ petitions. The petitioners may seek any relief by invoking any remedy which may be available to them as a result of this judgment or otherwise. No costs.

Petitions disposed of

R.M. Sahai, J.

39. Considering sensitivity of the issue and magnitude of the problem, both on the desirability of a uniform or common civil code and its feasibility, it appears necessary to add a few words to the social necessity projected in the order proposed by esteemed Brother Kuldip Singh, J. more to focus on the urgency of such a legislation and to emphasise that I entirely agree with the thought provoking reasons which have been brought forth by him in his order clearly and lucidly.

40. The pattern of debate, even today, is the same as was voiced forcefully by the members of the minority community in the Constituent Assembly. If, 'the non implementation of the provisions contained in Article 44 amounts to grave failure of Indian democracy' represents one side of the picture, then the other side claims that, 'logical probability appears to be that the code would cause dissatisfaction and disintegration than serve as a common umbrella to promote homogeneity and national solidarity'.

41. When Constitution was framed with secularism as its ideal and goal, the consensus and conviction to be one, socially, found its expression in Article 44 of the Constitution. But religious freedom, the basic foundation of secularism, was guaranteed by Articles 25 to 28 of the Constitution. Article 25 is very widely worded. It guarantees all persons, not only freedom of conscience but the right to profess, practice and propagate religion. What is religion? Any faith or belief. The Court has expanded religious liberty in its various phases guaranteed by the Constitution and extended it to practices and even external overt acts of the individual. Religion is more than mere matter of faith. The Constitution by guaranteeing freedom of conscience ensured inner aspects of religious belief. And ', external expression of it were protected by guaranteeing right to freely, practice and propagate religion. Reading and reciting holy scriptures, for instance, Ramayana or Quran or Bible or Guru Granth Sahib is as much a part of religion as offering food to deity by a Hindu or bathing the idol or dressing him and going to a temple, mosque, church or gurudwara.

42. Marriage, inheritance, divorce, conversion are as much religious in nature and content as any other belief or faith. Going round the fire seven rounds or giving consent before Qazi are as much matter of faith and conscience as the worship itself. When a Hindu becomes convert by reciting Kalma or a Muslim becomes Hindu by reciting certain Mantras it is a matter belief and conscience. Some of these practices observed by members of one religion may appear to be excessive and even violative of human rights to members of another. But these are matters of faith. Reason and logic have little role to play. The sentiments and emotions have to be cooled and tempered by sincere effort. But today there is no Raja Ram Mohan Rai who single handed brought about that atmosphere

which paved the way for Sati abolition. Nor is a statesman of the stature of Pt. Nehru who could pilot through, successfully, the Hindu Succession Act and Hindu Marriage Act revolutionising the customary Hindu Law. The desirability of uniform Code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change.

43. The problem with which these appeals are concerned is that many Hindus have changed their religion and have become convert to Islam only for purposes of escaping the consequences of bigamy. For instance, Jitender Mathur was married to Meena Mathur. He and another Hindu girl embraced Islam. Obviously because Muslim Law permits more than one wife and to the extent of four. But no religion permits deliberate distortions. Much misapprehension prevails about bigamy in Islam. To check the misuse many Islamic countries have codified the personal law, 'wherein the practice of polygamy has been either totally prohibited or severely restricted. (Syria, Tunisia, Morocco, Pakistan, Iran, the Islamic Republics of the Soviet Union are some of the Muslim countries to be remembered in this context). But ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. 'But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression'. Therefore, a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the first step should be to rationalise the personal law of the minorities to develop religious and cultural amity. The Government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about the comprehensive legislation in keeping with modern day concept of human rights for women.

44. The Government may also consider feasibility of appointing a Committee to enact Conversion of Religion Act, immediately, to check the abuse or religion by any person. The law may provide that every citizen who changes his religion cannot marry another wife unless he divorces his first wife. The provision should be made applicable to every person whether he is a Hindu or a Muslim or a Christian or a Sikh or a Jain or a Budh. Provision may be made for maintenance and succession etc. also to avoid clash of interest after death.

45. This would go a long way to solve the problem and pave the way for a unified civil code.

46. For the reasons and conclusions reached in separate but concurring judgments the writ petitions are allowed in terms of the answers to the questions posed in the opinion of Kuldip Singh, J.

MANU/SC/0559/2014

Neutral Citation: 2014/INSC/463

Back to Section 498A of Indian Penal Code, 1860

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 1277 of 2014 (Arising out of SLP (Crl.) No. 9127 of 2013)

Decided On: 02.07.2014

Arnesh Kumar Vs. State of Bihar

Hon'ble Judges/Coram:
C.K. Prasad and Pinaki Chandra Ghose, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Rakesh Kumar and Kaushal Yadav, Advs.
For Respondents/Defendant: Rudreshwar Singh, Samir Ali Khan, Aparna Jha, Braj Kishore Mishra and Abhishek Yadav, Advs.

JUDGMENT
C.K. Prasad, J.

1. The Petitioner apprehends his arrest in a case Under Section 498-A of the Indian Penal Code, 1860 (hereinafter called as Indian Penal Code) and Section 4 of the Dowry Prohibition Act, 1961. The maximum sentence provided Under Section 498-A Indian Penal Code is imprisonment for a term which may extend to three years and fine whereas the maximum sentence provided Under Section 4 of the Dowry Prohibition Act is two years and with fine.

2. Petitioner happens to be the husband of Respondent No. 2 Sweta Kiran. The marriage between them was solemnized on 1st July, 2007. His attempt to secure anticipatory bail has failed and hence he has knocked the door of this Court by way of this Special Leave Petition.

3. Leave granted.

4. In sum and substance, allegation levelled by the wife against the Appellant is that demand of Rupees eight lacs, a maruti car, an air-conditioner, television set etc. was made by her mother-in-law and father-in-law and when this fact was brought to the Appellant's notice, he supported his mother and threatened to marry another woman. It has been

alleged that she was driven out of the matrimonial home due to non-fulfilment of the demand of dowry.

5. Denying these allegations, the Appellant preferred an application for anticipatory bail which was earlier rejected by the learned Sessions Judge and thereafter by the High Court.

6. There is phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A of the Indian Penal Code was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grand-fathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested.

"Crime in India 2012 Statistics" published by National Crime Records Bureau, Ministry of Home Affairs shows arrest of 1,97,762 persons all over India during the year 2012 for offence Under Section 498-A of the Indian Penal Code, 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in 2012 were women i.e. 47,951 which depicts that mothers and sisters of the husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under Indian Penal Code. It accounts for 4.5% of total crimes committed under different sections of penal code, more than any other crimes excepting theft and hurt. The rate of charge-sheeting in cases Under Section 498A, Indian Penal Code is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads. As many as 3,72,706 cases are pending trial of which on current estimate, nearly 3,17,000 are likely to result in acquittal.

7. Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Code of Criminal Procedure. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

8. Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the Legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, the Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short 'Code of Criminal Procedure), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest. As the offence with which we are concerned in the present appeal, provides for a maximum punishment of imprisonment which may extend to seven years and fine, Section 41(1)(b), Code of Criminal Procedure which is relevant for the purpose reads as follows:

41. When police may arrest without warrant.-(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person -

(a) x x x x x x

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:

(i) x x x x x

(ii) the police officer is satisfied that such arrest is necessary -

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this Sub-section, record the reasons in writing for not making the arrest.

x x x x x x

From a plain reading of the aforesaid provision, it is evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence punishable as aforesaid. Police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. Law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. Law further requires the police officers to record the reasons in writing for not making the arrest. In pith and core, the police office before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by Sub-clauses (a) to (e) of Clause (1) of Section 41 of Code of Criminal Procedure.

9. An accused arrested without warrant by the police has the constitutional right Under Article 22(2) of the Constitution of India and Section 57, Code of Criminal Procedure to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey. During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power Under Section 167 Code of Criminal Procedure. The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner. Before a Magistrate authorises detention Under Section 167, Code of Criminal Procedure, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested is satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty bound not to authorise his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that condition precedent for arrest Under Section 41 Code of Criminal Procedure has been satisfied and it is only thereafter that he will authorise the detention of an accused. The Magistrate before authorising detention will record its own satisfaction, may be in brief but the said satisfaction must reflect from its order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement etc., the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording its satisfaction in writing that the Magistrate will authorise the detention of the accused. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant and secondly a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.

10. Another provision i.e. Section 41A Code of Criminal Procedure aimed to avoid unnecessary arrest or threat of arrest looming large on accused requires to be vitalised. Section 41A as inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009), which is relevant in the context reads as follows:

41A. Notice of appearance before police officer.-(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of Sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has

been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

11. Aforesaid provision makes it clear that in all cases where the arrest of a person is not required Under Section 41(1), Code of Criminal Procedure, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police office is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged Under Section 41 Code of Criminal Procedure has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

12. We are of the opinion that if the provisions of Section 41, Code of Criminal Procedure which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Code of Criminal Procedure for effecting arrest be discouraged and discontinued.

13. Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:
(1) All the State Governments to instruct its police officers not to automatically arrest when a case Under Section 498-A of the Indian Penal Code is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Code of Criminal Procedure;

(2) All police officers be provided with a check list containing specified sub-clauses Under Section 41(1)(b)(ii);
(3) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;
(4) The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;
(5) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;
(6) Notice of appearance in terms of Section 41A of Code of Criminal Procedure be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;
(7) Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.
(8) Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

14. We hasten to add that the directions aforesaid shall not only apply to the cases Under Section 498-A of the Indian Penal Code or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

15. We direct that a copy of this judgment be forwarded to the Chief Secretaries as also the Director Generals of Police of all the State Governments and the Union Territories and the Registrar General of all the High Courts for onward transmission and ensuring its compliance.

16. By order dated 31st of October, 2013, this Court had granted provisional bail to the Appellant on certain conditions. We make this order absolute.

17. In the result, we allow this appeal, making our aforesaid order dated 31st October, 2013 absolute; with the directions aforesaid.

MANU/UP/1177/2002

Back to Section 499 of Indian Penal Code, 1860

IN THE HIGH COURT OF ALLAHABAD

Crl. Misc. Appln. No. 2504 of 2001

Decided On: 24.09.2002

C.L. Sagar Vs. Mayawati and Ors.

Hon'ble Judges/Coram:
R.K. Dash, J.

Counsels:
For Appellant/Petitioner/Plaintiff: G.S. Bisaria and D.P.S. Chauhan, Advs.
For Respondents/Defendant: S.C. Misra, Adv. General and Vinod Mishra, A.G.A.

ORDER
R.K. Dash, J.

1. Ms Mayawati, respondent No. 1, was the Vice-President and petitioner was a member of Bahujan Samaj Party at the relevant time. The petitioner lodged a complaint bearing No. 5278 of 1997 in the Court of C.J.M., Bareilly against respondent No. 1 and another alleging that on 21-3-1996 respondent No. 1 came to Amla-Bareilly to hold public meeting. The petitioner met her in the circuit-house where she assured him of a party ticket to contest the Assembly election from Faridpur constituency on his paying rupees fifty thousand. He believed her and paid the amount. Subsequently, her Private Secretary R. K. Vidyarthi, the other accused issued him receipt acknowledging payment of the said amount. Respondent No. 1 also nominated him as the District President of Bahujan Samaj Party. On 22-8-1996 she came to Bareilly and demanded further sum of rupees ten thousand, to which the petitioner expressed his inability to pay. On his refusal, she became annoyed and in the public meeting declared to have removed him from Presidentship of the district saying "Bari Lambi Muchhay hai. Bare Imandar Bantey ho. Baeman Kahin Ka." This statement of respondent No. 1, according to the petitioner has harmed his reputation and he is looked down upon by the general public. It is urged, the aforesaid statement made in the public meeting was published in daily newspapers in the heading "Bare Be-abaru hokar teray kuchay say hum niklay".

2. Learned Magistrate recorded the statements of the petitioner and two witnesses produced by him. Thereupon, he by order dated 19-4-1999 took cognizance of the offence under Sections 406/500, I.P.C. and directed for issuance of notice to both the accused persons.

3. Respondent No. 1, it is alleged, was not aware of the criminal proceedings and order of the Magistrate taking cognizance of the offence. She, for the first time, came to know when summons was served upon her and within four days thereafter she moved an application before the Magistrate to recall the order. The application remained pending till 9-1-2001 on which date her counsel moved the court to withdraw the said application since in the meanwhile a view was taken by this Court that such application was not maintainable. Thereafter, she filed revision before the Sessions Judge and along with the revision, she filed application for condonation of delay. Upon hearing the parties and having gone through the records, the revisional court came to hold that respondent No. 1 was not aware of the summoning order and no sooner as it came to her notice, she moved the learned Magistrate to recall the same. In such background facts, the Court excluded the time spent for prosecuting the case before the Magistrate from computing the period of limitation in preferring revision and condoned the delay. It is against this order the petitioner has filed the present case seeking Court's intervention in exercise of inherent power.

4. High Court being the superior Court exercises the power of superintendence as envisaged in Article 227 of the Constitution over the inferior Courts and the tribunals in order to keep them within the limit of their authority and to see that they perform their duties in the manner as law demands. Similar provision as in Article 227 has been provided in Section 483, Cr.P.C. investing High Court with supervisory jurisdiction so as to prevent miscarriage of justice or to mete out injustice. Thus, power of High Court being very wide, it was felt that while deciding the legality and propriety of the impugned order of the revisional court, the Court in exercise of both supervisory and inherent power should decide finally whether allegations made in the complaint reveal commission of an offence and whether order of the learned Magistrate taking cognizance of the offence if allowed to continue, would cause grave injustice to the accused persons. Accordingly, records of both the courts below were called for and counsel appearing for the parties were heard on the legality and correctness of the impugned order on limitation as well as the order of the Magistrate whereby cognizance of the offence was taken.

5. Learned Counsel for the petitioner contended that order under challenge condoning the delay in filing revision having been passed contrary to the statutory provisions and the law laid down by various judicial pronouncements, should be set at naught by the Court in exercise of inherent power. With regard to the order of Magistrate taking cognizance of the offence, he urged that the same being based on scrutiny of the allegations made in the complaint and statements of the witnesses, the Court should be slow to interfere with the same and the whole matter should be left to be adjudicated by the trial Court on the basis of the evidence to be laid during trial.

6. Per contra, Sri Satish Chandra Mishra learned Advocate General, with skill and adroitness, urged that the order of the revisional Court condoning the delay being based on sound exercise of discretion on appreciation of fact that respondent No. 1 was ignorant

about the criminal proceedings and consequent order of the learned Magistrate taking cognizance of the offence, this Court should be loath to interfere with the said order in exercise of inherent power.

7. As to the question of legality and correctness of the summoning order, he would contend that the criminal proceeding by way of complaint has been filed with mala fide intention to malign respondent No. 1 and dent her reputation in the society. Besides, the allegations made in the complaint even if accepted on their face value do not prima facie constitute any offence. In that view of the matter, continuance of the criminal proceeding will be an abuse of the process of Court and so, law demands that the same should be brought to a halt, otherwise justice will be a casualty.

8. Law of limitation does not destroy the primary and substantive right, but imposes a bar after certain period to file a 'lis' to enforce an existing right. In a sense, limitation bars the judicial remedy if approach is not made within prescribed time limit. In Halsbury's Laws of England the policy underlying the Limitation Act is laid down as under:

"The courts have expressed at least three different reasons supporting the existence of statutes of limitation, namely (i) that long dormant claims have more of cruelty than justice in them, (ii) that a defendant might have lost the evidence to dispute the stale claim, (iii) that persons with good causes of actions should pursue them with reasonable diligence."
9. Laws come to the assistance of the vigilant and not of sleepy (Vigilantibus non dormientibus jura subveniunt).

10. Section 5 of the Limitation Act enables a litigant to file an appeal or application beyond the prescribed period of limitation. As provided therein, an appeal or application can be entertained after expiry of the limitation period if 'sufficient cause' is shown in not doing so within time. The word 'sufficient cause' should receive a liberal construction. It is the duty of the court to decide as to whether the litigant acted with reasonable diligence in prosecuting the appeal or application. No doubt, Court has discretionary power to interpret in the facts and circumstances of a particular case as to what constitutes 'sufficient cause' but such discretion has to be exercised on sound principle and not on the mere fancy or whims. So, when the court finds that diligence or bona fide was manifest for claiming the condonation, discretion should be exercised in favour of the claimant for doing justice to him.

11. It has been ruled that expression 'sufficient cause' must receive liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to the party seeking condonation of delay. When substantial justice and technical considerations are pitted against each other cause of

substantial justice deserves to be preferred for, the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

12. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. (See Collector, Land Acquisition v. Katiji MANU/SC/0460/1987.

13. Keeping in view the aforesaid legal position, it is to be ascertained whether respondent No. 1 had sufficient cause in not preferring revision in time. To repeat with, her case before the revisional court was that she had no knowledge that a criminal complaint had been filed against her by the petitioner and as soon as she came to know about it, she moved the Magistrate to recall the order by which cognizance of the offence under Sections 406/500, I.P.C. was taken. When the said application was pending for adjudication, a judgment was rendered by a Full Bench of this Court reported in (2000) 40 All Cri C 342: 2000 All LJ 898 that Magistrate cannot review/recall his own order of taking cognizance of the offence and in view of the said decision, she moved the court below to withdraw her application and thereafter filed revision challenging the said order.

14. Nothing was placed by the petitioner before the revisional court that respondent No. 1 had the knowledge of the order of the learned Magistrate much before filing of the application. Therefore, learned Additional Sessions Judge, on consideration of the averments made in the affidavit explaining the cause of delay, was satisfied that she had sufficient cause in not preferring the revision within the prescribed period of limitation challenging the order of learned Magistrate.

15. Having given my anxious consideration to the materials available on record and the submissions made by the learned Counsel for the parties, I am of the opinion that no ground is made out to upset the findings and the conclusion arrived at by the learned Additional Sessions Judge.

16. Before adverting to the legality of the order of the learned Magistrate taking cognizance of the offence, it is desirable to allude to the legal position as to the scope and ambit of inherent power of the High Court as envisaged in Section 482, Cr.P.C. This section does not confer any new power. It provides that the power which the court inherently possesses shall be preserved. Consensus judicial opinion is unanimous that the inherent power should be exercised sparingly and with circumspection keeping in mind the principle that more is the power, more is the restraint. As would appear from Section 482, Cr.P.C., inherent power shall be exercised under three circumstances, namely, (i) to give effect to any order under the Code, (ii) to prevent abuse of the process of Court, (iii) to otherwise secure ends of justice. The Legislature, in its wisdom, has not laid down any inflexible, rule for exercise of such power. It has left to the Court's discretion to exercise the power in order to undo the wrong committed to a person,

accused of a criminal offence. It is no doubt true that the duties of the criminal justice system are to bring the culprit to book and to punish him, but it is very often noticed that both the wings of the justice delivery system namely, police and the courts are used as instruments by unscrupulous persons and false and concocted cases are instituted to wreak personal vengeance. In such a situation, it becomes onerous duty of the High Court to bring such cases to a halt in exercise of inherent power.

17. The Supreme Court in the celebrated judgment in the case of State of Haryana v. Bhajan Lal MANU/SC/0115/1992 laid down the categories of cases by illustrations when the High Court in exercise of inherent power can quash a criminal proceeding. The illustrations indicated therein are as follows (para 108):

"(1) where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations in the FIR or complaint are so absurd and inherently improbably on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

18. In S. W. Palanitkar v. State of Bihar MANU/SC/0672/2001 the Apex Court held that it is obligatory for the High Court to quash the proceedings in exercise of inherent power when the Magistrate issued the process despite the fact that allegations did not constitute any offence. The Court observed (para 27):

".....while exercising power under Section 482 of Criminal Procedure Code the High Court has to look at the object and purpose for which such power is conferred on it under the said provision. Exercise of inherent power is available to the High Court to give effect to any order under the Criminal Procedure Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice. This being the position, exercise of power under Section 482 of Criminal Procedure Code should be consistent with the scope and ambit of the same in the light of the decisions aforementioned. In appropriate cases, to prevent judicial process from being an instrument of oppression or harassment in the hands of frustrated or vindictive litigants exercise of inherent power is not only desirable but necessary also so that the judicial forum of court may not be allowed to be utilized for any oblique motive. When a person approaches the High Court under Section 482 of Criminal Procedure Code to quash the very issue of process, the High Court on the facts and circumstances of a case has to exercise the powers with circumspection as stated above to really serve the purpose and object for which they are conferred."

19. In view of the legal position narrated above, a thorough scrutiny of the allegations made in the complaint should be made in order to find whether the allegations disclose offences under Sections 406/500, I.P.C. Necessary ingredients of offence of criminal breach of trust as envisaged in Section 405, I.P.C. are: (a) the person complained against was entrusted with the property or had dominion over it, (b) that the person so entrusted (i) dishonestly misappropriated or converted to his own use of the said property; or (ii) dishonestly used or disposed of that property in violation of any direction of law or of any legal contract, express or implied.

20. In the case on hand, it is not the case of the petitioner that he had entrusted rupees fifty thousand to respondent No. 1 and that she misappropriated the same. Rather his assertion in the complaint is that on being assured of a party ticket to contest the Assembly election, he paid her rupees fifty thousand and in support thereof he relied upon the receipt issued by her Private Secretary, the co-accused. The case of respondent No. 1 is that the petitioner, being the district President of Bahujan Samaj Party, deposited rupees fifty thousand in party's account of General Election, Lok Sabha/Vidhan Sabha, 1996 to meet the election expenses of Faridpur Vidhan Sabha Constituency. The allegation as made in the complaint that on her assurance to provide ticket to contest the Assembly election, he made such deposit, is false and baseless and the same does not find mention in the receipt which he relied upon in support of such allegation. Besides such discrepancies, on facts as alleged in the complaint, no offence under Section 406, I.P.C. is made out against respondent No. 1.

21. It is alleged in paragraph 9 of the complaint that defamatory statement, as stated therein, was aimed at the petitioner. As admitted by the petitioner, respondent No. 1 did not utter his name in the public meeting and whatever she stated using defamatory language was against the person having long moustache. The petitioner does not say either in the complaint or in his statement before the court that he was the only member in the party having long moustache and the defamatory statement was conveyed to him. Moreover, it appears that story of defamation as set out in the complaint is a cooked up story. This observation gains support from the newspaper reports on which the petitioner relies upon to prove his case. On scrutiny of the copies of the newspapers attached to the complaint, I find that the alleged defamatory statements are conspicuously absent. I would not have taken note of newspaper reports to ascertain the truth of the petitioner's case, but since he himself relies upon such reports. I scrutinized the same to appreciate the veracity of his statement as well as of his witnesses. Upon scrutiny of all the materials I find that no offence of defamation punishable under Section 500, I.P.C. is made out. against respondent No. 1.

22. Upshot of the discussions made about is that the order of the revisional court condoning the delay has to be affirmed and it is accordingly so ordered. As regards the order of the learned Magistrate taking cognizance of the offence under Sections 406/ 500 I.P.C., for the reasons aforestated, the same being contrary to law and facts is set aside and consequently the criminal proceeding is quashed.

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